BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor (Crystal River #3 1989 Outages)	)	DOCKET NO. 920001-EI ORDER NO. PSC-92-0614-FOF-EI ISSUED: 07/07/92

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
BETTY EASLEY

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

In connection with the regularly-scheduled fuel cost recovery hearings, the Office of Public Counsel questioned Florida Power Corporation's ("FPC's") recovery of fuel expenses related to certain 1989 outages of its Crystal River nuclear unit #3. The issues were heard separately, after which the Commission approved recovery of the expenses in Order No. 25455. Public Counsel thereafter filed a Motion for Reconsideration of certain aspects of that order. Additional unrelated Crystal River fuel recovery issues were heard separately in February of this year.

The purpose of a motion or petition for reconsideration was discussed in the case of State v. Green, 106 So.2d 817 at 818, (Fla. 1st DCA 1958), which was cited by FPC in its response to Public Counsel's motion. The same standards are applicable herein.

> The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision. Judges are human and subject to the frailties of humans. It follows that there will be occasions when a fact, a controlling decision or a principle of law even though discussed in the brief or pointed out in oral argument will be inadvertently overlooked in rendering the judgment of the court. There may also be occasions when a pertinent decision of the Supreme Court or of another District Court of Appeal may be rendered after the preparation of briefs, and even after oral argument, and not considered

> by the court. It is to meet these situations that the rules provide for petitions for rehearing as an orderly means of directing the court's attention to its inadvertence.
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> It is not a compliment to the intelligence, the competency or the industry of the court for it to be told in each case which it decides that it has "overlooked and failed to consider" from three to twenty matters which, had they been given proper weight, would have necessitated a different decision.
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> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

In its motion, Public Counsel argues that the Commission made two "glaring errors" in determining that equipment qualification work mandated by the Nuclear Regulatory Commission did not unnecessarily extend the outage: relying on what Public Counsel characterizes as "improper rebuttal testimony" by Mr. Paul McKee, FPC's witness, and accepting Mr. McKee's testimony that the work did not extend the outage. Public Counsel disagrees with the Commission's decision, but fails to point out a matter which the Commission overlooked.

"Improper rebuttal" argument: Public Counsel argues that Mr. McKee's testimony was improper for rebuttal purposes in that it was not intended to rebut or clarify any testimony of Public Counsel's witness, Dr. Stephen Hanauer. Public Counsel made this same argument at hearing. It was specifically overruled. After the hearing, Public Counsel re-argued the matter in his brief. The Commission clearly rejected the argument again in Order No. 25455, as shown by its reliance upon Mr. McKee's testimony in finding that equipment qualification work did not extend the outage. Because the Commission has already considered and rejected this argument, it is not a proper ground for reconsideration.

Outage extension: Public Counsel argues that the Commission should not have considered evidence which showed that equipment qualification work did not extend the outage. Public Counsel believes that an 11 day extension was an "agreed-upon fact", and points out that he "vehemently objected" to the introduction of evidence which rebutted it. However, Public Counsel has not shown a fact, precedent or rule of law which the Commission overlooked in rendering its decision. Rather, he re-argues the very points which were ably argued in his brief. The Commission has already considered and rejected this argument.

Citing Gandy v. Department of Offender Rehabilitation, 351 So.2d 1133 (Fla. 1st DCA 1977), Public Counsel argues that it was improper for the Commission to consider evidence outside the issues. Public Counsel believes that the issue before the Commission was not whether the outage was extended by EQ work, but whether FPC was imprudent for extending the outage. We disagree. In Gandy, the parties stipulated that the issue to be determined was negligence. Thereafter, the petitioner's attorney limited his questioning to that issue and was therefore harmed by the hearing officer's reliance on evidence, received over objection, which was outside the scope of the stipulated issue. In contrast, the issue here was broadly stated[1] and there was no stipulation that the outage was extended by EQ work. Further, upon Public Counsel's objection to the introduction of Mr. McKee's rebuttal testimony, the hearing was suspended and Public Counsel was given additional time to conduct discovery. When the hearing reconvened nearly four months later, Public Counsel had the opportunity to present additional evidence. Clearly, there is no "procedural problem of due process proportions" as was present in Gandy.

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[1]Prehearing Order No. 24387 set forth Issue 4 as follows: "Were the 1989 power reductions and outages extended unnecessarily because of FPC's need to comply with NRC-mandated equipment qualification requirements?"

It is therefore

ORDERED by the Florida Public Service Commission that the Motion for Reconsideration filed by the Office of Public Counsel is hereby denied.

By ORDER of the Florida Public Service Commission, this 7th day of July, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

by: Kay Flynn
Chief, Bureau of Records

NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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