BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| 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<br>ORDER NO. PSC-03-0876-FOF-EI<br>ISSUED: July 30, 2003 |

The following Commissioners participated in the disposition of this matter:

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

ORDER GRANTING MOTION TO ENFORCE SETTLEMENT AGREEMENT AND REQUIRING ADDITIONAL REFUNDS

BY THE COMMISSION:

BACKGROUND

This Commission opened Docket No. 000824-EI on July 7, 2000, to review the earnings of Florida Power Corporation (FPC), now known as Progress Energy Florida, Inc. (PEFI), and the effects of the acquisition of FPC by Carolina Power & Light Company. The acquisition was consummated on November 30, 2000. By Order No. PSC-01-1348-PCO-EI, issued June 20, 2001, in Docket No. 000824-EI, we directed FPC to file Minimum Filing Requirements (MFRs) to provide us and all other interested parties the data necessary to begin an evaluation of FPC's level of earnings on a going-forward basis.

The hearing was scheduled to begin on March 20, 2002. On that date, however, the parties filed a Joint Motion To Postpone Scheduled Hearings to afford the parties the opportunity to finalize the terms of a settlement stipulation. The motion was granted by Order No. PSC-02-0411-PCO-EI, issued March 26, 2002. By

Order No. PSC-02-0412-PCO-EI, issued March 26, 2002, we suspended the hearing schedule.

On March 27, 2002, FPC filed a Joint Motion for Approval of Stipulation and Settlement and Further Postponement of Hearings and a Stipulation and Settlement. We approved the stipulation and settlement agreement (Settlement) in Order No. PSC-02-0655-AS-EI, issued May 14, 2002. Among other things, the Settlement required PEFI to make refunds to customers if its revenues should exceed certain thresholds during the years 2002, 2003, 2004, or 2005. For the period ended December 31, 2002, PEFI calculated a refund amount of $4,954,413, excluding interest.

On February 24, 2003, the Office of Public Counsel, Florida Industrial Power Users Group, Florida Retail Federation, Buddy Hansen/Sugarmill Woods Civic Association, and Publix Super Markets, Inc. (Movants) filed a Motion To Enforce Settlement Agreement (Motion). The Movants contend that PEFI's refund calculation made three adjustments which are inappropriate and not contemplated by the Settlement.

On March 7, 2003, PEFI filed both a response in Opposition to the Motion To Enforce Settlement Agreement (Response) and a Request for Oral Argument and, in the Alternative, for an Evidentiary Hearing. In an effort to facilitate a possible resolution of these issues, our staff held a noticed meeting with the parties on March 27, 2003. The parties were unable to resolve their differences at the meeting.

By letter dated April 9, 2003, PEFI provided its initial Revenue Sharing Refund Report per Order No. PSC-02-0655-AS-EI, indicating that $4,995,649 had been refunded to its customers as of March 28, 2003.

Our staff's recommendation on the Motion to Enforce Settlement Agreement was filed May 8, 2003, for consideration at the May 20, 2003, Agenda Conference. On May 16, 2003, OPC filed a Motion in Limine and Motion to Strike with respect to certain matters raised in PEFI's March 7th response. On that same date, by Order No. PSC-03-0605-PCO-EI, the Florida Attorney General was granted intervenor status in this docket.

Our decision on the refund issue was deferred from the May 20, 2003, Agenda Conference, to permit oral argument on the Motion in Limine and Motion to Strike at a June 30, 2003, Special Agenda Conference. We noted that any other pending procedural matters would also be addressed and decided at the June 30th Special Agenda. A decision on the Motion to Enforce Settlement Agreement was scheduled to be made at a July 9, 2003, Special Agenda Conference.

At the June 30, 2003, Special Agenda Conference, by Order No. PSC-03-0850-PCO-EI, issued July 22, 2003, we granted the Motion in Limine, with the clarification that the three items that the Commission would consider at the July 9, 2003, Special Agenda Conference are the Settlement, Order No. PSC-02-0655-AS-EI, approving the Settlement, and the transcript from the April 23, 2002, Agenda Conference, wherein the Settlement was approved.

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

## REQUEST FOR ORAL ARGUMENT AND, IN THE ALTERNATIVE, FOR AN EVIDENTIARY HEARING

In its request, PEFI contends that oral argument will be essential to our resolution of this matter, and that after oral argument, we will be in a position to rule in PEFI's favor on the current state of the record. If, however, we believe that we do not have a sufficient record to rule on the merits in PEFI's favor, PEFI requests that we schedule an evidentiary hearing to resolve the dispute. No party filed a response either in opposition to or in support of PEFI's request.

We find that oral argument would aid us in comprehending and evaluating the issues before us, due to the importance and complexity of this matter. Further, we note that since no hearing has been held with respect to these issues, parties and interested persons may participate at the Agenda Conference at our discretion. Accordingly, we permitted oral argument by the parties at the July 9th Special Agenda Conference regarding the Motion to Enforce Settlement Agreement.

A proceeding pursuant to Section 120.57, Florida Statues, is designed to address matters involving disputed issues of material fact. PEFI's concerns present matters which require a legal, rather than factual, determination. We do not find that additional evidence is necessary in order to fully and fairly resolve the matter before us. As such, this matter has been noticed as a matter of final agency action, to which the appropriate recourse is to seek further relief from a court of competent jurisdiction. Accordingly, we deny PEFI's alternative request to set this matter for an administrative hearing.

MOTION TO ENFORCE SETTLEMENT AGREEMENT

This issue involves a dispute between the parties regarding one component of a very comprehensive stipulation, the refund for 2002. Neither this Commission nor its staff was privy to the discussions leading to the wording of the Settlement. Therefore, we are unable to provide an opinion regarding the intent and understanding of the various parties when they agreed to the provisions and amounts contained in the Settlement. We are further unaware of the basis for the revenue sharing mechanism.

In its Response, PEFI calculated a refund amount of $4,954,413, excluding interest, based on its understanding of the intent of the provisions of the Settlement and its interpretation of those provisions. The Movants calculated a refund amount of $23,034,004, excluding interest, based on their understanding of the intent and interpretation of those same provisions. The difference in the two amounts stems from three adjustments PEFI made in its refund calculation, which the Movants contend are inappropriate and not contemplated by the Settlement.

The adjustments made by PEFI to its actual revenues for calculation of its 2002 refund are as follows:

- Increased actual revenues by $35 million to account for the refund of interim revenues as required by Order No. PSC-02-0655-AS-EI.

- Reduced actual revenues by $9.3 million, related to the Service Fee/Lighting rate increase.

- Reduced 2002 actual revenues by $41.6 million to account for the rate reduction not being in effect for the entire year.

The Movants contend that PEFI entered into an agreement that set forth specific calculations determining the amount it would refund for 2002. Now that the year 2002 is over, PEFI cannot change those calculations to suit its tastes, and cannot rely on matters lying outside of the written agreement in order to change its obligations. The Movants contend that we must issue an order enforcing the settlement agreement so that PEFI's customers will get the refund to which they are entitled.

In its Response, PEFI states that:

> Traditionally, the Commission has used an authorized Return on Equity ("ROE") to limit earnings levels. When the utility earns above the top of the range, the Commission or OPC might initiate a rate review to reduce the utility's rates. In their Settlement Agreement in this case, however, the parties agreed to a revenue sharing plan in lieu of a traditional limit on ROE as a means to limit earnings levels. Under this revenue sharing plan, when Progress Energy receives more revenues than projected, the excess revenues are shared on a 1/3 - 2/3 basis between shareholders and customers.
>
> The key to the plan is that expected - i.e., projected - base rate revenues must be compared on an apples-to-apples basis with actual base rate revenues for the periods in which revenue sharing is in effect in order to identify excess revenues that should be shared.

(Response at page 2) PEFI states that the dispute about how to treat the transition year, 2002, arises from the fact that the revenue sharing plan commences part way through that year, on May 1, 2002. PEFI contends that the fact that the revenue sharing plan commences part way through the year necessitates some adjustments; however, "the basic premise of the plan remains unchanged: the object is still to identify whether there are any excess revenues over those projected." (Response at page 2) PEFI believes that when the Settlement and Order PSC-02-0655-AS-EI are applied "in a sensible manner, consistent with both the language and explicit

intent of those documents, it becomes clear that a refund of excess revenues in the amount $4,998,489 is called for in the year 2002."

Areas of Contention

Interim Refund - During its review of the Settlement, our staff noticed that the provision regarding the $35 million interim refund was silent regarding the apportionment of the interim refund between the amount attributable to 2001 and the amount attributable to 2002. In its recommendation, our staff pointed out the need for clarification of this point and proposed that only $10,370,000 of the interim refund was related to 2002. At the April 23, 2002, Agenda Conference, all of the parties, including PEFI and the Movants, agreed with the calculation, which we subsequently approved.

The $35 million interim refund was made during the May 2002 through December 2002 period, thereby reducing 2002's actual revenues by $35 million. While both PEFI and the Movants agree that an adjustment to increase revenues is necessary, each has proposed a different amount. PEFI has increased revenues by the entire $35 million while the Movants have increased revenues by the net amount of $24,630,000 ($35,000,000 - $10,370,000). Because of our express prior ruling as to this issue, we find that the appropriate adjustment is $24,630,000. This adjustment only affects the revenue sharing refund calculation for 2002.

We also note that PEFI has stated that an adjustment of $24,630,000 would be appropriate if it reduced its "rate reduction not in effect" adjustment from $41,625,000 to $31,255,000. (Response at page 10, footnote 2)

Lighting/Service Fee Increases - The second area of contention involves the treatment of the approximately $14 million annual revenue increase related to the increases in lighting and service fees. PEFI has made an adjustment to reduce its revenues by $9,338,000 to remove the portion of the increased lighting and service fee revenues that it collected between May 1, 2002, and December 31, 2002. PEFI claims that the increased lighting and service fee revenues should not be included as "base rate revenues" that are subject to the revenue sharing mechanism. As noted on Pages 5 and 6 of PEFI's Response, the term "base rate revenues" is

not defined in the Settlement. On Page 4 of the Motion, the Movants disagree with this adjustment and state that "no such adjustment is allowed by the agreement". Although the Settlement contains various explicit provisions, there is no provision for excluding any revenues from base rate revenues in determining the amount of revenues that are subject to the sharing mechanism.

At the April 23, 2002, Agenda Conference, we asked numerous clarifying questions to obtain a better understanding of the meaning and intent of various provisions in the Settlement. As previously discussed, our staff also expressed concerns about the apportionment of the $35 million interim refund in its recommendation and offered a proposed treatment for clarification. There was ample opportunity at the Agenda Conference for the parties to offer their own clarifications if the provisions of the Settlement, as plainly written, did not reflect their intent and understanding. This adjustment, if made, could also affect the calculation of any revenue sharing refund for each subsequent year during the term of the Settlement.

Rate Reduction Impact - PEFI had made another adjustment to reduce revenues by $41,625,000 for the January 1, 2002, to April 30, 2002, period prior to the actual implementation of the $125 million rate reduction. The Movants contend that the Settlement "sets forth a very specific calculation for 2002," and that PEFI "cannot simply add an additional adjustment of $41,625,000 when the agreement does not allow this adjustment." (Motion at page 4)

Paragraph 6 of the Settlement clearly states how the refund, if any, is to be calculated for 2002. It provides for a $1,296 million sharing threshold at which sharing is to begin. It also clearly states that, for 2002 only, the amount to be refunded "will be limited to 67.1% (May 1 through December 31) of the 2/3 customer share." (Response at page 16, Exhibit A) The purpose of the 67.1% limitation is to recognize that the $125 million rate reduction was not effective until May 1, 2002. Neither Paragraph 6 nor any other paragraph of the Settlement provides for any adjustments to the base rate revenues subject to the sharing mechanism. This adjustment only affects the revenue sharing refund calculation for 2002.

Movants' Position

The Movants urge application of the parole evidence rule, which simply put, holds that the terms of the contract speak for themselves; that absent an ambiguity in the contract terms, the contract may not be explained by extrinsic evidence or by reference to any other matter. Whereas PEFI contends, e.g., that the "key" to the agreement is "that the projected base rate revenues must be compared on an apples-to-apples basis with actual base rate revenues for the periods in which revenue sharing is in effect," there is no mention of this "key" in the Settlement.

The Movants contend that if this Commission is compelled to apply the law of contracts to the Settlement at issue, we should grant the Motion. That is, we may not consider an unstated "key," nor consider other matters not expressly set forth in the Settlement.

PEFI's Position

PEFI maintains that it agreed to a revenue sharing threshold based, in part, on its calendar year (CY) 2002 budget. It is true that the agreed upon threshold of $1.296 billion equals PEFI's original budget of $1.421 billion less the full effect of the $125 million base rate reduction. According to PEFI, the rate increases (street lighting and service) and interim refund were not part of its budget and therefore, the related effects should be removed so CY 2002 revenues are on a comparable basis to the $1.296 billion threshold considering full effect of the rate reduction.

PEFI argues that the Movants "are attempting to turn the revenue sharing feature of the Settlement Agreement on its head," by asking that PEFI be required to refund over $18 million of revenues that it had always projected it would receive, as can be readily deduced from the forecasted information in PEFI's MFRs. In other words, the Movants argue that $41.6 million in 2002 revenues that PEFI had always projected it would receive must be deemed excess revenues, subject to revenue sharing, because these revenues would have exceeded the forecast if we had applied the agreed-upon 9.25% rate reduction (totaling $125 million per year) prior to May 1, 2002, the effective date of the rate reduction. PEFI argues that this results in a retroactive rate reduction for the first

part of 2002, even though neither PEFI, the Commission, nor any of the parties ever stated or agreed that rates would be reduced prior to May 1, 2002.

PEFI contends that the Movants' argument contravenes the language and the intent of the Settlement and Order No. PSC-02-0655-AS-EI. PEFI also believes that we took as a given that PEFI would have to make appropriate adjustments to "base rate revenues" in determining the appropriate level of revenue that will be subject to the revenue threshold and cap for 2002." In summary, PEFI believes that the revenue threshold and determination of 2002 operating revenue were predicated on the utility's 2002 operating budget.

Decision Granting Motion to Enforce Settlement Agreement

We believe that had the intent of the agreement been as asserted by PEFI, language to that effect could have been incorporated in the Settlement. PEFI might also have requested clarification of such an understanding at the April 23, 2002, Agenda Conference. As discussed previously, a staff clarification regarding the interim refund portion of the Settlement was raised at that Agenda Conference, agreed to by all parties to the Settlement, and thereafter incorporated as part of the Settlement through Order No. PSC-02-0655-AS-EI. The language of the Settlement provides a hard number - $1,296 million - as the threshold from which any revenues to be shared are to be calculated. We find that a strict reading of the agreement does not support the adjustments proposed by PEFI.

The resolution of this issue must be in the same public interest standard under which we approved the initial Settlement, subject to our ratemaking authority and authority to ultimately resolve what the utility's rates and charges would be. Reading the Settlement as a whole, and in conjunction with Order No. PSC-02-0655-AS-EI, we find that the Motion to Enforce the Settlement Agreement shall be granted. PEFI has already refunded $4,954,413 (excluding interest). Therefore, the additional amount to be refunded is $18,079,591 ($23,034,004 - $4,954,413), plus interest, under the revenue sharing mechanism for 2002.

The additional refund amount is to be made in accordance with Paragraph 8 of the Settlement, to those customers of record during the last three months of the applicable 2002 refund period. The refund shall be in the form of a credit on the customers' bills, commencing no later than the first billing cycle of October 2003. Unclaimed refunds shall be credited to fuel costs through the fuel and purchased power cost recovery clause. Pursuant to agreement by all parties at the July 9, 2003, Special Agenda Conference, this treatment for unclaimed refunds shall be utilized for all unclaimed refunds, past and future, which occur by operation of the Settlement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Progress Energy Florida, Inc.'s request for an evidentiary hearing is hereby denied. It is further

ORDERED that the Motion to Enforce Settlement Agreement is hereby granted. It is further

ORDERED that Progress Energy Florida, Inc. shall refund an additional $18,079,591, plus interest, in accordance with Paragraph 8 of the Settlement, to those customers of record dating back to the three-month period of January through March, 2002. It is further

ORDERED that the refund shall be by customer credit, with the credit to customer accounts commencing no later than by the first billing cycle of October 2003. It is further

ORDERED that unclaimed refunds are to be credited to fuel costs through the fuel and purchased power cost recovery clause. It is further

ORDERED that any other unclaimed refunds which occur by operation of the Settlement shall also be credited to fuel costs through the fuel and purchased power cost recovery clause. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 30th Day of July, 2003.

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

( 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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15)

days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services 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.