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June 29, 2001

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

VIA FEDERAL EXPRESS

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light
Docket No: 000824-EI

Dear Ms. Bayo:

Florida Power Corporation ("FPC" or the "Company") is filing herewith an original, disc and fifteen (15) copies of Florida Power Corporation's Motion for Reconsideration of the Requirement in Order No. PSC-01-1348-PCO-EI to Hold Revenues Subject to Refund and the original and one copy of the Request for Oral Argument on same.

We request you acknowledge receipt and filing of the above by stamping the additional copy of this letter and returning it to me in the self-addressed, stamped envelope provided.

If you or your Staff have any questions regarding this filing, please contact me at (727) 821-7000.

Very truly yours,

Gary L. Sasso

Enclosure
Counsel of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's Earnings, Including Effects of Proposed Acquisition of Florida Power Corporation by Carolina Power & Light	DOCKET NO. 000824-EI Submitted for Filing: July 2, 2001

FLORIDA POWER CORPORATION'S MOTION FOR RECONSIDERATION OF THE REQUIREMENT IN ORDER NO. PSC-01-1348-PCO-EI TO HOLD REVENUES SUBJECT TO REFUND

Florida Power Corporation ("FPC" or the "Company"), hereby moves the Florida Public Service Commission ("PSC" or the "Commission") to reconsider and vacate Order No. PSC-01-1348-PCO-EI ("Refund Order"), insofar as that Order requires FPC to hold revenues in the amount of $113.9 million subject to refund. The Commission overlooked, failed to consider, or mistakenly resolved matters of critical importance to its determination and failed to afford FPC procedural due process, as explained more fully below.

Background

On May 3, 2001, the Commission Staff recommended that the Commission order FPC to place $97,970,532 of annual revenue subject to refund, plus interest, effective March 13, 2001, and further recommended that the Commission order FPC to hold an additional amount of $15,924,217 subject to refund, effective July 1, 2001, for total revenues in the amount of $113.9 million subject to refund. In its Refund Order, the Commission approved Staff's recommendation and ordered FPC to hold revenues in the amount of $113.9 million subject to refund pending final disposition in this proceeding.

Although recognizing that "FPC's reported achieved return on equity (ROE) has been under its authorized ceiling of 13.00% for the past several years," the Commission approved

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Staff's recommendation to require FPC to hold $113.9 million subject to refund on the basis of certain "adjustments" to FPC's calculation of its return on equity (ROE) for the twelve month period ending February 28, 2001. These "adjustments" include (1) disallowance of $63 million in accelerated amortization of the Tiger Bay regulatory asset by FPC under Order No. PSC-97-0652-S-EQ; (2) disallowance of an additional $10.7 million amortization taken at Staff's own request for previously flowed through taxes and the equity component of prior period Allowances for Funds Used During Construction; (3) disallowance of an adjustment under Order No. PSC-97-0840-S-EI permitting FPC to exclude from surveillance reporting the effects on its capital structure of the loss recognized in 1997 for non-recoverable replacement fuel costs and the additional operation and maintenance (O&M) expenses associated with the extended outage of the Crystal River Nuclear Plant (CR 3); and (4) disallowance of $64.6 million of O&M expenses resulting primarily from severance pay associated with the reduction in employment as a result of the merger.

Staff made its recommendation without the benefit of any meaningful input by FPC. The recommendation was placed on the Commission's agenda for the May 15, 2001 Agenda Conference. In its recommendation, Staff stated that the matter would be taken up at the Commission's regular agenda and that "interested persons may participate on issues 2 and 3 only," which did not include Staff's recommendation on interim rates, identified as issue 1. At the Agenda Conference, FPC was able to address the issue only incidentally, and then over Staff's objection. The Commission accepted all of Staff's recommended "adjustments" without question or comment. Of course, if the Commission's Refund Order stands, FPC would have the opportunity to contest at a final rate hearing whether any refunds should in fact be ordered. But that overlooks the interim impacts of the Commission's Refund Order.

To begin with, because the Commission's action in ordering that funds be placed subject to refund is legally ineffectual, it provides no adequate basis for even conducting a hearing on the issue of a refund. Further, the Commission has only prospective ratemaking authority. The interim rate statute provides a limited means by which the Commission may earmark revenues collected by the utility during the pendency of the rate proceeding for purposes of ordering a refund from those revenues at the conclusion of the proceeding. See § 366.071, Fla. Stats. In fact, the Refund Order establishes a "cap" on such revenues that may be refunded at the conclusion of the proceeding. In this instance, however, the Commission has impermissibly designated $113.9 million of funds subject to refund, when none should be so designated. Accordingly, the Commission has not established any proper statutory basis for later seeking a refund from FPC's 2001 revenues.

Standard of Review

FPC seeks reconsideration of the Commission's Refund Order directing FPC to hold revenues in the amount of $113.9 million subject to refund. FPC makes this motion under the Commission's rules, Section 366.071, Fla. Stats., and fundamental principles of due process under the Florida and United States Constitutions.

It is well settled that the Commission shall reconsider an order when the moving party "identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order." See In re Aloha Utilities, Inc., Order No. PSC-00-1628-FOF-WS, 2000 WL 1532551, * 4 (PSC Sept. 12, 2000) (citations omitted). The Commission has held that the "purpose of a motion for reconsideration is to bring to the Commission's attention some material and relevant point of fact that it overlooked or failed to consider when the order was

issued, a mistake of law or fact, or abuse of discretion." In re: Gulf Coast Electric Cooperative, Inc., Order No. PSC-97-0098-FOF-EU, 1997 Fla. PUC Lexis 105, (PSC Jan. 27, 1997).

This motion is intended to bring to the Commission's attention matters of critical importance that the Commission overlooked or did not have occasion or opportunity to consider before this time and to point out serious errors of law.

Argument

A. The Commission did not demonstrate appropriately that FPC earned too much during the past 12 months.

Section 366.071, Fla. Stats., prescribes the standard the Commission must satisfy and the test the Commission must apply to order a public utility to hold revenues subject to refund for the interim rate period. Specifically, in order to "establish a prima facie entitlement for interim relief," the Commission "shall demonstrate that the public utility is earning outside the range of reasonableness on rate of return … ." §366.071(1), Fla. Stats. (emphasis added). Further, "[i]n setting interim … revenues subject to refund," the Commission must "determine the revenue … excess by calculating the difference between the achieved rate of return" and "required rate of return" based on the "most recent 12-month period." §366.071(2), (5), Fla. Stats. Thus, before the Commission can hold revenues in the interim rate period subject to refund, the Commission must demonstrate that the public utility did in fact earn too much in the prior 12-month period.

The Commission based its determination in this case on certain "adjustments" that Staff proposed to make in the course of performing its surveillance of FPC's reported earnings. Most of the "adjustments" that Staff recommended, however, disallowed expenses that the Commission had previously authorized for surveillance purposes or that were specifically requested by Staff. As demonstrated below, these adjustments were impermissible and inappropriate.

1. Approved accelerated amortization of the Tiger Bay regulatory asset.

The Commission disallowed FPC's acceleration of $63 million of the Tiger Bay regulatory asset to offset deferred revenues. That disallowance overlooked material considerations and was erroneous as a matter of law.

On June 9, 1997, the Commission approved a stipulation between FPC, the Office of Public Counsel (OPC), and the Florida Industrial Power Users Group (FIPUG) regarding FPC's purchase of the Tiger Bay cogeneration facility and its termination of five high-cost QF contracts served by the facility. By virtue of this stipulation and order, the Commission established the Tiger Bay regulatory asset (consisting of the costs of terminating the high-cost cogeneration contracts). In its Order approving the stipulation, the Commission expressly permitted the acceleration of the amortization of that asset at FPC's discretion.

Specifically, paragraph 2(e) of the stipulation provided that "[o]n a going forward basis, FPC may, at its option, increase the dollar amount of amortization of the retail portion of the Tiger Bay Regulatory Asset, and each year's increased amount of amortization shall be deemed a prudent regulatory expense in calculating FPC's regulatory earnings for purposes of surveillance reporting, pursuant to Rule 25-6.024, F.A.C." Order No. PSC-97-0652-S-EQ, 1997 Fla. PUC LEXIS 672, Attachment 1, ¶ 2(e) (emphasis added).[1] The Commission addressed the "advantages" and "disadvantages" of the stipulation to the ratepayer and concluded that paragraph 2(e) was an "advantage."

The Commission recognized that paragraph 2(e) "provides FPC the discretionary ability to contribute dollar amounts from its revenues to accelerate the amortization of the Tiger Bay

[1] The Commission did provide in its Order that the prudence for the amortization amounts in future reviews remained with the Commission. Order No. PSC-97-0652-S-EQ, * 7. However, neither Staff in its recommendation nor the Commission in its Refund Order disallowing the accelerated amortization of the Tiger Bay regulatory asset by $63 million made any finding that the acceleration of this amount by FPC was imprudent.

Regulatory Asset" and that "[t]here are currently no assurances nor any requirements that FPC will exercise this provision of the Stipulation." Order No. PSC-97-0652-S-EQ, 1997 Fla. PUC LEXIS 672, * 3-4 (emphasis added). Nevertheless, the Commission determined that providing FPC with the discretion to apply revenues to accelerate the amortization of the Tiger Bay regulatory asset was beneficial to the ratepayer, expressly finding that "such contributions would be to the advantage of both FPC and its ratepayers in the form of reduced liability." Id. at * 4 (emphasis added).

The Commission's decision to include the deferred revenues that FPC applied against the Tiger Bay regulatory asset in the past 12-month period in the interim refund amount overlooks, fails to consider, and directly contradicts the Commission's determinations in Order No. PSC-97-0652-S-EQ, including the Commission's express determination that FPC may take into account accelerated amortization of this regulatory asset for surveillance reporting purposes. The Commission's exercise of its authority under Section 366.071 to review a public utility's stated earnings for purposes of determining whether the utility has exceeded its authorized rate of return is a direct exercise of its earnings surveillance function. The Commission's prior order permitting FPC to accelerate its amortization of the Tiger Bay regulatory asset—to the benefit of the ratepayer—is both final and binding on the Commission and controlling in this proceeding on the issue whether accelerated amortization of the Tiger Bay asset should be recognized for purposes of surveillance of FPC's earnings. As this Commission and the Florida Supreme Court have held, the Commission will not and may not revisit prior Commission determinations absent extraordinary circumstances not present here. E.g., Florida Power Corp. v. Garcia, 780 So. 2d 34, 44 (Fla. 2001) (ruling, absent extraordinary circumstances, parties have the right to rely on administrative decisions as "final and dispositive of the rights and issues involved therein");

Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966) (holding administrative orders "must eventually pass out of the agency's control and become final and no longer subject to modification," quashing Commission order that reversed four and one-half year old order approving territorial agreement); In re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., Order No. 25668, 1992 Fla. PUC LEXIS 267, p. 29, (PSC Feb. 3, 1992) (ruling that "doctrine of administrative finality is one of fairness[;] [i]t is based on the premise that the parties, as well as the public, may rely on Commission decisions...."); In re: Application for Amendment of Certificate Nos. 298-W and 248-S in Lake County by JJ's Mobile Homes, Inc., Order No. PSC-95-1319-FOF-WS, 1995 Fla. PUC LEXIS 1634, p. 54 (PSC Oct. 30, 1995) (holding "there must be a terminal point where parties and the public may rely on an order as being final and dispositive").

Further, in acting to "adjust" away the accelerated amortization, the Commission is effectively penalizing FPC for taking steps that directly benefit FPC's ratepayers. In this connection, it is important to recognize that FPC is recovering funds needed to write down the remaining amount of the Tiger Bay regulatory asset, unlike other regulatory assets, through the fuel adjustment charge. Specifically, FPC currently collects approximately $37 million per year from retail ratepayers through the fuel adjustment clause (capacity and energy), based on the high-cost charges under the five Tiger Bay contracts. (Over the life of the QF contracts whose termination costs constitute the Tiger Bay regulatory asset, the total customer savings through reduced fuel adjustment charges were originally projected to exceed $2 billion.) When the asset is fully recovered, FPC will cease collecting these monies from retail ratepayers under this pass-through clause, and ratepayers will enjoy an immediate, corresponding reduction in their electric bill without any base rate adjustment. Thus, by accelerating the amortization of this asset, FPC

has hastened the day when its ratepayers will enjoy this reduction. Oddly, the Commission's Refund Order actually punishes FPC for providing that benefit.

The Commission, nevertheless, attempted to justify its decision as "appropriate, reasonable, and consistent with the interim statute" because (1) "no revenue deferrals or amortization accelerations were included in the calculation of FPC's revenue requirement during its last rate proceeding," and (2) the Commission is "dependent" upon FPC to accelerate the amortization of the Tiger Bay regulatory asset to mitigate potential overearnings. Neither contention provides a basis for the Commission's Refund Order.

The interim rate statute does not permit the Commission to disallow expenses merely because they are not identical to those incurred in the utility's last rate case. Rather, the statute provides that the Commission shall calculate the "achieved rate of return" by making "appropriate adjustments consistent with those which were used" in the utility's most recent rate proceeding. §366.071(5)(b)1, Fla. Stats. (emphasis added). The Commission's Refund Order does not apply that legal standard.

As a threshold matter, FPC's amortization of the Tiger Bay regulatory asset simply constitutes an expense, like thousands of other expenses that are also discretionary (e.g., buying paper clips) and reduce earnings. The Commission has identified no "adjustments" used in FPC's last rate case consistent with disallowing such expenses.

To the contrary, the amortization of the Tiger Bay regulatory asset is consistent with the amortization of other regulatory assets recognized by the Commission in FPC's prior rate proceeding. See, e.g., In re: Petition for a rate increase by Florida Power Corp., Order No. PSC-92-1197-FOF-EI, 1992 Fla. PUC LEXIS 1546, *81 (PSC October 22, 1992) (approving amortization of interest on tax deficiencies). Indeed, FPC is not aware of any circumstance in

previous rate cases that would be "consistent with" the disallowance of an expense that the Commission had previously reviewed and approved, which is precisely what the Commission's disallowance of Tiger Bay expenses purports to do.

The Commission's second concern—that the Commission is "dependent" on FPC to accelerate the amortization of the Tiger Bay regulatory asset to offset increased earnings—also fails to support the disallowance. The fact that FPC has discretion regarding whether to incur these expenses in the future hardly justifies disallowance of otherwise appropriate and, in this case, expressly approved adjustments to FPC's revenues in calculating FPC's achieved rate of return. This is particularly true in this case given that the Commission recognized this concern at the time it approved the stipulation in Order No. PSC-97-0652-S-EQ and expressly held that it was outweighed by the advantages to the ratepayer of providing for the discretionary acceleration of the amortization of Tiger Bay. Id. The Commission therefore is fundamentally mistaken in treating its "concern" as an appropriate basis for this "adjustment" under the interim rate statute.

Furthermore, there is no basis in fact for the Commission's concern. The Commission overlooks the fact that FPC did accelerate the amortization of the Tiger Bay regulatory asset in the year 2000 and did apply deferred revenues that year to the asset for the benefit of the ratepayers. In fact, FPC has accelerated the amortization of this asset each full calendar year since the stipulation has been in effect, i.e., three consecutive years. This included approximately $45 million in amortization that FPC could have given to its shareholders without exceeding its authorized rate of return during those years. In 2000, FPC went so far as to divert wholesale revenues that belonged to its shareholders and used these to accelerate the amortization of Tiger Bay. Thus, FPC has consistently demonstrated its commitment to the

practice of accelerating the amortization of this asset. (Indeed, in its Petition for Approval of Proposal to Resolve Outstanding Issues, filed with the Commission on May 14, 2001, FPC offered to retire the Tiger Bay asset entirely, five years ahead of schedule, bringing about additional ratepayer savings of more than $200 million). Never before has the Commission or its Staff so much as suggested that such expenses should be disallowed for surveillance purposes.[2]

Finally, there is no basis to treat what FPC did during the last 12 months with this regulatory asset as a non-recurring event. FPC will have the opportunity to offset future revenues by amortizing the remaining balance (over $150 million) of this regulatory asset. Accordingly, there is no proper grounds to infer that FPC may enjoy unauthorized earnings in the year 2001 based on this item.

For all of these reasons, the Commission has not demonstrated a prima facie case that FPC had excess earnings in the prior 12-month period based on FPC's application of deferred revenues to $63 million of the Tiger Bay regulatory asset.

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[2] The Commission's reliance on FPC's failure to submit a plan for the use of the deferred revenues by April 2, 2001 under Order No. PSC-01-0071-PAA-EI is misplaced. The plan contemplated under that Order was for an <u>alternative</u> use of deferred revenues to their application against the Tiger Bay regulatory asset. The Order specifically provided that, in the absence of such an alternative plan, "FPC shall immediately apply all 2000 deferred earnings, plus interest, to the Tiger Bay regulatory asset." Order No. PSC-01-0071-PAA-EI, 2001 Fla. PUC LEXIS 62, * 4. That is exactly what FPC did. In fact, FPC applied revenues above its ROE of 12.7 percent—not just its allowed ROE of 13 percent—to the Tiger Bay regulatory asset when it could have given the revenues above its 12.7 percent ROE to its shareholders rather than the ratepayers. In doing so, FPC reduced the Tiger Bay regulatory asset to just over $150 million, further accelerating the time period when this asset will be fully amortized for the benefit of FPC's ratepayers.

2. Requested additional write-off of regulatory assets.

The Commission disallowed a $10.7 million additional amortization of regulatory assets for previously flowed through taxes and the equity component of prior period Allowances for Funds Used During Construction ("Taxes and AFUDC") and because, according to the Commission, the amortization is a "non-recurring expense" and cannot be included in FPC's ROE calculation. The Commission is mistaken in concluding that the $10.7 million amount is a non-recurring expense. The Refund Order further overlooks the fact that Staff specifically requested FPC to take this additional $10.7 million write-off in the prior 12-month period.

Beginning in 1993, FPC has included in its ROE calculations expenses for amortizing Taxes and AFUDC, and FPC will continue in the future to include these expenses for approximately 10 and 30 years, respectively. No one disputes that the amortization of Taxes and AFUDC are recurring expenses properly included in FPC's ROE calculation for the prior 12-month period. The Commission disputes only the amount taken by FPC in the prior 12-month period for these expenses in addition to the FPC-scheduled expenses in that time period.

Under the circumstances, this additional amount should not be considered as a non-recurring expense. Expenses are non-recurring when they "occur periodically and are not considered routine, annual expenses"; and the Commission excludes such expenses in setting rates only when they are excessive or unrepresentative and non-recurring. See In re: Application for a rate increase by Tampa Electric Co., Order No. PSC-93-0165-FOF-EI, 1993 Fla. PUC LEXIS 287, *105 (PSC Feb. 2, 1993); In re: Petition of Gulf Power Co. for an increase in its rates and charges, Order No. 11498 1983 Fla. PUC LEXIS 1065, *56-58 (PSC Jan. 11, 1983). Conversely, the expenses for which the additional $10.7 million write-off was taken have been

included annually without objection in FPC's ROE calculations since 1993, and they will continue to be included annually for up to 30 years in the future. Thus, the expenses do not qualify as non-recurring. Changing the amount of the expenses in the past 12-month period does not alter the fact that the expenses themselves are routine, annual, and thus recurring.

Further, in disallowing this expense, the Commission overlooked the fact that Staff asked FPC to incur this expense. Staff requested FPC to change its methodology for amortizing the Taxes and AFUDC. To comply with this request, FPC changed its amortization calculation of these expenses going forward and re-captured the past differences in the amounts amortized under the new methodology. The Commission's Refund Order penalizes FPC for its good faith compliance with Staff's request and undermines the incentive for FPC or any other public utility to work voluntarily to resolve such issues with Staff in the future.

Moreover, there is no basis to conclude that FPC's earnings would have been $10.7 million higher even in the absence of this write-off. Had it not been for Staff's request, FPC would have deferred and applied the corresponding $10.7 million in revenues against the Tiger Bay regulatory asset. (As discussed above, FPC had the right to do this under Order No. PSC-97-0652-S-EQ).

Accordingly, for all these reasons, the Commission was fundamentally mistaken in excluding the $10.7 million write-off in determining whether FPC exceeded its authorized rate of return.

3. Approved adjustment to capital structure for CR 3 regulatory asset.

The Commission ordered FPC to hold revenues in the amount of $15,924,217 from July 1, 2001, subject to refund by reversing the CR 3 equity adjustment the Commission approved in Order No. PSC-97-0840-S-EI. The Commission erred in ordering revenues in this amount held subject to refund because the purported "trigger" for the "adjustment" upon which the Refund Order is based does not arise during the relevant statutory time period, and the Commission, in any event, misread the purported "triggering" event from its prior order.

In Order No. PSC-97-0840-S-EI, issued July 14, 1997, the Commission approved a stipulation resolving issues related to the nuclear outage at CR 3 by, among other things, freezing FPC's base rates for four years. As the Commission concedes, this order further allowed FPC to make an adjustment to its capital structure so that the effect of writing off a significant amount of replacement fuel cost deemed to be non-recurring, and additional O&M expenses associated with the extended outage of CR 3, would be excluded from FPC's calculation of its common equity for purposes of surveillance reporting pursuant to Rule 25-6.1352, F.A.C. (Refund Order, pp. 4-5); Order No. PSC-97-0840-S-EI, 1997 Fla. PUC LEXIS 964, *11.

By the terms of the approved stipulation, the Commission-approved CR 3 equity "adjustment" could not possibly expire prior to July 2001, the end of the four-year amortization period. The Commission expressly recognized that the parties to the stipulation contemplated that the CR 3 adjustment might extend beyond the four-year amortization period. Id. at * 12. The approved stipulation is generally silent with respect to the end of the CR 3 adjustment. The Commission's Refund Order notes that FPC acknowledged only two events that might trigger an

end to the CR 3 "adjustment": (1) a rate proceeding or (2) a change in the law ordering industry restructuring. Id.

Under any possible scenario, the end of the CR 3 adjustment falls outside the statutory time period applicable to the Commission's interim Refund Order. Under Section 366.071(5), Fla. Stats., the relevant time period for "setting revenues subject to refund" is the utility's "most recent 12-month period." In this case, the most recent 12-month period is the year ending February 28, 2001. For the "most-recent 12-month period" ending February 28, 2001 there is no dispute that the CR 3 "adjustment" is a Commission-approved adjustment. The Commission concedes as much in its Refund Order by making its "reversal" of its approval of the CR 3 "adjustment" effective on July 1, 2001 because of the Commission's belief that the "four year amortization period" ends June 30, 2001. (Refund Order, p. 5).

In any event, the "trigger" event for the "reversal" of the CR 3 adjustment has not occurred. What has occurred is that Staff has relied in part on the CR 3 adjustment and stipulation to suggest that FPC is overearning and thus to ask the Commission to initiate a full rate case and to order that funds be held subject to refund. The Commission approved that recommendation in its Refund Order. This was improper and contravenes the stipulation.

During the Agenda Conference on the CR 3 stipulation, Commissioner Deason questioned Public Counsel at length to make sure that all parties understood that the Commission would be bound under the stipulation to accept FPC's surveillance reporting for the purpose of performing the Commission's own surveillance duties in determining whether FPC might be overearning:

> Commissioner Deason: [To Public Counsel] [D]o you agree if we approve the stipulation, the Commission pretty much is bound to have Florida Power specified booking for this equity adjustment, to use that for surveillance reporting purposes before

we could show the Company was overearning to initiate a rate reduction, it would have to even exceed the equity as they calculate it for surveillance purposes.

Mr. Howe: Yes, sir.

(Transcript, pp. 36-37) (emphasis added). In entering its Refund Order, the Commission overlooked the pertinent background and intent of the CR 3 stipulation, and took action that directly contravenes the stipulation.

Specifically, Staff recommended that the Commission initiate a rate proceeding in the first place based on "the reasons for an earnings investigation" specified in Staff's recommendation, including Staff's concerns about the CR 3 equity adjustment. (Staff Rec., p. 7). The Commission approved that recommendation. In reaching its determination to initiate this rate proceeding, the Commission "detail[ed] [its] specific concerns with regard to the level of earnings of FPC." (Refund Order, p. 2). In so doing, the Commission stated that "[w]hen additional adjustments are made to reverse the effects" of several items, including "the Crystal River Unit 3 (CR 3) adjustment to common equity, the achieved ROE increases to approximately 17.02%," which "exceeds the currently authorized maximum ROE of 13.00%." (Id., pp. 2-3).

What this shows is that the Commission mistakenly negated the Commission-approved CR 3 equity adjustment in performing its surveillance of FPC's earnings to conclude that FPC would be overearning in the absence of that adjustment, and partly on this basis decided to require a full rate proceeding. This violates the agreement that the Commission and all the parties had reached.

Further, having mistakenly terminated the CR 3 equity adjustment, the Commission overlooked the fact that FPC remains free to seek to establish in the rate case that the adjustment should be continued on its merits. The Commission simply presumed that the adjustment would

not be reinstated. In this respect, too, the Commission overlooked and mistakenly violated the intent of the CR 3 stipulation.

During the Agenda Conference concerning the CR 3 stipulation, Commissioner Deason questioned FPC's financial representative, John Scardino, about what would happen if a rate case took place. Mr. Scardino explained that "the proper capital structure at that time would be established upon which to earn." (Transcript, p. 29) (emphasis added). In other words, if a rate case were initiated, the Commission would be asked to consider what FPC's capital structure should be. This by no means rules out the prospect that FPC may seek and obtain the right to continue to use the CR 3 equity adjustment for the same reason it was used in the first place: to avoid penalizing FPC twice (by incurring the losses in 1997 and then reducing its equity capital, which would reduce the authorized level of future earnings) for its willingness to absorb the costs associated with the extended CR 3 outage. In fact, FPC intends fully to ask the Commission to continue the CR 3 equity adjustment for the same reasons that it sought and obtained the adjustment in the first place, as a matter of simple fairness and in view of all the facts and circumstances that will be developed in the rate case.

Accordingly, the Commission was mistaken in negating the CR 3 equity adjustment, in using that decision as a basis to initiate the rate case, and in presuming without making any factual showing that the CR 3 equity adjustment should not be continued on its merits.

4. Severance payments from reductions in employment due to merger.

The Commission also disallowed O&M expenses comprising $64.6 million of merger costs from FPC's ROE calculations for the prior 12-month period. The Commission bases its decision solely upon its conclusion that these costs are mainly "one-time severance payments" to employees whose jobs were eliminated as a result of the merger. (Refund Order, p. 3). The

Commission was mistaken in disallowing these expenses for two reasons: First, the Commission overlooked its prior precedent recognizing severance expenses as legitimate, recurring expenses. Second, the Commission overlooked the application of the recognized ratemaking principle of matching such expenses to existing or expected savings. We discuss these in turn.

First, the Commission has long recognized that a utility may legitimately include severance payments to employees as part of its base rate calculations. See In re: Application for a rate increase by United Telephone Co. of Florida, Order No. PSC-92-0708-FOC-TL, 1992 Fla. PUC LEXIS 1107, * 30-31 (PSC July 24, 1992); In re: Petition by the Citizens of the State of Florida to permanently reduce the authorized ROE of United Telephone Co. of Florida, Order No. 24049, 1991 Fla. PUC LEXIS 77, * 34-37 (PSC Jan. 31, 1991).[3] By allowing utilities to include such expenses in its ROE calculations, utilities are encouraged to reduce O&M expenses and thus operate more efficiently. Moreover, it is common knowledge that severance payments are an expected employee benefit in the industry and are necessary for public utilities to compete with private companies in recruiting and retaining the best employees. The ability to offer, and the obligation to incur, significant severance costs are thus a legitimate and recurring cost of doing business.

In fact, this is not the first time FPC has incurred significant severance costs. As this Commission is aware, FPC laid off an even greater number of employees (though at a lower

[3] There are two earlier Commission orders disallowing severance pay as a non-recurring expense. In In re: Petition of Alltel Florida, Inc., Order No. 15627, 1986 Fla. PUC LEXIS 1112, * 29-30 (PSC Feb. 5, 1986), the Commission provided no explanation at all for its decision. In the other order, the Commission concluded the Company's relatively small severance expenses ($24, 749) were non-recurring because they were offset by the fact that the rates included salaries for employees who might be terminated in the future. In re: Petition of Central Florida Gas Co. to increase its rates and charges, Order No. 18716, 1988 Fla. PUC LEXIS 34, * 18 (PSC Jan. 26, 1988). This order should be limited to its facts and should not be misapplied to this case because it provides no incentive for utilities to reduce labor costs and operate more efficiently and because it is inconsistent with the Commission's most recent orders, noted above, recognizing severance pay as legitimate, recoverable expenses.

overall cost) chiefly in 1994-95 as part of its ongoing efforts to streamline and improve operations. These severance costs were included in FPC surveillance reports without exception by the Commission or its Staff.

Second, as the Commission seems to acknowledge, FPC incurred the severance expenses in connection with its action in eliminating positions due to its merger with Carolina Power & Light (CP&L). FPC has obtained and expects to continue to obtain considerable synergies as a result of this merger, resulting in lower O&M costs. The Commission has long recognized that where, as here, a utility incurs significant costs to bring about even greater savings in O&M, the utility should be allowed to take credit for those costs for purposes of surveillance reporting and calculating its ROE. This ratemaking principle, sometimes called "matching," reflects the fact that the costs taken into account may be expected to bring about even greater savings. See In re: Petition by the Citizens of the State of Florida to permanently reduce the authorized ROE of United Telephone Co. of Florida, Order No. 24049, 1991 Fla. PUC LEXIS 77, * 58-9 (PSC Jan. 31, 1991); In re: Petition of Gulf Power Co. to increase its rates and charges, Order No. 6650, 1975 Fla. PUC LEXIS 415, * 30 (PSC May 7, 1975); Order No. PSC-1197-FOF-EI, 1992 Fla. PUC LEXIS 1546, *35-6. The principle of matching recognizes that, even when costs may be non-recurring, as a matter of equity and good policy utilities ought to be permitted to take credit for costs incurred to achieve ongoing savings. See, e.g., Order No. 24049, 1991 Fla. PUC LEXIS 77, * 58-9. That is what FPC has done here. (In accordance with GAAP, FPC was required to expense the total amount of these costs in 2000, the year the "contingent loss criteria" were met.)

The Commission, however, erroneously disallowed the entire amount of these severance benefits, even while noting correctly that FPC expected to achieve synergies from the CPL merger. (Refund Order, p. 5). This was a serious mistake, warranting reconsideration.

B. FPC was denied due process in connection with the Refund Order.

As we have described, on May 3, 2001, Staff issued its recommendation that the Commission order FPC to hold $113.9 million, plus interest, subject to refund based on four "adjustments" that Staff proposed that the Commission make to FPC's ROE calculations in the prior 12-month period. As we have also described, Staff's recommendation represented an about-face from several prior Commission orders.

Staff indicated on the face of its recommendation that the recommendation would be placed on the Commission's agenda for May 15, 2001, the next regularly scheduled Agenda Conference, and that FPC would not be permitted to respond to Staff's recommendation concerning interim rates at that Agenda Conference. Certainly, no hearing was scheduled, no opportunity for briefing was provided, and FPC had no meaningful opportunity to provide input on these significant, complex issues at the Agenda Conference. At the Agenda Conference, FPC's financial representative attempted to make some brief remarks about the interim-rate issue, but Staff counsel objected. Over this objection, the Commission permitted FPC's representative to finish his comments, but, under the circumstances, FPC was not in a position to provide and did not in fact provide meaningful input on the issue. The Commission approved Staff's recommendation without further question or comment.

Accordingly, FPC was denied adequate notice and an opportunity to be heard "at a meaningful time and in a meaningful manner" before the Commission entered its Refund Order. This amounts to a denial of FPC's state and federal due process rights. See Department of Law

Enforcement v. Real Property, et. al., 588 So. 2d 957, 966 (Fla. 1991) (ruling that "[e]ven temporary or partial impairments to property rights are sufficient to merit due process protection"); State Farm Mutual Automobile Ins. Co. v. Hassen, 650 So. 2d 128, 139 (Fla. 2d DCA 1995), approved on other grounds, 674 So. 2d 106 (Fla. 1996) (holding remedy for "post-deprivation" vindication of insurer's rights was "too little, too late" for due process purposes because insurer "would still be deprived of the time-value of its money pending resolution of the claim," noting it was "well-settled" that "a temporary, non-final deprivation is nonetheless a `deprivation'" in due process terms); Fuentes v. Shevin, 407 U.S. 67, 80-2 (1972) (ruling that right to notice and an opportunity to be heard "at a meaningful time and in a meaningful manner" is fundamental and "no later hearing and no damage award can undue the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred"), citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

The fact that the Commission's Refund Order was entered pursuant to the interim rate statute does not ameliorate this problem. As the Florida Supreme Court has held, the "public policy of this state favors traditional due process rights in rate hearings, whether permanent or interim." See United Telephone Co. of Florida v. Beard, 611 So. 2d 1240, 1245 (Fla. 1993) (emphasis added); Citizens of Florida v. Mayo, 333 So. 2d 1, 6 (Fla. 1976). The Court has explained:

> When factual matters affecting the fairness of utility rates are being considered by a regulatory commission the rudiments of fair play and due process require that the Company must be afforded a fair hearing and an opportunity to explain or rebut those matters. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to avoid delay, when the minimal requirement of fair hearing has been neglected or ignored.

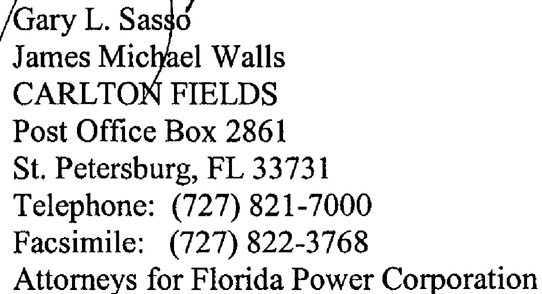
Florida Gas Co. v. Hawkins, 372 So. 2d 1118, 1121 (Fla. 1979) (citations omitted).

This is certainly true in this case where, without notice of the revenues to be held subject to refund or any real opportunity to challenge the legal or factual basis for Staff's and the Commission's decision, FPC is required to place at risk $113.9 million, with interest, and where this will establish a cap for ordering refunds after the final hearing. FPC was denied any meaningful opportunity to explain or rebut the erroneous "adjustments" to FPC's ROE calculations in the past 12-month period that were the basis for Staff's recommendation and the Commission's Refund Order. As a result, the "rudiments of fair play and due process" require the Commission to reconsider its Refund Order and vacate its decision requiring FPC to hold revenues subject to refund without sufficient notice or an adequate opportunity to be heard.

Conclusion

For the foregoing reasons, Florida Power Corporation respectfully requests the Commission to grant its Motion for Reconsideration and reconsider and vacate its Refund Order insofar as that order requires FPC to place revenues subject to refund.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of foregoing Motion for Reconsideration has been furnished to the following via Federal Express this 29 day of June 2001.

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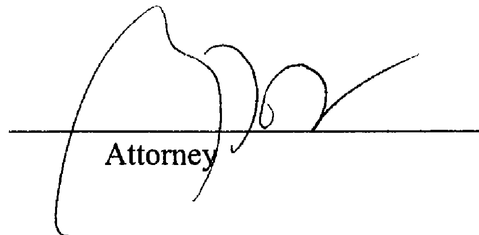

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