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 Subject: e-filing (Dkt. Nos. 060001-EI & 070001-EI)
 Attachments: 060001 OPC Motion for Reconsideration.sversion.doc

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a. Person responsible for this electronic filing:

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b. Docket No. 060001-EI & Docket No. 070001-EI

In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 9 pages.

e. The document attached for electronic filing is Citizens' Motion for Clarification and Reconsideration of Order No. PSC-06-1057-FOF-EI.

(See attached file: 060001 OPC Motion for Reconsideration.sversion.doc)

Thank you for your attention and cooperation to this request.

Brenda S. Roberts
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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power) Docket No. 060001-EI
Cost Recovery Clause with) Docket No. 070001-EI
Generating Performance Incentive) Filed January 8, 2007
_____)

**Citizens' Motion for Clarification and Reconsideration of
Order No. PSC-06-1057-FOF-EI**

Pursuant to Rule 25-22.060, Florida Administrative Code, the Citizens of Florida ("Citizens"), through Harold McLean, Public Counsel, file this motion for clarification and reconsideration of PSC order no. PSC-06-1057-FOF-EI issued December 22, 2006 ("Order").

The Commission Should Clarify its Order by Stating that it is Not Limiting the Scope of the Issue Concerning the Turkey Point Unit 3 Outage

During the course of the 2006 fuel proceedings Citizens raised the following issue about responsibility for an outage extension caused by a drilled hole in a pressurized pipe at the Turkey Point Unit 3 nuclear plant:

"With respect to the outage extension at Turkey Point Unit 3 which was caused by a drilled hole in the pressurized piping, should customers of FPL be responsible for the additional fuel cost incurred as a result of the extension?"

Order no. PSC-06-1057-FOF-EI characterizes the issue as one of whether FPL was prudent rather than one of whether FPL should be responsible for the additional fuel charges caused extended outage, as if prudence and responsibility were identical. The Order states at page 8 that "OPC raised an issue in this docket regarding the prudence of the additional fuel costs associated

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with the outage extension at Turkey Point Unit 3.” The Order then goes on to state that the Commission will allow Florida Power and Light Company (“FPL”) to collect the additional fuel costs of over \$6 million caused by the outage extension subject to refund with interest if the Commission should later determine that the costs were imprudent in a prudence review.

An outage extension caused by someone purposefully drilling a hole in the pressurized piping of a nuclear plant is an unprecedented event and undoubtedly raises an issue about the prudence of FPL in this incident. *Res ipsa loquitur* is a principle used in tort law which is useful in this case. Under this principle, the trier of fact (the Commission) may infer negligence if (1) the harm would not ordinarily have occurred without someone's negligence, (2) the instrumentality of the harm was under the exclusive control of the party at the time of the likely negligent act, and (3) the party did not contribute to the harm by his own negligence. With respect to the first point, a purposely drilled hole in the pressurized piping at Turkey Point Unit 3 would not ordinarily occur without negligence, and may under these circumstances be a deliberate, malicious act. Drilled holes in the pressurized piping of a nuclear plant don't “just happen.” With respect to the second point, the nuclear plant site is under FPL's exclusive control. It is hard to imagine a more closely guarded location anywhere in the country; no one enters the plant without authorization by FPL. Finally, with respect to the third point, customers of FPL had nothing to do with the drilled hole.

Under the principles governing *res ipsa loquitur*, the Commission would be fully warranted in drawing an inference of negligence, and therefore imprudence, by FPL. Higher rates attributable to negligence by FPL would not be fair, just and reasonable.

While prudence is an important matter regarding responsibility for the additional fuel costs, it is not the only matter. Chapter 366, Florida Statutes, requires that the rates set by the Commission be fair, just and reasonable. Section 366.05, for example, provides that “the commission shall have power to prescribe fair and reasonable rates and charges...” Section 366.06 provides that “the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged or collected by any public utility for its service.” Prudence is important, but only to the extent that it affects the Commission’s decision about whether rates are fair, just and reasonable. Even without the Commission finding that FPL acted imprudently, rates may still not be fair, just and reasonable, as required by chapter 366, Florida Statutes.

If the Commission were to determine that FPL did not act imprudently in regard to the drilled hole in the pressurized piping at its nuclear plant, that in itself would not answer the question of who should bear responsibility for the damages. Customers were obviously not imprudent. If neither customers nor FPL were imprudent, the Commission must still determine who bears the risk from someone drilling a hole in the pressurized piping at FPL’s nuclear facility. Extra fuel costs in excess of \$6 million were incurred, and either FPL or its

customers will bear responsibility for this cost. In order to determine whether rates are fair, just and reasonable, the question the Commission will have to answer is whether FPL or its customers should bear the risk of the consequences stemming from this incident.

FPL earns hundreds of millions of dollars per year more than would be necessary if it were only allowed to earn a risk-free return on equity. The rates FPL charges amply compensate the company for business risk, and someone drilling a hole in FPL's closely guarded nuclear plant is such a risk. The Commission should recognize this by not allowing the company to charge customers even more on account of this incident. There has to be some point at which the Commission will no longer allow the company to charge customers extra for every bad thing that happens. In essence, the Commission is allowing FPL to charge customers twice for the same risk because customers already compensate the company for business risk through existing rates. Further, the incident at the nuclear plant is not a *force majeure* like a hurricane, but is instead an act by humans which took place at a location where FPL employs extraordinary measures (all at ratepayer expense) to control who does or does not have access to its facilities. FPL must bear responsibility.

For the purposes of clarification, the Commission need not determine the answers to these issues now. Citizens raised an issue of whether customers of FPL should be responsible for the additional fuel cost incurred as a result of the outage extension. At FPL's request, the Commission deferred consideration of

the issue for one year. Order no. PSC-06-1057-FOF-EI, however, could be read to change the issue from one of responsibility to one solely of prudence.

No party to this proceeding argued to the Commission that it should limit the scope of Citizens' issue, nor did the Commission discuss or decide anything at agenda conference about limiting the scope of the issue. While prudence certainly is subsumed by the issue, prudence is only part of the bigger issue relating to responsibility for the drilled hole and whether rates covering the cost of the extended outage are fair, just, and reasonable.

Citizens request the Commission to clarify its Order by stating that nothing in its Order limits the scope of the issue raised by Citizens to one only of prudence.

The Commission Should Reconsider its Decision to Allow Customers to be Charged for the Outage Extension Pending the Decision in the 2007 Fuel Proceeding

FPL bears the burden of proving that its rates are fair, just and reasonable, but in this proceeding, at FPL's request, the Commission deferred FPL's obligation to justify the higher rates caused by the outage extension at Turkey Point Unit 3. Citizens understand that the Commission wished to provide additional time to FPL to determine the identity of the person or persons who drilled a hole in the pressurized piping at the nuclear plant and caused additional fuel cost in excess of \$6 million to be incurred. Given the facts as they are known, however, it is manifestly unjust to require customers to bear the burden of

higher rates while at the same time temporarily relieving FPL of their burden of proof to show that their rates are fair, just, and reasonable.

Simply showing that extra costs were incurred as a result of the outage extension does not satisfy FPL's burden of proof. *Florida Power Corporation v. Cresse*, 413 So.2d 1187 (Fla. 1982). In the *Cresse* case the Florida Supreme Court rejected claims by Florida Power Corporation that the burden of proof shifted to other parties once the company showed that costs were incurred. Instead, the Florida Supreme Court affirmed the Commission decision in that case to initially withhold recovery of \$22.8 million from the company. The Court also affirmed the Commission's decision in that case to permanently deny recovery of \$3.5 million after the Commission heard all of the evidence.

In this case the Commission is doing just the opposite of what the Commission did in the *Cresse* case. In the *Cresse* case the Commission withheld recovery from the company pending evidence from the company sustaining its burden of proof. Here, on the other hand, the Commission granted FPL request to delay carrying its burden of proof by a full year, yet the Commission still saddled customers with the full burden of the additional fuel costs in the meantime. The Commission should not presume that customers will be responsible for damages resulting from someone drilling a hole in the pressurized piping at FPL's nuclear plant. The law does not presume this, and in fact places the burden of proof squarely on FPL to show that its rates are fair, just and reasonable. It made no such showing here.

The Commission erred and made a mistake of law by not following the precedent set by the Florida Supreme Court in the *Cresse* case. The Commission should reconsider its Order by following *Cresse* and relieving customers from the burden of higher costs caused by the extended outage until FPL can meet its burden of proof in an evidentiary proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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