

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 26, 2008

ATTORNEY GENERAL'S CORRECTED BRIEF ON ISSUE 13C

It is undisputed that FPL has the burden of proof in showing that they acted reasonably in this matter. Unfortunately, FPL presented uncorroborated hearsay which this Commission may not rely upon in reaching its decision. See *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 evidence alone.).

In this case, FPL's main expert on this issue, T.O. Jones, repeatedly made statements about the Augmented Investigation Team's (AIT) findings related to FPL's compliance with the NRC's guidelines,

An Augmented Inspection Team is a team of inspectors that's dispatched by the NRC regional headquarters that consists of a number of inspectors in a number of areas with a charter, and their charter was to review the event, our response to the event, to examine and inspect our programs, our processes, our personnel, review the physical security plan, and to verify that we were in compliance with our processes, programs, and procedures, and that not only were we in compliance with those processes, programs, and procedures, but they were in full compliance with those as required by the Nuclear Regulatory Commission.

Jones Testimony, Record page 565-566. (Record page hereinafter referred to as "R".) (Emphasis supplied) See also R1266-1267. This is uncorroborated hearsay and is contradicted by the report of the AIT. See Exhibit 54, page 7, last paragraph, Bates No. FCR -08-9395, Confidential

Letter dated April 26, 2008:

(Redacted portion)

It should also be noted that the last exhibit from the NRC didn't indicate that any further investigation was done by the NRC and that they based their decision that FPL had appropriately responded to this incident on the AIT report. Letter bated stamped 88928-88929 in Staff's Composite Exhibit 2. Mr. Jones also admitted that the NRC closed out its investigation based upon the AIT and FBI reports. R1266, line 25-1267, line 1. Clearly, the NRC did not present any compliance report determining that FPL acted in compliance with its security guidelines. The reports only addressed the response and not compliance with security guidelines. Since Mr. Jones testified that FPL was in compliance with the NRC guidelines is uncorroborated by any evidence, the Commission may not rely on this testimony in determining whether FPL acted reasonably and prudently.

Since both Ms. Dubin and Dr. Avera did not participate in the NRC investigation and relied on the uncorroborated hearsay supplied by Mr. Jones, this Commission may not base its decision on their opinions either. R1180.

There is also evidence that FPL failed to comply with its own security policies. Mr. Jones testified that in order to gain unescorted access to the FPL nuclear plant, a person is subjected to the following screening:

* Each individual is subject to 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.

* Each individual is required to pass 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.

* Each individual is required to successfully complete an FBI criminal history verification, including fingerprints, with no disqualifying criminal background.

* Each individual must successfully complete drug and alcohol screening and is then subject to random drug and alcohol testing during the period of unescorted access.

Failure to successfully complete any of these steps will result in the individual being denied unescorted access to FPL's nuclear facilities. Jones pre-filed testimony page 7-8.

Despite Jones' testimony that the saboteur passed the screening test, the NRC reports indicated that information taken from FPL records showed that the person had six arrests for crimes ranging from criminal recklessness and criminal mischief (charges dismissed); driving under the influence (pleaded guilty); discharging a firearm in public (dismissed); public intoxication(d dismissed); and reckless driving (dismissed). (Exhibit 54, FOIA Report, page 12) The records also showed that the person had failed the written psychological test and had admitted drug use despite refusing to answer questions about drug treatment.

FPL approved this person for unescorted access despite all of these red flags and violation of its own policy. Mr. Jones also showed no interest in improving FPL's policies to prevent this kind of incident again. Mr. Jones did admit, however, that had FPL viewed this person's arrests, drug/alcohol problem and failure of the psychological test as red flags and

used them to prohibit him from unescorted access, this incident would have been prevented. (R696-707) It is also undocumented that there was any follow-up to determine why some of the charges were dismissed or whether the criminal mischief charge involved a graffiti spree versus an act of violence. Mr. Jones admitted that he did not know the details of the criminal mischief charge (R705). Although Mr. Jones testified that random drug screening is important to determine whether the employee is fit for duty, FPL permitted this person unescorted access despite admitted drug use, a conviction for DUI, and his refusal to discuss any drug treatment he was undergoing (R694-695).

Mr. Jones testimony and the record clearly demonstrate that FPL failed to do all that it could have done to prevent this incident. Further, since FPL had the burden of proof, it could have requested release of any document needed to support its position and filed a motion for protective order so that the Commission could have known the details of FPL's security protocols and considered all the facts necessary to determine whether FPL acted reasonably. In failing to do so, FPL failed to demonstrate with sufficient non-hearsay evidence that it acted reasonably and prudently.

The second issue raised at hearing was the concern that the saboteur had admitted to another employee that he had drilled the hole but the employee had failed to report it in a timely manner. A concern was expressed about whether employees are encouraged to report negative incidents like the drilled hole or whether FPL looked unfavorably upon the filing of such reports. The Commission should consider Confidential Exhibit 3, document No. 06271-08, the last letter dated February 11, 2008, as well as the recommendations contained in the independent assessment at Exhibit 58.

It is undisputed that FPL acted appropriately once the hole was discovered, with a few

exceptions. FPL should have taken action to ensure that there was a public record of the saboteur's misdeeds and to take action against a responsible party so that the customers did not have to bear the expense of such a preventable incident. It must also be noted that FPL did not pursue insurance or bonds or indemnification agreements with the contractor which would have protected the consumers. Although FPL denied it at the hearing, common sense tells us that if FPL had known it would bear the expense of such an incident, it would have done something more to lower the risk and prevent such an incident.

Nuclear energy is the future of Florida and it is critical that the public know that it is safe because the companies are doing everything possible to make it so. In cases such as this where the company has failed to carry its burden, it is essential that this Commission take action to let the company know that such unreasonable and imprudent action will not be allowed.

Based upon the foregoing, we urge this Commission to find that FPL did not act reasonably or prudently and to require the monies related to this incident be refunded to the customers.

Respectfully submitted,

BILL McCOLLUM
Attorney General

/s/Cecilia Bradley
CECILIA BRADLEY
Senior Assistant Attorney General
Florida Bar No. 0363790

Office of the Attorney General
PL 01 The Capitol
Tallahassee, FL 32399-1050
Telephone (850) 414-3300
Facsimile (850) 488-4872

DOCKET NO. 080001-EI
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **Attorney General's Corrected BRIEF ON ISSUE 13C** has been furnished by U.S. Mail and electronic mail to the following parties on this 26th day of November, 2008.

Keino Young, Esquire
Lisa Bennett, Esquire
Jean Hartman, Esquire
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Paul Lewis, Jr.
Director, Regulatory
Progress Energy Florida, Inc.
106 E. College Ave., Suite 800
Tallahassee, FL 32301

James Beasley
Lee Willis
Ausley Law Firm
P.O. Box 391
Tallahassee, FL 32302

Ken Hoffman
Florida Power & Light Co.
215 S. Monroe St., Suite 810
Tallahassee, FL 32301-1859

R. Wade Litchfield, Esq.
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408-0420

Susan D. Ritenour
Richard McMillan
Gulf Power Company
One Energy Place
Pensacola, FL 32520-0780

Norman H. Horton, Jr.
Fred R. Self
Messer Law Firm
P.O. Box 15579
Tallahassee, FL 32317

John T. Butler, Esq.
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408-0420

John McWhirter, Jr.
McWhirter, Reeves & Davidson, PA
P.O. Box 3350
Tampa, FL 33601-3350

Michael B. Twomey, Esq.
Post Office Box 5256
Tallahassee, FL 32314-5256

Cheryl Martin
Florida Public Utilities Company
P.O. Box 3395
West Palm Beach, FL 33402-3395

Lieutenant Colonel Karen White
Captain Damund Williams
AFCESA/ULT
139 Barnes Drive
Tyndall Air Force Base, FL 32403

Jeffery A. Stone
Russell Badders
P.C.
Beggs & Lane Law Firm
P.O. Box 12950
Pensacola, FL 32591

JR Kelly
Stephen C. Burgess
Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1010

Robert Scheffel Wright, Esq.
John T. LaVia, Esq.
Young van Assenderp, P.A.
225 South Adams Street, Suite 200
Tallahassee, FL 32301

Florida Retail Federation
100 East Jefferson Street
Tallahassee, FL 32301

Paula K. Brown
Tampa Electric Company
P.O. Box 111
Tampa, FL 33602-0111

John T. Burnett
Progress Energy Svc. Co., LLC
Post Office Box 14042
St. Petersburg, FL 33733-4042

James W. Brew
Brickfield, Burchette, Ritts & Stone,

1025 Thomas Jefferson St., NW
Eighth Floor, West Tower
Washington, DC 20007

Mehrdad Khojasteh
Florida Public Utilities Company
P.O. Box 3395
West Palm Beach, FL 33402-3395

White Springs Agricultural
Chemicals, Inc.
P.O. Box 300
White Springs, FL 32096

/s/Cecilia Bradley
Cecilia Bradley