

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost)
Recovery Clause and Generating)
Performance Incentive Factor)

DOCKET NO. 040001-EI
Filed: October 29, 2004

RECEIVED: FPSC
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COMMISSION CLERK

JOINT MOTION FOR RECONSIDERATION OF ORDER NO. PSC-04-1018-PCO-EI

Thomas K. Churbuck ("Churbuck") and the Florida Industrial Power Users Group ("FIPUG") (collectively, the "Joint Movants"), pursuant to Rule 25-22.0376, Florida Administrative Code, hereby request reconsideration of Order No. PSC-04-1018-PCO-EI (the "Order") issued on October 19, 2004, by the Prehearing Officer. The factual and legal grounds for this Motion are as follows:

1. On October 4, 2004, the Citizens of the State of Florida ("OPC") and the Florida Industrial Power Users Group filed their Joint Motion to Remove Issues Related to Proposed Unit Power Sales Agreement from this docket. On October 7, 2004, Churbuck filed his Motion to Remove Issues Related to Proposed Unit Power Sales Agreement and Notice of Joinder with the Joint Motion of OPC and FIPUG (collectively, the "Motions to Remove"). On October 11, 2004, Florida Power and Light Company ("FPL") filed its Response in Opposition to the Motions to Remove ("FPL's Response").

2. On October 19, 2004, the Prehearing Officer issued Order No. PSC-04-1018-PCO-EI which, inter alia, denied the Motions to Remove.

3. The purpose of a motion for reconsideration is to bring to the Commission's attention a point of fact or law which was misapprehended or overlooked by, in this case, the Prehearing Officer. Diamond Cab Company v. King, 146 So. 2d 889 (Fla. 1962).

4. In denying the Motions to Remove, the Prehearing Officer states (Order, Sec. I, page 3):

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Upon review of the pleadings and considerations of the arguments, I find that the issues related to the UPS purchased power agreements submitted for approval for cost recovery purposes by both FPL and PEF shall not be removed from this proceeding. FPL maintains that if it does not obtain Commission approval for its proposed UPS agreements by early 2005 that could be tantamount to a denial of the contracts. I find this *fact* to be persuasive. (Emphasis added).

5. This proceeding is subject to the requirements of section 120.57(1), Florida Statutes. Section 120.57(1)(j) states in pertinent part: “[f]indings of fact shall be based upon a preponderance of the evidence . . . and *shall be based exclusively on the evidence of record and on matters officially recognized.*” (Emphasis added). Moreover, findings of fact must be based on “competent substantial evidence.” Sec. 120.57(1)(l), Fla. Stat.

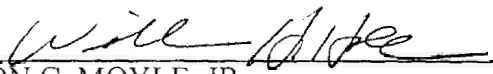
6. The Joint Movants respectfully submit that the Prehearing Officer has made a finding of fact that is based on argument, not on evidence. There is no competent, substantial record evidence supporting the Prehearing Officer’s factual determination that removing the proposed UPS agreements from this docket could be tantamount to a denial of the contracts.¹ The pre-filed testimony in this docket is unsworn and has not yet been tested by cross examination. FPL did not provide any other evidence (by way of affidavit) in conjunction with its Response. The Commission has not officially recognized any evidence that supports this factual finding.

7. Therefore, Joint Movants respectfully submit that there is no evidentiary basis to support the factual determination that was both made by the Prehearing Officer and relied upon by the Prehearing Officer as the basis for denying the Motions to Remove.

¹ FPL’s Response, page 3, ¶ 3, *argues* this issue, but this argument is not supported by any evidence of record.


8. Additionally, the Order does not even address arguments² raised in OPC and FIPUG's Joint Motion (echoing the comments of the Commission in last year's fuel docket) that given the time constraints of the fuel adjustment docket, and the complexity of these Agreements, the ratepayers and the Commission would be better served to address the Agreements in a more traditional atmosphere. Therefore, Joint Movants respectfully request that the Commission reconsider Order No. PSC-04-1018-PCO-EI to take into consideration these arguments which were overlooked by the Prehearing Officer.

WHEREFORE, Thomas K. Churbuck and FIPUG respectfully request that the Commission reconsider Order No. PSC-04-1018-PCO-EI denying the Motions to Remove, and that these Motions be granted.


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² See Joint Motion of OPC and FIPUG to Remove Issues Related to Proposed Unit Power Sales Agreement From the Fuel Adjustment Docket, at pages 3-4.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to those listed below with an asterisk and the remainder by U.S. Mail without an asterisk this day the 29th day of October, 2004.

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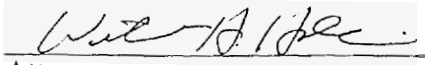
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