

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: October 12, 2006

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Economic Regulation (Lester, McNulty)
Office of the General Counsel (Bennett, Keating)

RE: Docket No. 060001-EI – Fuel and purchased power cost recovery clause with generating performance incentive factor.

AGENDA: 10/24/06 – Regular Agenda – Decision on Motion for Reconsideration of Non-Final Order – Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Carter

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060001.RCM.DOC

Case Background

By Order No. PSC-06-0568-CFO-EI, issued June 30, 2006, in Docket No. 060001-EU – In re: Fuel and purchased power cost recovery clause with generating performance incentive factor, the Prehearing Officer granted in part and denied in part Florida Power and Light Company's (FPL) November 3, 2005, Request for Confidential Classification of Certain Information Responsive to Staff's First Set of Requests for Production of Documents (Petition). FPL filed a timely motion for reconsideration of certain portions of the Order that denied its request on July 17, 2006. FPL requested oral argument. No party filed a written response to FPL's motion. For the reasons discussed below, especially in light of the new information raised by FPL, staff recommends that reconsideration be granted.

Docket No. 060001-EI
Date: October 12, 2006

The Commission has jurisdiction pursuant to Sections 350.01 and 366.093, Florida Statutes.

Discussion of Issues

Issue 1: Should FPL's Request for Oral Argument be granted?

Recommendation: No, oral argument should be denied. Staff believes that the motion is clear on its face. However, if the Commission believes that oral argument would be helpful, it has the discretion to hear from FPL and FPL's argument should be limited to five minutes. (Bennett)

Staff Analysis: By separate motion, FPL seeks oral argument on its motion for reconsideration. Rule 25-22.0376, Florida Administrative Code, provides that the Commission, at its discretion, may grant a request for oral argument on a motion for reconsideration of a non-final order, such as Order No. PSC-06-0568-CFO-EI. The Commission has traditionally granted oral argument upon a finding that oral argument would aid the Commission in its understanding and disposition of the underlying motion. FPL's arguments set forth in its motion are well-articulated. Staff believes the underlying motion is clear on its face and oral argument is not necessary to aid the Commission in its decision on the motion. Therefore, staff recommends that the Commission deny FPL's request for oral argument.

However, if the Commission believes that oral argument would be helpful, it has the discretion to hear from FPL. Pursuant to Rule 25-22.0376(5), "[a] party who fails to file a written response to a point on reconsideration shall be precluded from responding to that point during oral argument." Accordingly, if the Commission decides to hear oral argument, the other parties to the docket should be precluded from addressing the Commission. Staff also recommends that if the Commission decides to hear oral argument, FPL's argument be limited to five minutes.

Issue 2: Should FPL's Motion for Reconsideration of Order No. PSC-06-0568-CFO-EI be granted?

Recommendation: Yes. FPL's Motion for Reconsideration should be granted. (Bennett)

Staff analysis:

Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974);

Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So.2d 96 (Fla. 3rd DCA 1959) citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

The Order under Review

Among other things, Order No. PSC-06-0568-CFO-EI denied confidential treatment to certain information contained in FPL's response to Staff's Request for Production of Documents (No. 3). In its request for confidential treatment, FPL cited Section 366.093(3)(d) and (e) as the statutory justification and argued that this information was entitled to confidential treatment because it was "information concerning bids or other contractual data and information relating to competitive interests. Disclosure of this information would impair the competitive interest of FPL, as well as FPL's ability to contract on favorable terms." The prehearing officer disagreed and determined that the information was generic information concerning FPL's pre-hurricane and post-hurricane plans, and found that the information did not "reflect information containing bids or other contractual data or information relating to competitive interests nor [does it] include employee personnel information." As such, this information was denied confidential treatment.

FPL's Motion

FPL's response to Staff's Documents No. 3 contained its Energy Marketing and Trading Operations – 2005 Hurricane Response Plan (the EMT plan), for which the Commission denied confidential treatment for Tabs 1-6, 9, and 10. The utility agrees that Tabs 3, 6, and 9 do not require confidential treatment, and does not seek reconsideration for this part of the Order. FPL does seek reconsideration for that portion of Order No. PSC-06-0568-CFO-EI that denied confidential treatment for Tabs 1, 2, 4, 5, and 10. In its motion, FPL states there are errors in the original petition filed by FPL and the Order. FPL asserts that because of these errors, the Commission did not consider or overlooked important facts or law.

In its motion, FPL argues that Tabs 1, 2, 4, 5, and 10 contain "security-sensitive information" that should be granted confidential treatment under Section 366.093(3)(c), Florida Statutes. FPL acknowledges that its request for confidential treatment failed to mention subsection (3)(c), which provides that proprietary confidential business information includes "security measures, systems, or procedures." FPL argues that the information is pertinent to the operation of its electric generating system in the wake of hurricanes. Substantial disruptions of the fuel supply could easily result in major shortfalls in available generating output relative to system demand, putting severe strains on the economy, social and governmental services, and individual customers at a time when challenges to recovery efforts already abound, according to FPL. The EMT plan, states FPL, outlines logistics and procedures FPL intends to use to avoid or at least minimize fuel supply disruptions in the wake of hurricanes. If the EMT Plan were disclosed to the public, FPL alleges that disclosure of Tabs 1, 2, 4, 5 and 10 of the EMT Plan

would compromise FPL's ability to ensure adequate fuel supplies during and following hurricane conditions.

FPL also explains in its motion, for the first time, that certain pages within Tabs 1, 2, 4, 5 and 10 contain employees' names, home telephone numbers, personal cell phone numbers, and satellite phone numbers. The purpose of the information is to identify key personnel who need to be contacted in hurricane conditions and to provide contact information for those employees. The contact information is needed by FPL to facilitate rapid and reliable communications in connection with hurricane responses. Normally, FPL personnel would not expect the contact information to be publicized and the information would be used solely for hurricane-response purposes. According to FPL, in the event of a hurricane, if the general public had key employee telephone numbers, the communication chain could be disrupted by customers contacting individual employees versus using the established customer communication channels. Employees receiving calls from the general public following a hurricane could disrupt the performance of their responsibilities for ensuring post-hurricane fuel supply.

Analysis

After reviewing FPL's motion and original request, and in light of the new information provided by FPL, staff recommends that the Commission grant FPL's motion to reconsider that portion of Order No. PSC-06-0568-CFO-EI that denies confidential treatment for Tabs 1, 2, 4, 5 and 10 of FPL's response to Staff's Request for Production of Documents (No. 3). Staff maintains that the prehearing officer's order was correct based on the facts in front of him at the time the order was signed; however, there were points of law overlooked and mistakes of fact made based on the new information provided by FPL. The Order failed to consider that Section 366.093(3)(c) provides that proprietary confidential business information includes "security measures, systems, or procedures," in large part because the utility failed to argue this point before the Commission. FPL's request also failed to reference Section 366.093(3)(f), Florida Statutes, which provides that "employee personnel information unrelated to compensation, duties, qualifications, or responsibilities" should be afforded confidential treatment. While the order referenced "employee personnel information," the order incorrectly cited the wrong subsection for this provision of the statute. Normally, telephone numbers and names of employees are granted confidentiality, but in this particular circumstance the telephone numbers were to be used in the performance of the employees duties as part of the hurricane response plan. Accordingly, the Order denied confidential treatment of that personnel information. In its motion for reconsideration, FPL explains, for the first time, that the purpose of this compilation of the employee personnel information is to provide a clear chain of those employees who must be contacted in the event of a hurricane, and that it could be disruptive to hurricane restoration efforts if this information were to be made public.

Conclusion

Based on this new information provided by FPL as described above, staff recommends that the requested portions of the EMT Plan meet the requirements for confidentiality contained in Section 366.093, Florida Statutes. The information found in Tabs 1, 2, 4, 5 and 10 of the EMT Plan, which was produced by FPL in response to Request No. 3 of Staff's Request for Production of Documents, contains information which relates to "[s]ecurity measures, systems,

or procedures” or employee information that could be harmful to FPL’s storm restoration efforts if it were to be made public. The facts as applied to the correct provisions of Florida Statutes were not before the Commission at the time Order No. PSC-06-0568-CFO-EI was issued, and therefore were overlooked or not considered. Accordingly, this Motion for Reconsideration should be granted. Tabs 1, 2, 4, 5, and 10 of the EMT Plan should be afforded confidential treatment.

Issue 3: Should this docket be closed?

Recommendation: This docket is an ongoing docket and should remain open. (Bennett)

Staff Analysis: The fuel and purchased power cost recovery docket is an ongoing docket and should remain open.