STEEL HECTOR & DAVIS INTERNATIONAL℠

ORIGINAL

Steel Hector & Davis LLP
200 South Biscayne Boulevard
Suite 4000
Miami, FL 33131-2398
305.577.7000
305.577.7001 Fax
www.steelhector.com

John T. Butler, P.A.
305.577.2939
jtb@steelhector.com

November 26, 2002

-VIA FEDERAL EXPRESS-

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

Re: Docket No. 010908-EI

Dear Ms. Bayó:

I am enclosing for filing in the above docket the original and seven (7) copies of Florida Power & Light Company's Response to Petitioners' Motion for Reconsideration of Order No. PSC-02-1516-FOF-EI, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows 2000, and the word processing software in which the documents appear is Word 2000.

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

Very truly yours,

John T. Butler, P.A.

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

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint against Florida Power & Light Company regarding placement of power poles and transmission lines by Amy and Jose Gutman, Teresa Badillo and Jeff Leserra.	)	DOCKET NO. 010908-EI
	)	Dated: November 26, 2002

FLORIDA POWER & LIGHT COMPANY'S RESPONSE TO PETITIONERS' MOTION FOR RECONSIDERATION OF ORDER NO. PSC-02-1516-FOF-EI

Florida Power & Light Company ("FPL"), pursuant to Rule 25-22.060, Florida Administrative Code ("F.A.C."), hereby responds to the Petitioners' Motion for Reconsideration of Order No. PSC-02-1516-FOF-EI, dated November 5, 2002 (the "November 5 Order") and respectfully requests that the Motion be denied for the following reasons:

1. The Motion does not properly seek reconsideration. The Commission has recited the following standard for review on reconsideration:

> 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. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

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;

Order No. PSC-01-2313-PCO-EI, November 26, 2001. The Motion fails to meet this standard. It identifies no relevant points of fact or law that the Commission overlooked or failed to consider in issuing the November 5 Order.

Background

2. On June 10, 2002, the Commission issued Order No. PSC-02-0788-PAA-EI (the "June 10 Order"), which concluded in Part III that the Commission lacked jurisdiction over all of the Petitioners' complaints about FPL's Parkland transmission line (the "Parkland Line") except those relating to compliance with the National Electric Safety Code ("NESC"), and concluded in Part II that the Parkland Line complies with the NESC. The June 10 Order was issued as final agency action with respect to Part III, but was issued as proposed agency action with respect to Part II because it depended upon a factual determination. The June 10 Order advised the Petitioners that they could petition for a hearing as to the proposed agency action in Part II and that they could seek reconsideration of and/or appeal the final agency action in Part III.

3. On July 1, 2002 -- in disregard of the distinction between the available remedies for proposed agency action and final agency action described in the June 10 Order -- the Petitioners filed a petition that "request[ed] a hearing regarding the proposed agency action and final agency action" of the June 10 Order (the "Petition"). On July 17, 2002, FPL moved to dismiss the Petition (a) with prejudice as to Part III, because there is no right to a hearing with respect to final agency action; and (b) without prejudice as to Part II, because the Petitioners did not allege any specific NESC non-compliance or request relief within the Commission's authority. The November 5 Order granted FPL's motion to dismiss.

The Commission Properly Dismissed the Petition With Prejudice as to Part III

4. The primary rationale for the November 5 Order's dismissal with prejudice as to Part III is that "the [June 10] Order does not provide an opportunity to request a hearing on Part III because the law provides no right to request a hearing on final agency action." November 5 Order at 5. The Motion entirely ignores this rationale and hence misses the essential point of the November 5 Order with respect to Part III.

5. The November 5 Order goes on to observe that the Petitioners "appear to suggest" that the Petition was appropriate because it was filed within the time frame for a request for reconsideration. However, the November 5 Order concluded that, "[e]ven if the [Petition] is considered as a request for reconsideration, it must be denied as untimely" because the Petitioners' calculation of the filing deadline improperly took credit for five extra days under Rule 28-106.103, F.A.C. *Id.*

6. The Motion pounces upon this tangential issue of whether the Petition -- if it had been a request for reconsideration -- would have been timely. It argues at some length about how Rule 28-106.103 should be applied and about the abstruse concepts of "excusable neglect" and "equitable tolling" that are said to overcome the Petition's untimeliness. But the Petitioners have again ignored the essential in order to dwell on the unimportant. Their argument about the timeliness of the Petition as a motion for reconsideration assumes that the Petition requested reconsideration. It did not.

7. Nothing in the Petition could conceivably qualify as a motion for reconsideration of Part III of the June 10 Order. The Petition does not ask for reconsideration, and it does not suggest problems with Part III that would warrant reconsideration. The Petition expressly states at the outset

that it seeks "a *hearing regarding the* proposed agency action and *final agency action.*" Petition at 1 (emphasis added). It directly follows the format for a petition to initiate proceedings set forth in Rule 28-106.201, F.A.C. And it ends with this Statement of Relief Sought By Petitioners:

> Petitioners are requesting *the right to appear before an Administrative Law Judge*, and have the ALJ determine (1) if in fact that [*sic*] FPL's Transmission Line project does indeed comply to the NESC before and after the "modifications" were made; and (2) if the PSC does indeed have a right to simply dismiss our other interests.

Id. at 13 (emphasis added). Clearly, the Petitioners were looking for a hearing concerning both Parts II and III of the June 10 Order. The November 5 Order properly ruled that the Petition should be dismissed with prejudice as to Part III, because the Petitioners are not entitled to a hearing as to that Part. The Commission need not detour into a fruitless and unnecessary analysis of the timeliness of a request for reconsideration, when the Petition clearly did not make such a request.[1]

8. Finally, the Motion devotes several pages to debating the rationale for the conclusion in the June 10 Order that the Commission lacks jurisdiction over the non-safety issues raised by the Petitioners. But this debate amounts to a much-belated request for reconsideration of the *June 10 Order*. The November 5 Order does not analyze the scope of the Commission's jurisdiction; it rules on FPL's motion to dismiss the Petition. Reconsidering at this time the Commission's conclusions in the June 10 Order about the scope of its jurisdiction would be untimely and inappropriate.

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1 The Petitioners arguments about timeliness are, in any event, wrong. The Commission correctly construed Rules 28-106.103 and 106.111, F.A.C., and §120.569, Florida Statutes, as not permitting the addition of 5 days to the time for service of a motion for reconsideration. Moreover, the Petitioners' timeliness argument flies in the face of the plain words of the June 10 Order, which states on page 12 that a motion for reconsideration must be filed "within fifteen (15) days of the *issuance* of this order ...." (Emphasis added). No mention is made of when the order is *sent to* or *received by* the Petitioners, only the date when it is issued. Finally, the Motion provides no valid justification for applying the doctrines of excusable neglect or equitable tolling such that the Petitioners would have been given additional time to file the Petition.

9. In any event, the Motion raises nothing that would warrant reconsidering the June 10 Order. It cites to the Grid Bill (Motion at 6), which the Commission carefully reviewed and properly concluded did not confer jurisdiction over the non-safety issues raised by the Petitioners. June 10 Order at 5. The Motion also asserts that the Commission's jurisdiction over "public welfare" under Section 366.05(1), Florida Statutes is so broad that it contemplates requiring utilities to move transmission lines that are otherwise properly and safely located, in order to protect "spiritual" and other values. Motion at 6. But this extraordinary, expansive interpretation of "public welfare" ignores the context in which that phrase appears: the Commission is empowered to "require *repairs, improvements, additions and extensions* to the plant and equipment of [a] public utility" in furtherance of public welfare. §366.05(1), Florida Statutes (emphasis added). The Petitioners are not interested in "repairs, improvements, additions or extensions" to the Parkland Line; they want it moved elsewhere, where it can be seen by other customers but not them. Nothing in Section 366.05(1) suggests that the Commission is empowered to do this.

10. In sum, the Motion's arguments as to Part III of the June 10 Order are a pastiche of the irrelevant, the rehashed and the erroneous. They should be rejected.

The Commission Properly Dismissed the Petition Without Prejudice As to Part II

11. The Motion also does not warrant reconsideration of the November 5 Order's dismissal without prejudice as to Part II. The Motion raises five points that supposedly warrant reconsideration. For the reasons discussed below, none does.

a. First, the Motion asserts that "[w]e are only relying on FPL's general statements that the transmission lines comply with the NESC, without any supporting FPL documentation or externally verifyable [*sic*] engineering reports." Motion at 7. This assertion is just

plain wrong. On September 6, 2002, Ernesto Rencurrell of the Commission Staff completed a safety evaluation of the Parkland Line, which was based upon a "careful inspection of each pole" and concluded that there was not "a single trace of any possible [NESC] violation." The report goes on to evaluate the Parkland Line's compliance with ten separate provisions of the NESC. It shows that the Parkland Line complies with nine of them and that the tenth is not applicable. This report has been readily accessible to the Petitioners for more than a month as Document No. 10638-02 on the Commission's website link for this docket.

b. Second, the Motion asserts that "this is the first time that FPL has used this type of power poles on a parallel run so close to a canal" and goes on to suggest that FPL's alleged lack of experience with installing poles close to a canal raises a safety concern. Motion at 7 (emphasis in original). But the Motion makes no reference to anything in the NESC that relates to placement of poles near canals, much less to a requirement for prior experience in doing so.

c. Third, the Motion suggests that modification of FPL's South Florida Water Management District ("SFWMD") permit to accommodate changes to meet FPL's internal guidelines somehow "begs the question as to whether this FPL project has been in compliance with the NESC standard as stated by FPL's expert witness." *Id.* This reasoning is an astonishing *non sequitur.* To start with, it relates to FPL internal guidelines, not the NESC. Moreover, if FPL has now taken steps to ensure compliance with those guidelines, that presumably would make the Parkland Line *more,* not *less*, safe. It is hard to see how steps taken to improve safety would raise a NESC-compliance issue. And finally, the reference to "FPL's expert witness" is especially telling. FPL has presented no expert witnesses before the Commission, as there has been no hearing at which such witnesses would testify. FPL did, however, present expert witnesses at the hearing that was

held by the Division of Administrative Hearings ("DOAH") on the Petitioners' challenge to the SFWMD permit. It appears that the Petitioners are really seeking reconsideration not of the Commission's November 5 Order or even of its June 10 Order, but rather of the *SFWMD* order that was issued as a result of the DOAH hearing!

d. The Petitioners' fourth point is essentially the same as their third. *Id.* Again, the fact that FPL has taken steps to comply with FPL internal guidelines raises no legitimate dispute about compliance with the NESC.

e. Finally, the Petitioners suggest that the steps FPL has taken to comply with its internal guidelines may be related to poor soil conditions on the canal bank and then pose a question about the possibility that there could be other problems with the canal bank as well. *Id.* at 8. This is nothing but rank speculation and certainly cannot be the sort of specific allegation of non-compliance with the NESC that the November 5 Order contemplates.

12. The foregoing critique does not challenge the factual basis for the Petitioners' five reconsideration points (except for Point 1, which is simply incorrect on its face). This does not mean, however, that FPL accepts those factual allegations; to the contrary, FPL strongly disputes them. This factual dispute is a further reason why the Motion must be denied. The November 5 Order explicitly instructed the Petitioners that, if they wish to challenge the factual conclusion that the Parkland Line complies with the NESC, the place to do so is in a hearing. The Motion flagrantly disregards those instructions, with the result that the Motion contains numerous factual allegations which, if they were to be considered by the Commission at all, would first have to be put to proof at

an evidentiary hearing.[2]

WHEREFORE, FPL respectfully requests that the Commission deny the Petitioners' Motion for Reconsideration of Order No. PSC-02-1516-FOF-EI.

Respectfully submitted,

Steel Hector & Davis LLP
Suite 4000
200 South Biscayne Boulevard
Miami, Florida 33131-2398

Attorneys for Florida Power
& Light Company

By: _____
John T. Butler, P.A.
Fla. Bar No. 283479

2 Because the Petitioners ignored the Commission's instructions, it does not appear that they still have the option at this point of requesting a hearing. The November 5 Order expressly warns that "if the [P]etitioners do not file an amended petition within 20 days of the issuance of this order, this docket will be administratively closed." The 20-day period to file an amended petition expired on Monday, November 25, 2002. While the filing of a motion for reconsideration delays the date on which a final order is deemed to be rendered for the purpose of judicial review, it does not automatically stay the effectiveness of a final order. Rule 25-22.060(1)(c), F.A.C.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of FPL's Response to Petitioners' Motion for Reconsideration of Order No. PSC-02-1516-FOF-EI was served by Federal Express (*) or U.S. Mail this 26th day of November 2002 to the following:

Harold McLean, Esquire *
General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Wm. Cochran Keating III, Esq. *
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Suzanne Terwilliger
12590 Little Palm Lane
Boca Raton, FL 33428

Amy and Jose Gutman
12643 Little Palm Lane
Boca Raton, FL 33428

Donna Tennant
12596 Little Palm Lane
Boca Raton, FL 33428

Teresa Badillo
12280 St. Simon Drive
Boca Raton, FL 33428

Jeff Lessera
7200 Loxahatchee Road
Parkland, FL 33067

By: _____
John T. Butler, P.A.