REDACTED

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.	DOCKET NO. 080001-EI ORDER NO. PSC-09-0024-FOF-EI ISSUED: JANUARY 7, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

APPEARANCES:

R. WADE LITCHFIELD, ESQUIRE, and JOHN T. BUTLER, ESQUIRE, 700 Universe Boulevard, Juno Beach, Florida 33408
On behalf of Florida Power & Light Company (FPL).

NORMAN H. HORTON, JR., ESQUIRE, Messer, Caparello & Self, P. A., Post Office Box 15579, Tallahassee, Florida 32317
On behalf of Florida Public Utilities Company (FPUC).

JEFFREY A. STONE, ESQUIRE, RUSSELL A. BADDERS, ESQUIRE and STEVEN GRIFFIN, ESQUIRE, Beggs & Lane, Post Office Box 12950, Pensacola, Florida 32591-2950
On behalf of Gulf Power Company (GULF).

JOHN T. BURNETT, ESQUIRE, Progress Energy Service Company, LLC, 100 Central Avenue, St. Petersburg, Florida 33701-3323 and GARY PERKO, ESQUIRE
On behalf of Progress Energy Florida, Inc. (PEF).

JAMES D. BEASLEY, ESQUIRE and LEE L. WILLIS, ESQUIRE, Ausley & McMullen, Post Office Box 391, Tallahassee, Florida 32302
On behalf of Tampa Electric Company (TECO).

JOHN W. MCWHIRTER, JR., ESQUIRE, McWhirter, Reeves & Davidson, P. A., Post Office Box 3350, Tampa, Florida 33601-3350
On behalf of Florida Industrial Power Users Group (FIPUG).

MICHAEL B. TWOMEY, ESQUIRE, Post Office Box 5256, Tallahassee, Florida 32314-5256
On behalf of AARP.

ROBERT SCHEFFEL WRIGHT, ESQUIRE, Young van Assenderp, P.A., 225 South Adams Street, Suite 200, Tallahassee, Florida 32301
On behalf of Florida Retail Federation (FRF).

CECILIA BRADLEY, ESQUIRE, Office of the Attorney General, The Capitol – PL01, Tallahassee, Florida 32399-1050
On behalf of the Citizens of Florida (OAG).

PATRICIA A. CHRISTENSEN, ESQUIRE, STEVEN C. BURGESS, ESQUIRE, and JOSEPH A. MCGLOTHLIN, ESQUIRE, Office of Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400
On behalf of the Citizens of the State of Florida (OPC).

JAMES W. BREW, ESQUIRE, Brickfield, Burchette, Ritts & Stone, P.C., 1025 Thomas Jefferson Street, NW Eighth Floor, West Tower, Washington, DC 20007
On behalf of White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs (PCS Phosphate).

SHAYLA L. MCNEILL, CAPTAIN, KAREN S. WHITE, AFCESA/ULT, 139 Barnes Drive, Suite 1, Tyndall Air Force Base, FL 32403-5319
On behalf of Federal Executive Agencies (FEA).

LISA C. BENNETT, ESQUIRE, JEAN E. HARTMAN, ESQUIRE, and KEINO YOUNG, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Florida Public Service Commission (Staff).

ORDER REQUIRING FLORIDA POWER & LIGHT COMPANY TO REFUND CUSTOMERS FOR EXTENDED POWER OUTAGE AT TURKEY POINT UNIT 3

BY THE COMMISSION:

Background

On March 31, 2006, during preliminary testing and inspections for the restart of Turkey Point Unit 3, Florida Power & Light Company (FPL) personnel identified a small hole drilled in pressurizer piping. The resultant investigations and repair extended the outage duration by approximately five days. In the 2006 Fuel Clause proceedings, FPL requested that consideration

of the prudence of the additional replacement fuel costs be heard in a subsequent proceeding because of ongoing investigations. FPL stated it had been requested not to disclose the results of the ongoing investigations. During the interim, FPL requested recovery of the additional fuel expense due to the outage extension. The Office of Public Counsel (OPC) challenged FPL's recovery of those expenses and raised the following issue:

> 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?

This issue was identified as Issue 16G during the prehearing process, but was never included in the prehearing order. FPL and OPC made oral legal arguments supporting their respective positions. By Order No. PSC-06-1057-FOF-EI,[1] we decided to allow FPL to recover the amount subject to refund with interest. By the same order, we approved a stipulation proposed by FPL, OPC, and supported by our staff, that the amount of the additional fuels costs associated with the outage was $6,130,000.

On January 8, 2007, OPC filed a motion for clarification and reconsideration of Order No. PSC-06-1067-FOF-EI. OPC sought clarification to allow the deferred issue to be heard without limiting the scope of our review to a standard of prudence. (Order No. PSC-06-1057-FOF-EI at 2) OPC also asked that we reconsider our decision to allow FPL recovery subject to refund. FPL filed its response in opposition on January 16, 2007. Order No. PSC-07-0330-FOF-EI[2] granted OPC's motion for clarification, but denied OPC's motion for reconsideration.

By Order No. PSC-08-0030-FOF-EI,[3] we approved a stipulation between the parties that the resolution of the issue be deferred to the 2008 Fuel Clause proceeding in Docket No. 080001-EI. The money at issue would continue to be held by FPL subject to refund pending the outcome of the issue.

On April 3, 2008, FPL filed testimony in Docket No. 080001-EI, addressing, among other things, the conclusion of the ongoing investigations. Consequently, the deferred issue was included in Prehearing Order No. PSC-08-0726-PHO-EI[4] as Issue 13C. A public hearing was held on November 4, 5, 6, and 12, 2008.

Various parties were granted intervention in Docket No. 080001-EI. Those that participated in cross examination of witnesses addressing Issue 13C were FPL, Florida Industrial Power Users Group (FIPUG), AARP, Florida Retail Federation (FRF), Office of the Attorney General (OAG), OPC, and the Federal Executive Agencies (FEA). At the request of intervenors,

---

[1] Order No. PSC-06-1057-FOF-EI, issued December 22, 2006, in Docket No. 060001-EI, In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.
[2] Order No. PSC-07-0330-FOF-EI, issued April 16, 2007, in Docket No. 070001-EI, In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.
[3] Order No. PSC-08-0030-FOF-EI, issued January 8, 2008, in Docket No. 070001-EI, In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.
[4] Order No. PSC-08-0726-PHO-EI, issued October 13, 2008, in Docket No. 080001-EI, In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.

we permitted post-hearing briefs on Issue 13C to be filed November 24, 2008, with our staff's recommendation to be filed December 8, 2008, for consideration at our December 16, 2008 Agenda Conference. FPL, OPC, and AARP filed post-hearing briefs on November 24, 2008. The OAG filed a request to late-file its post-hearing brief on November 25, 2008, and subsequently filed a corrected brief on November 26, 2008. Attachment A to this Order includes a brief chronology of the investigation. We have jurisdiction over this subject matter pursuant to the provisions of Chapter 366, Florida Statutes, including Sections 366.04, 366.05, and 366.06, Florida Statutes.

Analysis

In its brief, FPL states that at the end of the spring 2006 refueling outage at Turkey Point Unit 3, FPL personnel identified a small drilled hole in the pressurizer piping during a series of pre-startup tests and inspections. FPL asserts that while the drilled hole never posed a threat to reactor safety, it did have to be repaired prior to the restart of Unit 3. FPL alleges that it needed to investigate the remainder of the plant to make certain there was no additional damage or vandalism requiring repair. FPL claims that because it performed the work quickly and well, the unit was down only an additional 5 days.

FPL reports that both the Federal Bureau of Investigation (FBI) and FPL's Corporate Security Department conducted an investigation to identify the individual or individuals who drilled the hole. According to FPL, the investigation indicates that only one individual (person of interest), working alone, was responsible for the drilled hole. FPL claims that the evidence relative to the criminal investigation was spotty and circumstantial, and as a result, the U.S. Attorney's Office elected not to charge the individual.

FPL relates that the United States Nuclear Regulatory Commission (NRC) also conducted an investigation of the incident, for different purposes. FPL explains that the NRC formed an Augmented Inspection Team (AIT) to conduct an investigation of the adequacy and effectiveness of FPL's security systems, as well as FPL's response once the drilled hole had been detected. FPL claims that the AIT found that FPL properly screened individuals for access to Turkey Point before the incident, that FPL's security personnel were appropriately positioned and effectively trained to control access, and that FPL had responded to the incident appropriately and effectively.

FPL asserts that its process of granting unescorted access to its nuclear plants relies on detailed background checks, an FBI criminal history verification, drug and alcohol testing, and detailed psychological screening. FPL also claims that individuals continue to be evaluated while they are working at the plant. FPL contends that its access procedures are subject to stringent and frequent NRC scrutiny.

FPL argues that the evidence presented by the company demonstrates that it acted prudently with respect to the drilled hole incident. FPL further contends that Unit 3 was exceptionally reliable in 2006, even with the drilled hole incident, and customers saved over a half million dollars in fuel costs. As an example, FPL points out that Turkey Point Unit 3

achieved an excellent equivalent availability during 2006 of 91.3 percent, which exceeded the generating performance incentive factor target. FPL acknowledges that this does not demonstrate the prudence of its specific actions with respect to the drilled hole incident. FPL claims, however, that the efficient performance provides a relevant perspective from which to judge FPL's actions, as those actions relate to the risk of operating nuclear plants that is perceived by investors.

FPL contends that it acted prudently both before and after the drilled hole incident. FPL states that the NRC has plenary and preemptive power to regulate the safe operation of nuclear power facilities. According to FPL, a key element to the NRC's regulation is the control of access to vital areas of nuclear facilities. FPL states that the NRC requires FPL to establish and maintain an access authorization program granting individuals unescorted access to protected areas. FPL alleges that the NRC regularly inspects FPL's plan to determine whether the controls are sufficient. FPL asserts that because access is so important, the NRC immediately dispatched investigators to evaluate the drilled hole incident, including FPL's application of its access authorization program as well as the effectiveness of the immediate actions taken by FPL in response to the incident. FPL provided a copy of the AIT report as part of the record. FPL states that the NRC issued no findings or violations as a result of the AIT's investigation, and as a result the NRC closed its investigation with a letter so indicating. FPL provided a copy of that letter as part of its exhibits.

FPL concludes that the evidence it presents shows that the NRC closely regulates the safe operation of nuclear power plants, including physical security, and that the NRC had a strong reason to investigate the incident and assure itself that FPL was properly implementing all NRC requirements. FPL states that the NRC did investigate the incident and confirmed that FPL was in full compliance with NRC regulations.

FPL argues that the intervening parties focused on the NRC's response to the Freedom of Information Act (FOIA) request that FPL provided in response to discovery requests by our staff. FPL states that it timely provided the FOIA response to us and to OPC. Further, FPL states that nothing in the FOIA response demonstrates that FPL was imprudent. FPL states that the FOIA response is a collection of field notes prepared at various points in the FBI's investigation of the drilled hole incident. Those notes were provided to the NRC. FPL points out that nothing in the FBI's investigation convinced the U.S. Attorney to prosecute the person of interest. According to FPL, the drilled hole was clearly a serious and dangerous bad act, and if there were sufficient evidence to pursue criminal or civil remedies, the U.S. attorney or the NRC would have done so. Moreover, FPL states that nothing in the FOIA response indicates any violations of FPL's or the NRC's access authorization requirements.

FPL argues against the credibility of the FOIA response. FPL points to an instance in the FOIA response in which the FBI field agent noted that the person of interest "failed" his psychological test. According to FPL that statement was incorrect because the person of interest did not fail, but was merely identified for additional screening by a licensed psychologist. FPL asserts that this happens in 18 to 22 percent of FPL's contract work force and does not mean the individual failed the test. FPL contends that the person of interest underwent the individual

psychological evaluation and was approved for access by the examining psychologist and a second licensed psychologist. FPL asserts that the second psychologist had more than a decade of experience in evaluating workers for access to nuclear plants and is highly respected by the NRC for his process and methods.

FPL acknowledges that the FOIA response includes information showing the individual reported prior arrests but was not completely accurate in his report. However, FPL asserts the fact that an applicant reports a prior arrest does not, by itself, disqualify the applicant from being granted access. FPL states that the arrest information is evaluated by FPL's corporate access manager and his staff using a matrix that scores applicants based on various factors that constitute NRC "Safeguards Information." FPL claims that the details of the "Safeguards Information" cannot be publicly disclosed. According to FPL, the resulting matrix score did not disqualify the person of interest from access. FPL claims that the appropriateness of this conclusion was directly scrutinized by the AIT with no violations or deficiencies found. FPL argues that it, like everyone else, wishes that the individual had not been hired. But adopting a zero tolerance policy for individuals with prior arrests is infeasible because it would limit the available workforce, thus causing extended outage times due to the limited workforce. FPL argues that it is unrealistic to expect perfection from any security program.

FPL next evaluates the validity of the information provided by the confidential informant in the FOIA response. FPL asserts that if indeed the confidential informant did not report information that he knew, it is a significant concern. But, FPL says, that concern should be weighed against the chilling effect that would occur if FPL were to retaliate against an individual who came forward later than he should with important information. FPL claims that it constantly reinforces with its contractor workforce the importance of reporting incidents that appear out of the norm or improper. FPL states that Turkey Point has a program to meet daily with the contractor work force to encourage them to bring forth safety issues or workplace frustrations. As to the issues raised in the letter by NRC regarding possible chilling effects, FPL responded that it had hired an independent consultant. According to FPL, that independent consultant found there were some improvements FPL could make to strengthen the safety conscious work environment, but that the environment was not chilled and workers reported that they had avenues available to express concerns.

FPL next addresses the testimony of OPC's witness Larkin. FPL asserts that the prefiled testimony of witness Larkin did not address the prudence of FPL's handling of the drilled holed incident. However, by agreement of the parties, witness Larkin testified orally regarding the prudence of FPL's conduct based on the information in the FOIA response. FPL argues that witness Larkin's oral testimony was not beneficial. FPL states that witness Larkin lacked expertise in engineering, power plant operation, or criminal investigation. FPL reports that the witness testified that he had not read the NRC's rules on access authorization. In addition, FPL asserts that, when asked, the witness did not know whether FPL followed its own procedures in granting access to the person of interest.

FPL also asserts that the standard for approving the recovery of purchased power is the prudence standard. FPL argues that OPC witness Larkin's position that it is not "fair, just, and

reasonable" to charge the replacement fuel costs to customers is, in fact, not true. FPL contends that our policy and Florida Supreme Court precedent permit a utility to recover actual fuel costs unless the costs have been imprudent. FPL alleges that using a "fair, just, and reasonable" standard rather than a prudence standard would shift the risk factor to the utilities, with an unfavorable result in the financial markets causing an increase in financing costs for all Florida investor-owned utilities. According to FPL, the shift from a prudence standard to a "fair, just, and reasonable" standard would create a strong disincentive for investment in generating resources with low energy costs like nuclear and renewables. FPL asserts that potential replacement power costs are high during periods when low costing power plants are off-line, resulting in a large differential which adds to the risk associated with building and operating nuclear or other renewable energy facilities. FPL argues that OPC's position is different than our long standing practice of applying prudence. FPL argues that OPC is asking us to apply a stricter standard of prudence. According to FPL, if the new, stricter standard of prudence is applied, the financial markets would react negatively, and the end result would be to impose new costs on FPL's customers that would far exceed the $6.2 million reduction due to this disallowance.

FPL states that the standard of proof applicable to administrative proceedings is whether there is a preponderance of the evidence to support the finding. FPL alleges that it handled access authorization for the person of interest exactly as it did authorization for others and in full compliance with the NRC's strict requirements. FPL concludes that the greater weight of the evidence supports the prudence of FPL's handling of the drilled hole incident.

FPL briefly addresses the potential for recovering the costs from third parties. It asserts that it has evaluated the possibility for such claims previously and is not optimistic that there are viable claims against entities with an ability to pay for the replacement power. Because it has committed to further explore this avenue, however, FPL states it prefers not to discuss its evaluation at this time due to the potential adverse impact of public statements made in the evaluation of future claims that might be brought.

OPC filed its brief stating FPL granted unescorted access to its nuclear plant to an individual who, within one month of being hired, intentionally vandalized the plant. AARP adopted OPC's brief. According to OPC, the individual has been identified but has not been arrested or charged with a crime. OPC asserts that the individual also has not been sued by FPL. OPC states that FPL's position is that FPL's 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. OPC asserts that FPL had filed sworn testimony indicating the person of interest had been subjected to and passed the rigorous access and fitness for duty screening processes. OPC quotes the sworn testimony of FPL witness Jones, "[f]ailure to successfully complete any of these steps will result in the individual being denied unescorted access to FPL's nuclear facilities." OPC contends that the prefiled testimony did not suggest that the person of interest had any indication on his applications that there were potential problems.

OPC states that on the Friday before the fuel hearing, FPL produced a document that included field notes (also referred to as the FOIA response) written by the FBI agent

investigating the case. According to OPC, the field notes contained information that the agent had found on the person of interest's security questionnaire, completed as part of the screening process. OPC states that the questionnaire had been in the possession of FPL since February 2006, and had not been presented to us.

OPC argues that the FBI agent's field notes paint a different picture than did the testimony of the FPL witness. OPC asserts that the actual source document, the questionnaire, has never been produced by FPL. OPC challenges the credibility of FPL's sworn testimony, stating that, while FPL assured us that the person of interest had been rigorously screened, FPL never mentions that there existed anything in the questionnaire that could call the individual's background into question. OPC contends that although FPL's sworn testimony stated that the screening process required the person of interest "to successfully complete an FBI criminal history verification . . . with no disqualifying criminal background" and "to successfully complete drug and alcohol screening . . . ," the FOIA response showed the person of interest had been arrested several times, pled guilty to driving under the influence, and responded affirmatively to the question of whether he had ever used or sold illegal drugs. OPC also questions the credibility of FPL's testimony regarding the statement that the person of interest:

> . . . 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.

OPC states that, contrary to that testimony, the FBI field notes indicate the person of interest "failed his psychological test," but "received clearance from a physician to gain plant access."

OPC also challenges the value of FPL witness Jones' testimony regarding the content of the person of interest's psychological questionnaire. OPC asserts that witness Jones did not look at the person of interest's questionnaire, but rather based his sworn testimony on assurances from another FPL employee.

OPC contends that the case centers on FPL's specific decision to grant unescorted nuclear plant access to the individual who drilled the hole. OPC states that the case is not about the general condition of FPL's screening process. OPC asserts that any question about access should focus on the access granted to the specific individual who caused the damage. According to OPC, we should ask ourselves: "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?"

OPC argues that FPL is requesting that we approve FPL's decision to allow the person of interest unescorted access while not permitting us to see the person of interest's security questionnaire results. But OPC states the FBI field agent's notes now inform us that the person of interest had a record that indicates he had been arrested and charged with criminal mischief and that those charges were dropped some four years later. OPC cites the definition of criminal mischief as follows:

> 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.

Section 806.13(1)(a), Florida Statutes. Additionally, OPC cites to the FBI notes that indicate the person of interest was arrested for criminal recklessness, discharging a firearm in public, driving under the influence, public intoxication, and reckless driving. OPC contends that any reasonable person would conclude that access should not have been granted, or at a minimum, assure themselves that the individual should be granted access only after asking a battery of questions about the arrests. If there are no answers to those questions, then there is no proof that FPL acted prudently in granting unescorted nuclear plant access to an individual with this type of background. OPC asserts that we tried to get specific answers to questions about the person of interest's background and other areas of concern found in the FOIA response, but were prevented from obtaining the information because FPL chose not to make it available. Likewise, witness Jones, who testified that FPL acted prudently in allowing the person of interest to have unescorted access, never looked at the background of the person of interest, because he "did not need to know."

OPC argues that while FPL witness Jones had faith in his corporate security manager's decision, we should have before us independent facts upon which to make our decision. According to OPC, those facts should be in the record before us. OPC states that FPL chose not to bring us any verifiable evidence about the person of interest's background.

OPC states that the burden of proof is an important principle in this case. According to OPC, the party which has the burden of proof is responsible for presenting us with all the evidence necessary for a ruling. OPC contends that if a party with the burden of proof fails to present us with material evidence that we believe is necessary to reach a ruling, then that party has failed to meet it burden. To support that contention, OPC cites to Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, in Docket No. 991643-SU, In re: Application for increase in wastewater rates in Seven Springs System in Pasco County by Aloha Utilities, Inc. In the Aloha order we found:

> 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 [sic] be considered in this rate proceeding.

OPC compares the facts in the Aloha docket to the present case, and OPC concludes that, like Aloha, FPL failed to provide sufficient evidence to us. OPC points to portions of this proceeding in which we asked FPL questions to try to obtain details about the background of the person of interest. OPC reports that FPL did not provide the source documents. OPC states that FPL's witness never looked at the documents to be able to answer our questions. OPC concludes that FPL failed to meet its burden of proof.

OPC asserts that in addition to the failure of FPL's screening process for plant access, FPL also failed in its worker training program, which was a contributing cause to the outage. OPC states that the FOIA response shows that the person of interest told a co-worker that he had drilled a hole in the pipe, but that the co-worker did not report the conversation until after the drilled hole had been discovered. OPC argues that had the co-worker immediately reported the incident, the drilled hole could have been discovered and repaired during the planned outage, which would have circumvented the additional outage time. OPC contends that this raises the issue of the adequacy of FPL's training of workers with access to nuclear power plants. OPC asserts that again FPL was unable to answer many of our questions about the co-worker.

Finally, OPC argues that the AIT report does not support the assertions FPL made about the AIT findings. OPC states that the AIT report actually contradicts the representation made by FPL about the AIT findings. OPC points to the testimony of FPL witness Jones who 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 . . .

According to OPC, those claims are contradicted by the actual AIT report.

In addition to arguing that FPL was not prudent, OPC also takes the position that FPL's screening process is directly a management function, and the losses resulting from management's errors should not be the financial responsibility of customers. OPC argues that Order No. 23232, issued July 20, 1990, in Docket No. 900001-EI, In re: Fuel and purchased power cost recovery clause with generation performance incentive factor, established the precedent that is applicable to the current case. OPC contends that in Order No. 23232, the sole and exclusive reason we disallowed recovery of purchased power was because "operator training is directly a management function. . . ." The plant was shut down until the operators had additional training, and the power that was purchased during that time was disallowed for recovery. According to OPC, because training is a management function, FPL was responsible for the resulting loss, not ratepayers. OPC argues that, like the facts in Order No. 23232, the present factual circumstances indicate that this was a management error, and FPL should be responsible for the costs of the purchased power. FPL has a worker screening program that is generally successful, meets industry standards and has been approved by the NRC. OPC states that, notwithstanding the general success of the screening program, the program failed to produce the intended result on one specific occasion. OPC asserts that we should look to the

facts surrounding that one failure to determine whether there was mismanagement. OPC concludes that FPL should be responsible for the costs of the extended power outage.

The OAG asserts that FPL failed to meet its burden of proving that FPL acted reasonably in this matter. Specifically, the OAG contends that the evidence FPL presented to support its position was uncorroborated hearsay. According to the OAG, the cases of Juste v. Department of Health and Rehabilitative Services, 520 So. 2d 69 (Fla. 1st DCA 1988) (Uncorroborated hearsay cannot support the ultimate finding) and Strickland v. Florida A&M University, 799 So. 2d 276 (Fla. 1st DCA 2001) (University could not base its conclusions on hearsay alone) apply to preclude the testimony of FPL witnesses Jones, Dubin, and Avera. The OAG argues that the testimony of FPL witness Jones regarding the contents of the AIT is hearsay. OAG concludes that since witness Jones' testimony is not corroborated by the AIT report or any other report, the testimony is uncorroborated hearsay evidence and accordingly we may not use this testimony to support a finding of prudence. The OAG also states that witnesses Dubin and Avera's testimonies were based on the hearsay testimony of witness Jones, and likewise are not sufficient to support a finding of prudence.

The OAG also states that there is evidence in the record that FPL failed to comply with its own security policies. The OAG points out that witness Jones testified that to gain unescorted access to the plant, a person is subjected to a screening that includes: (1) a detailed background investigation, including verification of employment history, credit check, and a character verification, including reference checks, and where applicable, education and military checks, (2) each individual is required to pass a rigorous psychological examination consisting of nearly 600 questions, with responses screened for psychological stability and other characteristics, and may be subject to further psychological review as required, (3) an FBI criminal history verification, including fingerprints, with no disqualifying criminal background, and (4) a drug and alcohol screening with additional random drug and alcohol testing during the period of unescorted access. The OAG contends that the testimony of witness Jones is that failure to successfully complete any of these steps will result in the individual being denied unescorted access to FPL's nuclear facilities. And yet, according to the OAG, the FOIA response indicates that the person of interest had six arrests, failed a written psychological test, and had admitted to drug use. The OAG asserts that FPL approved the person of interest for unescorted access in violation of its own policy. The OAG concludes that the drilled hole incident was preventable. According to the OAG, not only did FPL fail to carry its burden of proof, but the evidence shows that the company acted imprudently in this circumstance.

In its brief, FPL states that the standard of review for recovery of fuel costs should be that of prudence. OPC contends that the burden of proving the prudence of expenditures is on the utility. FPL asserts that the standard of proof in administrative proceedings is whether the preponderance of the evidence supports the party's position. The OAG points out that uncorroborated hearsay cannot be used by an administrative tribunal to make a finding of fact. We agree with all of these statements. We shall consider whether FPL was prudent in its action to allow unescorted access to the person of interest. FPL has the burden of proving its actions were prudent. FPL must prove by a preponderance of the evidence that its actions were prudent. FPL may not use uncorroborated hearsay to prove its prudence.

To determine prudence, we must ask ourselves what a reasonable utility manager would do in light of the conditions and circumstances which he knew or reasonably should have known at the time the decision was made. See Order No. PSC-07-0816-FOF-EI, issued October 10, 2007, in Docket No. 060658-EI, In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers $143 million; and City of Cincinnati v. Public Utilities Commission, 620 N.E. 2d 826 (Ohio 1993). In making our decision, we will not apply hindsight review. Richter v. FPC 366 So. 2d 798 (Fla. 2d DCA 1979) (Hindsight makes a different course of action look preferable). It has been well established both by us and the State's courts that the burden of proof lies with the utility who is seeking a rate change (See Florida Power Corp. v. Cresse, 413 So. 2d 1187, 1191 (Fla. 1982); Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, in Docket No. 991643-SU, In re: Application for increase in wastewater rates in Seven Springs System in Pasco County by Aloha Utilities, Inc.; and Order No. 12654, issued November 3, 1983, in Docket No. 830001-EU, In re: Investigation of Fuel Adjustment Clauses of Electric Utilities).

The evidentiary standard we apply to prudence proceedings is whether there is a preponderance of evidence to support a finding of prudence. (See Balino v. HRS, 348 So. 2d 349 (Fla. 1st DCA 1977) cert. den., 370 So. 2d 458 (Fla. 1979); and Order No. 23232, issued July 20, 1990, in Docket No. 900001-EI, In re: fuel and purchased power cost recovery clause with generating incentive performance factor). Therefore, we review the evidence presented by FPL, as well as the intervenors, to determine if the preponderance of the evidence supports a finding that FPL was prudent. While we may consider hearsay evidence in making our decision, we cannot rely solely on hearsay evidence. That hearsay evidence must be supported by other facts within the record. (See Section 120.57(1)(c), Florida Statutes; Juste v. Department of Health and Rehabilitative Services, 520 So. 2d 69 (Fla. 1st DCA 1988); and Strickland v. Florida A&M University, 799 So. 2d 276 (Fla. 1st DCA 2001)).

While FPL states that it complied with NRC requirements and that the NRC report found FPL's handling of the drilled hole incident appropriate, OPC argues that the case centers on FPL's specific decision to grant unescorted nuclear plant access to the individual who drilled the hole. We agree with OPC. A finding that FPL was prudent hinges on FPL showing it prudently managed and exercised proper oversight of temporary contract personnel, including the person of interest, during the spring outage of 2006. In the following analysis, we determine that FPL's witness and the information FPL presented is not sufficient to meet FPL's burden to establish the prudence of FPL in management and oversight of temporary contract personnel during the spring outage of 2006.

In making our determination, we consider the burden of proof to be whether the preponderance of the evidence supports a finding of prudence. Both FPL and OPC sponsored testimony. Our analysis includes a review of the testimony and exhibits submitted by FPL in its direct case, including cross examination of the witness. Next we analyze OPC's witness and exhibits, including the cross examination of the witness. And finally, we analyze FPL's rebuttal testimony. FEA, FRF, and FIPUG did not file a post-hearing brief on issue 13C; therefore, pursuant to the prehearing order, FEA, FRF and FIPUG have waived their position on this issue.

While FPL submitted the testimony and exhibits of three witnesses - Jones, Avera, and Dubin - FPL's only witness regarding the details of management and oversight of temporary contract personnel was witness Jones. Witness Jones was Site Vice President of Turkey Point Nuclear Power Plant at the time of the incident. Witness Jones opined that FPL was reasonable and prudent based on his review of the NRC AIT report, his review of FPL's Corporate Security Investigative Report, his review of the NRC's March 18, 2008, notification letter of no further inspections, and his faith in FPL's staff and processes. The NRC AIT report is confidential and included in the record as Exhibit 3, Tab 8. FPL's Corporate Security Investigative Report is confidential, identified as Exhibit 9, and titled "2006 Turkey Point Outage Extension" for purposes of the record. The NRC's notification letter, dated March 18, 2008, is not confidential and was included in the record as Exhibit 2, Tab 24, at page 1045.

The OAG challenged the probative value of FPL witness Jones' testimony stating that witness Jones' opinion testimony is hearsay and is not corroborated by the NRC AIT report nor the NRC's notification letter. We agree that the documents used by witness Jones in fact do not support his testimony as to the prudence of FPL's actions. Our analysis addresses each of these documents and explains why these documents are insufficient or not dispositive in addressing the prudence of FPL's management and oversight of temporary contract personnel during the 2006 spring outage. In performing this analysis, we are mindful that most of the supervisors associated with the temporary contract personnel were the contractors themselves. FPL did not sponsor testimony by these supervisors. Additionally, we note that 10 CFR § 73.56(4) states:

> The licensee may accept an access authorization program used by its contractors or vendors for their employees provided it meets the requirements of this section. The licensee may accept part of an access authorization program used by its contractors, vendors, or other affected organizations and substitute, supplement, or duplicate any portion of the program as necessary to meet the requirements of this section. In any case, the licensee is responsible for granting, denying, or revoking unescorted access authorization to any contractor, vendor, or other affected organization employee.

(emphasis added) The licensee is FPL. Unescorted access refers to individuals FPL allows to enter a specific protected area of the power plant without accompaniment of another individual, supervisor, or security personnel.

Regarding the NRC AIT report, witness Jones opined that the NRC found FPL prudent and reasonable, although he acknowledges that those specific statements are not within the NRC AIT report. Based on the NRC's review, witness Jones believes the person of interest had been properly authorized to have unescorted access to the area where the pressurizer piping is located. Witness Jones also stated there was no report of aberrant behavior by that individual that would have warranted revoking or limiting access. FPL did not offer any internal records regarding access screening or other FPL data in support of witness Jones' testimony. We reviewed the NRC AIT report to determine its contents regarding FPL's management and oversight of temporary contract personnel.

*** begin confidential text ***

[redacted]

*** end confidential text ***

Consequently, we find that the NRC AIT report is insufficient or not dispositive in addressing the prudence of FPL in management and oversight of its temporary contract personnel. We performed similar reviews of Exhibit 9, FPL's Corporate Security Investigative Report, and the NRC's notification letter with the same results.

OPC challenged the sufficiency of witness Jones' opinion testimony regarding the actions of FPL's staff in reviewing and approving access to the person of interest. Specifically, OPC argues that we should have before us independent facts upon which to make our decision, not just witness Jones' faith in his corporate security manager's decision. We agree. While we understand that it is necessary for senior management to have faith in subordinates and the process in order to function as senior management, when presenting the facts of what occurred, we should have been presented with, at a minimum, the testimony of the management personnel who made the decision to allow unescorted access to the person of interest and supervised such personnel. FPL did not provide that testimony.

Rather than present the facts regarding the decision to grant unescorted access to the person of interest, witness Jones testified to the general conditions of FPL's access authorization process and security measures. Witness Jones testified at length regarding several characteristics of the FPL process used to screen personnel who are authorized to have unescorted access. Witness Jones described in general terms the measures FPL uses to control access after unescorted access is granted, such as a monthly supervisor review that includes behavioral observations and a continual observation program that is performed by peers, supervisors, and management. Witness Jones also noted that, for FPL employees or long-term contracted personnel, there was a re-investigation process in the event that someone brings forward a concern about an individual. The re-investigation process was also triggered based on the nature of the work or elapsed time. He noted that FPL deploys security officers to verify access into the containment structure and use of cameras to monitor work activities. He also stated that all of these processes were in full force and effect, and were applied to all personnel who had unescorted containment access.

While all such things are relevant to other aspects of prudently managing a nuclear power plant, we find that witness Jones' testimony is general in nature and does not disclose details pertaining to FPL's management and oversight of temporary contract personnel during the 2006 spring outage, and specifically does not address whether those procedures were followed with regard to the person of interest. For instance, when questioned, FPL witness Jones was unable to inform us of various specific, relevant details addressing FPL's management and supervision of contract personnel during the 2006 spring outage. The following are examples:

- Not aware prior to 2008 that the person of interest had a criminal history.
- Affirmed that allowing the confidential informant future access may be a concern because the confidential informant appears to have not made a timely report of vandalism. Witness Jones could not affirm the access status of the confidential informant.
- Did not know if FPL's background check information was provided for the psychologist's use in the screening process.
- Did not know what screening the contractors perform.
- Did not know whether, subsequent to January 2008, any additional NRC actions or FPL actions had occurred regarding letting employees know that they should not have apprehension to report thoughts or feelings about the safety or well-being of the plant.
- Did not know if the person of interest was being considered for layoff.
- Did not know if the person of interest complained to a supervisor or spoke to a supervisor regarding any frustrations.
- Did not know whether daily meetings between FPL and the variable workforce occurred during the April 2006 outage.

FPL witness Jones' rational for not knowing or providing such detailed information was that he did not need to know. Witness Jones considered much of this information as safeguarded and, as such, would not disclose it even when questioned by the bench. Witness Jones confirmed there was a process and procedure to gain access to the information. He also confirmed, both on cross and redirect examination, that he did not know, for the purposes in this proceeding, whether we or our staff met the need-to-know test. Since witness Jones stated that a disclosure/qualification process existed, we find that FPL had knowledge and opportunity to consider avenues of making the applicable safeguarded information available to us. However, nothing in the record demonstrates FPL's efforts to make information regarding management and oversight of temporary contract personnel, which FPL considers safeguarded, available to us.

FPL contends that the standard for approving the recovery of purchased power is the prudence standard, and not the OPC position of whether it is "fair, just, and reasonable" to

charge the ratepayers for the replacement fuel. We agree that the appropriate standard is prudence. OPC witness Larkin asserted that FPL's system to identify individuals who pose a risk to the company's property effectively failed, and that FPL's management is responsible for its operation and its failure. However, witness Larkin admitted that his assertion was not based on a review of FPL's system. He stated that:

> . . . the Commission doesn't need to find imprudence. All it needs to find is that it's just not fair, not just, not reasonable to ask ratepayers to pay a cost that they did not themselves cause.

He also asserted that this is not a new policy, and referenced our decision in Order No. 23232, in Docket No. 900001-EI, as an example. He represented that, in that case, we disallowed recovery based on determining management responsibility and not on a prudence review. We disagree with witness Larkin's apparent over-simplification of the case. Order No. 23232, at page 3, states, "In its March 1989 Operating Status Report to the NRC, FPL reported that Turkey Point Unit 3 was voluntarily shut down to allow for RCCO Re-qualification Exams for Licensed Operators." The NRC requires re-qualification exams which some of FPL's operators failed. (See page 6, Finding of Fact 2) FPL's management is required to maintain certified nuclear plant operators in order to keep the plants operating. FPL failed to have operators that passed NRC's required re-certification exams resulting in the Turkey Point Unit 3 not being available. Thus, our decision, as expressed in Order No. 23232, was based on a prudence review that found FPL mismanaged its operators.

FPL witness Dubin rebutted Witness Larkin's testimony by describing our historical practice of a prudence review as the standard for denying cost recovery. As previously discussed, we agree that we have a history of prudence reviews and we base our decisions on a preponderance of the evidence. Ms. Dubin agreed that failure of a utility to carry its burden of proving prudence could also justify a disallowance.

FPL witness Avera provided rebuttal testimony directed at warning us of potential consequences should we begin using a standard of fair, just, and reasonable, as posed by witness Larkin. These consequences include increased regulatory risk and perverse incentives against investment in generation resources with low energy cost, such as nuclear, wind or solar. However, witness Avera agreed, based on his experience, that we have disallowed recovery based on a utility's failure to carry its burden of proof.

We observe that FPL has had approximately two years to prepare for this proceeding. FPL is the principal source of information. Nevertheless, FPL chose to sponsor a witness who had no direct knowledge of the specific facts regarding the approval of the person of interest. His testimony, as asserted by the OAG, was hearsay. FPL did not offer any exhibits that corroborated the witness's testimony. When requested by us to provide specific facts and to respond to questions, the witness believed he and FPL had limited ability to disclose details regarding FPL's management and oversight of temporary contract personnel during the 2006 spring outage at Turkey Point Unit 3. There is nothing in the record describing FPL's efforts to make the appropriate safeguarded information available to us. Finally, FPL chose to rely on NRC documents that are not dispositive regarding the prudence of FPL's management and

oversight of temporary contract personnel during the 2006 spring outage at Turkey Point Unit 3. We conclude that the record does not present sufficient relevant facts concerning what FPL was aware of, or should have been aware of, regarding the management and oversight of temporary contract personnel during the 2006 spring outage.

We agree with OPC that the Aloha order, Order No. PSC-01-0326-FOF-SU, supra, is controlling. The utility had the burden of proving the prudence of its costs. We find that FPL had reasonable opportunity to carry it's burden, but failed to provide evidence that would show it prudently managed and exercised proper oversight of temporary contract personnel during the spring outage of 2006. FPL failed to show the replacement fuel cost of $6,130,000 was prudently incurred, and therefore FPL shall be required to implement a customer refund, with interest.

Customer Refund

FPL provided an estimate based on our requiring a refund over a 12 month period starting in January of 2009. In Exhibit 56, dated November 7, 2008, FPL noted that the replacement fuel cost plus interest totaled $6,667,227. Exhibit 56 also provides an estimate of the residential bill assuming 1000 kWh usage and with the November total of $6,667,227, refunded to customers over the 12 months of 2009. Comparing Exhibit 15 with Exhibit 56 shows that making the refund over the entire year results in a $0.06 monthly residential bill reduction for 1000 kWh usage. However, because the monthly bill reductions on an annual basis are relatively small, we direct that FPL shall implement the refund in the form of a one-time credit on retail customers' bills, beginning with the first day of the first billing cycle 30 days after the final order is issued. Refunds to customers shall be completed as expeditiously as reasonably possible. To the extent that the actual refund made does not equal the replacement fuel costs, plus interest, FPL shall report the difference to us at the end of the billing cycle. We acknowledge that FPL could incur administrative costs associated with a one-time refund. However, there is no record evidence addressing the level of such costs.

We direct that only retail customers of record shall receive a refund. The refund shall be applied as a cent per kilowatt-hour credit to customer bills in the month the refund is made. FPL shall put a note on the bill stating that a credit was made, the amount of the credit, and that the credit is a result of our decision in Docket No. 080001-EI, the 2008 Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor proceeding.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the findings set forth in the body of this Order are hereby approved. It is further

ORDERED that Florida Power & Light Company failed to carry its burden of proving the replacement fuel cost of $6,130,000 was prudently incurred. It is further

ORDERED that Florida Power & Light Company shall refund to its customers $6,130,000 plus interest. It is further

ORDERED that Florida Power & Light Company shall implement the refund in the form of a one-time credit on retail customers' bills, beginning with the first day of the first billing cycle 30 days after the final order is issued. It is further

ORDERED that only retail customers of record shall receive a refund and that refund shall be applied as a cent per kilowatt-hour credit to customer bills in the month the refund is made. It is further

ORDERED that Florida Power & Light Company shall put a note on the bill stating that a credit was made, the amount of the credit, and that the credit is a result of our decision in Docket No. 080001-EI, the 2008 Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor proceeding. It is further

By ORDER of the Florida Public Service Commission this 7th day of January, 2009.

ANN COLE
Commission Clerk

(SEAL)

LCB

CONCURRENCE BY: COMMISSIONER SKOP

COMMISSIONER SKOP, concurring specially with comment:

I concur with the unanimous decision of the Commission. The record evidence clearly reflects that if the second co-worker had immediately reported what the person of interest told him, the drilled hole could have been discovered and repaired during the planned outage preventing the need to purchase power altogether.[5] By its own admission, FPL had direct involvement in the screening, hiring, training, access granting, and management oversight of temporary contract personnel during the spring outage of 2006. Accordingly, FPL should not be permitted to shift risk directly to the ratepayers without being held accountable for its own

[5] Transcript (pages 774-777) of Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor Hearing, Hearing Issue 13C; November 6, 2008.

involvement with respect to the incident in question. Had FPL been willing to take some responsibility for its actions at hearing, a different remedy may have been more appropriate and warranted.

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Chronology of Investigations

During the spring 2006 outage at Turkey Point Unit 3, FPL authorized persons to access the containment building to perform scheduled work. After the work had been completed, on March 31, 2006, a 3/16 inch hole was found in the pressurizer piping during preliminary restart testing and inspections. FPL then began searching for other possible damages and informed various agencies of possible sabotage. The primary agencies are the Nuclear Regulatory Commission (NRC), which has jurisdiction over radiological safety, and the Federal Bureau of Investigation (FBI), which has investigative jurisdiction. FPL also suspended access of the 1,137 persons whom FPL had allowed to enter the containment building during the period March 9-31, 2008. FPL's reinstatement of access for each of the 1,137 persons was subject to FBI interview and psychological screenings.

The NRC assembled an Augmented Inspection Team (AIT) which was tasked to: (1) review the facts surrounding a licensee-identified hole in the pressurized piping; (2) assess the licensee's response and investigation of the event; (3) identify any generic issues associated with the event; and (4) conduct an independent extent of condition review. Additionally, the NRC Office of Investigations participated as a member of AIT by coordinating efforts and as liaison with the FBI. The AIT completed its inspection April 6, 2006, and provided an inspection report dated April 26, 2006. The NRC AIT report was entered into the record as Exhibit 3, Tab 8. The NRC AIT inspection report identified concerns.

*** begin confidential text ***

[redacted]

*** end confidential text ***

The FBI investigation revealed tool marks near the hole in a piece of strapping that held the lagging around the piping. There was also a pressure mark and drill chuck marks. The FBI Laboratory Tool Marks Unit examined the evidence, but the tool marks were not identifiable and the FBI was unable to use them for comparison with specific drill bits and/or drills. No other forensic evidence, including video surveillance, was available.

On April 7, 2006, the FBI issued a press release requesting anyone with information to contact the FBI. The press release included a $100,000 reward. FPL completed its inspection for other damages, repaired the affected pressurizer piping and the plant was restarted on April 10, 2006, without further incident.

On April 25-26, 2006, during an FBI interview, an individual (Person A) advised of someone (Person B, or person of interest) who claimed to have drilled a hole in a pipe while working at the Turkey Point nuclear power plant. Person A asserted that Person B was frustrated with rules and regulations, had problems with the background check, failed the psychological examination, was ordered to see a psychologist, and complained about how much time it was taking to begin working inside the plant. Once working, Person B complained about the drills not being powerful or sharp enough, insufficient pay, and an earlier layoff than previously promised. On or about March 14, 2006, Person B is alleged to have stated that he finally got a drill bit that worked and drilled a hole in a pipe.

Notes of NRC field staff, dated November 3, 2006, reflect inquiries into the status of the Personnel Access Database (PAD) records for both Person A and B. PAD is a national database used by all nuclear power plant operators with information regarding individuals which have been allowed access by nuclear power plant operators. PAD provides a flag for further inquiry. At that time, both persons were included in the PAD.

On March 27, 2007, during an FBI interview, Person B denied culpability. Additionally, Person B stated employment at Turkey Point began on either February 18 or 20, 2006, and ended April 7, 2006. Person B described the work as a good experience and would work at Turkey Point again if given the opportunity. Notes of NRC field staff, dated April 13, 2007, record FBI concern of Person B obtaining future access to nuclear plants.

The FBI investigation revealed both Person A and Person B had access to the area where the hole was drilled. The FBI investigation and NRC notes show Person B had a criminal history, a negative psychological evaluation prior to employment, and that Person B had checked out a cordless drill on March 20, 2006.

An NRC internal memorandum, dated September 11, 2007, noted that the United States Attorney's Office did not accept the case for prosecution. The NRC was still considering options relative to the FBI investigation.

By letter dated March 18, 2008, the NRC informed FPL that based on the results of NRC inspection during the AIT, the results of the FBI investigation, and the actions that FPL took in response to the event, the NRC did not plan to conduct any further inspection. FPL witness Jones stated that FPL was informally notified that the NRC does not have sufficient evidence to pursue civil enforcement action against the individual.