BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.	DOCKET NO. 000824-EI ORDER NO. PSC-01-2313-PCO-EI ISSUED: November 26, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION AND PRESCRIBING TREATMENT FOR CERTAIN AMOUNTS HELD SUBJECT TO REFUND

BY THE COMMISSION:

I. CASE BACKGROUND

At the May 15, 2001, agenda conference, we voted to require Florida Power Corporation (FPC) to file minimum filing requirements, (MFRs) based on a 2002 test year. The MFRs will provide the Commission and interested persons with information necessary to evaluate whether FPC's retail rates should be changed. We also required FPC to hold $113,894,794 of annual revenue (beginning July 1, 2001) subject to refund, pursuant to Section 366.071, Florida Statutes, pending final disposition as part of the rate proceeding. The decisions were memorialized in Order No. PSC-01-1348-PCO-EI issued June 20, 2001.

On July 2, 2001, FPC timely filed a Motion for Reconsideration of the Requirement in Order No. PSC-01-1348-PCO-EI to hold revenues subject to refund. FPC asserts that the Commission overlooked,

failed to consider or mistakenly resolved matters of critical importance to its determination and failed to afford FPC procedural due process. OPC filed a Response in Opposition to FPC's Motion for Reconsideration. FPC also filed a separate Request for Oral Argument on its Motion for Reconsideration. FPC suggested that oral argument "would be of great assistance to the Commission in addressing these concerns and would provide FPC with the first opportunity to be heard in a meaningful way on these matters."

At the September 4, 2001, agenda conference, we granted FPC's Request for Oral Argument. We heard argument from both FPC and OPC at the agenda conference. This Order addresses FPC's Motion for Reconsideration. Jurisdiction over these matters is vested in the Commission by Section 366.071, Florida Statutes.

II. FLORIDA POWER CORPORATION'S MOTION FOR RECONSIDERATION

A. Applicable Standard:

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).

B. The Interim Statute:

Section 366.071,(1), (2)(b), and (5)(b) Florida Statutes, provide in pertinent part:

> (1) The Commission may, during any proceeding for a change in rates, upon its own motion, or upon petition from any party, or by a tariff filing of a public utility, authorize the collection of interim rates until the effective date of the final order. Such interim rates may be based upon a test period different from the test period used in the request for permanent rate relief. To establish a prima facie entitlement for interim relief, the commission, the petitioning party, or the public utility shall demonstrate that the public utility is earning outside the range of reasonableness on rate of return calculated in accordance with subsection (5).
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> (2)(b) In a proceeding for an interim decrease in rates, the commission shall authorize... the continued collection of the previously authorized rates; however, revenues collected under those rates sufficient to reduce the achieved rate of return to the maximum of the range of rate of return calculated in accordance with subparagraph (5)(b)2. shall be placed under bond or corporate undertaking subject to refund at a rate ordered by the commission.
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> (5)(b)1. "Achieved rate of return" means the rate of return earned by the public utility for the most recent 12-month period. The achieved rate of return shall be calculated by applying appropriate adjustments consistent with those that were used in the most recent individual rate proceeding of the public utility...

C. Commission Precedent:

The Commission has consistently removed non-recurring expenses from "the most recent 12 month period" in calculating the achieved rate of return pursuant to the interim statute. In Order No. PSC-00-1416-PCO-GU, issued August 3, 2000, in Docket No. 000108-GU

(Request for a rate increase by Florida Division of Chesapeake Utilities Corporation), the Commission made an adjustment to remove non-recurring consulting fees in calculating the achieved rate of return. See Order No. PSC-00-1416-PCO-GU at page 5.

In Order No. PSC-92-0188-OF-GU, issued April 13, 1992, in Docket No. 911150-GU (Petition of Peoples Gas System, Inc. for Authority to increase its Rates and Charges), the Commission made an adjustment to remove non-recurring legal fees in calculating the achieved rate of return. See Order No. PSC-92-0188-OF-GU at page 9.

D. Discussion:

In interpreting any provision of Chapter 366, Florida Statutes, it is important to keep in mind the explicit declaration of legislative intent found in Section 366.01, Florida Statutes:

> The regulations of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed an exercise of the police power of the state for the protection of the public welfare and all of the provisions herein shall be liberally construed for the accomplishment of that purpose.

As detailed below, FPC refers to each adjustment as a "disallowance" or a "reversal" or suggests that somehow the Commission has retroactively "negated" a previously approved expense. FPC infers that it has somehow been denied the opportunity to recover prudently incurred expenses. That is not true, and is a mischaracterization of the interim statute. The interim statute provides a statutory methodology to calculate a reasonable revenue requirement on a prospective basis during the interim period. The starting point for this calculation is the utility's most recent 12 months earnings. The Commission is then charged to make adjustments consistent with those used in the utility's last rate proceeding to determine an amount to be collected subject to refund. In the context of the interim statute, adjustments to a public utility's reported earnings are not "disallowances." The statute's application is prospective. For interim purposes, the calculated earnings, after adjustments, represent a proxy for the reasonable revenue requirement, on a

going forward basis, against which the permanent revenue requirement will be measured. It is only if the utility fails to demonstrate, after the opportunity for a full hearing on the merits, that its current rates are not reasonable, that any refund is operative. The interim statute mitigates regulatory lag and protects the interests of both the ratepayers and the shareholders. Because the interim revenue requirement is calculated pursuant to the statutory formula, it does not contain all the adjustments or allowances that would be made at the conclusion of the full case. It does not "prejudge" the prudence of a particular expense which may or may not be justified during the rate hearing.

As discussed below, in considering whether an adjustment is appropriate pursuant to Section 366.071, Florida Statutes, is the treatment afforded the item in the utility's last rate proceeding, and not whether an expense in a historic time period was prudently incurred or appropriate. In FPC's 1992 rate case, no discretionary, accelerated amortization of the Tiger Bay regulatory asset was included in the calculation of FPC's revenue requirement. Thus, we appropriately adjusted this non-recurring discretionary expense in calculating FPC's achieved rate of return for interim purposes. In FPC's 1992 rate case, no non-recurring severance payments, O and M, or other merger-related expenses were included in the calculation of FPC's revenue requirement. Thus, we appropriately adjusted for this non-recurring expense in calculating FPC's achieved rate of return for interim purposes. In FPC's 1992 rate case, no non-recurring catch up provision for AFUDC and Previously Flowed Through Taxes was included in the calculation of FPC's revenue requirement. Thus, we appropriately adjusted for this non-recurring expense in calculating FPC's achieved rate of return for interim purposes.

E. Specific Adjustments:

1. Merger-related Expenses:

At pages 16 through 18 of its motion, FPC argues that $64.6 million of merger related expenses were disallowed:

> The Commission also disallowed O&M expenses comprising $64.6 million of merger costs from FPC's ROE calculations for the prior 12-month period. The Commission bases its

decision solely upon its conclusion that these costs are mainly "one-time severance payments" to employees whose jobs were eliminated as a result of the merger. (Refund Order, p. 3). The Commission was mistaken in disallowing these expenses for two reasons: First, the Commission overlooked its prior precedent recognizing severance expenses as legitimate, recurring expenses. Second, the Commission overlooked the application of the recognized rate making principle of matching such expenses to existing or expected savings. We discuss these in turn.

First, the Commission has long recognized that a utility may legitimately include severance payments to employees as part of its base rate calculations. See In re: Application for a rate increase by United Telephone Co. of Florida, Order No. PSC-92-0708-FOC-TL, 1992 Fla. PUC LEXIS 1107, * 30-31 (PSC July 24, 1992); In re: Petition by the Citizens of the State of Florida to permanently reduce the authorized ROE of United Telephone Co. of Florida, Order No. 24049, 1991 Fla. PUC LEXIS 77, * 34-37 (PSC Jan. 31, 1991)... In fact, this is not the first time FPC has incurred significant severance costs. As this Commission is aware, FPC laid off an even greater number of employees (though at a lower overall cost) chiefly in 1994-95 as part of its ongoing efforts to streamline and improve operations. These severance costs were included in FPC surveillance reports without exception by the Commission or its Staff.

Second, as the Commission seems to acknowledge, FPC incurred the severance expenses in connection with its action in eliminating positions due to its merger with Carolina Power & Light (CP&L). FPC has obtained and expects to continue to obtain considerable synergies as a result of this merger, resulting in lower O&M costs. The Commission has long recognized that where, as here, a utility incurs significant costs to bring about even greater savings in O&M, the utility should be allowed to take credit for those costs for purposes of surveillance reporting and calculating its ROE. This rate making principle, sometimes called "matching," reflects the fact

> that the costs taken into account may be expected to bring about even greater savings.

At page 7 of its Response to FPC's Motion, OPC suggests that FPC has misconstrued the purpose and effect of the interim statute:

> Florida Power also misses the point about its severance pay expenses. It is not an issue of whether the return on equity for a past period was reported correctly. It is an issue whether such nonrecurring expenses should be allowed to affect rates prospectively. To allow the expenses would assume that Florida Power will continue to incur such expenses and that disallowance of the expenses would prevent the company from earning a fair return on its investment in the future. Yet the Commission (and everyone else) reasonably believes just the opposite to be true. If severance pay were allowed, Florida Power is guaranteed to overearn during the pendency of this proceeding, the very thing interim rate decreases are expected to militate against.

The relevant and statutorily required area of inquiry is FPC's last rate proceeding, not what was decided for other utilities in a context other than a calculation pursuant to the interim statute. Neither Order cited by FPC involved a calculation of an interim revenue requirement. The decisions in the cited Orders were either post-hearing or proposed agency action. The fact that FPC incurred severance expenses in 1994 and 1995 is of no moment to a determination of what adjustments, consistent with the determination in FPC's last rate proceeding (1992) are appropriate for the interim calculation. At Oral Argument, FPC alluded without providing detail, to the fact that some non-recurring expenses were included in FPC's last rate case. A review of Order No. PSC-92-1197-OF-EI, issued October 22, 1992, in Docket No. 910890-EI indicates that the Commission did allow some nuclear O&M expense in excess of the O&M benchmark, finding that due to increasing and unpredictable safety requirements, these type expenses occur on a regular basis. That belies the notion that they are "non-recurring." See Order No. PSC-92-1197-OF-EI, at page 56.

2. Discretionary Amortization of Tiger Bay Regulatory Asset:

At pages 5 through 9 of its motion, FPC argues that $63 million of accelerated amortization associated with the Tiger Bay Regulatory Asset was disallowed:

> The Commission's decision to include the deferred revenues that FPC applied against the Tiger Bay regulatory asset in the past 12-month period in the interim refund amount overlooks, fails to consider, and directly contradicts the Commission's determinations in Order No. PSC-97-0652-S-EQ, including the Commission's express determination that FPC may take into account accelerated amortization of this regulatory asset for surveillance reporting purposes... The Commission's prior order permitting FPC to accelerate its amortization of the Tiger Bay regulatory asset – to the benefit of the ratepayer – is both final and binding on the Commission and controlling in this proceeding on the issue whether accelerated amortization of the Tiger Bay asset should be recognized for purposes of surveillance of FPC's earnings.
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> Further, in acting to "adjust" away the accelerated amortization, the Commission is effectively penalizing FPC for taking steps that directly benefit FPC's ratepayers... The Commission has identified no "adjustments" used in FPC's last rate case consistent with disallowing such expenses... FPC is not aware of any circumstance in previous rate cases that would be "consistent with" the disallowance of an expense that the Commission had previously reviewed and approved, which is precisely what the Commission's disallowance of Tiger Bay expenses purports to do... The fact that FPC has discretion regarding whether to incur these expenses in the future hardly justifies disallowance of otherwise appropriate and, in this case, expressly approved adjustments to FPC's revenues in calculating FPC's achieved rate of return.

In its response to FPC's Motion for Reconsideration, OPC suggests that the Commission's decision is consistent with the application of the interim statute:

> The discretionary Tiger Bay amortization was properly excluded as an expense to calculate Florida Power's earnings because: (1) it was not an adjustment made in the last rate case (it does not even arise out of the last case); (2) it is not a predictable recurring expense for the future; (3) it is not the type of expense the Commission has allowed when evaluating interim rate relief; (4) while paragraph 2(e) of the stipulation does provide for inclusion of the amortization for surveillance purposes, the stipulation does not provide for the discretionary amortization to be treated as a recurring or otherwise recoverable expense in any future rate proceeding, whether interim or permanent; and (5) allowance of a discretionary expense would prevent the Commission from complying with its statutory duties because it could not know whether the amounts captured subject to refund would permit Florida Power to earn above the ceiling of its last ROE range during the pendency of this proceeding. Moreover, the discretionary Tiger Bay amortization was implicitly tied to the potential for excess earnings until the next rate case, a proposition which expired with the creation of this docket. Further, the possibility that the Commission might allow for some accelerated Tiger Bay amortization in permanent rates is not sufficient to deviate from established policy with regard to interim rates.

Again FPC mischaracterizes the application and effect of the interim statute. Each dollar of amortization associated with the Tiger Bay regulatory asset which has been booked has been recovered by the shareholders, either through base rates or through the capacity cost recovery clause. Again, the relevant inquiry for purposes of applying the interim statute, is FPC's last rate proceeding. No discretionary accelerated amortization of this regulatory asset was included in the calculation of the revenue requirement. Therefore, it is appropriate to remove it for interim purposes. However, we find it is appropriate to prescribe the specific treatment for any discretionary accelerated amortization

taken during the pendency of this proceeding. This treatment is detailed Section III of this Order.

3. Non-recurring catch up provision for AFUDC and Previously Flowed Through Taxes:

At pages 11 and 12 of its motion, FPC argues that $10.7 million of accelerated amortization associated with AFUDC and Previously Flowed Through Taxes was disallowed:

> The Commission disallowed a $10.7 million additional amortization of regulatory assets for previously flowed through taxes and the equity component of prior period Allowances for Funds Used During Construction ("Taxes and AFUDC") and because, according to the Commission, the amortization is a "non-recurring expense" and cannot be included in FPC's ROE calculation. The Commission is mistaken in concluding that the $10.7 million amount is a non-recurring expense. The Refund Order further overlooks the fact that Staff specifically requested FPC to take this additional $10.7 million write-off in the prior 12-month period... The Commission disputes only the amount taken by FPC in the prior 12-month period for these expenses in addition to the FPC-scheduled expenses in that time period... Under the circumstances, this additional amount should not be considered as a non-recurring expense. Expenses are non-recurring when they "occur periodically and are not considered routine, annual expenses"; and the Commission excludes such expenses in setting rates only when they are excessive or unrepresentative and non-recurring. See In re: Application for a rate increase by Tampa Electric Co., Order No. PSC-93-0165-OF-EI, 1993 Fla. PUC LEXIS 287, *105 (PSC Feb. 2, 1993); In re: Petition of Gulf Power Co. for an increase in its rates and charges, Order No. 11498 1983 Fla. PUC LEXIS 1065, *56-58 (PSC Jan. 11, 1983). Conversely, the expenses for which the additional $10.7 million write-off was taken have been included annually without objection in FPC's ROE calculations since 1993, and they will continue to be included annually for up to 30 years in the future. Thus, the expenses do not qualify as non-recurring. Changing the

> amount of the expenses in the past 12-month period does not alter the fact that the expenses themselves are routine, annual, and thus recurring.

At page 7 of its response to FPC's Motion for Reconsideration, OPC suggests that the Commission's decision is consistent with the application of the interim statute:

> The $10.7 million for prior period flow-through of taxes was also properly excluded from the calculation of interim revenues subject to refund. The fact that staff may have asked that the expense be recorded does not alter its character as a nonrecurring expense when the issue is reasonable earnings for the future. The Commission does not have to pretend it was a recurring expense eligible for future recovery if reflected in a test year used for either interim or permanent rates, or both.

Consistent with FPC's last rate proceeding, the cited precedents, and the language of the statute, there is simply no basis to include this non-recurring expense in the calculation of the achieved rate of return for interim purposes.

4. Crystal River 3 Equity Adjustment:

At pages 13 through 16 of its motion, FPC argues that $15,924,217 of annual revenue associated with an accounting adjustment to its capital structure as a result of the stipulation which expired in July of 2001 should not be considered in calculating the amount held subject to refund:

> By the terms of the approved stipulation, the Commission-approved CR 3 equity "adjustment" could not possibly expire prior to July 2001, the end of the four-year amortization period. The Commission expressly recognized that the parties to the stipulation contemplated that the CR 3 adjustment might extend beyond the four-year amortization period. Id. at * 12. The approved stipulation is generally silent with respect to the end of the CR 3 adjustment. The Commission's Refund Order notes that FPC acknowledged only two events that might

> trigger an end to the CR 3 "adjustment": (1) a rate proceeding or (2) a change in the law ordering industry restructuring. Id.
>
> Under any possible scenario, the end of the CR 3 adjustment falls outside the statutory time period applicable to the Commission's interim Refund Order. Under Section 366.071(5), Fla. Stats., the relevant time period for "setting revenues subject to refund" is the utility's "most recent 12-month period." In this case, the most recent 12-month period is the year ending February 28, 2001. For the "most-recent 12-month period" ending February 28, 2001 there is no dispute that the CR 3 "adjustment" is a Commission-approved adjustment. The Commission concedes as much in its Refund Order by making its "reversal" of its approval of the CR 3 "adjustment" effective on July 1, 2001 because of the Commission's belief that the "four year amortization period" ends June 30, 2001. (Refund Order, p. 5).

In its response to FPC's Motion for Reconsideration, OPC notes the procedural posture of this case and the purpose of the interim statute:

> The equity ratio adjustment for CR3 was properly discontinued for interim purposes. It was not made in the last rate case. Its continued viability is not established in the stipulation. And it may or may not be allowed by the Commission when permanent rates are established. In short, it is precisely the type of questionable adjustment requiring record development, and for this very reason, it is not appropriately decided at the interim stage.

Having considered the arguments of the parties, and, after reviewing the Stipulation, reviewing the discussion of the Stipulation by the Commission prior to approval, and reviewing Order No. PSC-97-0840-S-EI (the order which approves the Stipulation), we conclude it was the Commission's intent that this adjustment continue at least until reasonable rates are established on a going-forward basis. Accordingly, the decision to make this adjustment was predicated on a mistake of fact. For this reason, we

conclude that FPC's Motion for Reconsideration should be granted as to this adjustment.

F. Conclusion:

As to the challenged adjustments concerning the merger-related expenses, the discretionary accelerated amortization of the Tiger Bay regulatory asset, and the non-recurring catch-up provision for AFUDC and previously flowed through taxes, FPC has failed to demonstrate a mistake of fact or law by the Commission in rendering the Order. Therefore, FPC's Motion for Reconsideration is denied as to these adjustments. As to the Crystal River 3 Equity Adjustment, FPC has shown that the Commission made a mistake of fact in rendering the Order. Therefore, FPC's Motion for Reconsideration is granted as to this adjustment.

III. TREATMENT OF CERTAIN AMOUNTS HELD SUBJECT TO REFUND (TIGER BAY REGULATORY ASSET)

In Section II(E)2. of this Order, we affirmed that it is appropriate to hold $63 million of accelerated amortization associated with the Tiger Bay Regulatory Asset subject to refund. Section 366.071(4), Florida Statutes, provides in part, that after a determination of reasonable rates on a prospective basis, a "...refund ordered by the commission shall be calculated to reduce the rate of return of the public utility during the pendency of the proceeding to the same level within the range of the newly authorized rate of return which is found to be fair and reasonable on a prospective basis." Order No. PSC-97-0652-S-EQ, issued June 9, 1997, in Docket No. 970096-EQ, provided FPC the discretion to accelerate the amortization of the Tiger Bay Regulatory Asset on the basis that such action was beneficial to the customers of FPC. Holding these funds subject to refund could put the company at some risk, depending on the ultimate determination of FPC's rates on a going forward basis. To eliminate this potential risk, and to assure that the benefits foreseen in the approval to accelerate the amortization are fully realized, we prescribe the following treatment for the accelerated amortization of the Tiger Bay Regulatory Asset. To the extent that Florida Power Corporation exercises its discretion to expense discretionary accelerated amortization of the Tiger Bay Regulatory Asset during the period

that funds are held subject to refund, the amount held subject to refund shall be reduced by a like amount. For example, if the company chooses to exercise its discretion to amortize an additional $50 million, the amount held subject to refund pursuant to refund by Order No. PSC-01-1348-PCO-EI shall be decreased by $50 million. This action will help assure that the Stipulation approved by Order No. PSC-97-0652-S-EQ continues to have its full force and effect.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power Corporation's Motion for Reconsideration is granted in part and denied in part, as set forth in this Order. It is further

ORDERED that if Florida Power Corporation exercises its discretion to expense discretionary accelerated amortization of the Tiger Bay Regulatory Asset during the period that funds are held subject to refund, the amount held subject to refund shall be reduced by a like amount. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 26th day of November, 2001.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request judicial review by the Florida Supreme Court. 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.