



# Public Service Commission

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**DATE:** JULY 21, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

**FROM:** DIVISION OF <sup>meq</sup>ELECTRIC AND GAS (DUDLEY, BALLINGER, BASS, FLOYD, HAFF, KUMMER)  
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (NORIEGA, STALLCUP)  
DIVISION OF LEGAL SERVICES (ELIAS, PAUGH)

**RE:** DOCKET NO. 981890-EU - GENERIC INVESTIGATION INTO THE AGGREGATE ELECTRIC UTILITY RESERVE MARGINS PLANNED FOR PENINSULAR FLORIDA.

**AGENDA:** 07/27/99 - REGULAR AGENDA - MOTIONS FOR RECONSIDERATION OF PREHEARING OFFICER'S ORDER - DECISION PRIOR TO HEARING - PARTIES - MAY PARTICIPATE AT THE DISCRETION OF THE COMMISSION

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\981890.RCM

### CASE BACKGROUND

On June 30, 1999, a Status Conference and Preliminary Prehearing Conference was held pursuant to Order No. PSC-99-1229-PCO-EU, issued June 22, 1999. During the Conference, several of the parties raised issues challenging the nature of this docket as an investigation being conducted as a formal evidentiary hearing. On July 1, 1999, Order No. PSC-99-1274-PCO-EU (Order) was issued, in which the Prehearing Officer ordered that the docket shall proceed as a formal evidentiary proceeding. In addition, the Order defines the scope of the proceeding, establishes the issues in the docket, and revises the filing dates for utility and intervenor testimony.

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FPSC-RECORDS/REPORTING

DOCKET NO. 981890-EU

DATE: July 21, 1999

On July 9, 1999, Florida Power Corporation (FPC) filed a Motion For Reconsideration Of Order No. PSC-99-1274-PCO-EU and a Request For Oral Argument. On July 12, 1999, Florida Power & Light Company (FPL, or collectively with FPC, the companies) filed a Motion For Reconsideration of the Order and a Request For Oral Argument. On July 20, 1999, Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. and Duke Energy North America, L.L.C. (Duke) filed a Consolidated Response To Motions For Reconsideration. This recommendation addresses the Requests for Oral Argument, Motions for Reconsideration and Consolidated Response.

### **DISCUSSION OF ISSUES**

**ISSUE 1:** Should Florida Power Corporation's and Florida Power & Light Company's Requests For Oral Argument be granted?

**RECOMMENDATION:** No. FPC and FPL have failed to comply with the specificity requirements of Rule 25-22.058, Florida Administrative Code, regarding requests for oral argument. However, this is a decision prior to hearing. The Commission has the discretion to allow interested persons to participate. [PAUGH]

**STAFF ANALYSIS:** Rule 25-22.058, Florida Administrative Code, governs requests for oral argument in formal proceedings. Rule 25-22.058(1), Florida Administrative Code, states that the request "...shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it."

FPC and FPL's Requests For Oral Argument fail to state with particularity why the oral argument would aid the Commission in comprehending the issues. FPC's Request states only that oral argument "would be beneficial" to the Commission. FPL states only that "oral argument would be helpful" to the Commission. Both FPC and FPL fail to elaborate any reason why oral argument would assist the Commission with its deliberations. As such, FPC's and FPL's requests for oral argument fail to meet the specificity requirement of the Rule and should be denied. Notwithstanding this failure to demonstrate a need for oral argument, this is a decision prior to hearing. The Commission has the discretion to allow interested persons to participate.

DOCKET NO. 981890-EU

DATE: July 21, 1999

**ISSUE 2:** Should Florida Power Corporation's and Florida Power & Light's Motions For Reconsideration of Order No. PSC-99-1274-PCO-EU, issued July 1, 1999, Docket No. 981890-EU, be granted?

**RECOMMENDATION:** No. FPC's and FPL's Requests For Reconsideration do not identify a matter of fact or law which the Commission overlooked or failed to consider in rendering the Order. Both Motions For Reconsideration reargue matters previously considered by the Prehearing Officer. In addition, the Motions fail to identify a mistake of fact or law. Therefore, both Motions should be denied. [PAUGH]

**STAFF ANALYSIS:** It is well settled that an agency may reconsider its order if the order is found to have been based on mistake, inadvertence or a specific finding based on adequate proof of changed conditions. People's Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966). The purpose of a reconsideration proceeding is to bring to the attention of the agency some matter which it overlooked or failed to consider when it rendered its order. Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962). The mere fact that a party disagrees with the order is not a basis for rearguing the case. Id. Nor is reweighing the evidence a sufficient basis for reconsideration. State v. Green, 104 So.2d 817 (Fla. 1st DCA 1958)

#### FPC's Motion For Reconsideration

The gravamen of FPC's Motion, and its argument at the Status Conference, is that the Commission cannot initiate an investigation as a formal evidentiary hearing. According to FPC, investigations may only be initiated by the Commission as informal proceedings. To do otherwise, "...flagrantly violates the directives the Legislature has set forth in the Administrative Procedures Act, ... and the directives of the United Statutes and Florida constitutions, ..." (FPC Motion, pg. 9) As authority for its position FPC states that Rule 25-22.036(3), Florida Administrative Code, cannot be the basis for initiating this investigation because this Commission's request for an exception to that rule was denied by the Administration Commission. FPC also relies on Rule 28-106.101(2) of the Uniform Rules of Procedure which excepts agency investigations from application of the rules governing decisions determining substantial interests. Rule 28-106.101, Florida Administrative Code, states in part:

DOCKET NO. 981890-EU

DATE: July 21, 1999

#### 28-106.101 Scope of this Chapter

This chapter shall apply in all proceedings in which the substantial interests of a party are determined by the agency and shall be construed to secure the just, speedy, and inexpensive determination of every proceeding. This chapter applies to all proceedings under Chapter 120 except as follows:...

(2) Agency investigations or determinations of probable cause preliminary to agency action;....

According to FPC, the Commission lacks authority to conduct any investigation as a formal evidentiary proceeding. To conduct this proceeding as an evidentiary hearing, opines FPC, denies the company an adequate opportunity to address the issues raised. This could, claims FPC, expose the utility to a penalty, in violation of its due process right to notice.

#### FPL's Motion For Reconsideration

The gravamen of FPL's Motion, and its argument at the Status Conference, is that the Order Establishing Procedure, Order No. PSC-99-0760-PCO-EU, issued April 20, 1999, was issued pursuant to Rule 28-106.211, Florida Administrative Code, which is applicable only to hearings involving disputed issues of material fact. Hearings involving disputed issues of material fact, FPL opines, do not include agency investigations because of the exception for agency investigations contained in Rule 28-106.101(2), Florida Administrative Code, quoted above. FPL also states that Rule 25-22.036(3), Florida Administrative Code, cannot provide a basis for this proceeding because "[q]uite simply, this rule, was displaced by the Uniform Rules and the Commission's request for an exception was denied by the Administration Commission. It can no longer apply to proceedings affecting substantial interests or be the basis for initiation of such proceedings." (FPL Motion, pg. 6)

#### Duke's Consolidated Response

In its Consolidated Response, Duke traces the procedural history of this docket with particular focus on the extensive involvement of FPC, FPL and Tampa Electric Company. The purpose of Duke's analysis is to illustrate that those parties have actively participated in issue identification and refining the scope of the docket over a period of four months. It is against this background

DOCKET NO. 981890-EU  
DATE: July 21, 1999

that Duke rebuts the allegations of FPC that the Commission has failed to provide legally sufficient notice of the proceeding in contravention of FPC's Florida and United States Constitutional right to due process. Likewise, Duke rebuts FPL's allegation that this docket cannot proceed as a 'decision determining substantial interests' without violating FPL's due process rights. Citing applicable caselaw and Florida Statutes<sup>1</sup>, Duke opines that the Commission has given "...legally sufficient notice of all actions that it is contemplating taking in this proceeding". (Duke Response, pg. 5) In short, Duke argues that the Motions For Reconsideration should be denied because the Commission has the requisite statutory authority to proceed with the docket, there has been no violation of any parties' due process rights, and the proceeding has been properly commenced. Staff agrees with Duke's analysis.

#### Analysis

Neither FPC nor FPL have pled cognizable claims for reconsideration because they merely reargue their case. FPC and FPL argued these same issues in their pleadings requesting the Status Conference and during the extensive oral argument before the Prehearing Officer at the Status Conference. In short, these questions have been asked and answered. The Order unequivocally states that Rule 28-106.101(2), Florida Administrative Code, does not supersede the Commission's statutory jurisdiction to proceed with an investigation as a formal evidentiary proceeding. The Order also holds that Rule 25-22.036(3), Florida Administrative Code, controls the initiation of this proceeding. The mere fact that FPC and FPL disagree with the Order is not a basis for reconsideration. Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962)

Clearly, FPC and FPL have not met the substantive requirements under the law of reconsideration. In addition, the companies have failed to demonstrate that the Order is based on any mistake of

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Varney v. Florida Real Estate Commission, 515 So.2d 383 (Fla. 5th DCA 1987); Henry v. State Department of Administration, 431 So.2d 677 (Fla. 1st DCA 1983); Inquiry Concerning Davey, 645 So.2d 398 (Fla. 1994); Wagman v. Florida Board of Medicine, 590 So.2d 12 (Fla. 1st DCA 1991); Section 120.569(2)(c), Florida Statutes.

DOCKET NO. 981890-EU

DATE: July 21, 1999

fact or law. The companies' analysis of the Commission's investigatory jurisdiction and their interpretation of the decision of the Administrative Commission is wrong. It cannot seriously be disputed that the Commission may proceed with this investigation as a formal evidentiary proceeding. Section 350.123, Florida Statutes grants the Commission plenary procedural jurisdiction to effectuate its statutory obligations. Section 350.123 states:

The Commission may administer oaths, take depositions, issue protective orders, issue subpoenas, and compel the attendance of witnesses and the production of books, papers, documents, and other evidence necessary **for the purpose of any investigation or proceeding.**" (emphasis added)

Section 366.05(1), Florida Statutes, authorizes the Commission to "...require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto;..." Clearly, the Commission has the explicit statutory authority to require any public utility to add facilities, including supply resources, when necessary to assure adequate service. To do so, the Commission must necessarily investigate the adequacy of the facilities, in this case, planned reserve margins.

At the Status Conference, FPC and FPL argued vociferously that since passage of the Uniform Rules of Procedure, the Commission may only 'investigate' in an informal proceeding. Therefore, they asserted, discovery could not be permitted, there could be no parties or intervenors, witnesses could not be called to testify and no action or final order could be rendered following the proceeding. (TR Status Conf. Pgs. 14, 15, 17, 19, 23, 25, 29, 38 & 58) The companies' position is in direct conflict with the Commission's manifest authority under Chapters 350 and 366, Florida Statutes.

FPC and FPL are also wrong about the interplay between the Uniform Rules of Procedure and the Commission's Rules of Procedure. Contrary to the arguments of the companies, formal evidentiary proceedings (or hearings involving 'disputed issues of material fact') pending before the Public Service Commission are not governed solely by Chapter 28-106. Certain provisions of Chapter 25-22 were retained by the Commission as a result of the rulings of

DOCKET NO. 981890-EU

DATE: July 21, 1999

the Administration Commission. Thus, Chapter 28-106 must be read in conjunction with the remaining portions of Chapter 25-22 and the Commission's statutory obligations. One of the provisions retained by the Commission is Rule 25-22.036, *Initiation of Formal Proceedings*, subsection (3). The subsection states that the Commission may, on its own motion, issue an order or notice initiating a proceeding. This is the procedure followed in the instant docket.

FPC's and FPL's argument that because the Commission's request for an exception to subsection Rule 25-22.036(3), Florida Administrative Code, was denied, the Rule no longer provides a point of commencement for a formal proceeding, is an incorrect interpretation of the Administration Commission's decision. The request for an exception was denied because subsection (3) was deemed by the Administration Commission to be outside the scope of Rule 28-106, Florida Administrative Code. Therefore, an exception was not necessary. Subsection (3) has been retained by the Commission and remains in full force and effect as evidenced by the Commission's recently completed rule revisions. Thus, the provisions of Chapter 28-106, Florida Administrative Code, are supplemental to, but do not supersede, the provisions of Chapter 25-22, Florida Administrative Code, retained by the Commission.

In sum, FPC's and FPL's Motions For Reconsideration should be denied because they merely reargue matters considered at the Status Conference and addressed in the Order, and because they fail to identify any mistake of fact or law upon which the Order is based. The companies' arguments regarding alleged due process violations are spurious given their extensive involvement in these proceedings heretofore. Finally, the companies' attempt to limit the Commission's ability to carry out its statutory duties to assure an adequate and reliable source of energy for the state by bootstrapping inapplicable rule requirements as purportedly not permitting evidentiary investigations, is in clear contravention of this Commission's statutory duties and jurisdiction. Staff finds it ironic that in the context of procedures designed to identify issues, thus affording all parties an opportunity to a full and fair hearing on the merits, the utilities are claiming that there are due process violations.

DOCKET NO. 981890-EU  
DATE: July 21, 1999

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No.

**STAFF ANALYSIS:** This docket should remain open pending the hearing currently scheduled for November 2-3, 1999.