Matilda Sanders

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From: Natalie_Smith@fpl.com
Sent: Friday, November 05, 2004 4:09 PM
To: Filings@psc.state.fl.us
Cc: lwillis@beasley.com; jbeasley@ausley.com; nhorton@lawfla.com; jmcglothlin@mac-law.com; Vicki Gordon Kaufman; jas@beggslane.com; jmcwhirter@mac-law.com; james.mcgee@pgnmail.com; Adrienne Vining; christensen.patty@leg.state.fl.us; jregnery@calpine.com; jmoylejr@moylelaw.com; tperry@mac-law.com; bhollimon@moylelaw.com
Subject: Electronic Filing for Docket No. 040001-EI

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I am enclosing for electronic filing in Docket No. 040001-EI, In re: Fuel and Purchased Power Recovery Clause and Generating Performance Incentive Factor, PDF files of Florida Power & Light Company's Response in Opposition to Thomas K. Churbuck's and FIPUG's Motion for Reconsideration (eight pages) and Response in Opposition to Thomas K. Churbuck's and FIPUG's Request for Oral Argument (three pages). Each of these pleadings is being electronically served contemporaneously on all parties of record in this docket.

Thank you for your assistance.

Best regards,

Natalie F. Smith, Attorney
Florida Power & Light Company
700 Universe Blvd., E2424
Juno Beach, FL 33480
561-691-7207 (phone)
561-691-7135 (fax)
natalie_smith@fpl.com

(See attached file: FPL's Response in Opposition to Jt M for Reconsideration.pdf)(See attached file: FPL's Response in Opposition to Jt Request for Oral Arg.pdf)

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Oral Argument
DOCUMENT NUMBER-DATE
11963 NOV-5 04
FPSC-COMMISSION CLERK

Reconsideration
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11962 NOV-5 04
FPSC-COMMISSION CLERK

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power Recovery Clause and Generating Performance Incentive Factor)	DOCKET NO. 040001-EI
	Filed: November 5, 2004

FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO JOINT MOTION FOR RECONSIDERATION

Florida Power & Light Company ("FPL"), by and through its undersigned counsel, and pursuant to Rule 25-22.0376, Florida Administrative Code, responds in opposition to the Joint Motion of Thomas K. Churbuck ("Mr. Churbuck") and the Florida Industrial Power Users Group ("FIPUG") for Reconsideration of Order No. PSC-04-1018-PCO-EI ("Joint Motion"), and in support states:

1. The standard of review for a motion for reconsideration of a Prehearing Officer's order is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the 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); Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). A motion is not an appropriate vehicle to reargue matters that have already been considered by the Prehearing Officer. 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). Nor should a motion for reconsideration 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, 294 So. 2d at 317.

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2. The Joint Motion should be denied as it fails to meet the standard for reconsideration outlined under Florida law. The Joint Motion fails to point to any issue of fact or law that the Prehearing Officer overlooked in denying the Joint Motion to Remove Issues Related to Proposed Unit Power Sales ("UPS") Agreement from this docket, filed October 4, 2004, by the Citizens of the State of Florida and FIPUG and the Motion to Remove Issues Related to Proposed UPS Agreement and Notice of Joinder, filed October 7, 2004 ("Motions to Remove").

3. Mr. Churbuck and FIPUG ("Joint Movants") argue that their Joint Motion should be granted because the Prehearing Officer made a finding of fact within the meaning of Section 120.57(1), Florida Statutes, that was not based on sworn testimony or other evidence. FPL disagrees. Order No. PSC-04-1018-PCO-EI was not an evidentiary ruling. While Joint Movants correctly quote Section 120.57(1) and the requirements for findings of fact in the issuance of a final order, Joint Movants misunderstand or ignore that Section 120.57(1) provides the "procedures applicable to hearings involving disputed issues of material fact." See § 120.57(1), Fla. Stat. (2003) (emphasis added). The Prehearing Officer did not make a finding of fact within the meaning of 120.57(1) when he considered the arguments of FPL and the Joint Movants and determined, as a procedural matter based on the pleadings and arguments of the parties, that the Motions to Remove should be denied. Section 120.57(1), Florida Statutes, does not apply to rulings on preliminary procedural matters.

4. Further, the Joint Movants argument that Order No. PSC-04-1018-PCO-EI should be reconsidered because it is based on unsworn testimony is not well taken because the Prehearing Officer's order was based on the arguments of the parties in signed pleadings. The signatures on the parties' pleadings certify to the Prehearing Officer that the arguments in the

pleadings are based upon reasonable inquiry and could support the ruling requested. Section 120.569(1)(e) of the Florida Administrative Procedure Act, which relates to pleadings, motions, or other papers filed in the proceeding, requires that such pleadings "be signed by the party, the party's attorney, or the party's qualified representative." The Section goes on to provide:

> The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation.[1]

See § 120.569(1)(e), Fla. Stat. (2003). Therefore, the burden is on the parties submitting the pleadings, motions, or other papers to certify to the Prehearing Officer that, based on reasonable inquiry, the arguments are based on information that is sufficient to support the requested ruling. In ruling on a preliminary procedural matter, it is not the Prehearing Officer's obligation to make an independent finding of fact based on sworn testimony or other evidence.

5. It is premature to argue that a violation of Section 120.57(1) has occurred. Joint Movants have submitted direct testimony and deposed FPL's witness, and they will have the opportunity at the 120.57(1) hearing that is scheduled to take place November 8-10, 2004, to introduce evidence and cross-examine FPL on the testimony and evidence put forth by FPL. Section 120.57(1)(j) and (l), Florida Statutes, instructs the Commission to make findings of fact

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[1] Section 120.569(1)(e) goes on to state that "[i]f a pleading, motion or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." See § 120.569(1)(e), Fla. Stat. (2003) (emphasis added), See also Rule 28-106.206, Florida Administrative Code (2003) ("The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanctions in accordance with the Florida Rules of Civil Procedure, except contempt."). Thus, pleadings filed for the purpose of delaying administrative action in order to advance economic interests of persons and entities who would not otherwise have standing in a matter could be grounds for sanctions under this Section.

that must be supported by competent substantial evidence in the record of the 120.57(1) hearing and matters officially recognized.

6. Had the Prehearing Officer granted the Motions to Remove, FPL would have effectively been foreclosed from again making the argument that removing the issues related to approval of the UPS Replacement Contracts into a separate docket could be tantamount to denial of the Contracts and result in the loss of associated benefits for customers.[2] As stated in FPL's Response in Opposition to the Motions to Remove:

> Understandably in order to preserve its option to market the power elsewhere if necessary, Southern Company was reluctant to agree to an open-ended condition precedent such as Commission approval without a time limitation. The most that Southern Company is willing to agree to is to allow FPL until the later of (i) the date when FPL secures the necessary transmission rights to deliver the SoCo power to FPL's system, or (ii) approximately six months (180 days) after the contracts were executed to terminate the contracts if the Commission does not approve them. If transmission rollover rights are granted prior to the expiration of the 180 days, --a distinct possibility--, FPL would have until early February 2005 by which to obtain a final order from the Commission, or could be constrained to reject the contracts.

See FPL Response to Motions to Remove at ¶ 3. FPL expects that Joint Movants will continue to argue that the issues should be removed from this proceeding and will seize every opportunity to attempt to delay the Commission proceeding beyond February 2005. The two witnesses

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[2] As described in FPL witness Tom Hartman's direct testimony, the benefits of the UPS Replacement Contracts are significant and include a reduction in energy price volatility due to the firm coal component, as well as the ability to purchase low cost base load energy from the Southeastern Electric Reliability Council region during the off-peak periods. These contracts also provide increased system reliability due to the ability to purchase power from outside the State, as well as delivery of gas to these units via a pipeline that is independent of the two existing pipelines in Florida. The shorter term nature of the contracts allows FPL to broaden the range of generation options for the future as opposed to an accelerated commitment to additional natural gas generation in 2010. Further, these contracts enable FPL to retain firm transmission rights that will give FPL greater resource choices in the future. FPL believes that these benefits more than offset any perceived advantages associated with accelerating the construction of combined cycle self-build options listed in its Ten Year Site Plan, thus making the UPS Replacement Contracts the best alternative for FPL's customers.

whose testimony FIPUG sponsors are employees of merchant power companies – LS Power Development, LLC ("LS Power") and Northern Star Generation Services Company, LLC ("Northern Star"). Mr. Churbuck is the president of a subsidiary of Calpine Corporation ("Calpine"), also a merchant power company. The interests of Calpine, LS Power and Northern Star (the "Merchants") favor any delay in the process that would potentially scuttle this opportunity to secure the benefits of the UPS Replacement Contracts for customers. The Merchants would oppose a rollover of transmission rights to FPL and its native load customers because it would make bringing power from out of state (and not from in-state merchant assets) more feasible, thereby putting downward pressure on wholesale power prices in Florida and diminishing the market value of in-state merchant assets. For the same reasons, the Merchants also would benefit from the failure of FPL to conclude any resource acquisition that does not include them.

7. Joint Movants also argue that the Commission should reconsider Order No. PSC-04-1018-PCO-EI because "the Order does not even address arguments raised in [the Motions to Remove]" that the proposed purchase power agreements are too complex to be considered in the fuel and purchased power cost recovery clause docket. See Joint Motion at 8. Joint Movants argue that the Commission should reconsider the Order "to take into consideration these arguments which were overlooked by the Prehearing Officer." See id. However, a review of the Prehearing Officer's Order reveals that the argument has no merit because the Order states that the Prehearing Officer considered the arguments of the parties as outlined in the Order, including the argument that the purchase power agreements are too complex for consideration in this docket. On page 1 of the Order, the Prehearing Officer states in relevant part:

> OPC and FIPUG argue that these UPS agreements are complex and represent a significant commitment of capacity and energy, which require discovery and

analysis that cannot be done in the shortened time frame of this docket.

See Order No. PSC-04-1018-PCO-EI, at 1. Page 2 of the Order further provides:

> [FPL argues that] the issues presented by the UPS agreements are not complex and need not be removed for consideration in a separate docket in order to come to a reasoned decision. According to FPL, the UPS agreements in question are replacing existing UPS agreements that are expiring. FPL maintains that several of the important benefits of these agreements are not susceptible of quantification, and that no amount of discovery or extension of the schedule of this proceeding will better enable an intervenor to arrive at a decision of what is essentially a question of judgment rather than measurement. Third, the fuel clause is the appropriate proceeding through which to review these agreements. FPL argues that the purpose of the fuel and purchased power clause is to allow utilities to recover costs associated with power purchase agreements.

See id. at 2. On page 3 of the Order, the Prehearing Officer concludes:

> Upon review of the pleadings and consideration of the arguments, I find that the issues related to the UPS purchased power agreements submitted for approval for cost recovery purposes by both FPL and [Progress Energy Florida] shall not be removed from this proceeding.

See id. at 3.

8. The Order summarized the arguments and the Prehearing Officer said he considered each of these arguments in making his ruling. There is no requirement that the Prehearing Officer state with particularity the weight that he assigned to each of the arguments asserted in the Motions to Remove, and the Joint Movants cite no authority for their argument. FPL submits that Joint Movants are attempting to reargue matters that have already been considered by the Prehearing Officer, as proscribed by Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959).

9. FPL respectfully requests that the Prehearing Officer deny the Joint Motion because it fails to meet the standard for reconsideration under Florida law. The Order is not an evidentiary ruling to which the provisions of Section 120.57(1) apply. Further, Joint Movants did not identify a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering Order No. PSC-04-1018-PCO-EI.

WHEREFORE, FPL respectfully requests that the Commission deny the Joint Motion of FIPUG and Mr. Churbuck for Reconsideration of Order No. PSC-04-1018-PCO-EI.

Respectfully submitted this 5th day of November, 2004.

R. Wade Litchfield, Senior Attorney
Natalie F. Smith, Esq.
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561-691-7101
Facsimile: 561-691-7135

Attorneys for Florida Power & Light Company

John T. Butler, Esq.
Steel Hector Davis, LLP
200 South Biscayne Boulevard
Suite 4000
Miami, FL 33131-2398
Telephone: 305-577-7000
Facsimile: 305-577-7001

Attorneys for Florida Power & Light Company

By:
Natalie F. Smith

CERTIFICATE OF SERVICE
Docket No. 040001-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and United States Mail this 5th day of November, 2004, to the following:

Adrienne Vining, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Lee L. Willis, Esq.
James D. Beasley, Esq.
Ausley & McMullen
Attorneys for Tampa Electric
P.O. Box 391
Tallahassee, Florida 32302

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
McWhirter, Reeves, McGlothlin, Davidson, et al.
Attorneys for FIPUG
117 South Gadsden Street
Tallahassee, Florida 32301

John W. McWhirter, Jr., Esq.
McWhirter, Reeves, McGlothlin, Davidson, et al.
Attorneys for FIPUG
P.O. Box 3350
Tampa, Florida 33602

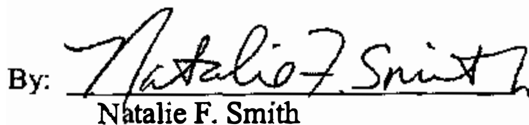
John C. Moyle, Jr., Esq.
Moyle, Flannigan, Katz, Raymond & Sheehan, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, Florida 32301

Patricia A. Christensen, Esq.
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399

James A. McGee, Esq.
Progress Energy Florida, Inc.
P.O. Box 14042
St. Petersburg, Florida 33733

Norman H. Horton, Esq.
Floyd R. Self, Esq.
Messer, Caparello & Self
Attorneys for FPUC
215 South Monroe Street, Suite 701
Tallahassee, Florida 32302-0551

Jeffrey A. Stone, Esq.
Russell A. Badders, Esq.
Beggs & Lane
Attorneys for Gulf Power
P.O. Box 12950
Pensacola, Florida 32576-2950

By: 
Natalie F. Smith