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**Florida
Power**
CORPORATION

JAMES A. MCGEE
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March 12, 1997

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

Re: Docket No. ~~970261-EI~~

Dear Ms. Bayó:

Enclosed for filing in the subject docket are an original and fifteen copies of Motion of Florida Power Corporation to Confirm Scope of Hearing and Sever Workshop and Supporting Memorandum.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

ACK _____
AFA 2 _____
APP _____
CAF _____
CMU _____
CTR _____
EAG _____
LEG 1 _____
LIN 5 _____
OPC _____
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SEC 1 _____
WAS _____
OTM _____

JAM/kp
Enclosures
cc: Parties of Record

Very truly yours,

James A. McGee

DOCUMENT NUMBER-DATE

02653 MAR 13 1997

CERTIFICATE OF SERVICE

Docket No. 970261-EI

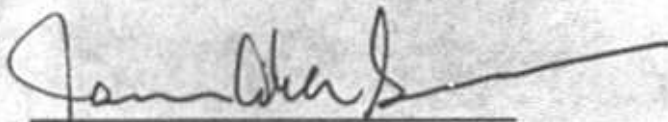
I HEREBY CERTIFY that a true and correct copy of Motion of Florida Power Corporation to Confirm Scope of Hearing and Sever Workshop and Supporting Memorandum has been sent by regular U.S. mail to the following individuals on March 12, 1997:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of nuclear outage
at Florida Power Corporation's
Crystal River Unit No. 3.

Docket No. 970261-EI

Submitted for filing:
March 13, 1997

**MOTION OF FLORIDA POWER CORPORATION TO
CONFIRM SCOPE OF HEARING AND SEVER WORKSHOP**

Florida Power Corporation ("Florida Power") moves the Commission to enter its order confirming, at the earliest possible time, that the scope of the scheduled hearing in this proceeding will be limited to the prudence of Florida Power's "specific actions and circumstances that led to the shutdown of the unit on September 2, 1996, and the reasons Florida Power Corporation determined it was necessary to keep the unit down for an extended outage" -- the issues identified in the Prehearing Officer's February 28, 1997 Order Establishing Procedure -- and thereby confirm that the hearing will not encompass the actions and decisions of Florida Power with respect to the performance of the modifications themselves. Florida Power further requests that the Commission sever the ordered workshop from, and conduct it outside of, the record in this proceeding.

The reasons for this motion are set forth more fully in the supporting memorandum set forth below.

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SUPPORTING MEMORANDUM

I. Introduction.

On February 28, 1997, the Commission, through its appointed prehearing officer, issued an "Order Establishing Procedure" in this matter. The order provides in part:

Florida Power Corporation shall file with the Commission, no later than March 19, 1997, a preliminary report outlining the specific actions and circumstances that led to the shut-down of the unit on September 2, 1996, and the reasons Florida Power Corporation determined it was necessary to keep the unit down for an extended outage. The preliminary report shall, at a minimum, include the information requested in Attachment 1 to this order

A staff workshop will be held on March 26, 1997. Florida Power Corporation shall make an oral presentation as to the information provided in the preliminary report, as well as any new information discerned by the company after the submission of the report. Public Counsel, other parties and interested persons shall be permitted to present additional information regarding the outage.

The hearing will be conducted according to the provisions of Chapter 120, Florida Statutes, and the rules of this Commission.

Florida Power, by its motion, has asked the Commission to confirm, at the earliest possible time, that the scope of the scheduled hearing will be limited to the issues identified in the Order Establishing Procedure and that it will not encompass the actions and decisions of Florida Power with respect to the performance of the modifications themselves. Florida Power has further requested that the Commission sever the ordered workshop from, and conduct it outside of, the record in this proceeding.

We address both these issues in turn.

II. The scope of the proceeding should be limited to the issues specified in the February 28 Order Establishing Procedure.

It appears from the Order Establishing Procedure that the scope of this particular proceeding is limited to "the specific actions and circumstances that led to the shut-down of the unit on September 2, 1996, and the reasons Florida Power Corporation determined it was necessary to keep the unit down for and extended outage." Florida Power requests that its understanding be promptly confirmed, since Florida Power's prepared testimony must be filed on April 14. If Florida Power's understanding is ruled to be incorrect so that issues other than those specified in the order are to be considered in this proceeding, a continuance will then be required in order to allow Florida Power an adequate opportunity to prepare its pre-filed testimony on those additional issues.

Indeed, it would be impossible for Florida Power to comply with the present schedule if the scope of this proceeding were to be expanded to include the period after the decisions identified in the Order. This is especially true since the employees of Florida Power who are necessary to prepare and present testimony are the very same employees who are currently working full time to bring CR3 back into service.

Quite apart from Florida Power's inability to meet the present schedule if the proceeding were to be subsequently expanded, it would be inefficient, premature, and indeed, completely unfeasible to review -- in this proceeding -- Florida Power's on-going actions in implementing the modifications occasioning the outage. Since these modifications are still being performed, they cannot possibly be reviewed at this stage. They may, of course, be reviewed, in due course, once they have been completed and the unit is again on line. However,

the only issue that is currently ripe and capable of review on a complete record in this proceeding is whether Florida Power's decisions in commencing and then deciding to extend the outage were prudent.

Furthermore, any attempt to review in this proceeding the actions Florida Power is currently taking to conclude the outage would be counterproductive to Florida Power's efforts to bring the outage to an end. If the scope of the proceeding were to be expanded in this manner, that would require Florida Power management and personnel to divert even more of their attention to Florida Power's preparation for the hearing in this proceeding, rather than concentrating on getting the unit back in service; this would in turn threaten to extend the outage. Clearly, anything which would impede Florida Power's ability to get the unit up and running is not in anyone's best interest. On the other hand, there is no compelling need to conduct such a review before the outage is completed, since Florida Power's collection of fuel costs during the outage is subject to refund.

Thus, at the hearings set for June 26 and June 27, the only issue ripe for consideration by the Commission is the prudence of Florida Power's decisions to commence and then extend the outage at the nuclear plant. Any other review of the outage must be reserved for a time after the outage has ended, when the Commission can consider any remaining issues on a complete record. Accordingly, Florida Power requests that the Commission confirm that the only issues to be determined in this proceeding are those specified in the February 28, 1997 order of the Prehearing Officer.

III. The workshop should be severed from this proceeding.

Florida Power is currently preparing for the scheduled workshop and it intends to participate fully and frankly in that workshop. However, because that workshop (1) will not be conducted in accordance with Sections 120.569 - 120.57, and (2) will address matters that cannot be considered by the Commission in determining the prudency issues, this workshop should be severed from and conducted outside of the record in this prudency proceeding, and the workshop record not allowed to become part of the hearing in this proceeding. See, Transgulf Pipeline v. Board of County Commissioners, 438 So. 2d 876, 879 (Fla. 1st DCA 1983) (record of prior local government hearing which not conducted with adequate procedural safeguards was not admissible in Chapter 120 hearing).

Simply put, the formal hearing will be conducted under entirely different procedures and, in addition, it will involve entirely different evidence than the informal workshop. As we now show, it would be utterly improper to allow the informal workshop to taint the formal hearing.

A. Due process requires that the workshop be held outside the record in this proceeding.

The due process requirements of the federal and Florida Constitutions, Florida Statutes Sections 120.569 - 120.57, and Florida public policy dictate that the workshop be severed from the Commission's prudency proceeding. Florida law specifically requires a proceeding which affect rates to be conducted in compliance with formal procedural safeguards to preserve the parties due process rights. See, United Telephone Company v. Beard, 611 So. 2d 1240, 1243 (Fla. 1993) (procedural safeguards are required in any quasi-judicial proceeding affecting utility rates; "[t]he public policy of this state favors traditional due

process rights in rate hearings, whether permanent or interim"); Citizens of Florida v. Mayo, 333 So. 2d 1, 6 (Fla. 1976) (due process is required in proceeding setting interim rates and parties must accordingly be afforded the opportunity to cross-examine the witnesses and present evidence).

Moreover, the Prehearing Officer's order specifically states that "the hearing will be conducted" according to the provisions of Chapter 120. Section 120.57(1)(b) provides that basic procedural safeguards must be afforded to all interested parties:

All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel.

The imperative nature of such procedural safeguards is clear. See In re Integration Rule of The Florida Bar, 103 So. 2d 873, 876 (Fla. 1956) (right to cross-examination is "indispensable").

The workshop at which Florida Power has been directed to give an oral presentation concerning the outage and to report on the decisions and corrective measures it has taken to that point will plainly be an informal proceeding, devoid of important procedural rights required under Section 120.57(1)(b) and as a matter of constitutional due process. It will, in addition, encompass matters that are absolutely irrelevant to the issues which the Commission will consider at the prudency hearing. See pages 7, et. seq., *infra*. Simply put, the matters which the Prehearing Officer has ordered to be addressed at the informal workshop are much broader than those which can be properly considered during the formal prudency hearing itself. Hence, the workshop would irretrievably taint the hearing if it were to be in any way a part of it.

As such, the workshop must be severed from this proceeding, and no party should be entitled to rely in the prudency hearing on any information presented at the workshop. This is especially the case since no party will suffer any detriment by the exclusion of such matters from the prudency hearing. All relevant evidence will be available through the discovery channels provided in the Commission's Rules. The workshop -- although satisfying a proper informational function for the public -- is not an appropriate vehicle for the collection of record evidence for an adjudication of liability.

In sum, since the workshop will not be conducted pursuant to the procedural safeguards to which all parties are entitled when the Commission makes a decision which affects their substantial interests, then the information gathered in it may not be permitted to become a part of the record in the prudency hearing or be relied upon in any other way in that hearing. To hold otherwise would allow the Commission to incorporate into the record and then consider matters in setting Florida Power's rates that it is directly and constitutionally prohibited from considering for that purpose.

B. The workshop must be severed because, in determining prudency, the Commission cannot rely on any evidence arising from or reflecting a hindsight perspective.

It is settled under Florida law that, in considering Florida Power's prudence in deciding to commence and then continue the outage at its nuclear plant, the Commission must put itself in the shoes of Florida Power's management at the time those decisions were made, and it may only consider what they knew or

should have known at that time.¹ See e.g. Gulf Power Company, 487 So. 2d 1036 (Fla. 1986) (managerial decisions must be evaluated "under the conditions at the time they were made.").

Indeed, the impropriety of determining management prudence through a hindsight analysis was expressly recognized by the Florida Supreme Court in Florida Power Corporation v. Public Service Commission, 424 So. 2d 745 (Fla. 1982). In reversing the PSC's finding of management imprudence there, the Court noted that the PSC's finding was based on two reports compiled after the incident in question. One of the reports was a notice of violation issued by the NRC which criticized Florida Power's plant procedures for the labeling and testing of hooks; the second was a report by Florida Power's nuclear general review committee. Because both were issued "after the accident had occurred," the Court concluded that the Commission's reliance upon them to find management imprudence "would clearly violate Florida's strong public policy in favor of post accident investigation," and it further emphasized that "[h]indsight should not serve as the basis for liability [i.e., a finding of imprudence] in this instance." *Id.*

The Court made the same point again in Florida Power Corporation v. Public Service Commission, 456 So. 2d 451, 452 (Fla. 1984) in reversing the

¹ Florida law is in accord with other states in this regard. See, e.g., Garst v. General Motors Corp., 484 P. 2d 47, 61 (Kan. 1971) ("Reasonable care does not require prescience nor is it measurable with the benefit of hindsight. Tort law does not expect Saturday manufacturers to have the insight available to Monday morning quarterbacks."); Wisconsin Telephone Co. v. Public Service Commission, 287 N.W. 122, 167 (Wis. 1939), cert. denied, 309 U.S. 657, 84 L. Ed. 1006, 60 S. Ct. 514 (1940) ("It is much easier to point out past errors in management than it is to avoid further mistakes [T]he Commission may not ignore actual expenses because in the light of experience and present conditions it is possible to say that some part of the expenses might have been avoided.").

PSC's renewed finding of management imprudence. The Court explained that "the lack of procedures which might have prevented the accident, suggested by the PSC, amounts to an application of 20/20 hindsight. The PSC has not shown the Florida Power management acted unreasonably at the time."

As these controlling precedents make clear, reports and other evidence which reflect a hindsight perspective can not -- as a matter of law -- be considered by the Commission in making a prudence determination. Since the matters discussed at the information gathering workshop will necessarily include considerable hindsight information and views, this further confirms the need to sever that workshop from this proceeding.

For example, Florida Power has been directed by the Prehearing Officer to include, as a part of Florida Power's preliminary report, any NRC reports, correspondence, or minutes relating to NRC meetings which prompted the actions and decisions surrounding the outage. However, applying the teaching of the Supreme Court's and the Commission's prior precedent, it is clear that such NRC documents, to the extent they reflect a hindsight perspective, cannot be relied upon to show management imprudence as a matter of law.²

Likewise, as noted above, the February 28, 1997 order specifically requires Florida Power to prepare a "Preliminary Report" on the outage, up to this point.

² Moreover, the Commission may not rely on the NRC reports as evidence of management imprudence for an additional reason. As the Florida Supreme Court emphasized in *Florida Power Corporation v. Public Service Commission*, 424 So. 2d at 747, the "NRC notice involved a very different risk and a much higher standard of care than were involved in the prudence proceeding[.]" Thus, the NRC does not consider whether it was prudent for Florida Power to shut the unit down and incur replacement fuel costs, but instead engages in an evaluation of Florida Power's safety practices and procedures based on a hindsight perspective and a more stringent standard than is properly applied to a determination of management imprudence. (Emphasis added.)

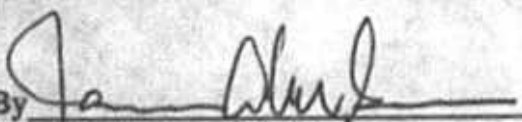
By virtue of the topics Florida Power has been directed to include, this report cannot avoid being reflective of a hindsight perspective, and therefore it cannot be considered by the Commission in rendering its prudence determination.³ Since that "Preliminary Report" will be the focal point of the workshop, it is imperative that the workshop be severed from the record in this proceeding; concomitantly, no party should be permitted at the hearing to rely on statements or documents presented on any other matter arising during the workshop.

IV. Conclusion.

The scope of the currently scheduled hearing in this proceeding should be limited to the issues specified in the Prehearing Officer's February 28, 1997 Order. In addition, the currently scheduled workshop should be severed from, and conducted outside of, the record in this proceeding. Due process requires this, as well as the authorities set forth in this memorandum.

Respectfully submitted,

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FLORIDA POWER CORPORATION

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³ In addition, the Preliminary Report would also be inadmissible in the prudency hearing since its consideration would violate Florida's strong public policy in favor of post accident investigations. Florida Power Corp. v. Public Service Commission, *supra*, at 747.