

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Power)	DOCKET NO. 900796-EI
& Light Company for Inclusion of)	ORDER NO. 24668
the Scherer Unit No. 4 Purchase)	ISSUED: 6/17/91
in rate base, including an)	
acquisition adjustment - Citizens)	
and Nassau's motions for recon-)	
sideration.)	
_____)	

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
 BETTY EASLEY
 MICHAEL MCK. WILSON

ORDER DENYING RECONSIDERATION

BY THE COMMISSION:

PRELIMINARY STATEMENT

On May 14, 1991 this Commission issued Order No. 24527 denying petitions for reconsideration filed by Office of Public Counsel and Nassau Power Corporation of Order No. 24165. Order No. 24527 reflects a vote by Commissioners Easley, Gunter and Wilson. It was brought to Commission's attention that Commissioner Gunter should have been advised to refrain from voting on the petitions because he had not voted on the final order (Order No. 24165) in that proceeding. Subsection 350.01(5), Florida Statutes dictates that "[a] petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding."

In order to correct that oversight Chairman Beard and Commissioners Easley and Wilson at the Commission agenda on June 11, 1991 voted on staff's recommendation of April 18, 1991. The following is the Commission's order on reconsideration.

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BACKGROUND

On January 26, 1991 this Commission issued Order No. 24165 in Docket No. 900796-EI which approved a request by Florida Power & Light Company (FPL) to include the purchase of Scherer Unit No. 4 in its rate base. More specifically, the Commission determined that (a) a need existed for the additional capacity provided by Scherer, (b) the purchase was reasonable and prudent, and (c) an acquisition adjustment should be allowed in the purchase price. Motions for reconsideration of Order No. 24165 were filed on behalf of the Office of Public Counsel (OPC) and Nassau Power Corporation (Nassau), both intervenors in this docket. A response to the motions was filed by FPL. For the reasons cited hereinafter, we conclude that the motions must be denied.

On April 29, 1991, OPC filed a pleading entitled Request To Take Official Notice of Florida Power & Light Company's Form 10-K. In the request OPC has asked the Commission to delay action on its motion for reconsideration until our staff has had an opportunity to review the request. At the agenda conference held to deliberate and vote on this matter, staff indicated that it had reviewed the request and the pleading did not change the recommendation to deny the motion for reconsideration. Accordingly, we accept staff's recommendation and deny OPC's request to delay action in this matter.

DISCUSSION

"[T]he purpose of a petition [motion] for rehearing [reconsideration] is merely to bring to the attention of the trial court or, in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance. Maule Industries, Inc. v. Seminole Rock and Sand Company, 91 So.2d 307 (Fla. 1956). It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order." Diamond Cab Company of Miami v. King, 146 So.2d 889, 891 (Fla. 1962).

With one exception, the points raised by movants in their motions are carefully crafted rearguments of their previously argued positions and requests to reweigh the evidence. Thus, they are not proper matters to be raised in a motion for reconsideration. We do conclude that one point raised by OPC merits discussion. OPC contended that the Commission based a finding of fact in Order No. 24165 on hearsay testimony in contravention of Subsection 120.58(1)(a), Florida Statutes (1989).

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That statute provides generally that hearsay evidence may be used for purposes of supplementing or explaining other competent evidence, but it cannot be used to support a finding of fact unless it would be admissible over an objection in civil actions. The finding in question is on page 7 of the Order and states that "the joint participation by JEA in the purchase of Scherer Unit 4 paved the way for additional transmission interface capability from JEA". OPC suggests that because this finding is based on statements made by JEA officials to FPL representatives who repeated those statements at the hearing, the JEA statements are hearsay and thus cannot be used to support the finding on page 7. Initially, it should be pointed out that failure of a party to object to what it considers to be hearsay evidence helps create a void in the record. Without a proper objection and response, the trier of fact may be forced to speculate as to the purpose for the submission of the evidence. Fortunately, in this instance we find a number of acceptable grounds for the admission of those statements. First, there is other competent evidence in the record to support the finding in question besides the JEA statements. Secondly, the FPL witnesses who testified concerning FPL-JEA's negotiations were tendered as experts and thus could formulate an opinion based on data that would otherwise be inadmissible. Section 90.704, Florida Statutes (1989). Thus, under the cited statute, the FPL experts could properly express an opinion on the transmission access issues even if such opinion was based on matters that would otherwise be inadmissible at the hearing. Finally, the statements of the JEA officials were not offered for the truth of the matter asserted, i.e. that such statements were in fact true, but were offered only to show FPL's state of mind in responding to JEA's negotiating posture. Therefore, we find OPC's assertion in this regard is without merit. We have considered the remaining contentions of OPC and Nassau and, as noted above, we find them to be a reargument of points previously considered or a request to reweigh the evidence in a manner more favorable to movants. The motions should accordingly be denied.

In summary, having reviewed the record and the arguments advanced by the parties we find our decision in Order No. 24165 is supported by a preponderance of the evidence and should not be disturbed.

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In consideration of the foregoing, it is

ORDERED by the Florida Public Service Commission that the motions for reconsideration of the Office of Public Counsel and Nassau Power Corporation are denied.

By ORDER of the Florida Public Service Commission, this
17th day of JUNE, 1991.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 the Commission's final action in this matter may request 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 sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.