

State of Florida



# Public Service Commission

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## -M-E-M-O-R-A-N-D-U-M-

**DATE:** March 15, 2007

**TO:** Commission Clerk (Cole)

**FROM:** Division of Economic Regulation (Lester, McNulty)  
Office of the General Counsel (Bennett, Young)

*PL WBM  
XOB JY PSLT*

**RE:** Docket No. 070001-EI – Fuel and purchased power cost recovery clause with generating performance incentive factor.

**AGENDA:** 03/27/07 – Regular Agenda – Decision on Motion for Reconsideration – Oral Argument Requested

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Carter

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\ECR\WP\070001.RCM.DOC - *ac*

### Case Background

In its filing seeking cost recovery through the fuel and purchased power cost recovery clause during the pendency of Docket No. 060001-EI, Florida Power and Light Company (FPL) included costs associated with purchased power which it incurred during an extended outage of its Turkey Point Unit 3. The extended outage was due to the discovery of a drilled hole in the pressurized piping at the nuclear plant. The Office of Public Counsel (OPC) challenged FPL's recovery of those expenses and raised the following issue:

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

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This issue was identified as Issue 16G, but never included in the prehearing order.

At the prehearing conference on October 23, 2006, FPL argued and the Prehearing Officer agreed that Issue 16G be postponed until 2007 when a full evidentiary proceeding could be held.<sup>1</sup> At the November 2006 fuel hearing, FPL requested that it be allowed to collect its expenses associated with the outage, subject to refund. OPC argued that the refund should be recovered, if at all, after the 2007 evidentiary hearing. The Commission ruled: "the additional fuel cost incurred as a result of the outage extension at Turkey Point Unit 3 in March and April 2006 of \$6,163,000 shall be recovered by FPL in 2007, subject to refund with interest, with a prudence review by us in a subsequent fuel proceeding."<sup>2</sup> In so ruling, the Commission incorrectly characterized OPC's argument as "OPC urged the Commission to disallow the costs associated with the outage and if the Commission were to later deem them prudent, FPL could collect the costs (including interest) from ratepayers in 2008."<sup>3</sup>

OPC filed a timely Motion for Clarification and Reconsideration concerning the timing of the cost recovery for the extended outage, and also filed a Request for Oral Argument. OPC urges the Commission to clarify Order No. PSC-06-1057-FOF-EI to acknowledge that the Commission will not be limited in its review of Issue 16G during the 2007 fuel proceeding to a prudence standard. Rather OPC would like the Commission to consider whether FPL's rates are fair, just, and reasonable if those rates include the costs of an extended outage at Turkey Point Unit 3. OPC also urges the Commission to reconsider its ruling allowing FPL's recovery in 2007 of the costs associated with the outage extension. FPL responded in opposition to OPC's motion.

For the reasons discussed below, staff recommends that oral argument is not necessary and the motion for clarification should be granted while the motion for reconsideration should be denied. The Commission has jurisdiction pursuant to Sections 366.041, 366.05 and 366.06, Florida Statutes.

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<sup>1</sup> Order No. PSC-06-0920-PHO-EI, issued November 2, 2006, in Docket No. 060001-EI, page 58.

<sup>2</sup> Order No. PSC-06-1057-FOF-EI, issued December 22, 2006, in Docket No. 060001-EI, page 8.

<sup>3</sup> Id.

### Discussion of Issues

**Issue 1:** Should OPC's Request for Oral Argument be granted?

**Recommendation:** No, oral argument should be denied. Staff believes that the motion is clear on its face. However, if the Commission believes that oral argument would be helpful, it has the discretion to hear from OPC and all parties to the docket. If the Commission decides to hear oral argument, argument should be limited to ten minutes per side. (Bennett)

**Staff Analysis:** By separate motion, OPC seeks oral argument on its motion for clarification and for reconsideration. Rule 25-22.0022, Florida Administrative Code, provides that the Commission, at its discretion, may grant a request for oral argument on a motion for reconsideration of a final order, such as Order No. PSC-06-1057-FOF-EI. The Commission has traditionally granted oral argument upon a finding that oral argument would aid the Commission in its understanding and disposition of the underlying motion. OPC's arguments set forth in its motion are well-articulated. Staff believes the underlying motion is clear on its face and oral argument is not necessary to aid the Commission in its decision on the motion. FPL has filed a response to the motion which further aids the Commission in its decision. Therefore, staff recommends that the Commission deny OPC's request for oral argument.

However, if the Commission believes that oral argument would be helpful, it has the discretion to hear from OPC and all parties to the docket. Staff also recommends that if the Commission decides to hear oral argument, argument should be limited to ten minutes per side.

**Issue 2:** Should OPC's Motion for Clarification be granted?

**Recommendation:** Yes. The motion for clarification should be granted. The Commission should clarify that it did not intend to limit the scope of its review of OPC's Issue 16G during the 2007 fuel hearing.

**Staff Analysis:**

**OPC's Position**

OPC argues that Order No. PSC-06-1057-FOF-EI, by using the word "prudence," limits the scope of the Commission's review of Issue 16G. OPC argues that its Issue 16G was much broader than a prudence review. According to OPC, the scope of review for the recoverability of fuel charges for the extended outage at Turkey Point Unit 3 is whether it is "fair, just and reasonable"<sup>4</sup> to require ratepayers to bear the burden of the extended outage at Turkey Point Unit 3. OPC states that even if the Commission determines FPL was not imprudent, it still would not be fair, just or reasonable, under the facts of this case, to require FPL's rate payers to bear the costs of the extended outage. The risk, according to OPC, should be born by the shareholders and not the rate payers.

OPC urges that no party to the proceeding argued to the Commission that it should limit the scope of Issue 16G, nor did the Commission discuss or decide anything about limiting the scope of the issue. Accordingly, OPC argues that Order No. PSC-06-1057-FOF-EI should be clarified to allow Issue 16G, as raised by OPC, to be heard by the Commission in its 2007 fuel hearings, without limiting the scope of Commission review to a standard of prudence.

**FPL's Position**

FPL argues that the Commission did determine the scope of review of Issue 16G in Order No. PSC-06-1057-FOF-EI. FPL states that the Motion for Clarification is actually a Motion for Reconsideration since the Commission specifically refers to "prudence review" at least five times in its ordering paragraph. FPL argues that OPC's motion should be treated as a Motion for Reconsideration, and that OPC failed to meet the appropriate standard of review for reconsideration.<sup>5</sup> FPL argues that the Commission considered the arguments of both parties and determined that the standard of review for the upcoming 2007 fuel hearing on Issue 16G is whether or not FPL acted prudently.

**Analysis**

The question to be determined is did the Commission have Issue 16G before it at the time of the Commission's bench decision on November 8, 2006? If it did, then the final order does not need to be clarified because the Commission intentionally limited its scope of review of the recoverability of costs associated with the outage at Turkey Point Unit 3 to a prudence review. If the issue was not before the Commission, the order should be clarified to reflect that Issue 16G

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<sup>4</sup> Sections 366.05, and 366.06, Florida Statutes.

<sup>5</sup> 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. 1<sup>st</sup> DCA 1981).

will be heard in the 2007 fuel proceedings. A review of the transcripts indicates that Issue 16G was not before the Commission and there is a need to clarify Order No. PSC-06-1057-FOF-EI to the extent it could be read to limit the scope of Commission review of Issue 16G.

During the prehearing conference, FPL asked that Issue 16G be deferred to a later date. The prehearing officer concurred, finding that "The Commission must make decisions based upon facts presented in the record. Because there are limited facts available to the Commission until the criminal investigation is complete, it is appropriate to defer the hearing on this issue until next year's fuel hearing."<sup>6</sup> The prehearing officer further stated in his order, "[t]he question of *the timing of cost recovery*, if any is permitted, can be addressed by the Commission through Issues 2, 3, 5, 6 and 8."<sup>7</sup> (emphasis supplied).

When asked for its recommendation on FPL's request to recover costs associated with the extended outage, staff responded "staff recommends that the amount of money that is at question in this case be allowed to be recovered and be placed into the factors for 2007. We think that's much more consistent with Commission history and the precedent that has been set in previous cases before this Commission. We think that the question of whether or not these costs are prudent or not cannot be factually determined until a later time, but we believe that certainly these costs are going to be subject to a true-up, *whether it's put into rates now or put into rates later is the only thing that is in question.*" [Transcript at 1066]. (emphasis supplied).

When making the motion to approve staff's recommendation, Commissioner Deason stated: "So, I would agree with staff's recommendation that more consistent with past policy would be to go ahead and to allow the recovery. There will be a full and complete investigation, and apparently there's going to be an investigation into a number of issues that are probably even beyond the jurisdiction of this Commission, and hopefully to some extent we may have the benefit of that at some point in the future. So I guess that's the long way of saying that I agree with staff's recommendation, and if there are no other questions I would move approval of staff's recommendation." [Transcript at 1069].

The motion and vote, based on staff's recommendation, was to allow FPL to recover the costs incurred for the extended outage of Turkey Point Unit 3, subject to refund with interest. The Commission made no pronouncement concerning the scope of its review during the 2007 fuel proceeding; therefore, the Commission did not intend to limit the scope of its review of Issue 16G to a prudency review only. The motion for clarification should be granted and Issue 16G should be heard without limitation in the 2007 fuel proceedings.

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<sup>6</sup> Order No. PSC-06-0920-PHO-EI, page 58.

<sup>7</sup> Id.

**Issue 3:** Should OPC's Motion for Reconsideration of Order No. PSC-06-1057-FOF-EI be granted?

**Recommendation:** No. OPC's Motion for Reconsideration should be denied. (Bennett, Young)

**Staff analysis:**

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).

**OPC's Motion**

OPC cites Florida Power Corporation v. Cresse, 413 So. 2d 1187 (1982) as supporting its position that the Commission should not allow FPL to collect for the outage subject to refund. Rather, according to OPC, it is the burden of the utility to prove prudence prior to collecting costs through the fuel adjustment clause. Because FPL did not meet its burden, OPC asserts, FPL should not be permitted to recover the costs associated with the extended outage at Turkey Point Unit 3.

**FPL's Response**

FPL argues that the Commission considered Cresse in its determination to allow recovery subject to refund. According to FPL, OPC made the same argument in the November 2006 fuel hearing. FPL states that OPC pointed to nothing that the Commission overlooked or failed to consider in its evaluation. OPC raised no new law or fact in its motion for reconsideration and, therefore, the motion for reconsideration should be denied.

**Analysis**

Under the applicable standard, OPC's motion does not identify a point of fact or law which was overlooked or which the Commission failed to consider when rendering its order. In its motion for reconsideration, OPC argues that the Commission erred and made a mistake of law by not following the precedent set-forth in Cresse. (OPC's Motion for Reconsideration, pp. 6 and 7). Specifically, OPC argues that a simple showing that extra costs were incurred as a result of the outage extension does not satisfy FPL's burden of proof to seek a refund from its customers. Moreover, the Commission should not presume that customers will be responsible

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for damages resulting from someone drilling a hole in the pressurized piping at FPL's nuclear plant because the law does not presume that customers will be responsible.

OPC's arguments are the same arguments made during the hearing before the Commission on November 22, 2006. [Transcript at 42-43]. At the hearing, the Commission denied OPC's request and allowed FPL to recover the monies spent pending the outcome of the 2007 fuel proceeding. The Commission reviewed the relevant cases and orders, it listened to both sides as OPC and FPL presented their respective arguments, and made an intelligent and informed decision, which it thought was in the best interest of the customers. Therefore, OPC's motion for reconsideration should be denied because OPC did not identify a point of fact or law in its motion that was overlooked or which the Commission failed to consider in rendering its Order.

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**Issue 4:** Should this docket be closed?

**Recommendation:** This docket is an ongoing docket and should remain open. (Bennett, Young)

**Staff Analysis:** The fuel and purchased power cost recovery docket is an ongoing docket and should remain open.