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February 24, 2003

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COMMISSION
CLERK

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 000824-EI

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of a Motion to Enforce Settlement Agreement for filing in the above-referenced docket.

Also enclosed is a 3.5 inch diskette containing Citizens' Prehearing Statement in Microsoft Word format. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

Jack Shreve
Jack Shreve
Public Counsel

CJB/dsb
Enclosures

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- SEC 1
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FPSC-COMMISSION CLERK

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

Dated February 24, 2003

MOTION TO ENFORCE SETTLEMENT AGREEMENT

The Citizens of Florida ("Citizens"), Florida Industrial Power Users Group ("FIPUG"), Florida Retail Federation ("Retail Federation"), Buddy Hansen / Sugarmill Woods Civic Association ("Sugarmill Woods"), and Publix Super Markets, Inc. ("Publix") file this motion seeking an order from the Florida Public Service Commission ("Commission") enforcing the settlement agreement made with Progress Energy Florida, Inc., f/k/a Florida Power Corporation ("Progress Energy") on March 27, 2002, and state the following:

1. The parties entered into a settlement agreement on March 27, 2002, for the purpose of resolving all outstanding issues in docket 000824-EI. Commission order no. PSC-02-0655-AS-EI issued May 14, 2002, approved the settlement agreement.

2. Among other things, the settlement agreement requires Progress Energy to make refunds to customers if its revenues should exceed certain thresholds during the years 2002, 2003, 2004, or 2005. The specific portion of the agreement addressing revenue sharing and refunds follows:

"6. Commencing on the Implementation Date and for the remainder of 2002 and for calendar years 2003, 2004 and 2005, and for each calendar year thereafter until terminated by the Commission, FPC will be under a Revenue Sharing

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FPSC-COMMISSION CLERK

Incentive Plan as set forth below. For purposes of this Revenue Sharing Incentive Plan, the following retail base rate revenue threshold amounts are established:

I. Revenue Cap - All retail base rate revenues above the retail base rate revenue cap will be refunded to retail customers on an annual basis. The retail base rate revenue cap for 2002 will be \$1,356 million. For 2002 only, the refund to customers will be limited to 67.1% (May 1 through December 31) of the retail base rate revenues exceeding the cap. The retail base rate revenue caps for calendar year 2003 and for each calendar year thereafter in which this Plan is in effect will be increased by \$37 million over the prior year's revenue cap. Section 8 explains how refunds will be paid to customers.

II. Sharing Threshold - Retail base rate revenues between the sharing threshold amount and the retail base rate revenue cap will be divided into two shares on a 1/3, 2/3 basis. FPC's shareholders shall receive the 1/3 share. The 2/3 share will be refunded to retail customers. The sharing threshold for 2002 will be \$1,296 million in retail base rate revenues. For 2002 only, the refund to the customers will be limited to 67.1% (May 1 through December 31) of the 2/3 customer share. The retail base rate revenue sharing threshold amounts for calendar year 2003 and for each calendar year thereafter in which this Plan is in effect will be increased by \$37 million over the prior year's revenue sharing threshold. Section 8 explains how refunds will be paid to customers.....

8. All revenue sharing refunds will be paid with interest at the 30-day commercial paper rate as specified in Rule 25-6.109, Florida Administrative Code, to retail customers of record during the last three months of each applicable refund period based on their proportionate share of base rate revenues for the refund period. For purposes of calculating interest only, it will be assumed that revenues to be refunded were collected evenly throughout the preceding refund period at the rate of one-twelfth per month. All refunds with interest will be in the form of a credit on the customers' bills beginning with the first day of the first billing cycle of the third month after the end of the applicable refund period. Refunds to former customers will be completed as expeditiously as reasonably possible."

3. Progress Energy currently reports net base rate revenues of \$1,318,108,695 during 2002.¹ As shown by schedule 1 attached to this motion, the refund required for this level of reported revenues is \$23,034,004 plus interest.

4. Progress Energy proposes to refund \$4,690,197 instead of \$23,235,551 as required by the agreement. In its report to staff concerning the amount to be refunded, the company makes three improper adjustments.

5. First, it makes a positive adjustment of \$35,000,000 to reported revenues for the interim revenue refund, even though the Commission's order makes it perfectly clear that the proper adjustment is \$24,630,000. The order specifically cites the provision of the settlement agreement providing for a \$35 million refund of interim revenues collected subject to refund since March 13, 2001 (order at 5). Noting that the settlement agreement was silent regarding the apportionment of the interim rate refund during the interim period, the Commission decided to apportion the interim rate refund for the purpose of determining the appropriate level of revenue subject to the new revenue threshold and cap for 2002. The Commission found that \$10,370,000 of the total refund of \$35,000,000 was attributable to revenues collected subject to refund during the January 1, 2002, through April 30, 2002, period (order at 5). In other words, since the entire \$35,000,000 refund of interim revenues would take place during 2002 and would reduce revenues actually collected in 2002 by \$35,000,000, an upward adjustment to revenue collected during 2002 of \$24,630,000 (\$35,000,000 minus \$10,370,000) would be necessary in order to properly accrue revenues over the entire interim period of March 13, 2001, through April 30, 2002.

1. This is the most recent number reported by Progress Energy Florida, but it reported a different number earlier this year. Citizens have a pending request for production of documents to investigate the reported revenue figure. This motion *assumes* that this most recently reported revenue figure is correct; If

6. Second, Progress Energy makes an negative adjustment of \$41,625,000 to annualize the May 1, 2002, rate reduction, even though there is nothing whatsoever in the agreement that would allow this. The agreement sets forth a very specific calculation for 2002: paragraph 6(II) states that for 2002 only, the refund to customers will be limited to 67.1% (May 1 through December 31) of the 2/3 customer share. The agreement makes other allowances to the company for 2002, such an allowance for a full year debit of \$62.5 million to depreciation expense (agreement, paragraph 11), even though the agreement was effective for only seven months during 2002. There is a total package of specific calculations and allowances for the company contained in the agreement to account for 2002, and these are the adjustments and allowances that the company can rightfully claim. It cannot simply add an additional adjustment of \$41,625,000 when the agreement does not allow this adjustment.

7. Third, the company includes a negative adjustment of \$9,338,000 for lighting and service charge revenues. No such adjustment is allowed by the agreement.

8. Progress Energy may try to claim rationales outside of the agreement to support these adjustments, but the company, just like everyone else, must abide by the terms of the agreement they signed.

9. The parol evidence rule prohibits the use of parol evidence to contradict, vary, defeat, or modify a complete and unambiguous written instrument, or to change, add to, or subtract from it, or affect its construction. 24 Fla. Jur. 2d §444. According to the Florida Supreme Court:

"It is hardly necessary to state again that the parol evidence rule is a fundamental rule of substantive law 'resting

investigation indicates that reported revenues should be different, we will file an amendment to this motion.

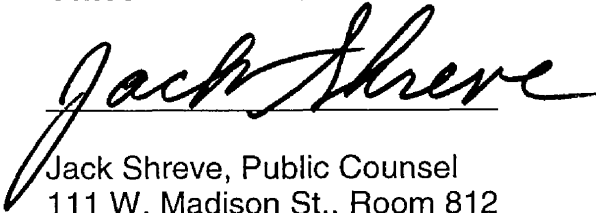
on a rational foundation of experience and policy' and is essential to the certainty and stability of written obligations." *Schwartz v. Zaconic*, 68 So.2d 173 (Fla. 1953).

The parol evidence rule applies to this situation. Progress Energy entered into an agreement that set forth specific calculations determining the amount it would refund for 2002. Now that the year 2002 is over, it cannot change those calculations to suit its tastes, and it cannot rely on matters lying outside of the agreement in order to change its obligations. The Commission must issue an order enforcing the settlement agreement so that customers will get the refund to which they are entitled.

WHEREFORE, Citizens, FIPUG, Retail Federation, Sugarmill Woods, and Publix respectfully request the Commission to enforce the settlement agreement and order Progress Energy to refund approximately \$23,034,004 plus interest to its customers.

Respectfully submitted,

Office of Public Counsel



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Florida Industrial Power Users Group

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Woods Civic Association**

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Gray, Harris & Robinson, P.A.
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SCHEDULE 1

CALCULATION OF REFUND OWED FOR 2002

2002 Revenues, as reported by Progress Energy	\$1,322,836,080
Interim refund attributable to 2001	<u>+ 24,630,000</u>
Total Revenues for 2002	1,347,466,080
Threshold for 2002	<u>-1,296,000,000</u>
Difference between Revenues and Threshold	51,466,080
67.1% of above amount, per agreement	34,533,740
Customer Share (66.7% of above)	\$23,034,004
 Refund Owed:	 <u>\$23,034,004 plus interest</u>