

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Review of nuclear outage) DOCKET NO. 970261-EI
at Florida Power Corporation's) ORDER NO. PSC-97-0406-PCO-EI
Crystal River Unit 3.) ISSUED: April 11, 1997
_____)

ORDER DENYING MOTION TO CONFIRM SCOPE OF HEARING
AND TO SEVER WORKSHOP

On March 13, 1997 Florida Power Corporation (FPC) filed a Motion of Florida Power Corporation to Confirm Scope of Hearing and Sever Workshop. FPC asks that:

the scope of the scheduled hearing... 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" and... 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.

On March 21, 1997, the Office of Public Counsel (OPC) filed its Response in Opposition To Florida Power Corporation's Motion To Confirm Scope of Hearing and Sever Workshop.

As to the Motion to Sever, OPC avers that it has and "reserves the right to introduce any evidence, from whatever source, that is admissible under Chapter 120, Florida Statutes."

As to the Motion to Confirm Scope of Hearing, OPC states:

It is not at all clear what is meant by FPC's use of the term "modifications." Plant modifications done wrong or without adequate management oversight may have been the initiating cause of the outage, making replacement fuel costs properly the responsibility of stockholders. Similarly, modifications performed during the outage may have been necessitated by improper modifications done earlier.

On March 21, 1997, the Florida Industrial Power Users Group (FIPUG) filed its response to FPC's motion. FIPUG notes that the

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"purpose of the scheduled staff workshop was to aid the Staff in discovery and to provide timely public information concerning the outage." FIPUG notes that "...all information concerning the outage may not be available by the time of the hearing scheduled for June, 1997." Given these two facts, FIPUG "... has no objection to an order providing that the informal workshop will not be part of the record in this docket, provided that FPC acknowledges at or prior to the workshop, that its due process rights are unaffected by the proceedings." FIPUG further states it agrees with FPC's request to limit "the current prudency hearing to known facts"

...provided that the hearings scheduled for June will not be res judicata with respect to the final determination of financial responsibility for the shut down. If newly discovered evidence justifies relieving customers of all or partial responsibility for bearing the economic loss occasioned by the plant shut down, FIPUG on its own behalf and on behalf of other customers similarly situated reserves the right to petition the Commission for further consideration of the matter.

The two requests in the motion are addressed in turn.

I. Motion to Confirm Scope of Hearing

FPC states in its motion:

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

Order No. PSC-97-0246-PCO-EI Order Establishing Procedure issued February 28, 1997 in this docket states in pertinent part:

"This docket has been set for hearing on June 26, and 27, 1997, to investigate the outage Florida Power Corporation's Crystal

River 3 nuclear generating unit." The Order requires the Company to submit 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." No inference that the scope of the proceedings is limited by the subject matter of the preliminary report is appropriate.

Order No. PSC-97-0246-PCO-EI further states:

The scope of this proceeding shall be based upon the issues raised by the parties and Commission staff (staff) up to and during the prehearing conference, unless modified by the Commission. The hearing will be conducted according to the provisions of Chapter 120, Florida Statutes, and the rules of this Commission.

It is my finding that the issues to be decided at the June 26 and 27, 1997, formal hearing will be determined in the manner contemplated in by Order No. PSC-97-0246-PCO-EI. Parties may raise issues they believe to be appropriate to the Commission's review of the outage as part of the normal prehearing process, up to the prehearing. The relevance of a particular issue and ability of the parties to present evidence and offer argument on a particular issue in time for the June hearing will be considered as part of the prehearing process. Given that the outage is expected to continue until well after the June hearing, additional evaluation of the prudence of FPC's actions will be necessary. However, it is not appropriate in this case to make any determination as to whether or not a particular issue or type of issue should or should not be considered at the June hearing. FPC has shown no reason to substitute an inflexible predetermination of the subject matter of this hearing for the development of issues through the normal means of discovery, investigation and prefiled testimony. I agree with OPC's statement that: "It is premature to limit the matters subject to inquiry without having a full understanding of everything which might be encompassed within the category of evidence FPC is trying to exclude." For these reasons, I find that FPC's request to Confirm Scope of Hearing should be denied.

II. Motion to Sever Workshop

In its Motion, FPC requests that the Staff Workshop held March 26, 1997 be severed from, and conducted outside of, the record in this proceeding. FPC states that because the 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.

FPC cites several cases in support of its motion. All the cases are either distinguishable or not ripe for argument. In Transgulf Pipeline v. Board of County Commissioners, 438 So. 2d 876, 879 (Fla. 1st DCA 1983) the First District Court of Appeal held it was appropriate for a hearing officer to conduct a full evidentiary hearing, rather than rely on the transcript of a prior hearing where the testimony was not sworn and no opportunity for cross-examination was afforded. This matter is set for a full evidentiary hearing. Thus, this proceeding comports with the court's finding in Transgulf.

Similarly, United Telephone Company v. Beard, 611 So. 2d 1240, 1243 (Fla. 1993), and Citizens of Florida v. Mayo, 333 So. 2d 1, (Fla. 1976) support the premise that hearings on utility rate matters must afford all whose substantial interests could be affected the opportunity to present evidence and conduct cross-examination. FPC and all other parties will have this opportunity at the June 26-27, 1997, hearing.

Collectively, the holdings in Gulf Power Company, 487 So. 2d 1036 (Fla. 1986), Florida Power Corporation v. Public Service Commission, 424 So. 2d 745 (Fla. 1982), and Florida Power Corporation v. Public Service Commission, 456 So. 2d 451 (Fla. 1984) describe the legal standard for nuclear outage prudency reviews and limit the Commission's ability to rely solely on Nuclear Regulatory Commission post-accident safety related investigation reports as a basis for finding that a utility was not prudent.

In essence, FPC asks for a ruling on the use and admissibility of its preliminary report. Such a ruling is, at best, premature.

Order No. PSC-97-0246-FOF-EI states "The hearing will be conducted according to the provisions of Chapter 120, Florida Statutes, and the rules of this Commission."

Section 120.57(1)(f), Florida Statutes (Supp .1996) provides that the record in a formal evidentiary proceeding is limited to:

1. All notices, pleadings, motions, and intermediate rulings.
2. Evidence admitted.
3. Those matters officially recognized.
4. Proffers of proof and objections and rulings thereon.
5. Proposed findings and exceptions.
6. Any decision, opinion, order, or report by the presiding officer.
7. All staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records.
8. All matters placed on the record after an ex parte communication.
9. The official transcript.

Section 120.569(2)(e), Florida Statutes (Supp. 1996) provides that "Evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs" is admissible in Section 120.57(1), Florida Statutes proceedings.

Nothing is part of the evidentiary record of this proceeding until offered and admitted. Thus the transcript of the Staff workshop held March 26, 1997 is not, per se, part of the record in this proceeding. Similarly, documents provided at the workshop are not, per se, part of the record in this proceeding. If any workshop materials are offered as evidence at the hearing, they will be considered based on the evidentiary standards applicable to Section 120.57(1), Florida Statutes proceedings.

After 1) the issues to be considered at the June hearing have been determined and; 2) a party attempts to offer evidence which FPC believes is objectionable, consideration of that evidence in light of the legal standards enunciated in the Gulf and the two FPC cases would be appropriate.

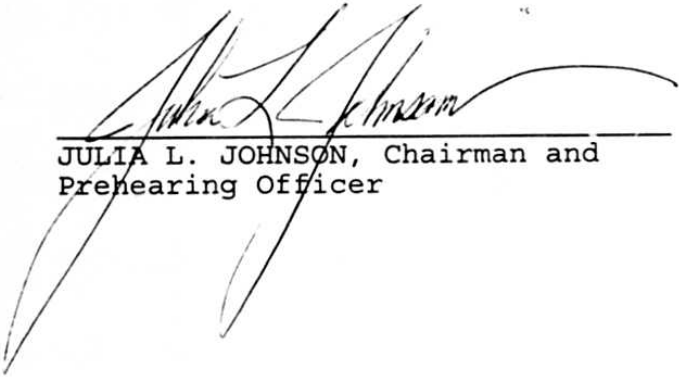
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For these reasons, I find that Florida Power Corporation's motion to sever the workshop should be denied.

Based on the foregoing, it is

ORDERED by Chairman Julia L. Johnson, as Prehearing Officer, that Florida Power Corporation's Motion of Florida Power Corporation to Confirm Scope of Hearing and Sever Workshop is denied.

By ORDER of Chairman Julia L. Johnson, as Prehearing Officer, this 11th day of April, 1997.



JULIA L. JOHNSON, Chairman and
Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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 this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial

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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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.