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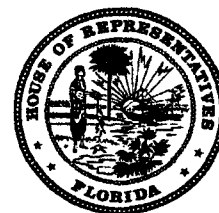
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REDACTED

November 24, 2008

Anne Cole, Commission Clerk
And Administrative Services
Room 100, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RECEIVED-FPSC
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COMMISSION
CLERK

Re: Docket No. 080001-EI

Dear Ms. Cole:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' Brief on Issue 13C (Public Version). A diskette in Word format is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Stephen C. Burgess
Associate Public Counsel

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ECR _____
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OPC _____
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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 080001-EI

FILED: November 24, 2008

CITIZENS' BRIEF ON ISSUE 13C

I. Basic Facts

Florida Power and Light Company ("FPL," or "the Utility") granted unescorted nuclear plant access to an individual who, within one month of being hired, intentionally vandalized the nuclear plant to which he had been granted access. This individual vandal ("the Individual" or "the Vandal") has been identified, but has not been arrested or charged with a crime, or sued by Florida Power and Light. FPL argues that its customers should be held financially accountable for the vandalism because the Utility had in place a rigorous screening process that was designed to prevent this type of occurrence. In sworn testimony, FPL assured the Commission that prior to his being granted unescorted nuclear plant access, the Individual "was subject to and successfully completed FPL's rigorous access and fitness for duty screening processes." [T. 543] The sworn testimony described the several steps of the screening process and concluded that "[f]ailure to successfully complete any of these steps will result in the individual being denied unescorted access to FPL's nuclear facilities." [T.542] The sworn testimony did not even hint that the Vandal's application may have shown any red flags for potential problems. FPL contended that nothing possible could have been foreseen.

The Friday before the hearing, however, FPL produced a document that the Utility had received approximately one month earlier. [T. 568; Exhibit 54, p. 11] The document included field notes written by the FBI agent investigating the case. The field notes contained information that the

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agent had found on the vandal's Turkey Point security questionnaire. That questionnaire was completed as part of the vandal's screening process, and has been in the possession of FPL since February, 2006. [T. 571] FPL, however, chose not to present the questionnaire to the Commission.

The field notes paint a strikingly different picture of the relevant information about the Vandal, which FPL had in its possession when it granted unescorted nuclear plant access. Florida citizens would be shocked by a juxtaposition of FPL's sworn testimony alongside the FBI agent's field notes (the actual source document – the questionnaire, itself – has never been produced by FPL, so the agent's notes are the closest rendition available).

While assuring the Commission that the Individual had been rigorously screened, FPL's sworn testimony never even mentioned that there existed ANYTHING on the questionnaire that could possibly call the Individual's background into question. Instead, FPL cited all of the areas in which the vandal had been screened and had passed. FPL's sworn testimony stated that the screening process required the Individual "to successfully complete an FBI criminal history verification ... with no disqualifying criminal background" and "to successfully complete drug and alcohol screening...." As we now know, however, the Vandal had been arrested for: 1990 Criminal Recklessness and Criminal Mischief (charges dismissed in 1994); 1990 Driving under the Influence (guilty); 1991 Discharging a fire arm in public (dismissed); 1989 Public Intoxication (Dismissed); 1989 Reckless Driving (Dismissed). Further, the Vandal responded "yes" to the question "Have you ever used/sold illegal drugs?" and did not answer questions relative to participation in substance/alcohol abuse programs. Finally FPL's sworn testimony assured the Commission that the Vandal "passed a rigorous psychological examination consisting of nearly 600 questions, with the responses screened for psychological stability and other characteristics. As required, individuals may be subject to further

psychological review, including interviews by a licensed psychologist.” [T. 542] The FBI field notes, however, indicated that the individual “failed his psychological test,” but “received clearance from a physician in order to gain plant access.” [Exhibit 54; p. 11]

OPC is troubled by the version of the facts that the Commission initially received from FPL before the notes of the FBI agent became available. If one were actually trying to communicate to the Commission an accurate picture of how the Vandal fared in FPL’s screening process, one would have at least brought attention to the obvious red flags that appear on his security questionnaire. One would certainly not have used the description in Mr. Jones’ sworn testimony, which implied a totally clean application. As Mr. Larkin stated:

Now up until we got the, what has been called the FBI report, which is really portions of, of individual reports, the company had represented to the Public Counsel, to everybody in this room that we had this super-duper system that we applied and it would have identified everything that was out of, out character or, or we should have paid attention to and this individual past it. Not only did he pass it, he passed it with flying colors.

So on last Friday, due to the vigilance of your staff, we got some more information. And what that information indicated is that not only did this individual that perpetrated this vandalism should have been flagged, it indicated that, that this was almost a siren, that this guy had several prior run-ins with the law, that he responded yes to the use and selling of drugs, that he failed to answer the question about substance abuse and he filed the company’s initial psychological test. [T. 987; 988]

Mr. Jones explained that he never actually looked at the Vandal’s questionnaire [T. 572], but instead he based his sworn testimony on assurances from a Mr. Bonthron. [T. 641] The problem facing the Commission is that Mr. Jones has not examined the Vandal’s questionnaire to this day, but continues to base his representations to the Commission on representations of the same Mr. Bonthron who apparently led Mr. Jones to believe that there was no reason to disclose to the Commission all of

the red flags appearing on the Vandal's security questionnaire.

II. The Commission must determine whether customers should be held financially responsible for damages that were intentionally caused by an individual who had been granted unescorted nuclear plant access by FPL.

This case centers on FPL's specific decision to grant unescorted nuclear plant access to the specific individual who drilled the hole. This case is NOT about the general condition of FPL's screening process, or even about the NRC's opinion of that process. Since the customers are being asked to pay for damage caused by a single act of a single individual, any question about access should focus on the access granted to the specific individual who caused the damage. Thus, the Commission should ask itself: "Have we seen all the information that we need to be absolutely certain that FPL's decision to allow unescorted access to this particular individual was a prudent decision? Can we tell the public that we support FPL's decision to grant unescorted nuclear plant access to the individual who committed the vandalism?"

Suppose a high quality automobile manufacturer is known for its stellar production process. Further suppose that manufacturer's production process had received the highest possible accolades from every existing industry oversight group and publication. Now finally suppose that, in spite of all of this, one automobile is produced that is abominably defective. Would that auto maker say: "Well, we don't need to bother trying to find out what went wrong in this particular case. We don't need to look at any of the specific circumstances of how that particular vehicle turned out so obviously defective. No, we don't need to bother with any of that because we have faith in the overall process and our process has received accolades from industry experts.?" Of course no

reasonable business would ever take that approach – it would be sheer lunacy. The very first thing the auto maker would do is scrutinize the defective vehicle in painstaking detail to find out exactly what went wrong for that specific car. Without a detailed examination of the specific defect, the manufacturer would have no way of understanding what went wrong.

Yet that is exactly what FPL is asking the Commission to do. FPL wants the Commission to assure Florida's citizens that FPL appropriately allowed unescorted access to the Individual who vandalized the plant, while withholding from the Commission the Individual's security questionnaire results -- information that is vital to making an informed decision. Thanks to the FBI field notes, the record is now clear that, among many other problems, the vandal had been arrested and charged with criminal mischief and the charges were dropped four years later.

Florida Statutes define "criminal mischief" as:

A person commits the offense of criminal mischief if he or she willfully and maliciously injures or damages by any means any real or personal property belonging to another, including, but not limited to, the placement of graffiti thereon or other acts of vandalism thereto.

[EMPHASIS ADDED] Section 806.13(1)(a), Florida Statutes

In addition, the Individual was arrested for criminal recklessness, discharging a firearm in public, driving under the influence, public intoxication, and reckless driving.

Yet, in spite of all of that "smoke," FPL is now asking the Commission to vouch for the Company and assure the public that FPL acted appropriately in granting the Individual unescorted access to the nuclear plant. If we were to select virtually any Florida citizen to evaluate whether this Individual who had been arrested for such serious crimes should have been granted unescorted access

to a nuclear plant, the citizen surely would either conclude that access clearly should not have been granted or at least pursue an entire battery of questions about the arrests, such as the following:

- “What does the police arrest report say about the criminal mischief charge?”
- “What was the nature and seriousness of the vandalism that led to the charges of criminal mischief?”
- “Was the vandalism in the nature of corporate sabotage?”
- “What was the monetary value of the vandalism?”
- “Was the vandalism committed on the job?”
- “Was the vandalism committed at an electric power plant? ... a nuclear power plant?”
- “What did the police report say about the charge of criminal recklessness?”
- “How badly was the victim hurt?”
- “What was the extent of the ‘great bodily harm’?”
- “Was the great bodily harm caused by the act of vandalism?”
- “Was a plea bargain entered?”
- “Were the charges dropped as part of a plea bargain or an expunction process?”
- “Did the individual serve a jail sentence as part of an agreement?”
- “Why did it take four year for the charges to be dropped?”
- “What kind of firearm was discharged publicly?”
- “What kind of public setting was it?”
- “How many people were around?”
- “Was anyone hit, or nearly so?”
- “Why were the charges dismissed?”
- “What was the blood alcohol level while driving?”
- “What were the circumstances of the reckless driving?”
- “Was anyone hit? ... Hurt?”
- “Etc.”

If our imaginary Florida citizen were told that Florida Power and Light chose not to provide him with any of the answers because the Utility does not think he needs to know, there can be little doubt about what the citizen would say: “This is an easy decision. No one can possibly conclude that FPL was prudent to grant this individual access, without knowing the information I was asking for. Since FPL has chosen not to give me this critical information, there is only one possible conclusion. FPL has NOT proven that it acted prudently in granting unescorted nuclear plant access to an

individual with this kind of background.”

Of course, we do not select individual Florida citizens to make such evaluations. Instead we select Public Service Commissioners to make those evaluations on the citizens’ behalf. The Commission tried mightily to get specific answers to questions about the Individual’s arrests and other red flags in the individual’s background [See T. 564-628], but was prevented from obtaining the necessary information because FPL chose not to make it available. Florida Power and Light possesses the information, and there is no legal impediment to presenting the information with the name redacted. [T. 573; T. 624] Mr. Terry Jones had oversight responsibility in that area. In that capacity, Mr. Jones presented testimony purportedly to assure the Commission that FPL had acted prudently in granting this specific Individual unescorted access to a nuclear power plant. Incredibly, however, even as of the hearing, Mr. Jones had never bothered to look at the background of the specific Individual because he believed that he “did not need to know.” [T. 578]

Mr. Jones apparently felt comfortable in making his unqualified assurance that FPL had no reason at all to be concerned about granting the Individual unescorted nuclear plant access, based on his faith in the corporate security manager and in the Nuclear Regulatory Commission (NRC) report. [T. 641-643] The Florida Public Service Commission, however, has specific obligations that it owes to Florida’s citizens. Among those is the obligation to make an independent finding on the facts brought before the Commission in hearings conducted by the Commission. The Commission cannot give a public assurance based on Mr. Jones’ faith in Mr. Bonthron (particularly when it was Mr. Bonthron whose initial representations led to Mr. Jones’ sworn testimony implying that no red flags had been raised). The Commission must make an independent finding, based on the record of evidence brought before the Commission. In this case, FPL chose not to bring the Commission any

verifiable evidence about the Vandal's background. Without such evidence, it is impossible for the Commission to vouch for the prudence of FPL's decision to grant unescorted nuclear plant access to the Individual that we now know is a very dangerous vandal.

III. **Florida Power and Light has failed to carry its burden of proof.**

The burden of proof is a fundamentally important principle in the overall concept of due process, and it has particular relevance to this case. The party which has the burden of proof is responsible for presenting the Commission with all the evidence necessary for a ruling. If the party with the burden of proof fails to present the Commission with material evidence that the Commission believes is necessary to reach a ruling, then quite simply, that party loses. That was the result in Aloha Utilities, Inc., wherein the Commission ruled:

However, it is the utility's burden to prove that its costs are reasonable. See Florida Power Corp. v. Cresse, 413 So.2d 1187, 1191 (Fla. 1982). We are persuaded by Ms. Merchant's testimony that the utility has not taken advantage of the opportunity it was provided in this case to show that the costs incurred for the new building were prudent. There is insufficient evidence to determine that the purchase of the building was the most cost effective alternative. As such, we find that the utility has not presented sufficient evidence in this case to show that these costs are prudent. Therefore, none of the requested costs associated with the purchase of the building shall not be considered in this rate proceeding.
Docket No. 991643-SU; Order No. PSC-01-0326-FOF-SU
01 FPSC 2:163, 182

In every respect, the Aloha case is precisely on point with the current case. Just as Aloha failed to avail itself of its opportunity to bring a cost benefit analysis to the Commission, so FPL failed to avail itself of its opportunity to bring details of the Individual's background. Just as the Commission concluded that a cost benefit analysis was crucial to proving that the cost of Aloha's office building was prudent, so the details of the Vandal's background are crucial to evaluate whether

granting unescorted access to that Individual was prudent. Just as the Commission ruled that Aloha failed to carry its burden of proof, so FPL failed to carry its burden of proving that it was prudent to grant unescorted access to the Individual who committed the vandalism.

In this case, the Commissioners asked FPL many questions to try to obtain details about the background of the specific Individual who committed the act of vandalism. Those questions needed to be answered because the information was directly relevant to the issue of whether FPL was justified in allowing unescorted access to that particular Individual. Nevertheless, Florida Power and Light Company consciously chose to withhold the source documents from the Commission, and FPL's witness never looked at the documents to be able to answer the Commissioners' questions. Since FPL has the burden of proving that it is entitled to the money in question, it was incumbent on the Utility to present the necessary proof. FPL failed to carry its burden of proving that it acted prudently in granting unescorted nuclear plant access to the Individual who committed the act of vandalism.

IV. FPL's screening process is directly a management function, and the losses resulting from errors in this function should not be the financial responsibility of customers.

FPL witness Korel Dubin testified that in Order No. 23232, issued in Docket No. 900001, the Commission established precedent that is applicable to the current case. [T. 1217, 1218] OPC agrees that Order No. 23232 established precedent that is applicable to the current case, but Ms. Dubin erred in the principle that is applicable.

Just as in the current case, in Docket No. 900001 the Commission considered the issue of replacement fuel costs that were incurred by FPL due to an unexpected outage at Turkey Point Unit 3. In Order No. 23232, the Commission denied the replacement fuel costs that were incurred as a result

of FPL's nuclear operators' failure to pass the NRC requalification exam. In denying the costs, the Commission stated:

The Turkey Point 3 outage commencing March 29, 1989, was attributed to FPL's nuclear operators' failure to pass NRC requalification exam. Because operator training is directly a management function, we find that this outage was the responsibility of FPL's management.
90 FPSC 7:361, 364

The sole and exclusive reason the Commission cited for disallowance was that "operator training is directly a management function...." Because the training process was considered a management function, the Commission found that the "outage was the responsibility of FPL's management," and that customers should not be held responsible. It was the training process that produced a failure, and because that training process is a management function, FPL – not its customers – was responsible for the resulting loss.

The issue in Docket No. 900001 is conceptually identical to the current case. In 1990, FPL had an operator education program that was generally successful, met industry standards and was approved by the NRC. Notwithstanding the general success of the operator education program, it failed to produce the intended result on one specific occasion. In the current case, FPL has a worker screening program that is generally successful, meets industry standards and has been approved by the NRC. Notwithstanding the general success of the screening program, it failed to produce the intended result on one specific occasion.

It is important to recognize all of the factors that the Commission did NOT consider relevant in reaching its decision in Order No. 23232. The Commission was not concerned with any of the issues that FPL is trying to bring into the current case. In the current case FPL argues that it should not be held responsible because the overall screening process is normally effective; but in Order No.

23232, the Commission did not consider whether the overall operator education process was normally effective because its concern was the specific failure that caused the loss. In the current case FPL argues that it should not be held responsible because its screening process follows a protocol that meets or exceeds the NRC and the industry standard; but in Order No. 23232, the Commission did not consider whether the operator education process met the NRC or the industry standard because the program's failure in a specific instance resulted in a loss. In the current case FPL argues it should not be held responsible because the NRC did not identify a specific error in FPL's screening of the Individual who drilled the hole; but in Order No. 23232, the Commission did not consider whether the NRC found any error in FPL's training of the specific operators who failed because the Commission considered the training to be a management function and therefore held the Utility responsible.

Likewise, FPL's screening program for nuclear plant access is directly a management function, as is the training program for nuclear plant operators. The Citizens urge the current Commission to hold FPL to the standard used by the Commission in its 1990 decision to hold FPL responsible for direct management functions.

V. Beside the failure of its nuclear plant screening process, the failure of FPL's worker training program was also a contributing cause of the Turkey Point 3 outage.

At the hearing, Commissioner Skop pursued a concern that had not been identified by any of the parties. Exhibit 54 revealed that the Individual who drilled the hole had divulged his act of vandalism to a co-worker prior to the hole being discovered by FPL. That co-worker, however, did not report this conversation until after the vandalism had been discovered by FPL. Had the co-worker

immediately reported the incident, the drilled hole could have been discovered and repaired during the planned outage. The timely repair of the hole would have circumvented the additional outage and the need for replacement fuel to be burned.

This revelation raises the issue of the adequacy of FPL's training of the workers with access to the nuclear power plants. Workers with this access must be thoroughly trained in the importance of reporting anything that could possibly be a concern. The failure of the co-worker to report this incident reflects a failure in FPL's training process. Just as the failure of the screening process called for a full investigation, so also this failure of the training process calls for an in-depth examination.

Commissioner Skop raised questions about FPL's training and whether it included adequate emphasis on how critical it is for workers to report any sign of problems. Unfortunately, FPL was unable to respond to the Commissioner's questions except in the most general terms. Much like the circumstances surrounding the Vandal himself, the co-worker also remains a mystery. The Commission is again left without answers to critical areas of inquiry.

FPL gained access to the FBI notes approximately one month before the hearing. Had FPL taken this new revelation more seriously, it could have investigated the matter and perhaps presented the Commission with more complete answers to Commissioner Skop's questions.

Even granting some leeway to FPL, however, there remain two reasons to hold the Utility responsible for this failure in its training process. First, this failure arose in the training process, just as in Docket No. 900001. Accordingly, the Commission's precedent has direct application to the current case. In Order No. 23232, the Commission held that training is a direct management function and therefore a failure in the training program is the responsibility of FPL's management, not its customers.

The second reason FPL should be held accountable is that, as discussed earlier, FPL had the burden of proof in this case. Along with that burden comes the responsibility to bring forward all the evidence the Commission needs to make an informed finding. FPL's failure to provide complete answers to Commissioner Skop's questions amounts to a failure to carry its burden of proof, leaving the Commission no option but to rule against the Utility.

VI. The actual language contained in the confidential NRC Augmented Inspection Team's report directly contradicts the public claims that FPL made about the NRC's findings.

OPC continues to be troubled by the game of hide-and-seek that FPL played with the findings of the NRC's Augmented Inspection Team (AIT). The report of the AIT was contained in confidential Exhibit No. 3; Document No. 06271-08. Its confidential status prevented OPC and other parties from citing excerpts from the AIT report for cross-examination. Nevertheless, FPL witnesses took liberties to make several public representations which purported to characterize the AIT's findings. The actual language of the confidential report, however, directly contradicts the public representations that FPL made about the AIT's findings.

The Utility's witnesses claimed that the NRC's confidential findings exonerated FPL. In fact, Mr. Jones stated:

And in addition, the NRC's Augmented Inspection Team found that our access authorization personnel programs, processes, and procedures were in full compliance with the requirements of the NRC, and that our physical security plan was in compliance with the NRC. . . . [T.566]

Mr. Jones' claims, however, are directly contradicted by the report itself. In direct contradiction to Mr. Jones, the NRC report states:

****BEGIN CONFIDENTIAL****



****END CONFIDENTIAL****

The clear and unambiguous language of the AIT report itself directly contradicts Mr. Jones' claim that the AIT found FPL's programs, processes and procedures "in full compliance with the NRC." OPC has been unable to find any other document in the record in which the NRC recedes from the statement quoted above. Accordingly, the public representations of FPL are directly contrary to the AIT findings, and it is entirely disingenuous and self serving for FPL to publicly claim that the confidential report exonerates the Utility.

VII. Conclusion

The question before the Commission was whether the Utility should be held responsible for its decision to allow a specific Individual unescorted nuclear plant access, in spite of red flags surrounding the Individual's application. Initially, FPL never mentioned any red flags, but rather led the Commission to understand that the Individual's application was clean. Just days before the hearing, it was revealed that the Individual's security questionnaire (which FPL has possessed since 2006) showed a number of red flags that should have concerned FPL. At the hearing, however, FPL could not answer questions about the specific background of the Individual because FPL's witness considered that both he and the Commission "did not need to know" that information. Accordingly,

FPL has failed to carry its burden of proving why it should not be held as the financially responsible party for granting access to the Individual who drilled the hole.

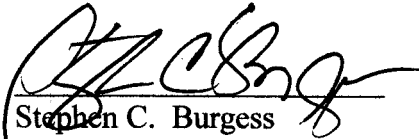
Further, FPL's screening process is directly a management function, and pursuant to Commission precedent, the losses resulting therefrom are the responsibility of the Utility.

Moreover, the Vandal had confided to a co-worker that he had drilled the hole. Had the co-worker reported this very serious admission in a timely fashion, the hole could have been discovered and repaired without any additional outage. Requiring workers to report incidents of such magnitude is the responsibility of FPL's program for training nuclear plant workers. As the Commission held in Order No. 23232, training is directly a management function, and the losses resulting therefrom are the responsibility of FPL.

Finally, contrary to the public claims of FPL witnesses, the AIT report explicitly does NOT determine that FPL's processes were in compliance with NRC requirements.

For all of the foregoing reason, the Commission should require Florida Power and Light to refund the \$6.1 million in replacement fuel cost, along with applicable interest.

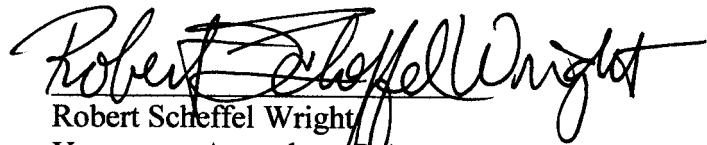
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DOCKET NO. 080001-EI
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **CITIZENS' BRIEF ON ISSUE 13C** has been furnished by U.S. Mail and electronic mail to the following parties on this 24th day of November, 2008.

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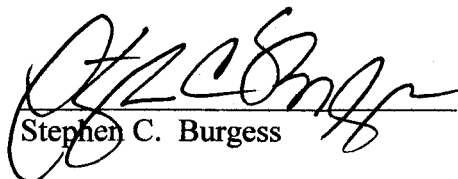
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