

State of Florida



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

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

**DATE:** May 10, 2013

**TO:** Office of Commission Clerk (Cole)

**FROM:** Office of the General Counsel (Young, Klanchke, Lawson, Tan, Gilcher)  
Division of Engineering (Ballinger)  
Division of Accounting and Finance (Willis)

**RE:** Docket No. 100437-EI – Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.

**AGENDA:** 05/14/13 – Regular Agenda – Decision on Motion for Reconsideration – Oral Argument Requested

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Balbis

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\ENG\WP\100437.RCM.DOC

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### Case Background

Docket No. 100437-EI, In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc., was opened at the request of Progress Energy Florida (PEF) to address the extended outage at its nuclear plant Crystal River Unit 3 (CR3), and the resulting replacement fuel/power costs. On August 23, 2011, the Commission issued Order No. PSC-11-0352-PCO-EI (Order Establishing Procedure) which divided this docket into three phases in order to aid the

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Commission in evaluating the complex issues in this proceeding in a timely manner. In addition, the Order Establishing Procedure set a hearing date for Phase I.

By Order No. PSC-12-0104-FOF-EI, issued March 8, 2012, in Docket No. 120022-EI, the Commission approved a global stipulation and settlement agreement that resolved outstanding issues in several dockets, including issues raised in this docket concerning the CR3 outage (2012 Settlement). Following the approval of the 2012 Settlement, Order No. PSC-12-0115-PCO-EI was issued on March 14, 2012, which approved PEF's motion to dismiss Phase I and to stay Phases 2 and 3. In 2012, PEF merged with Duke Energy, Inc. and on April 29, 2013, changed its name to Duke Energy Florida, Inc. (DEF).

On February 5, 2013, DEF announced that its parent company Duke Energy, Inc.'s Board of Directors made the decision to retire CR3. On February 8, 2013, DEF filed an unopposed Motion to Lift Stay on Phase 2 and to Establish Procedural Case Schedule. By Order No. PSC-13-0080-PCO-EI, issued on February 13, 2013, the Prehearing Officer lifted the stay. Additionally, on February 13, 2013, the Second Revised Order Establishing Procedure, Order No. PSC-13-0084-PCO-EI (Second Revised Order), was issued to establish the schedule by which the Commission would resolve Phases 2 and 3. On April 5, 2013, by joint motion, DEF, the Office of Public Counsel (OPC), the Florida Retail Federation (FRF), the Florida Industrial Power Users Group (FIPUG), and PCS Phosphate (PCS), all signatories to the 2012 Settlement, filed a joint motion to resolve certain disputed issues.

On April 11, 2013, by Order No. PSC-13-0155-PCO-EI, the parties joint motion was granted to allow the filing of initial briefs, and responsive briefs if necessary, and to set the joint motion for oral argument on April 30, 2013. Thereafter, on April 26, 2013, Order No. PSC-13-0175-PCO-EI (Third Revised Order) was issued which set Phases 2 and 3 for hearing on October 21-23, 2013. Pursuant to the requirements of Rule 25-22.0376, Florida Administrative Code (F.A.C.), and as set forth in the "Notice of Further Proceeding or Judicial Review" section of the Third Revised Order, any party adversely affected by this order was required to seek reconsideration within 10 days of the issuance thereof, or by May 6, 2013.

On May 6, 2013, OPC attempted to electronically file its Motion for Reconsideration of Order No. PSC-13-0175-PCO-EI (Motion for Reconsideration) as well as a Request for Oral Argument. The Motion for Reconsideration and Request for Oral Argument were received by the Commission Clerk's Office on May 6, 2013, at 5:03 p.m. and were thus deemed to have been filed on May 7, 2013.<sup>1</sup> On May 8, 2013, OPC filed a Motion to Accept Public Counsel's Motion for Reconsideration and Request for Oral Argument as timely filed, or alternatively to enlarge the time to file. On May 9, 2013, DEF filed its Response in Opposition to the Office of Public Counsel's Motion for Reconsideration of Order No. PSC-13-0175-PCO-E (Response).

This recommendation addresses the timeliness of OPC's pleadings, the Request for Oral Argument, and the Motion for Reconsideration. The Commission has jurisdiction over the matter pursuant to Sections 366.06(2) and (4), and 366.071, Florida Statutes. (F.S.).

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<sup>1</sup> Also on May 6, 2013, PCS Phosphate filed a statement in support of OPC's Motion for Reconsideration at 5:55 p.m. and thus, it was deemed by the Commission Clerk's Office to have been filed on May 7, 2013.

### Discussion of Issues

**Issue 1:** Should OPC's Motion for Reconsideration and Request for Oral Argument be barred from consideration due to lack of timeliness?

**Recommendation:** Yes, staff recommends that the Commission find that OPC's Motion for Reconsideration and Request for Oral Argument are barred because they are untimely and outside the jurisdictional time period afforded to a party to seek reconsideration of a Commission order. The Commission does not have authority to waive the jurisdictional time period and adjudicate OPC's motion and request on the merits. Staff notes that if the Commission agrees with Issue 1, Issues 2, 3, and 4 are moot. (Young, Klancke)

**Staff Analysis:** On May 6, 2013, at 4:59 p.m., OPC electronically submitted a Motion for Reconsideration of Commission Order No. PSC-13-0175-PCO-EI. At 5:01 p.m., OPC electronically submitted a Request for Oral Argument on the Motion for Reconsideration. However, the Commission Clerk did not receive these documents until 5:03 p.m. Accordingly, based upon the Commission's electronic filing requirements, the documents were not posted as received until May 7, 2013, at 8:00 a.m. Pursuant to Commission Rule 25-22.0376, F.A.C., and the provisions of the Third Revised Order, a motion for reconsideration of the Third Revised Order must be filed within 10 days of its issuance. As stated by OPC, day 10 was May 6, 2013. The Motion and Request for Oral Argument were filed on May 7, 2013, which was day 11.

On May 8, 2013, OPC filed an unopposed Motion to request that the Commission consider its Motion for Reconsideration and Request for Oral Argument as timely filed, or alternatively to exercise its discretion and grant a one-day extension of time for filing the Motion for Reconsideration, or take whatever steps are necessary to consider its Motion and Request in the interest of fairness. In its Motion, OPC asserted that the Commission should accept its Motion for Reconsideration as timely in the interest of fairness and to meet the ends of justice. OPC contends that despite its filings being deemed late in the most technical sense, its Motion and Request should nevertheless be considered timely filed given the totality of the facts and circumstance and the absence of an objection from DEF.

OPC asserted that the Commission has granted relief in similar circumstance for cause.<sup>2</sup> OPC argued that case law and Commission decisional law indicate that the ability to enlarge the time for reconsideration or accept late-filed Motions for Reconsideration only apply to final

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<sup>2</sup> Order No. 24425, issued April 24, 1991, in Docket No. 860723-TP, In re: Petition for Review of Rates and Charges paid by PATS Provider to LECs; (Motion to enlarge the time to file Motion for Reconsideration granted for a Motion for Reconsideration of a final order filed one day late); Order No. PSC-95-0047-FOF-WS, issued January 11, 1995, in Docket No. 930880-WS, In re: Southern States Utilities, (Motion for Reconsideration filed one day out of time given consideration (but ultimately denied) due to amendatory language being added to the dissent); Docket No. 981834-TP In re: Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth Telecommunications, Inc.'s Service Territory; Order No. PSC-04-0036-PCO-TP, issued January 13, 2004, in Docket No. 990321-TP, In re: Petition of ACI Corp. d/b/a Accelerated Connections, Inc. for Generic Investigation to Ensure that BellSouth Telecommunications, Inc., Sprint-Florida, Incorporated, and GTE Florida Incorporated Comply with Obligation to Provide Alternative Local Exchange Carriers with Flexible, Timely, and Cost-Efficient Physical Collocation, (Motion for leave to file prehearing statement out-of time granted where the filing was made one day late).

decisions on the merits and not procedural orders such as the Third Revised Order. OPC asserted that the non-final nature of the Third Revised Order gives the Commission broad discretion to grant the relief requested.<sup>3</sup> OPC acknowledged that the leading case on the issue of jurisdictional nature of the deadline for filing Motions for Reconsideration is City of Hollywood v. Public Employees Relations Commission, 432 So. 2d 79 (Fla. 4<sup>th</sup> DCA 1983). However, OPC asserted that this case is in contrast to the holding in City of Hollywood because the Third Revised Order is a procedural, scheduling, non-final order, whereas the City of Hollywood deals with an enlargement of time to file a Motion for Reconsideration of a final order on the merits. Thus, OPC asserted that the Commission's statements in the Southern Bell Repair Case indicate that the Commission has broad discretion in non-final procedural matters that are not dispositive determinations on the merits disposing of the case. Moreover, there is nothing indicating that the Courts have extended the City of Hollywood holding to motions of reconsideration of merely procedural, scheduling or other non-final matters. Therefore, OPC requested that the Commission find that it has the discretion to grant the relief requested and accept its Motion for Reconsideration and Request for Oral Argument as timely filed.

#### ANALYSIS

Based upon staff's review of OPC's Motion, the analysis of the applicable case law, and the Commission's decisions on the untimely filing of motions, staff recommends that the Commission find that OPC's Motion for Reconsideration and Request of Oral Argument are untimely. As stated above, on May 6, 2013, at 4:59 and 5:01 p.m., OPC electronically submitted a Motion for Reconsideration of Commission Order No. PSC-13-0175-PCO-EI and its Request for Oral Argument on the Motion for Reconsideration, respectively. However, the Commission Clerk did not receive these documents until 5:03 p.m. The Commission's electronic filing requirements "Special Conditions" section specifically provides:

The party submitting a document for filing by electronic transmission acknowledges and agrees:

- a. That the original physically signed document will be retained by that party for the duration of the proceeding and of any subsequent appeal or subsequent proceeding in that cause, and that the party shall produce it upon request of the other parties or the Commission.
- b. That the party submitting the filing shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the Division as a result.
- c. That the filing date for an electronically transmitted document shall be the date the Division receives the complete document. If the document

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<sup>3</sup> Order No. PSC-92-0339-FOF-TL, issued May 13, 1992, in Docket No. 910163-TL, In re: Petition of the Citizens of the State of Florida to Initiate Investigation Into Integrity of Southern Bell Telephone and Telegraph Company's Repair Service Activities and Reports, (Southern Bell Repair Case) ("The Commission's designation of and the delegation of authority over procedural matters to the Prehearing Officer are unquestionably within the Commission's discretion. It is equally within the Commission's discretion to establish the standard by which it will review a Prehearing Officer's decisions").

is received on a non-business day, or after 5:00 p.m. on a business day, it will be considered filed as of 8:00 a.m. on the following business day.

- d. That the Commission does not have the authority to grant an extension of time for certain jurisdictional filings, including motions for reconsideration and notices of appeal.

Thus, pursuant to the requirements above, both the Motion for Reconsideration and the Request for Oral Argument were deemed filed on May 7, 2013. Pursuant to Rule 25-22.0376, F.A.C., and the Third Revised Order, a motion for reconsideration of the Third Revised Order was required to be filed within 10 days of its issuance.<sup>4</sup> Because OPC's Motion for Reconsideration was filed on the 11<sup>th</sup> day, staff does not believe the Commission can take jurisdiction for the Motion and adjudicate the Motion on its merits. As acknowledged by OPC, the leading case that addresses the jurisdictional question is City of Hollywood v. Public Employees Relations Commission. In City of Hollywood, the Court held that the PERC did not have authority to grant an enlargement of time to file a Motion for Reconsideration of a final order. The Court found a lack of express authority to do such and more importantly stated:

There is no express authority either in the APA, PERC's rules, or in the Model Rules of Procedure for extending the time for filing such a motion. Nor do we believe the agency has inherent power to do so. By analogizing an agency's inherent power to that of a court of general jurisdiction, we conclude that if a circuit court cannot extend the time for filing a motion for new trial in a criminal case, then it would follow that an agency cannot extend the time for filing a motion for reconsideration in an administration proceeding.

Id. at 81. Likewise, staff does not believe the Commission can grant an enlargement of time for OPC to seek reconsideration. Such authority is jurisdictional and cannot be waived. Staff's recommendation is consistent with Citizens of the State of Florida v. North Fort Myers Utility, Inc. and the Public Service Commission, Case No. 95-1439 (Fla.1<sup>st</sup> DCA, Nov. 16, 1995). In North Fort Myers Utility, Inc., the First District Court of Appeal (First DCA) dismissed an

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<sup>4</sup>Notice of Further Proceeding or Judicial Review in the Third Revised Order stated:

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 this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, F.A.C.; 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 or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, F.A.C. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

appeal filed by OPC of two Commission final orders. In that case, an unopposed request to extend the time to seek reconsideration was granted by order of the Prehearing Officer in an effort to accommodate the parties. After considering the arguments of the parties as to why the appeal should not be dismissed as untimely in light of City of Hollywood, the Court dismissed the appeal.

Staff acknowledges that the Commission has granted enlargements of time to accept untimely filed Motions for Reconsideration as timely.<sup>5</sup> One such instance is contained within Order No. PSC-06-0527-PSC-EI, issued June 22, 2006, in Docket No. 060038-EI, In re: Petition for issuance of a storm recovery financing order, by Florida Power & Light Company (FPL). Here, FPL electronically filed a Motion for Reconsideration and a Request for Clarification at 4:49 p.m. In addition, FPL electronically filed a Request for Oral Argument which specifically stated that it was filed in support of the Motion for Reconsideration at 4:50 p.m. The Commission Clerk officially filed FPL's Request for Oral Argument at 4:59 p.m., and its Motion for Reconsideration at 5:01 p.m. Thus, the clerk stamped the Motion for Reconsideration as filed the next day. Because the Oral Argument request, which was timely filed, incorporated the Motion for Reconsideration, the Prehearing Officer deemed the Motion for Reconsideration as timely filed.

Staff understands and sympathizes with OPC's argument that the Third Revised Order is a procedural order, which is non-final in nature. However, staff does not believe that the Commission's broad discretion trumps matters over which it does not have jurisdiction. The Commission simply cannot extend the jurisdictional time period for filing a Motion for Reconsideration. OPC is correct that this is the third revision to the Order. However, unless revised, the Third Revised Order is final and controls the procedures upon which this case will be governed.

In addition, OPC is not barred from pursuing alternative means for the ultimate relief it seeks. In its Motion for Reconsideration, OPC requests that the Commission review and revise the controlling dates of the Third Revised Order because the dates are per se inadequate. Nothing prevents OPC from requesting the Prehearing Officer to alter the dates in a separate request. This is an alternative parties have frequently used in past Commission dockets after an order establishing procedure has been issued. Also, staff would note that the Commission on its own motion can consider the controlling dates in the Third Revised Order.

Based upon the analysis above, staff recommends that the Commission find that OPC's Motion for Reconsideration and Request for Oral Argument are untimely and outside the jurisdictional time period afforded to a party to seek reconsideration of a Commission's order. Because the Motion for Reconsideration and Request for Oral Argument are outside the jurisdictional time period, the Commission cannot waive the jurisdictional time period and adjudicate OPC's motion and request on the merits. If the Commission agrees with Issue 1, Issues 2, 3, 4 are moot.

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<sup>5</sup> Id. at fn.1.

**Issue 2:** Should the Commission grant OPC's Request for Oral Argument?

**Recommendation:** No. If the Commission denies staff's recommendation on Issue 1, staff does not believe that the Commission should grant oral argument on OPC's Motion for Reconsideration, as the issues set forth in OPC's Motion for Reconsideration are clear. Staff does not believe that oral argument is necessary to aid the Commission in its deliberation. (Young, Klancke)

**Staff Analysis:** Rule 25-22.0021(1), F.A.C., provides for oral argument before the Commission as follows:

Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested, or no later than ten (10) days after exceptions to a recommended order are filed. Failure to timely file a request for oral argument shall constitute waiver thereof. Failure to timely file a response to the request for oral argument waives the opportunity to object to oral argument. The request for oral argument shall state with particularity why oral argument would aid the Commissioners, the Prehearing Officer, or the Commissioner appointed by the Chair to conduct a hearing in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument.

OPC properly filed its Request for Oral Argument concurrently with its Motion for Reconsideration. In its request for oral argument OPC asserted that oral argument would aid the Commission in understanding why the controlling dates set forth in the Third Revised Order would not facilitate the Commission having a complete and thorough record for its review. In addition, OPC asserted that oral argument would assist the Commission in understanding the mistake of fact which OPC asserts led to the unreasonable schedule contained in the Third Revised Order. OPC further requests a minimum of thirty minutes for oral argument for each party in this docket to argue their position.

In DEF's Response, the utility stated that OPC's Motion for Reconsideration of the Third Revised Order is insufficient on its face, as a matter of well-accepted legal principles applicable to reconsideration motions, and, therefore, oral argument would not be helpful to the Commission and is unnecessary. Accordingly, OPC's Request for Oral Argument for its Motion for Reconsideration of the Third Revised Order should be denied.

In the instant case, staff believes that OPC's Motion for Reconsideration and DEF's Response fully address the issues, and oral argument would not further assist the Commission in understanding and evaluating the Motion for Reconsideration. Thus, staff recommends that OPC's request for oral argument be denied.

Staff notes that the Commission has the discretion to grant or deny oral argument. If the Commission decides to hear from the parties, staff recommends that the Commission allow five minutes per side.

**Issue 3:** Should the Commission grant OPC's Motion for Reconsideration of Commission Order No. PSC-13-0175-PCO-EI ?

**Recommendation:** No. The Commission should deny the Motion for Reconsideration. OPC has failed to identify a point of fact or law that was overlooked or which the Prehearing Officer failed to consider in Order No. PSC-13-0175-PCO-EI. (Young, Klancke)

**Staff Analysis:**

OPC'S ARGUMENT

Standard of Review

In its Motion for Reconsideration OPC argued that the standard of review of an order establishing hearing dates should be *de novo* in that the establishment of the hearing schedule has traditionally been the prerogative of the Chairman. OPC asserted that this has been the practice as understood by the movant and is consistent with the requirements contained within Section 350.01(5), F.S. To the extent that the establishment of controlling dates are driven by hearing dates set by the Chairman, OPC seeks formal review and a *de novo* determination by the full Commission.

To the extent that the Prehearing Officer was delegated authority to establish controlling dates in this proceeding, OPC requested reconsideration based on the standard utilized by the Commission regarding a mistake of fact or law.

Summary of OPC's Argument

OPC asserted that statements made by the Prehearing Officer at the April 30, 2013, oral argument indicate that the quarterly meeting process established in the 2012 Settlement provided a mechanism which should have streamlined the adjudicative process and shortened the need for hearing. OPC argued that the meeting process created by paragraph 10 of the 2012 Settlement was intended to provide updates to the Intervenor's relating to the repair cost estimates and thus were not intended to provide a forum for resolving the potential dispute that is now before the Commission. OPC asserted that the assumption that the hearing process could be held in an expedited time frame as set forth in the Third Revised Order, based on the quarterly meetings, is thus, an error of fact that requires the Commission to reconsider and revise the entire schedule.

OPC further argued that at the April 30, 2013, oral argument the Prehearing Officer stated as a basis for an expedited hearing schedule that the 2012 Settlement resolved certain issues and therefore "there is not much left" to litigate in this proceeding.<sup>6</sup> OPC asserted that this statement indicates the existence of a mistake of fact in that the issues remaining to be litigated in this proceeding are factually complex and novel. Moreover, the relatively small number of issues does not support the shortened hearing and testimony schedule set forth in the Third Revised Order. In support of this assertion, OPC specified that the disputed issues in this proceeding only arose in February of 2013 following DEF's announcement of its decision to

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<sup>6</sup> Oral Argument TR p. 68.



retire CR3. OPC contends that this decision to retire spawned an entirely new case which requires extensive discovery and analysis. By setting the schedule in the Third Revised Order to allow only 84 days to secure an expert(s) who can respond to DEF's case, conduct meaningful discovery, and prepare expert testimony on a case of first impression before the agency, the Commission is precluding OPC from providing DEF's customers with effective representation.

In addition, OPC argued that the hearing schedule set forth in the Third Revised Order does not adequately take into consideration the time necessary to resolve the impending privilege-based discovery dispute. OPC asserted that DEF is currently in possession of the vast majority of relevant evidence in this proceeding and that this information has been identified by DEF as protected information as set forth in the privilege logs. OPC asserted that it intends to seek *in camera* inspections of previously identified privileged information through Motion(s) to Compel which will be filed with the Commission shortly. OPC argued that the current schedule does not afford the parties nor the Commission with ample time to resolve these discovery disputes thereby ensuring access to information available to the Commission through the adversarial process.

OPC further took umbrage to the Prehearing Officer's statement at the April 30, 2013, oral argument that "the continued uncertainty related to the issues addressed in this agreement adversely affects the utility and the customers . . . These issues are ripe for hearing. The customers and investors cannot afford for this uncertainty any more than it has."<sup>7</sup> OPC asserted that the customers desperately need additional time to secure the appropriate expertise once DEF has filed testimony. OPC further asserted that the Commission should not give weight to investor expectations as it does not have a duty to investors to manage their expectations at the expense of customers. Furthermore, OPC argued that there is no compelling reason to expedite the date for hearing in this matter since there is no statutory time frame for resolution of this docket and rates cannot change due to the amortization of the CR3 asset until January 1, 2017.

At the April 30, 2013, oral argument the Prehearing Officer stressed the need to move forward with this proceeding in order to preserve evidence by mitigating the impact of the personnel changes that have occurred as a result of the Duke/Progress merger and other events. OPC asserted that although the preservation of evidence is important, none of the facts that were cited as a basis for expediting the hearing occurred after the announcement of the CR3 retirement and the settlement reached between NEIL and DEF. Thus, OPC asserted that the reasons cited by the Prehearing Officer are within Duke's control and should not be the basis for penalizing OPC and the other Intervenor with an "unrealistic and rushed hearing."

For the reasons cited above, OPC urged the Commission to reconsider the controlling dates set out in the Third Revised Order and establish a minimum of 150 days between DEF's direct testimony and the Intervenor's responsive direct testimony. Additionally, OPC specified that the time between the filing of Duke's rebuttal testimony and the discovery cut off date (allowing for 13 days) must be revised to a "reasonable time" (e.g. 60 days) given the novelty and complexity of the issues and the likelihood that significant testimony will be filed on Rebuttal.

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<sup>7</sup> Oral Argument TR, p. 68-69.

DEF'S RESPONSE

In its Response, DEF contends that OPC's arguments contained within its Motion for Reconsideration are fundamentally based on the erroneous assertion that the intervenors' due process rights will be impermissibly impaired if the schedule is not reconsidered and revised to an open-ended schedule that meets with OPC's approval. DEF further asserted that the OPC's Motion for Reconsideration is, at best, premature because OPC cannot demonstrate that its due process rights are violated two months into an eight-month hearing schedule. DEF noted that six months remain in the Third Revised Order schedule for OPC to take discovery, retain experts, and prepare testimony. DEF further argued that OPC has not shown that it has been denied any discovery that it is entitled to obtain, that it cannot retain any expert that it needs, or that it cannot file testimony four months from now in accordance with the Third Revised Order. In support of this assertion, DEF noted that since the inception of discovery in February 2013 with respect to the remaining issues in this proceeding, DEF has already responded to 129 intervenor interrogatories, including subparts. Moreover, OPC has requested twenty-two depositions, and contrary to OPC's assertion, the Company has not objected to producing any Company witness for deposition.

DEF acknowledged that it has objected to producing privileged information and documents but asserted that this is based on their contention that OPC has no legal right to obtain this information which it has characterized as privileged. Regardless, DEF asserted that the transcript of the April 30, 2013 oral argument, clearly indicates that the Prehearing Officer is aware of the impending privilege claims and the potential for motions to compel as he inquired with the parties about them at the oral argument. Thus, DEF argued that the Prehearing Officer clearly did not overlook or fail to consider this issue.

DEF further asserted that the remaining issue regarding the prudence of the Company's settlement with NEIL is not as complex as OPC makes it out to be in its Motion. DEF specified that at the oral argument on April 30, 2013, OPC agreed that the remaining issues did not require OPC to challenge the "specific stand alone actions" by DEF that led to insurance with NEIL under the NEIL policies and the CR3 insurance claim; instead, OPC admitted that OPC was "after the big picture." Rather, DEF asserted that the parties are "relatively close together" about what this case is about on a going forward basis if the Prehearing Officer accepts DEF's representation and limits the proceeding on the threshold issue to "the big picture," instead of decades- or years-old decisions to insure with NEIL in the first place and to insure CR3 under the terms and conditions of the NEIL policies. DEF further argued that ultimately, this proceeding is focused on the big picture of the prudence of the Company's settlement with NEIL, and there is no reason this issue cannot be resolved under the Third Revised Order schedule.

DEF further argued that the Intervenors are well positioned to address this remaining insurance issue on the Third Revised Order schedule despite OPC's protests to the contrary in OPC's Motion. In support of this contention, DEF noted that Intervenors have investigated its actions with respect to NEIL for over three years. During that time, DEF has responded to hundreds of intervenor interrogatories and document requests, and DEF has produced millions of pages of documents over three years regarding the SGR project, the delaminations, and the

delamination repairs that admittedly are the basis for the Company's NEIL insurance claim. DEF noted that it produced its insurance policies with NEIL years ago. Thus, DEF argued that the Intervenor did not enter this Docket in February 2013 wholly uninformed about the CR3 costs, the NEIL policies, or the reasons for the NEIL insurance claim.

Finally, DEF asserted that OPC cites no authority that an eight-month schedule for the remaining issues in this Docket is, in OPC's words, "per se" inadequate and a violation of the Intervenor's due process rights. DEF argued that despite OPC's objections and at times baseless or erroneous accusations in its Motion for Reconsideration, there are no real grounds to believe at this time that the Intervenor's due process rights are violated by the schedule contained in the Third Revised Order and thus, OPC's Motion for Reconsideration should accordingly be denied.

### STAFF'S ANALYSIS

#### Standard of Review

The appropriate standard of review in 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 Final Order. 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. 3d DCA 1959), citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958).

As noted above, OPC requested the application of a *de novo* standard of review inasmuch as the setting of hearing dates have historically been under the purview of the Chairman in accordance with Section 350.01(5), F.S. In support of this assertion, OPC merely cites to a tradition which is not codified in any rule or order. In the instant case, staff believes that the mistake of fact or law standard provided above is the appropriate standard since the Chairman's Office approved the hearing dates set forth in the Third Revised Order. Moreover, the Prehearing Officer has been delegated the authority to address procedural matters in Commission cases via Rule 28-106.211, F.A.C.

#### Discussion

In its Motion for Reconsideration OPC has failed to cite to any point of fact or law which was overlooked by the Prehearing Officer in rendering his decision setting forth the procedural schedule in the Third Revised Order. Staff believes that OPC's arguments are based upon the flawed contention that the Prehearing Officer's statements made at the oral argument on Tuesday, April 30, 2013, regarding the procedural schedule for this case somehow retroactively undermined the determinations contained within the Third Revised Order which was issued on Friday, April 26, 2013, four days before. As specified in Order No. PSC-13-0155-PCO-EI, Granting in Part and Denying in Part Joint Motion of the Parties to Resolve Certain Disputed Case Issues and Request for Oral Argument, the purpose of the oral argument on April 30, 2013, was to afford the parties with an opportunity to present their arguments on the disputed threshold

question regarding the scope of the proceeding.<sup>8</sup> Following the oral argument on the disputed question, the Prehearing Officer, heard comments from the parties regarding the schedule set forth in the Third Revised Order.<sup>9</sup> It is clear from both the Third Revised Order as well as the Prehearing Officer's statements made at the oral argument on April 30, 2013, that the schedule of the proceedings contained in the Third Revised Order were in no way based upon or impacted by the substance of the parties comments made at the end of the oral argument. Thus, staff does not believe that any of the statements of the Prehearing Officer undertaken at the oral argument on April 30, 2013, can constitute a mistake of fact or law which the Prehearing Officer overlooked or failed to consider in rendering an opinion which was issued four days before the oral argument even commenced.

Even overlooking the temporal scope issues contained within OPC's Motion for Reconsideration noted above, staff does not believe that OPC's underlying arguments identify a point of fact or law which was overlooked or which the Prehearing Officer failed to consider in rendering his Third Revised Order. In particular, OPC asserted that the very recognition of the existence of the quarterly meetings undertaken by the parties, and discussed by the Prehearing Officer at the oral argument on April 30, 2013, constitutes a mistake of fact. As noted above, the status conferences engaged in by the parties in this proceeding were undertaken pursuant to the requirements of paragraph 10.b. of the 2012 Settlement Agreement formed by the parties. Thus, the assertion that the Prehearing Officer's statement that the status conferences were designed to facilitate the communication and free flow of information during the interim period between February 22, 2012, and the DEF resolution of the decision to repair or retire CR3, is an accurate representation of the requirements of the provisions of the 2012 Settlement as agreed by the parties and thus cannot be the basis for an alleged mistake of fact.

OPC further asserted that the schedule set forth in the Third Revised Order constituted a mistake of fact because it does not afford the parties with enough time to conduct discovery and retain witnesses on the NEIL insurance issue. Even accepting that OPC's assertion that DEF's February 2013 announcement regarding its decision to retire the CR3 unit did substantially impact the issues to be litigated in this proceeding going forward, the Intervenor under the schedule contained in the Third Revised Order will have six months to take discovery, retain experts, and prepare testimony. Moreover, as noted by DEF in its Response, OPC has not shown that it has been denied any discovery that it is entitled to obtain, that it cannot retain any expert that it needs, or that it cannot file testimony months from now in accordance with the Third Revised Order. Staff notes that since the inception of discovery in February 2013 with respect to the remaining issues in this proceeding, OPC has proactively participated in the discovery process propounding more than 100 interrogatories to DEF. Thus, staff does not believe that

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<sup>8</sup> Order No. PSC-13-0155-PCO-EI, Granting in Part and Denying in Part Joint Motion of the Parties to Resolve Certain Disputed Case Issues and Request for Oral Argument, issued on April 11, 2013 in Docket 100437-EI, In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.

<sup>9</sup> Staff notes that OPC included as Attachment A to its Motion for Reconsideration only a small portion of the transcript from the oral argument conducted on April 30, 2013. In particular, Attachment A includes pages 1-3, and thereafter jumps to page 62 of the transcript. Staff notes that the entire transcript of the oral argument indicates that the vast majority of the meeting was dedicated to addressing the resolution of the threshold question on the scope of the proceedings and only a brief portion of the proceeding was allotted for comments regarding the schedule set forth in the Third Revised Order.

OPC's argument has merit, that the schedule set forth in the Third Revised Order will impermissibly impair the Intervenors' due process rights and thereby constitute a mistake of fact which was overlooked by the Prehearing Officer.

Moreover, as stated in both the Third Revised Order and at the oral argument on April 30, 2013, the Prehearing Officer did consider the time requirements of the parties to fully adjudicate this matter and comported the schedule accordingly.<sup>10</sup> On page two of the Third Revised Order the Prehearing Officer expressly stated that he considered the parties' concerns regarding the time for adjudication of the remaining issues in creating the schedule in this case and in fact enlarged the amount of time originally afforded. In particular, he stated:

There were concerns raised during this process by several parties regarding sufficient time to conduct discovery and file testimony and exhibits under the current case schedule set forth in the Second Revised OEP. It is to the Commission's benefit to have a complete and thorough record, so that the Commission has before it all relevant aspects of the case. . . . Therefore, I find that a rescheduling of the hearing and controlling dates is necessary to facilitate the Commission having a complete and thorough record for its review and to give staff and the Parties additional time in their preparation for hearing.

At the oral argument on April 30, 2013, the Prehearing Officer reiterated his belief that the six month time frame set forth in the Third Revised Order would afford all parties with the time needed to prepare and will allow the Commission to make an informed decision.<sup>11</sup> Staff believes that the record clearly reflects that the Prehearing Officer did not overlook the time necessary for a thorough review of this matter in setting the schedule contained in the Third Revised Order. Thus, staff believes that OPC failed to identify a point of fact or law which was overlooked or which the Prehearing Officer failed to consider when the Third Revised Order was issued.

In addition, OPC's contention that the Prehearing Officer's statements at the oral argument that the 2012 Settlement Agreement resolved many of the issues in this proceeding and, as such, there are few issues remaining to be litigated, similarly fails to identify a mistake of fact. In fact, the 2012 Settlement Agreement did resolve many of the issues in contention. By the terms of the 2012 Settlement Agreement the parties themselves acknowledged that "the issues addressed by this Agreement resolve in a comprehensive manner an unprecedented combination of circumstances." As noted by DEF in its brief, the parties themselves acknowledged that the remaining issues to be litigated in this proceeding primarily pertain to the prudence of the Company's settlement with the NEIL which is not as complex as OPC makes it out to be in its Motion. Therefore, staff does not believe that the statements made by the Prehearing Officer form the basis for a mistake of fact in this proceeding. Thus, OPC's Motion does not meet the standard upon which a Motion for Reconsideration should be granted.

Similarly, OPC's argument that the Prehearing Officer's statement at the oral argument on April 30, 2013, regarding the need to conduct a speedy resolution of this matter to abate the uncertainty affecting the utility and the customers, is also unpersuasive as it was a direct quote:

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<sup>10</sup> See Third Revised Order, p.2.; see also, Oral Argument TR, p. 70.

<sup>11</sup> Oral Argument TR, p. 70.

from the 2012 Settlement Agreement itself. In particular, on page 5 of the 2012 Settlement Agreement it provides that “the Parties further recognize that continued uncertainty related to the issues addressed in the Agreement adversely affects the Company and its customers, and this Agreement will mitigate those uncertainties.”<sup>12</sup> Staff does not believe that the paraphrasing by the Prehearing Officer of a provision of the 2012 Settlement Agreement constitutes a mistake of fact or law which was overlooked or which the Prehearing Officer failed to consider when he issued the Third Revised Order.

Therefore, based upon the analysis stated above, staff recommends that the Commission deny OPC’s Motion for Reconsideration because it does not identify a point of fact or law which was overlooked or which the Prehearing Officer failed to consider when he issued the Third Revised Order.

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<sup>12</sup> See Order No. PSC-12-0104-FOF-EI, issued March 8, 2012, in Docket No. 120022-EI, p. 5.

Docket No. 100437-EI

Date: May 10, 2013

**Issue 4:** Should this docket be closed?

**Recommendation:** No. This docket should remain open pending the resolution of the underlying issues in this proceeding. (Young, Klancke)

**Staff Analysis:** This docket should remain open to allow for the adjudication of the underlying issues in this proceeding.