BEFORE THE PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.	DOCKET NO. 040001-EI ORDER NO. PSC-04-0411-FOF-EI ISSUED: April 21, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DISPOSING OF MOTIONS FOR RECONSIDERATION/CLARIFICATION OF FINAL ORDER

BY THE COMMISSION:

By Order No. PSC-03-1461-FOF-EI, issued December 22, 2003, in Docket No. 030001-EI ("Fuel Order"), this Commission established fuel and capacity cost recovery factors for investor-owned electric utilities to apply for billing purposes in calendar year 2004. On January 6, 2004, Tampa Electric Company ("Tampa Electric") filed a motion for reconsideration of that portion of the Fuel Order which addressed the costs and savings associated with the shutdown of Tampa Electric's Gannon Units 1-4. At the same time, Tampa Electric filed a request for oral argument, which was granted at the outset of our deliberations. The Office of Public Counsel ("OPC"), Florida Industrial Power Users Group ("FIPUG"), and Florida Retail Federation (collectively, "Intervenors") filed a joint response in opposition to Tampa Electric's motion on January 13, 2004.

On January 6, 2004, the Intervenors filed a joint motion for reconsideration of that same portion of the Fuel Order. Tampa Electric filed a response in opposition to Intervenors' joint motion on January 13, 2004.

On January 6, 2004, Florida Power & Light Company ("FPL") filed a motion for clarification or, in the alternative, reconsideration of that portion of the Commission's Fuel Order concerning a growth adjustment used to establish the baseline for determining incremental power plant security costs. No party filed a response to FPL's motion.

We have jurisdiction over this subject matter pursuant to Chapter 366, Florida Statutes, including Sections 366.04, 366.05, and 366.06, Florida Statutes.

I. TAMPA ELECTRIC'S MOTION FOR RECONSIDERATION

As noted in the Fuel Order, Tampa Electric is required to cease operating coal-fired generation at its Gannon Station by December 31, 2004, pursuant to a Consent Final Judgment ("CFJ") entered into with the Florida Department of Environmental Protection, signed December 6, 1999, and a Consent Decree ("CD") entered into with the United States Environmental Protection Agency and Department of Justice, signed February 29, 2000. The Fuel Order addresses, among other things, the recovery of replacement fuel costs incurred by Tampa Electric as a result of its decision to shut down Gannon Units 1-4 prior to December 31, 2004, and a sharing of savings achieved by Tampa Electric as a result of the shutdown. In addressing these matters, we stated, at page 21 of the Fuel Order, the following:

> But for TECO's decision to cease operations at Gannon Units 1 through 4 when it did, the company would not have incurred the replacement fuel costs that we have determined to be reasonable. Further, but for that same decision, the company would not have achieved O&M savings estimated at $10,521,000 for 2003. Because these O&M savings derive from the same finite decision that resulted in replacement fuel costs, we believe that, under the unique circumstances presented, the replacement fuel costs to be borne by customers should be offset to some extent by the amount of savings. . . . Taking into account all of the competing evidence in the record on this point and the unique circumstances presented, we believe that a fair and reasonable sharing of the O&M savings associated with the units' closure will be achieved by providing 80% of the estimated O&M savings, or $8,416,800, to ratepayers as an offset to TECO's recoverable fuel costs, and providing TECO the benefit of the remaining 20% of the O&M savings.

Arguments of the Parties

In its motion for reconsideration, Tampa Electric first argues that this Commission erred by effectively disallowing recovery of prudently incurred costs. Tampa Electric notes that we found that the replacement fuel costs associated with Tampa Electric's decision to shut down Gannon Units 1-4 were prudently incurred. Tampa Electric asserts that we are legally obligated to allow full recovery of those costs.

Next, Tampa Electric argues that this Commission erred by considering base rate costs as the basis for an adjustment to fuel and purchased power costs. Tampa Electric asserts that an evaluation of base rate costs may be performed only during a full rate proceeding when all expenses and investments are considered, and that our decisions in the fuel and purchased power cost recovery clause ("fuel clause") proceedings must be confined to fuel and purchased power costs.

Further, Tampa Electric argues that, assuming it is appropriate to consider base rate costs in the fuel clause, this Commission erred by failing to consider cost factors other than O&M

costs in determining whether savings were achieved as a result of the shut down of Gannon Units 1-4. Tampa Electric asserts that we erroneously focused on only one estimate of O&M savings associated with the shut down of Gannon Units 1-4 and failed to consider other costs related to the same transaction, in particular increases in O&M costs related to Tampa Electric's other generating units. Tampa Electric asserts that to determine if savings exist, we must calculate the combined effect of all of the factors directly related to compliance with the CFJ and CD, including increased investment in generating plant, increased depreciation expense, and increased maintenance expenses at other generating units. Otherwise, according to Tampa Electric, we would fail to adhere to the principle of symmetry that requires both ratepayers and utilities be treated in a similar manner.

Finally, Tampa Electric argues that this Commission failed to consider several unintended adverse consequences of its decision. Tampa Electric claims that based on our decision and the principle of symmetry, we would be required to allow a surcharge to fuel adjustment factors for increases in costs prudently incurred by a utility when it takes actions which increase O&M expenses or investment which then reduce the utility's fuel and purchased power costs, such as scheduled maintenance costs that improve reliability and availability of a generating plant. Further, Tampa Electric asserts that our decision operates as a significant and unintended penalty which will have a chilling effect on a utility's pursuit of O&M savings under circumstances where it runs the risk that such savings will be isolated and used to offset recovery of prudently incurred fuel and purchased power costs. In addition, Tampa Electric asserts that our decision injected uncertainty in Tampa Electric's full recovery of prudently incurred costs required to comply with the CFJ and CD.

In their joint response, Intervenors argue that Tampa Electric's motion for reconsideration inappropriately reargues points that this Commission considered and rejected in its deliberations on this issue. Intervenors note that Tampa Electric, at the Prehearing Conference, objected to inclusion of the issue now subject to reconsideration on the grounds that it mixed base rate and fuel cost recovery concepts, but that the issue was deemed appropriate by the Prehearing Officer. Intervenors assert that Tampa Electric, having not challenged that decision, cannot now complain that the issue is beyond the scope of the fuel clause. The Intervenors further contend that this Commission did not overlook or fail to consider Tampa Electric's position that we could not consider base rate costs as the basis for an adjustment to fuel and purchased power costs. Intervenors state that the issue was discussed in both the testimony of Tampa Electric witness Jordan and FIPUG witness Brown, and that witness Jordan acknowledged that this Commission has, on a case-by-case basis, allowed recovery of certain expenses through the fuel clause that would traditionally be recovered through base rates. Intervenors further state that, in our deliberations, we explicitly discussed and rejected Tampa Electric's position, noting instances in which this Commission had permitted capital and O&M expenditures, typically base rate items, to be recovered through the fuel clause.

Intervenors also assert that we did not err by disallowing recovery of prudent expenses because we did not disallow recovery of such expenses. Rather, according to Intervenors, this Commission ordered a sharing of O&M savings associated with the closure of Gannon Units 1-4.

Further, Intervenors assert that this Commission did not overlook or fail to consider the full context in which its decision was made. Intervenors assert that we heard, considered, and discussed extensive evidence concerning the totality of the circumstances surrounding closure of Gannon Units 1-4 and the related costs. In response to Tampa Electric's arguments concerning "symmetry" of Commission decisions, Intervenors assert that without the sharing of savings required by the Fuel Order, the ratepayers would have suffered harm while Tampa Electric benefited.

Finally, Intervenors contend that Tampa Electric's assertions of adverse unintended consequences from the Fuel Order are merely conjecture, unsupported by experience following this Commission's past decisions to allow recovery of base rate items through the fuel clause, and inconsistent with the language in the Fuel Order indicating that our decision was based on the unique circumstances presented.

Analysis and Conclusions

The standard of review for a motion for reconsideration of a Commission order is whether the motion identifies a point of fact or law that this Commission overlooked or failed to consider in rendering the order. See 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 162 (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. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). 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." Stewart Bonded Warehouse, Inc. vs. Bevis.

For the reasons set forth below, we conclude that Tampa Electric has not identified any point of fact or law that this Commission overlooked or failed to consider in rendering that portion of the Fuel Order which addressed the costs and savings associated with the shutdown of Tampa Electric's Gannon Units 1-4.

As noted above, Tampa Electric first argues that this Commission erred by effectively disallowing recovery of prudently incurred costs. This argument, however, mischaracterizes our decision. We determined that the replacement fuel costs incurred by Tampa Electric as a result of its decision to shut down Gannon Units 1-4 when it did were prudently incurred. We did not "disallow" any portion of those costs. Instead, we determined that the shutdown of Gannon Units 1-4 resulted in O&M savings for Tampa Electric in 2003 and that these savings, because they resulted from the same finite decision which led to the replacement fuel costs to be borne by

ratepayers, should be shared with ratepayers through an offset to the costs being recovered by Tampa Electric through the fuel clause. In other words, we allowed recovery of all prudently incurred replacement fuel costs, then chose to offset those costs by a percentage of the associated O&M savings realized by Tampa Electric as a means of allowing ratepayers to share in those savings. Pursuant to Chapter 366, Florida Statutes, this Commission has the exclusive authority and the obligation to set rates that it deems fair, just, reasonable, and compensatory. We firmly believe that we acted fully within our authority when we ordered that Tampa Electric's recoverable fuel costs be offset by O&M savings resulting from the same finite decision which led to replacement fuel costs. Thus, we find that we did not err in this regard.

Second, Tampa Electric argues that this Commission erred by considering base rate costs as the basis for an adjustment to fuel and purchased power costs. The argument that "the Commission's decision in the fuel and purchased power proceeding must be confined to fuel and purchased power costs" is at odds with a long history of decisions in which this Commission allowed recovery of certain expenses through the fuel clause that would traditionally be recovered through base rates, such as capital and O&M expenses. See, e.g., Order No. 11217, issued October 1, 1982, in Docket No. 820155-EU (allowing recovery through the fuel clause of capital expenses associated with 500kV transmission line pursuant to oil-backout rule); Order No. 11223, issued October 5, 1982, in Docket No. 820055-EU, and Order No. 11658, issued March 2, 1983, in Docket No. 820533-EU (allowing recovery through the fuel clause of capital and O&M expenses associated with converting Gannon units from oil-fired to coal-fired pursuant to oil-backout rule); Order No. 23366, issued August 17, 1990, in Docket No. 900001-EI, pages 5-6 (allowing recovery through the fuel clause of capital expenses associated with rail cars used to transport coal); Order No. PSC-93-1331-FOF-EI, issued September 13, 1993, in Docket No. 930001-EI, pages 5-6 (allowing recovery through the fuel clause of capital expenses associated with natural gas pipeline lateral); Order No. PSC-95-1089-FOF-EI, issued September 5, 1995, in Docket No. 950001-EI, pages 9-10 (allowing recovery through the fuel clause of capital expenses associated with conversion of combustion turbine from single-fuel to dual-fuel capability); Order No. PSC-02-1484-FOF-EI, issued October 30, 2002, in Docket No. 011605-EI (allowing recovery through the fuel clause of incremental O&M expenses associated with new or expanded hedging programs); and Order No. PSC-02-1761-FOF-EI, issued December 13, 2002, in Docket No. 020001-EI, pages 3-4, 5-7, 9-11, 14-15 (allowing recovery through the fuel clause of incremental power plant security costs). Even in the Fuel Order that is the subject of Tampa Electric's motion for reconsideration, Tampa Electric was authorized to recover incremental power plant security costs, a type of cost traditionally recovered through base rates rather than the fuel clause. The rationale behind these decisions has largely been to allow recovery through the fuel clause of non-fuel costs not recognized or anticipated at the time of the utility's last rate case that, if expended, would create fuel cost savings for customers. Under this approach, customers benefit from fuel cost savings while the utility is made whole for the non-fuel expenses necessary to achieve that benefit. We simply applied the converse of the rationale in this instance: customers were allowed to share in non-fuel cost savings achieved while the utility was made whole for its additional fuel expenses.

Consistent with this history and consistent with our statutory authority and obligation to set fair, just, reasonable, and compensatory rates, we find that we did not err by considering non-fuel costs as the basis for an adjustment to fuel and purchased power costs. Chapter 366, Florida Statutes, makes no distinction between cost recovery mechanisms, i.e., base rates and fuel clause recovery, where it requires this Commission to set fair, just, reasonable, and compensatory rates. Further, it is clear from the record that we considered Tampa Electric's argument and rejected it. We heard testimony from Tampa Electric witness Jordan and FIPUG witness Brown concerning the appropriateness of offsetting replacement fuel costs with associated O&M savings. In our deliberations, we took note of past decisions "mixing" fuel and non-fuel cost recovery in the fuel clause and, while recognizing that this was the first instance in which we were confronted with a situation where increased fuel costs resulted from the same finite decision which led to O&M savings, determined that we were not constrained from reaching the result we reached simply because the O&M savings at issue were non-fuel costs.

Third, Tampa Electric argues that, assuming it is appropriate to consider base rate costs in the fuel clause, this Commission erred by failing to consider cost factors other than O&M costs in determining whether savings were achieved as a result of the shut down of Gannon Units 1-4. We had before us extensive testimony from Tampa Electric concerning the totality of the circumstances surrounding the decision to shut down Gannon Units 1-4 when it did and found that the estimate of O&M savings set forth in Exhibit MJM-5 to the testimony of OPC witness Majoros was the best statement of savings to use for the purpose of offsetting replacement fuel costs incurred as a result of Tampa Electric's decision to shut down Gannon Units 1-4 when it did. Thus, we find that we did not fail to consider the extensive evidence before us concerning the other cost factors suggested by Tampa Electric.

Fourth, Tampa Electric argues that this Commission failed to consider several unintended adverse consequences of its decision, suggesting that we would be required to allow a surcharge to fuel adjustment factors for increases in costs prudently incurred by a utility when it takes routine actions, such as scheduled maintenance, which increase O&M expenses or investment but reduce the utility's fuel and purchased power costs. We clearly took this into consideration, pointing out in the Fuel Order that our decision was based on the very unique circumstances presented. In our deliberations, we noted that we were presented with an extraordinary circumstance where four generating units were required to be shut down as opposed to a circumstance where more modest O&M savings were generated by a new efficiency procedure. Further, in our deliberations, we made clear that we are not advocating a review of all O&M savings achieved by utilities for purposes of crediting such savings through the fuel clause. While we could not reasonably have speculated as to every possible consequence of our decision, we certainly considered the potential precedential value of our decision and clearly limited the decision to the extraordinary circumstances presented.

For the reasons set forth above, we deny Tampa Electric's motion for reconsideration.

II. INTERVENORS' MOTION FOR RECONSIDERATION

The Intervenors seek reconsideration of the same portion of the Fuel Order for which Tampa Electric seeks reconsideration. The Intervenors argue that the Fuel Order does not go far enough in sharing with customers the O&M savings resulting from the shutdown of Gannon Units 1-4. Rather than arguing that we erred in reaching our decision, the Intervenors argue that the Fuel Order did not properly reflect our vote. The Intervenors assert that the Fuel Order erroneously used the $10.5 million "Net Savings" shown in Exhibit MJM-5 to the testimony of OPC witness Majoros to represent the O&M savings related to replacement fuel costs through December 31, 2004, when the amount in Exhibit MJM-5 represented only O&M savings for 2003. The Intervenors assert that we intended Exhibit MJM-5 to be used as the formula for calculating O&M savings that should be offset against associated replacement fuel costs, but that the Fuel Order failed to account for 2004 savings. According to the Intervenors, using MJM-5 as a formula for calculating "Net Savings" for 2003 and 2004 results in a total offset of $31.9 million, after the 80/20 sharing of savings ordered by this Commission.

In response, Tampa Electric asserts that the Intervenors failed to identify any point of fact or law that this Commission overlooked or failed to consider in rendering the Fuel Order. Tampa Electric asserts that our deliberations reveal that our clear intent was to use the O&M savings reflected in Exhibit MJM-5 as the appropriate offset for all relevant time periods. Thus, Tampa Electric argues that the Fuel Order correctly reflects our intent.

Based on the standard of review set forth in part II of this Order, we find that the Intervenors' motion for reconsideration fails to identify any point of fact or law that this Commission overlooked or failed to consider in rendering the Fuel Order. Further, the transcript of our deliberations makes clear our intent to use the O&M savings shown in Exhibit MJM-5 as the only offset to replacement fuel costs incurred as a result of the shut down of Gannon Units 1-4.

From our deliberations, the Intervenors have taken a single use of the word "formula" out of context and attempted to use that single reference as the basis for an additional $21.4 million offset that is not suggested anywhere else in our deliberations or vote. Further, the Intervenors have attempted to use references to Tampa Electric's "decision to cease operations at Gannon Units 1 through 4 prior to December 31, 2004" as the basis for asserting that we must have intended to use Exhibit MJM-5 as a formula for calculating 2003 *and 2004* O&M savings to be offset against replacement fuel costs. Throughout the transcript of our deliberations, however, it is clear that we recognized the O&M savings reflected in Exhibit MJM-5 as the amount of savings we wished to use to offset replacement fuel costs. It is also clear that we recognized that Exhibit MJM-5 reflected estimates of 2003 O&M savings only. Nowhere in the transcript of our deliberations do we suggest that an additional offset is required. The motion on this issue, which was unanimously approved, reads as follows:

> I would move that we would recognize the amount in Scenario 5 of Exhibit MJM-5 as O&M savings, and that we would attribute 80 percent of that savings to the ratepayers, which would be whatever that number calculates to be, something in excess of $8 million would be a reduction in fuel costs that would be passed through to customers.

In restating the motion before the vote, the Chairman added that "we recognize that the last six months of 2003 will be affected." Accordingly, we find that the Fuel Order precisely reflects our vote.

For the reasons set forth above, we deny Intervenors' motion for reconsideration.

III. FPL'S MOTION FOR CLARIFICATION/RECONSIDERATION

By its motion, FPL asks us to clarify that the portion of our Fuel Order approving an adjustment of the baseline used to determine incremental recoverable costs to reflect growth in kWh sales ("gross-up adjustment") is intended to apply only to incremental power plant security costs. FPL notes that the Commission staff witness who proposed this adjustment filed testimony in response solely to the limited issue of the appropriate methodology for determining incremental power plant security costs. FPL further notes that at hearing the staff witness clarified that he was proposing a gross-up adjustment to apply only to incremental power plant security costs, consistent with the limited issue to which his testimony was directed. FPL states that the Fuel Order, however, does not explicitly state that this gross-up adjustment will apply only to incremental power plant security costs recoverable through the capacity cost recovery clause. If, by our Fuel Order, we intend to apply the gross-up adjustment to determine the amount of other incremental costs recoverable through cost recovery clauses, then FPL asks that we reconsider that decision.

In addressing this issue, we stated, at page 30 of the Fuel Order, the following:

> We agree with staff witness Brinkley that base amounts used for calculating incremental security costs for recovery through the capacity cost recovery clauses should be adjusted for growth or decline in energy sales in kilowatt-hours from the base year to the current year. By adjusting the base year amounts for growth in energy sales, we believe utilities will collect through the capacity clause only those expenses that are truly incremental to the level of costs being recovered through base rates. For those utilities currently operating under a revenue sharing plan approved by this Commission, current year revenues shall be reduced by the amount of revenues refunded through the utility's sharing plan prior to application of this growth adjustment.

Given the limited issue that we were asked to decide and the staff witness's clarification that his testimony was intended to address only that issue, we find that the clarification sought by

FPL is appropriate. While the Fuel Order does make specific reference to "incremental security costs for recovery through the capacity cost recovery clauses," we clarify that our approval of the gross-up adjustment was intended to apply only to incremental power plant security costs recoverable through the capacity cost recovery clause. In making this clarification, we do not preclude ourselves from considering or approving any future proposal to more broadly apply the gross-up adjustment to determine the amount of other incremental costs recoverable through cost recovery clauses.

In sum, we grant FPL's motion to clarify Order No. PSC-03-1461-FOF-EI to more precisely reflect our vote.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Tampa Electric Company's motion for reconsideration of Order No. PSC-03-1461-FOF-EI is denied. It is further

ORDERED that the Office of Public Counsel, Florida Industrial Power Users Group, and Florida Retail Federation's joint motion for reconsideration of Order No. PSC-03-1461-FOF-EI is denied. It is further

ORDERED that Florida Power & Light Company's motion for clarification or, in the alternative, reconsideration of Order No. PSC-03-1461-FOF-EI is granted as set forth in the body of this Order. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 21st day of April, 2004.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

WCK

NOTICE OF JUDICIAL REVIEW

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 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 wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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.