STATE OF FLORIDA

OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, Florida 32399-1400
904-488-9330

JACK SHREVE
PUBLIC COUNSEL

ORIGINAL
FILE COPY

March 13, 1991

Mr. Steve Tribble, Director
Records and Reporting
Florida Public Service Commission
101 E. Gaines Street
Tallahassee, FL 32399-0863

RE: Docket No. 900796-EI

Dear Mr. Tribble:

Enclosed please find the original and twelve copies of Public Counsel's Motion for Reconsideration in the above-referenced docket.

Please indicate receipt by date-stamping the attached copy of this letter and returning it to this office. Thank you for your consideration of this matter.

Sincerely,

John Roger Howe
Assistant Public Counsel

ACK 1
AFA 1
APP
CAF
CMU
CTR
EAG
LEG 1 w/m
LIN 3
OPC
RCH
SEC 1
WAS
OTH

JRH/ch
Enclosures

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
02498 MAR 13 1991
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Power & Light Company for inclusion of the Scherer Unit No. 4 purchase in rate base, including an acquisition adjustment	)	DOCKET NO. 900796-EI FILED: March 13, 1991

MOTION FOR RECONSIDERATION

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Rule 25-22.060, Florida Administrative Code, move the Public Service Commission to reconsider its Order No. 24165, dated February 26, 1991, and, as grounds therefor, state:

I.

THE COMMISSION WAS INCORRECT, AS A MATTER OF LAW, IN CONCLUDING THAT THE PURCHASE AGREEMENT PAVED THE WAY FOR JEA'S GRANTING OF TRANSMISSION ACCESS TO FPL BECAUSE AGENCY FINDINGS CANNOT BE BASED EXCLUSIVELY ON HEARSAY.

FPL's witnesses stated that JEA officials would not have provided additional transmission capacity to FPL but for JEA's participation in the purchase of Scherer Unit No. 4. [Woody, Tr. 67-75, 114; Cepero, Tr. 357; Waters, Tr. 1044-45] Such testimony is hearsay, i.e., out of court statements offered in court to prove the truth of the matter asserted. Moreover, such hearsay would not be admissible over objection in civil actions. The record in this proceeding is devoid of <u>any</u> independent evidence to support the Commission's acceptance of FPL's representations that "the joint participation by JEA in the purchase of Scherer Unit 4 paved the

way for additional transmission interface capability from JEA." Order No. 24165, at 7. The Commission's acceptance of FPL's representations is, therefore, contrary to Section 120.58(1), Florida Statutes (1989), which provides, in pertinent part:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

The Commission apparently labors under the misconception that this statute is invoked only if an objection is taken to the introduction of hearsay -- that hearsay can support agency findings if no objection is made. This is untrue. As the First District Court of Appeal found in Harris v. Game and Fresh Water Fish Commission, 495 So.2d 806, 809 (Fla. 1st DCA 1986), a party's failure to object to hearsay at hearing does not justify an agency's failure to have nonhearsay evidence to support its finding:

> The Commission further argues that because appellant did not contemporaneously object to the admissibility of the investigator's report, he cannot now be heard to complain on appeal. However, in view of the provision of Section 120.58(1), such evidence was not inadmissible in an administrative forum. It follows that a party's failure to object to admissibility does not foreclose him from subsequently asserting, under that section, that such hearsay evidence was insufficient because there was no competent evidence introduced which the hearsay evidence could, in the language of the statute, "supplement or explain."
>
> We, therefore, conclude that the Commission's order is not supported by competent substantial evidence and must be
>
> REVERSED. [Footnote omitted, emphasis in original.]

Public Counsel's proposed conclusion of law number 8 cited to both Section 120.58(1) and the Harris opinion. The staff recommendation ignored Harris and, instead, cited to Marks v. Delcastillo, 386 So.2d 1259 (Fla. 3rd DCA 1980). This latter case had nothing to do with the APA or with hearsay.[1] On advice of counsel, the Commission declined to rule on proposed conclusions of law. However, it appears, at least implicitly, that the Commission accepted staff's interpretation, based on Marks, that Public Counsel improperly raised a belated objection to the admissibility of hearsay. To the contrary, Public Counsel has not, and does not, object to its admissibility. But the Commission is wrong, as a matter of law, in basing one of its pivotal findings solely on hearsay evidence in contravention of Section 120.58(1)(a).

II.

THE COMMISSION'S ACCEPTANCE OF FPL'S CALCULATION OF EMISSION ALLOWANCE CREDITS ASSOCIATED WITH THE UPS OPTION IS FACTUALLY INCORRECT BECAUSE FPL ADDED ASSUMED COSTS TO A BASE ALREADY INFLATED TO RECOGNIZE THE EFFECTS OF ACID RAIN LEGISLATION.

FPL's calculation of the costs for emission allowances for the UPS option, accepted by the Commission in Order No. 24165, at 7, was performed incorrectly. FPL added projected costs of acid rain compliance to a base already inflated to recognize such costs. In its response to the RFP, Gulf Power had offered lower cost

---

[1]The Marks case was a wrongful death action in civil court. Appellants objected to the admission of parts of depositions. The court said: "We do not consider the merits of this contention because the record does not show that the issue was properly preserved by an appropriate objection below." 386 So.2d at 1266.

alternate energy from other units on the Southern System on terms consistent with the 1988 UPS Agreement. [Tr. 230, 241, 534-36] FPL, however, assumed that the 90% availability offered by Georgia Power would be met out of Scherer Unit No. 4 at that unit's energy price.[2] [Tr. 249, 355, 517, 534, 552, 585]

In answer to some questions from Commissioner Gunter addressing the costs of acid rain compliance, Mr. Denis stated:

> "[W]e discounted any credits of alternate and supplemental energy with regards to having a price impact -- not with regards to availability, but with regards to price impact -- because of a belief that some of these effects that you're talking about potentially would come about." [Tr. 248]

Thus, the energy costs of Scherer Unit No. 4 under a UPS agreement were held at an artificially high level to compensate, at least in

---

[2]The Staff, in its recommendation, stated with respect to Public Counsel's proposed finding of fact number 39 that: "We agree with this finding except for the assumption that the higher fuel cost would be assumed to come from only Scherer Unit No. 4. We believe that the higher fuel cost is a result of the 90% capacity factor for the UPS sale. UPS power from Scherer No. 4 would have to be augmented from more expensive units lower in the dispatch hierarchy to achieve a 90% capacity factor." This statement, which the Commission adopted at page 19 of Order No. 24165, is contrary to the record. Certainly, other units would have to contribute to reach a 90% capacity factor, but, for modeling purposes, FPL used the energy charges identified in the RFP response for Scherer 4 alone. In so doing, it ignored the availability of lower cost alternate energy which would have reduced fuel costs. [Tr. 240-42, 585, 590-91] (In 1989, Scherer 4 operated at only a 17% capacity factor because its UPS commitments were met out of other, less expensive units. (Tr. 53-54, 345-46, 535-37)) In its RFP response, Georgia Power stated (on the same page listing Scherer 4's energy prices) that "Actual energy costs should be lower due to the proposal to make Alternate energy available." [Exh. 10, at Form 8, Exhibit 8.2.1, Page 7 of 14] Mr. Waters testified that "the prices or values we used in our modeling are shown on [Exhibit 10] Exhibit 8.2.1, Page 7 of 14. [Tr. 517] At the same time, FPL employed higher transmission costs in recognition of the fact that alternate energy would be provided under the UPS response to the RFP. [Tr. 355]

part, for acid rain compliance. This resulted in a double-counting of such costs when Mr. Waters introduced acid rain expenses in Exhibit 36 to the extent the energy costs under UPS failed to recognize lower cost alternate energy.

III.

SINCE THE COMMISSION KNOWS THAT FPL'S CALCULATION OF PRESENT VALUE REVENUE REQUIREMENTS FOR UPS IS IN ERROR BUT DOES NOT KNOW THE FULL MAGNITUDE OF THE ERROR, THE COMMISSION LACKS COMPETENT EVIDENCE TO SUPPORT THE IMPACT OF ACID RAIN LEGISLATION ON THE UPS OPTION.

FPL's witness, Mr. Waters, sponsored Exhibit 21 comparing the cumulative present value revenue requirements of the various options. This analysis showed that the purchase option was approximately $15,000,000 less expensive than the UPS option. Mr. Waters conceded, however, that the entries for the UPS option for the years 1991, 1992, and 1993 had to be in error. This error was evident because the entries for those years should have been the same for each option, but they were different for UPS. The error grew year-by-year: 1991 was overstated by $3 million, 1992 by $11 million, and 1993 by $27 million. [Tr. 568-74, 877, 882-83] It was obvious that the total of $42.82 billion had to be overstated by at least $27 million. But the Commission has no idea how the increasing error propagated after 1993.

Public Counsel's witness, Mr. Bartels, calculated that recognition of just the obvious errors, assuming an in-service date of 1994, would make the UPS option more cost-effective by $19,748,000. [Tr. 872-82; Exhibit 30] Giving effect to Mr. Waters' concession that his analyses showed that costs would be

even less if FPL delayed taking any action until 1996 [Tr. 573-74] resulted in the UPS option being almost $79 million less than the purchase option. [Tr. 874-83] But even this number gave recognition to only the obvious errors. If the progression in the first three years continued throughout the 30-year period, the error would far exceed FPL's claimed $128 million for emission allowances associated with the UPS option.

The Commission, however, at page 7 of Order No. 24165, accepts Mr. Bartels' adjustment for 1991-93, but then assumes that Mr. Waters' figures are otherwise accurate. There is no basis for this assumption. Mr. Waters had the opportunity to review Exhibit 21 after the obvious errors were pointed out and before he returned to the stand for rebuttal testimony. When Commissioner Wilson asked him if he knew why the figures for UPS were different, he answered: "No, sir, I really haven't pursued it. . . ." [Tr. 990] He merely assumed there were no further errors and claimed that, even if Mr. Bartels was correct, the $19.7 million he identified would leave over $100 million of additional acid rain costs associated with the UPS option. [Tr. 991; Exhibit 36] Without an explanation from Mr. Waters why the UPS option was different than the others, the Commission has no credible evidence to support the total dollars FPL assigned to UPS either before or after consideration of emission allowance costs. The Commission's acceptance of an analysis conceded to be in error was a mistake that should be corrected on reconsideration.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, move the Public Service Commission to reconsider its Order No. 24165.

Respectfully submitted,

Jack Shreve
Public Counsel

John Roger Howe
Assistant Public Counsel

c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

(904) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 900796-EI

I HEREBY CERTIFY that a true and correct copy of the Citizens' MOTION FOR RECONSIDERATION, has been furnished by U.S. Mail or by *hand-delivery to the following on this 13th day of March, 1991.

MATTHEW M. CHILDS, ESQUIRE
Steel Hector & Davis, P.A.
215 South Monroe Street
Suite 601
Tallahassee, FL 32301

FREDERICK M. BRYANT, ESQUIRE
Moore, Williams, Bryant,
Peebles & Gautier, P.A.
Post Office Box 1169
Tallahassee, FL 32302

JOHN T. BUTLER, ESQUIRE
Steel Hector & Davis, P.A.
4000 S.E. Financial Center
Miami, Florida 33131-2398

*M. ROBERT CHRIST, ESQUIRE
EDWARD A. TELLECHEA, ESQUIRE
Florida Public Service Commission
Division of Legal Services
101 East Gaines Street
Tallahassee, FL 32399-0872

FREDERICK J. MURRELL, ESQUIRE
Schroder & Murrell
The Barnett Center, Suite 375
101 Third Avenue West
Bradenton, FL 34205

JOSEPH A. MCGLOTHLIN, ESQUIRE
Lawson, McWhirter, Grandoff
& Reeves
522 E. Park Avenue, Suite 200
Tallahassee, FL 32301

John Roger Howe