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| Subject: | Electronic filing for Docket No. 070001-EI -- Response to Office of Public Counsel Motion for Reconsideration) |
| Attachments: | Response to OPC motion for reconsideration (TP3 Outage) FINAL.doc |

Response to
: motion for re

Electronic Filing

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b. Docket No. 070001-EI

c. Document is being filed on behalf of Florida Power & Light Company.

d. There is a total of 10 pages.

e. The document attached for electronic filing is Florida Power & Light Company's Response in Opposition to Citizens' Motion for Clarification and Reconsideration of Order No. PSC-06-1057-FOF-EI.

(See attached file: Response to OPC motion for reconsideration (TP3 Outage) FINAL.doc)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| **IN RE: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor** | ) ) ) | **Docket No: 070001-EI**<br>**Filed: January 16, 2007** |

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO CITIZENS' MOTION FOR CLARIFICATION AND RECONSIDERATION OF ORDER NO. PSC-06-1057-FOF-EI**

Florida Power & Light Company ("FPL") hereby responds in opposition to the Motion for Reconsideration of Order No. PSC-06-1057-FOF-EI ("Order 1057") filed by the Office of Public Counsel ("OPC") on January 8, 2007, and states as follows:

1. OPC's Motion raises two points, both related to the procedure that the Commission intends to use in addressing the additional fuel costs incurred for the outage extension in March and April 2006 at Turkey Point Unit 3 due to the discovery of a drilled hole in the pressurizer piping (the "TP3 Outage"). Order 1057, at page 8, sets forth that procedure: the additional fuel costs "shall be recovered by FPL in 2007, subject to interest, with a prudence review by us in a subsequent fuel proceeding." First, OPC asks the Commission to "clarify" that the subsequent review of the TP3 Outage costs will not be governed by the prudence standard, but rather that OPC may show that FPL is "responsible" for the additional fuel costs (*i.e.,* will not be able to recover them from customers) even if FPL is not found to have been imprudent with respect to the outage. Second, OPC asks the Commission to reconsider its decision to allow recovery of the costs in 2007 pending the subsequent review. For the reasons discussed below, both points lack merit, and OPC has failed to show valid grounds for reconsideration of either of them.

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### The Commission's standard for reconsideration

2. The Commission has recited the following standard for review on reconsideration:

> 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).

*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, dated November 26, 2001, at page 2. OPC fails to recite this standard, or even discuss its application, in the Motion. This is perhaps unsurprising, because neither point raised in the Motion comes close to meeting the standard for reconsideration.

### OPC's First Point – the Proper Standard for Subsequent Review of the TP3 Outage

3. OPC's first point is couched as a request for "clarification," but in reality seeks reconsideration. There is nothing unclear in Order 1057 about the Commission's intent to conduct its subsequent review of the TP3 Outage as a prudence review. Order 1057 specifically refers to holding a "prudence review" and, in fact, uses variants on the term "prudent" five times in the single paragraph that is devoted to the procedure to be followed for the TP3 Outage. OPC

cannot plausibly contend that the Commission meant to refer to some different standard of review but simply misspoke five times in a row. Rather, OPC's real complaint is that it does not like the prudence standard that the Commission has clearly decided to apply.

4. OPC presents nothing in the Motion justifying reconsideration of the Commission's decision to use a prudence standard. It does not even attempt to identify "a point of fact or law which was overlooked or which the Commission failed to consider in rendering" Order 1057. Order No. PSC-01-2313-PCO-EI, at page 2. To the contrary, the Motion simply rehashes arguments that were presented to the Commission at the hearing. The Commission has expressly stated that this is not a valid basis for reconsideration: "In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered." *Id.*

5. On the first day of hearing, both FPL and OPC directly addressed the subject of what standard would govern subsequent review of the TP3 Outage, in the course of oral argument that formed part of their opening statements. OPC broached the subject first, arguing that:

> The statute's criteria for rates is fair, just and reasonable. It's not just negligence. The Commission has in the past used negligence to determine as a, as an indicator of whether rates are fair, just and reasonable, but that's not the only issue in this case. The question is who should bear the burden of the increased rates? You know, who is in a better position and more -- who could be responsible for making sure that a drilled hole didn't happen with a deliberate act of sabotage? So it's not just negligence. There's an issue of who's responsible for it.

Tr. 43-44. FPL then responded as follows:

> ... I'd like to note that FPL gladly accepts the burden of demonstrating prudence, but OPC seems to suggest that FPL should pay just because an employee or a contractor apparently drilled the hole in the pressurizer piping in question. I would submit that this is inconsistent with the notion of prudence review.

> And the best analogy we really have for the purposes here is the tort law doctrines applicable to employers of negligent hiring, negligent retention, negligent supervision, all doctrines that can impose on an employer liability for the acts of an employee that occur outside the scope of the employee's employment and certainly something that may be an intentional, deliberate bad action. And it's possible for employers to be responsible, but they are responsible when there has been actually a determination that they were negligent in the hiring, retention or supervision, that they knew or should have known of something that they either didn't take into account in hiring, that they ignored in retaining an employee, or that they failed to do in supervising the employee. That's the analogous standard that would apply here, and there's absolutely nothing in the record today to suggest that FPL was, you know, negligent or failed to meet any of those standards.

Tr. 54-55.

6. Thus, the Commission was squarely presented with two competing views of the standard that should govern subsequent review of the TP3 Outage: the well-recognized prudence standard espoused by FPL, and OPC's view that a utility should not be permitted to recover actual costs incurred as a result of deliberate wrongful acts, even if the utility could not reasonably have prevented those acts. Staff recommended that the subsequent review be governed by the prudence standard, and the Commission voted unanimously to approve that recommendation after deliberations that made several references to "prudence." Tr. 1065-70. As noted previously, "[i]n a motion for reconsideration, it is not appropriate to reargue matters that have already been considered," yet that is exactly what OPC seeks to have the Commission do here.

7. The only thing new in the Motion concerning the standard of review is OPC's attempt to fit the TP3 Outage within the legal doctrine of *res ipsa loquitur.* But this cannot salvage OPC's argument for reconsideration. First of all, OPC could have addressed this legal doctrine during oral argument at the hearing, but either chose not to do so or else had not thought

of it at the time. Either way, reconsideration is not a vehicle to supplement the record with evidence or make legal arguments that could and should have been made at hearing. Allowing reconsideration to be used in that fashion would undermine the finality of the hearing process.

8. More fundamentally, however, *res ipsa loquitur* is simply inapplicable here. As explained by the Florida Supreme Court in *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So.2d 1339, 1341-42 (Fla. 1978),

> Res ipsa loquitur - "the thing speaks for itself"- is a doctrine of extremely limited applicability. It provides an injured plaintiff with a common-sense inference of negligence where direct proof of negligence is wanting, provided certain elements consistent with negligent behavior are present. Essentially, the injured plaintiff must establish that the instrumentality causing his or her injury was under the exclusive control of the defendant, and that the accident is one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control.

Here, the cause of the TP3 Outage is not unknown – it is already established that a hole was deliberately drilled in the pressurizer piping of Turkey Point Unit 3. What is not known yet is who drilled the hole and why, and how that person had the opportunity to do so. As noted in Order 1057, criminal investigations are proceeding to answer those questions. For *res ipsa loquitur* to apply here by analogy, one would have to assume that -- no matter how the criminal investigations turn out -- the inevitable conclusion will be that FPL was negligent in allowing the misconduct to occur. But such a conclusion is by no means inevitable. Certainly, FPL did not *authorize* anyone to drill a hole in the pressurizer piping. Rather, the hole was drilled as a deliberate, bad act that was outside the proper scope of employment. As FPL pointed out at the hearing, the well-established law in Florida is that an employer is responsible for bad acts of its employees that are outside the proper scope of employment only if the plaintiff shows that the

employer has been negligent in hiring, retaining or supervising the employee. Tr. 54-55; *see Tallahassee Furniture Co. v. Harrison*, 583 So.2d 744 (Fla. 1st DCA 1991); *Total Rehabilitation & Medical Centers, Inc. v. E.B.O.*, 915 So.2d 694 (Fla. 3d DCA 2005). In short, OPC's belated analogy to *res ipsa loquitur* provides no valid basis for reconsidering the Commission's decision that the subsequent review of the TP3 Outage should be governed by the prudence standard.

**OPC's Second Point – Recovery of TP3 Outage Fuel Costs Pending Subsequent Review**

9. OPC likewise has shown no valid basis for reconsideration as to its second point, that the Commission should not permit FPL to recover the additional fuel costs associated with the TP3 Outage pending the outcome of the Commission's subsequent review of that outage. Essentially, the sum of OPC's argument on this point is that requiring FPL to defer collection of the additional fuel costs until the subsequent review is concluded would be consistent with the holding of *Florida Power Corp. v. Cresse*, 413 So.2d 1186 (Fla. 1982). But OPC made this exact same argument at the hearing. Tr. 42-43. FPL responded that the *Cresse* case does not stand for what OPC claimed, and that the Commission had subsequently issued two orders in which it allowed utilities to collect additional fuel costs associated with nuclear plant outages, pending the outcome of subsequent prudence reviews of those outages.[1] Staff reviewed the cases and orders cited by OPC and FPL, then advised the Commission that "it is within the discretion of the Commission as to whether to grant approval of recovery of these costs subject to refund, or, in the alternative, you may wait until next year to hear the case fully, and if you

decide that the costs were prudently occurred [sic], to allow recovery at that proceeding." Tr. 1065. Staff went on to note that, if recovery were deferred and then subsequently allowed, customers would have to pay FPL interest covering the period of deferral, whereas if FPL recovers the costs currently and then they are subsequently disallowed, FPL would have to return the amount collected to customers plus interest. *Id.* Staff then recommended that the Commission exercise its discretion by allowing FPL to recover the additional fuel costs pending the outcome of the subsequent prudence review, with a commitment to refund the costs with interest if they are subsequently determined to have been imprudent. The Commission approved this recommendation, because it avoided the possibility of customers having to pay FPL interest on the deferred recovery later and because allowing current recovery of the costs pending review would be more consistent with past Commission practice. Tr. 1069.

10. As can be seen, the Commission carefully evaluated and rejected the exact argument that OPC presses in its Motion. OPC points to nothing that the Commission overlooked or failed to consider in its evaluation. Once again, OPC is simply rehashing an argument that already has been considered and rejected. That cannot be a valid basis for reconsideration.

**Conclusion**

For the foregoing reasons, OPC's Motion for Clarification and Reconsideration of Order No. PSC-06-1057-FOF-EI should be denied.

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[1] Tr. 53-54. The two orders are Order No. 15486 in Docket No. 840001-EI-A (FPL's St. Lucie Unit 1) and Order No. 18690 in Docket No. 860001-EI-B (Progress Energy Florida's Crystal River Unit 3). Tr. 35-36.

Respectfully submitted,

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**Docket No. 070001-EI**

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