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April 10, 2019

**E-PORTAL FILING**

Mr. Adam Teitzman, Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

**Re: Docket No. 20180061-EI – In Re: Petition for Limited Proceeding to Recovery Incremental Storm Restoration Costs by Florida Public Utilities Company.**

Dear Mr. Teitzman:

Attached for filing, please find Florida Public Utilities Company's Response in Opposition to Citizens' Motion to Reconsider Order No. PSC-2019-0114-FOF-EI.

Thank you for your assistance with this filing. As always, please don't hesitate to let me know if you have any questions whatsoever.

Kind regards,



Beth Keating  
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Limited Proceeding to Recovery Incremental Storm Restoration Costs by Florida Public Utilities Company.	DOCKET NO. 20180061-EI Filed: April 10, 2019
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FLORIDA PUBLIC UTILITIES COMPANY'S RESPONSE IN  
OPPOSITION TO CITIZENS' MOTION TO RECONSIDER PORTIONS OF  
ORDER NO. PSC-2019-0114-FOF-EI AND RESPONSE TO SEPARATE REQUEST FOR  
ORAL ARGUMENT

Florida Public Utilities Company ("FPUC" or "Company"), by and through its undersigned counsel, hereby submits its Response in Opposition to Citizens' Motion to Reconsider Order No. PSC-2019-0114-FOF-EI, issued March 26, 2019 ("Final Order"). By this Response, FPUC asks that the Citizens' Motion be denied. In support of this Response, FPUC states that:

1. As the Commission has recognized time and again, 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). 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."<sup>1</sup> Applying the foregoing standard, Citizens' Motion must be denied, because it fails to identify any mistake of fact or law in the Commission's decision, or anything that was overlooked in rendering the decision. Instead,

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<sup>1</sup> Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d at 317. See, e.g. Order No. PSC-13-0180-CO-EI, issued April 29, 2013, in Docket No. 120192-EI; citing Order No. PSC-11-0222-FOF-TP, issued May 16, 2011, in Docket No. 090538-TP.

Citizens simply disagree with the Commission's conclusions, which is not sufficient to meet the high standard required for reconsideration. A motion for reconsideration is not the appropriate vehicle for merely rearguing issues that have already been considered.<sup>2</sup> Likewise, a Motion for Reconsideration of a decision disposing of a motion for reconsideration should not be entertained, in accordance with Rule 25-22.060(10(a), Florida Administrative Code.

2. Citizens' arguments can be boiled down to the following two points: (1) the Commission's decision regarding FPUC's Inclement Weather Exempt Employee Compensation Policy does not comport with Rule 25-6.0143(10(f), Florida Administrative Code; and (2) the Prehearing Officer's decision to reword Issue 7 and to Strike Issue 10 entirely, as set forth in Order No. PSC-2018-0567-PHO-EI, and the Commission's subsequent rejection of Citizen's Motion for Reconsideration of that decision, should be reconsidered, or at least clarified, to reflect the justification for the Commission's decision. While neither argument is accurate, more importantly, neither presents a mistake of fact or law or anything overlooked by the Commission in rendering its decisions on these points.

**I. Inclement Weather Compensation Policy**

3. Citizens argue that, in rendering its decision regarding FPUC's Inclement Weather Exempt Employee Compensation Policy ("Policy"), the Commission overlooked part of the applicable rule, Rule 25-6.0143, Florida Administrative Code ("Bonus Rule"). While the Commission determined that the \$69,632 in compensation payments made by FPUC to its employees pursuant to the Policy did not constitute a "bonus" or "other special compensation," which are prohibited by the Bonus Rule, Citizens contend that the Commission gave undue weight to whether the compensation at issue was discretionary. (Motion at 2). Citizens contend

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<sup>2</sup> Sherwood v. State, 111 So. 2d 96, 97 (Fla. 3<sup>rd</sup> DCA 1959)(citing State ex. Rel. Jaytex Realty Co v. Green, 105 So. 2d. 817 (Fla. 1<sup>st</sup> DCA 1958).

that, in contrast, the Bonus Rule focuses upon the classification of the employee, such that any supplemental payments to employees not eligible for overtime pay would constitute “other special compensation” prohibited by the Bonus Rule. Thus, Citizens argue that the \$69,632 in compensation payments should have been disallowed either because: (1) they constitute “other special compensation” prohibited under the Bonus Rule; or (2) the payments constitute regular, base rate recoverable payroll.<sup>3</sup> (Motion at 4).

4. Citizens’ arguments overlook the fact that the Commission carefully considered what constitutes both “special compensation” and “bonus” payments in the context of exempt employees. The Commission simply disagreed with, and therefore rejected, Citizens’ argument on this point. Instead, the Commission appropriately recognized that a supplemental payment contemplated by an employee’s base salary package, does not necessarily constitute either “special compensation” or a “bonus” – or “base rate recoverable regular payroll” for that matter. Noting FPUC Witness Cassel’s arguments on this point, the Commission found that the Policy requires that the Company supplement exempt employees’ pay for storm-related work that exceeds their normal hours and job functions. (Final Order at 4). This “extra compensation” is contemplated as part of all exempt employees’ standard pay and benefits package, and thus, is not “special compensation” nor is it a “bonus” that would be awarded at the Company’s discretion. As such, Citizens’ assertions largely constitute re-argument, which is not proper in the context of a motion for reconsideration.<sup>4</sup>

5. As for Citizens’ untimely assertion that payments under the Policy must otherwise be excluded as “part of the standard compensation package” for exempt employees, this

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<sup>3</sup> Citizens’ alternative assertion that the payments under the policy constitute “part of the standard compensation package” and as such, would also be excluded under the Bonus Rule is raised for the first time on reconsideration and finds no support in the record.

<sup>4</sup> Sherwood v. State, 111 So. 2d 96, 97 (Fla. 3<sup>rd</sup> DCA 1959)(citing State ex. Rel. Jaytex Realty Co v. Green, 105 So. 2d. 817 (Fla. 1<sup>st</sup> DCA 1958).

argument should be rejected as being untimely raised for the first time on reconsideration. (Motion at 6). Citizens' newest argument also fails to meet the accepted standard for reconsideration, because: (1) Citizens' assertion that any "part of the standard compensation package" is not recoverable under the Bonus Rule improperly expands the actual language of the Bonus Rule; and (2) it assumes an "either or scenario" not contemplated in the Bonus Rule. The Commission clearly determined that the payments are allowable under the Bonus Rule as non-discretionary, supplemental compensation. Citizens' argument that these payments should, in the alternative, be excluded because they are part of the employees' standard compensation package does not identify a mistake of fact or law in the Commission's conclusion on this point. Instead, Citizens ask the Commission to change its mind with regard to how the rule should be interpreted. Citizens' desire that the Commission reach a different conclusion as to the proper interpretation of its Bonus Rule is not a valid basis for reconsideration.

6. Furthermore, the Bonus Rule does not exclude all aspects of a "standard compensation package" as Citizens seem to suggest. The Rule excludes only "base rate recoverable regular payroll," in addition to "special compensation" and bonuses. There is no record to support that the payments made under the Policy are "base rate recoverable regular payroll" nor any assertions in the underlying proceeding that they are.<sup>5</sup> As such, Citizens' have failed to identify any mistake of fact or law in the Commission's decision on this point.

7. Citizens also seem to suggest that payments made to exempt employees must, in every instance under the Bonus Rule, either be excluded from recovery as part of the employees' standard compensation package or excluded as "special compensation" or bonus payments. The Bonus Rule does not, however, establish such an "either/or" scenario. Instead, the Bonus Rule

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<sup>5</sup> In fact, FPUC agreed with Commission staff witness Dobiak regarding removal of other regular payroll from the recoverable amounts. (Hearing TR Volume 1, 15).

makes clear that payroll already being recovered through base rates should not also be eligible for recovery as a storm cost. It also makes clear, as the Commission has interpreted, that bonuses or other discretionary incentives are prohibited from recovery as a storm expense. (Final Order at 4). It does not, however, preclude recovery of other categories of compensation, such as non-discretionary, supplemental compensation that is not otherwise recovered through base rates. This is precisely how the Commission characterized the Company's payments under the Policy in reaching its conclusion that the payments were allowed for recovery under the Bonus Rule. Citizens have identified no mistake of fact or law in the Commission's Final Order that could serve as the basis for reconsideration on this point.

## **II. Reconsideration of Decision on Reconsideration**

8. Citizens also seek reconsideration of the Prehearing Officer's decisions, as reflected in the Prehearing Order<sup>6</sup>, regarding Hearing Issues 7 and 10. The Commission has already addressed, and denied, Citizens' December 7, 2018, Motion for Reconsideration of the Prehearing Order as reflected in its Final Order, Order No. PSC-2019-0114-FOF-EI. As such, Citizens' latest request for reconsideration is not appropriate and should not be considered, in accordance with Rule 25-22.060(1)(a), Florida Administrative Code.

9. In addition, as it relates to Issue 7, Citizens still have not identified any mistake of fact or law as it relates to the exclusion of the phrase "of up to \$509 per hour" from the wording of this issue. Exclusion of that phrase had no material impact on the issues to be addressed in this case, nor Citizens' ability to make its arguments. In fact, Citizens very plainly posited arguments regarding the "excessive \$509 per hour rate" and the "grossly excessive hourly rate." (Citizens' Post Hearing Brief at pgs. 5-6). Thus, exclusion of the language from the specific wording of the issue did not hinder Citizens' ability to present their case in any way. There simply is no

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<sup>6</sup> Order No. PSC-2018-0567-PHO-EI, issued December 4, 2018.

identifiable mistake of fact or law on this point – either in the Prehearing Order or the Final Order.

10. With regard to the exclusion of Issue 10, Citizens likewise fail to identify a basis for reconsideration. The hearing transcript clearly reflects that the Commissioners considered the written, filed pleadings regarding Citizens' Motion for Reconsideration, but decided, based upon the narrow standard of review applicable to reconsideration, that the Citizens had not identified a mistake of fact or law in the Prehearing Officer's conclusion. The pleadings, and likewise the Commission's determination, included consideration of the Prehearing Officer's decision that the instant storm cost recovery proceeding for an individual utility was not the appropriate vehicle for addressing a broad policy question with potential impacts that extended beyond the parties this proceeding. (Hearing Transcript, Volume 1, 7-11; Prehearing Transcript 26, 28). Thus, should the Commission elect, contrary to its rules, to entertain Citizens' Motion as it relates to the Commission's prior decision on reconsideration, the Commission should deny Citizens' requests as it relates to Issues 7 and 10, because Citizens have failed to identify a mistake of fact or law in the Commission's decision on this point.

### **III. Oral Argument**

11. With regard to Citizens' April 5 Request for Oral Argument, FPUC notes that it is untimely filed under Rule 25-22.0022, Florida Administrative Code.<sup>7</sup> Moreover, the issues that are the subject of Citizens' Motion for Reconsideration have been thoroughly debated and briefed through the hearing process; thus, FPUC is of the opinion that additional oral argument is unlikely to provide additional, revelatory insight on these issues.

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<sup>7</sup> Citizens' apparently reference Rule 25-22.058, Florida Administrative Code, which has been repealed, in error.

12. In the event that the Commission determines oral argument would be helpful, FPUC respectfully suggests that any such argument be limited to no more than 3 minutes per side.

For the foregoing reasons, FPUC respectfully requests that Citizens' Motion to Reconsider Order No. PSC-2019-0114-FOF-EI be denied.

Respectfully submitted,



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*Attorneys for Florida Public Utilities Company*

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the foregoing Response in Opposition to Citizens' Motion to Reconsider filed in the referenced docket has been served by Electronic Mail this 10th day of April, 2019, upon the following:

Rachael Dziechciarz Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 <a href="mailto:rdziehc@psc.state.fl.us">rdziehc@psc.state.fl.us</a>	J.R. Kelly / Mireille Fall-Fry Office of Public Counsel c/o The Florida Legislature 111 W. Madison Street, Room 812 Tallahassee, FL 32399-1400 <a href="mailto:fall-fry.mireille@leg.state.fl.us">fall-fry.mireille@leg.state.fl.us</a>
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