

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.

DOCKET NO. 000824-EI
ORDER NO. PSC-03-0687-PCO-EI
ISSUED: June 9, 2003

ORDER GRANTING MOTION FOR PROTECTIVE ORDER LIMITING
THE SCOPE OF DISCOVERY, AND GRANTING IN PART AND
DENYING IN PART MOTION FOR PROTECTIVE ORDER AGAINST
THE TAKING OF DEPOSITIONS OF ROBERTS AND HABERMEYER

By Order No. PSC-03-0659-PCO-EI, issued May 29, 2003, Progress Energy Florida, Inc. (PEFI) is required to respond to the Office of Public Counsel's Second Set of Interrogatories and Third Set of Requests for Production of Documents (RFP) by June 11, 2003. The Order also requires that the parties confer to reschedule the depositions of five PEFI employees, originally scheduled for June 4, 2003, for a mutually agreeable time between June 11 and June 20, 2003.

On May 29, 2003, Progress Energy Florida, Inc. (PEFI) filed a Motion for Protective Order to Limit the Scope of Discovery. PEFI contends that OPC's discovery does not concern the merits of the refund issue which has arisen with respect to the stipulation and settlement agreement (Settlement), approved by Order No. PSC-02-0655-AS-EI, issued May 14, 2002. Rather, the discovery concerns an ancillary investigation based on the suspicion that ex parte communications may have taken place between PEFI employees and one or more Commissioners. PEFI states that it is willing to respond to inquiries regarding the suspected ex parte communications, but contends that OPC's Third RFP covers an overly broad time frame and requests documents outside the scope of the ex parte issue.

Specifically, OPC's Request for Production No. 4 asks for documents to any Commission staff or Commissioner concerning the Settlement refund, as of March 27, 2002. Request No. 5 asks for any documents regarding the Settlement, meetings with any Commission staff or Commissioner, or the amount of the refund, as of March 27, 2002. Request No. 6 asks for all documents regarding

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the amount of refund required under the Settlement, as of March 27, 2002.

PEFI contends that OPC is seeking documents from over a year before the refund issue came before the Commission through the filing of the Motion to Enforce Settlement Agreement, on February 24, 2003. PEFI believes that the request should be governed by the relevant time frame established by the laws governing ex parte communications. The ex parte statute, and the Commission's rules, govern communications with Commissioners up to 90 days prior to the initiation of a docket when a person "knows" that the matter will be filed with the Commission. Section 350.042(1), Florida Statutes; Rule 25-22.033(1), Florida Administrative Code. In addition, PEFI contends that the scope of OPC's requests go far beyond what is necessary to address the subject of alleged ex parte communications.

On May 30, 2003, PEFI filed a Motion for Protective Order Against the Taking of Depositions of Gary Roberts and H. William Habermeyer, Jr., which asserts that these witnesses do not have knowledge which is necessary, relevant, or otherwise unavailable from lower level or other PEFI employees. On June 2, 2003, PEFI filed original affidavits of Messrs. Roberts and Habermeyer, which attests to their lack of participation in or knowledge of alleged improper ex parte communications with any Commissioner or Commission staff. PEFI contends that these employees are "apex officials," and should not be deposed, over objection, unless and until the opposing parties have exhausted other, less intrusive means of discovery.¹ In light of the witnesses' positions and schedules, and the availability of other discovery methods, PEFI contends that OPC's deposition of Messrs. Roberts and Habermeyer would have no legitimate purpose and constitute undue hardship.

¹PEFI describes "apex" officials as agency heads or high-level corporate executives, and cites several cases in its motion for the proposition that apex officials can not be deposed over objection "unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources." Dept. of Agricultural & Consumer Services v. Broward County, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002).

On June 4, 2003, a joint response to both PEFI Motions was filed by OPC and the Florida Attorney General (Respondents). With respect to the Motion to Limit Discovery, the Respondents argue that the ex parte statute is applicable from July 7, 2000, when this docket was opened. Further, the Respondents claim that the scope of discovery is not as limited as PEFI contends, but rather includes any matter, not privileged, relevant to the subject matter of the pending action. The Respondents contend that PEFI can not dispute the refund issue, and then claim that discovery about that issue should not be allowed.

With respect to PEFI's Motion for Protective Order to prohibit the depositions of Messrs. Roberts and Habermeyer, the Respondents state that Mr. Habermeyer personally signed the Settlement, and "has more direct knowledge of the negotiations leading to the settlement than any other person." The Respondents indicate that Mr. Habermeyer met with most, if not all of the Commissioners, individually in January 2003. The Respondents state contend that protection of an apex official should be denied if he or she has personal knowledge of the relevant claims at issue or if the motivations behind corporate actions are at issue. The Respondents state that Mr. Roberts may have information regarding the work and statements of Mr. Paul Lewis, who has also been identified as an employee whom OPC seeks to depose. Further, Mr. Roberts "is not an 'apex' official" entitled to protection from discovery.

A decision on the refund issue was deferred from the May 20, 2003, Agenda Conference to permit oral argument on OPC's Motion in Limine and Motion to Strike, filed May 16, 2003, and to permit the parties, including OPC, counsel for Buddy Hansen and Sugarmill Woods Civil Association, and the Florida Attorney General, to investigate whether any ex parte communication may have taken place regarding this matter. OPC's requests are broader in scope than is required to address this limited concern. At this stage of the proceeding, it would be inappropriate to use discovery as a fishing expedition, beyond the relevant scope of the ex parte concerns which have been raised. See City of Miami v. Florida Public Service Commission, 226 So. 2d 217 (Fla. 1969). The Respondents' argument that this matter has been pending since 2000 is unpersuasive. Docket 000824-EI was closed May 14, 2002; the same docket was re-opened only as an administrative convenience in February 2003 upon the filing of the Motion to Enforce Settlement

Agreement. Having reviewed the Motion to Limit Discovery and the Response, I believe that the relief requested by PEFI is reasonable. Therefore, the discovery sought by OPC in this matter shall be limited in scope to investigating whether a prohibited communication may have taken place, as of November 26, 2002, which is 90 days prior to the filing of the Motion to Enforce Settlement Agreement.

The Respondents state that Mr. Roberts "may have information regarding the work and statements of Mr. Paul Lewis," and that Mr. Roberts "is not an 'apex' official" entitled to protection from discovery. Without resolving whether or not Mr. Roberts is an "apex" official, I believe that the better course of obtaining information about Mr. Lewis' statements is by deposing Mr. Lewis himself, which OPC has proposed to do, and to which PEFI has not objected. It does not appear that Mr. Roberts has knowledge or information reasonably calculated to lead to admissible evidence in this matter. Therefore, PEFI's Motion for Protective Order is granted with respect to the proposed deposition of Mr. Roberts.

The arguments presented by the Respondents regarding Mr. Habermeyer's deposition are more persuasive, however. Mr. Habermeyer has attested that he does not possess any unique information or knowledge about this proceeding, and that to the extent he has such knowledge, such information would be available from other, lower-level employees. However, Mr. Habermeyer does appear to be in a position where he may have evidence relating to the relevant alleged ex parte issue. Having balanced the interests of the Respondents in requesting this discovery with the equal obligation to protect PEFI against excessive or irrelevant discovery demands, I find it reasonable to deny PEFI's request for a protective order in this instance. The Respondents are instructed to work with PEFI to reasonably accommodate Mr. Habermeyer's schedule, and to conduct the deposition within the scope of the ex parte investigation, as set forth above.

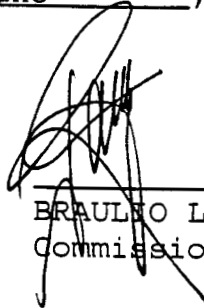
Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that Progress Energy Florida, Inc.'s Motion for Protective Order to Limit the Scope of Discovery is granted as set forth herein. It is further

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ORDERED that Progress Energy Florida, Inc.'s Motion for Protective Order Against the Taking of Depositions is granted with respect to the deposition of Mr. Gary Roberts, and denied with respect to the deposition of Mr. H. William Habermeyer, Jr., as set forth herein.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 9th day of June, 2003.

 for Commissioner Braulio Baez

BRAULIO L. BAEZ
Commissioner and Prehearing Officer

(S E A L)

JSB

NOTICE OF FURTHER PROCEEDINGS OR 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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, Florida Administrative Code; 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 Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. 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.