

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 May 19, 2003

COMMISSION CLERK

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PROGRESS ENERGY'S RESPONSE IN OPPOSITION TO MOTION IN LIMINE AND MOTION TO STRIKE

Progress Energy Florida, Inc., formerly Florida Power Corporation, Inc. ("Progress Energy" of "the Company") submits this response in opposition to the Motion in Limine and Motion to Strike filed by the Office of Public Counsel ("OPC"); the Florida Industrial Power Users Group; Florida Retail Federation; Buddy Hansen/Sugarmill Woods Civic Association; and Publix Super Markets, Inc. (collectively called "Movants").

By their motion, the Movants seek to strike an affidavit filed on March 7, 2003 by Progress Energy in support of Progress Energy's Opposition to OPC's Motion to Enforce Settlement Agreement. The Motion to strike is untimely. Movants had ample opportunity over the past 10 weeks to respond to the affidavit but chose not to do so. The fact that Staff has recommended that no evidentiary hearing be conducted in this matter is not material. Affidavits are routinely submitted in support of motions for summary judgment and may be appropriately considered in determining whether there is any need for an evidentiary hearing in the first place.

Further, the Motion is lacking in merit. Movants base their argument on the same ground

that they advance in their Motion to Enforce Settlement, namely, that the Settlement Agreement clearly and unambiguously calls for a greater refund than the one provided. The Commission

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cannot grant the Motion to Strike without deciding the merits of the underlying dispute. This is not the proper function of a “Motion in Limine” or “Motion to Strike.”

Background and Facts

The Movants filed their Motion to Enforce Settlement on February 24, 2003. In that Motion, the Movants contend that the Settlement Agreement approved by the Commission to resolve all issues in Progress Energy’s rate case calls for a greater refund through “revenue sharing” for the year 2000 than Progress Energy provided. Movants contended that the Commission should not take into account anything other than the Settlement Agreement itself, and the Commission’s Order approving it, under the “parol evidence” rule.

In opposition to the Motion to Enforce Settlement Agreement, Progress Energy filed a memorandum and supporting affidavit of Javier Portuondo on March 7, 2003. In its memorandum, Progress Energy pointed out that the Motion to Enforce Settlement Agreement was “in the nature of a motion for summary judgment, asking for affirmative relief (a determination that Progress Energy owes a refund) based ostensibly on the plain language of the Settlement Agreement and without any supporting affidavits.” (Opposition, p. 1). In its response, Progress Energy opposed that request for relief and “ask[ed] the Commission for a definitive ruling on the merits of this dispute in Progress Energy’s favor, based on the undisputed evidence, including . . . the Affidavit of Mr. Javier Portuondo.” (Id.).

In its Memorandum, Progress Energy contended that the most natural construction of the Settlement Agreement supported the Company’s interpretation, calling for the refund actually provided for 2002, even without resort to Mr. Portuondo’s affidavit. Progress Energy demonstrated that, at a minimum, the Settlement Agreement was ambiguous and called for

interpretation, and that the parol evidence rule does not preclude the consideration of matters outside a contract for purposes of interpreting an ambiguous agreement.

The Movants made no effort to respond to Progress Energy's submissions either by filing counter-affidavits or requesting to take a deposition of Mr. Portuondo.

ARGUMENT

The Movants' Motion in Limine and Motion to Strike is untimely. Movants had every opportunity to file affidavits of their own or to test the statements in Mr. Portuondo's affidavit by seeking his deposition long before now. Instead, they stood on their position that the Commission should resolve this dispute based solely on the argument provided by Movants in their legal memorandum.

In fact, one of the issues the Commission will consider on the merits of the underlying dispute is whether the Settlement Agreement is ambiguous. This means that the Commission cannot grant Movant's Motion to Strike without disposing of the central issue that the Commission must resolve on the merits of the underlying controversy, namely, whether the Settlement Agreement is ambiguous or not. Progress Energy demonstrated at length in its Opposition to the Motion to Enforce Settlement Agreement that parol evidence can and should be considered whenever a contract is ambiguous and calls for interpretation. See, e.g., Miller v. Kase, 789 So. 2d 1095, 1097-98 (4th DCA 2001) ("in the absence of clear and unambiguous language, the court must engage in judicial interpretation" and may accept parol evidence); Berry v. Teves, 752 So. 2d 112, 114 (2d DCA 2000) (when contract is ambiguous, "parole evidence is admissible to determine the parties intent"). The Movants have never disputed this.

Further, motions in limine may not be used in lieu of motions for summary judgment to force a determination of the merits of a dispute. Buy-Low Save Centers, Inc. v. Glinert, 547 So.

2d 1283 (Fla. 4th DCA 1989) (“use of a motion in limine is improper when it is used to do more than merely exclude irrelevant or improperly prejudicial evidence”); Brock v. G.D. Searle & Co., 530 So. 2d 428, 431 (Fla. 1st DCA 1988) (“trial courts should not allow motions in limine to be used as unnoticed motions for partial summary judgment or motions to dismiss”). The Movants have already made their position clear in their original Motion to Enforce Settlement Agreement – that they should be granted affirmative relief (the equivalent of summary judgment) based on the language of the Settlement Agreement and this Commission’s Order approving the agreement, without more. The Motion in Limine and Motion to Strike adds nothing to what Movants have already said, but merely begs the question they have posed in their Motion to Enforce Settlement Agreement, and thus calls upon the Commission to prejudge a key issue the Commission will decide in ruling on the underlying dispute.

Finally, parties submit affidavits in support of, or in opposition to, requests for summary relief all the time. First North American National Bank v. Hummel, 825 So. 2d 502 (Fla. 2d DCA 2002) (in seeking summary judgment, defendant bank “met its burden by filing a supporting affidavit”); Pita v. State Street Bank and Trust Co., 666 So. 2d 268 (Fla. 3d DCA 1996) (in a suit on indebtedness, bank submitted an affidavit of indebtedness in support of summary judgment, and the debtor submitted an affidavit of payment in opposition thereto). Moreover, this practice is expressly contemplated in administrative proceedings by Rule 28-106.104(4), F.A.C., which states that a motion [for summary final order] “may be accompanied by supporting affidavits.”

Progress Energy’s use of Mr. Portuondo’s affidavit is completely proper. Movants original motion was, in effect, a request for affirmative relief through a summary, legal ruling. And Progress Energy’s response and supporting affidavit was the proper procedural means to

demonstrate that Movants were not entitled to relief, but that Progress Energy was entitled to a ruling based on all of the undisputed evidence, including the matters set forth in Mr. Portuondo's affidavit.

Movants could have submitted affidavits of their own or requested a deposition of Mr. Portuondo, but chose not to do so, apparently to be consistent with their legal position that the Commission should not consider such matters. That being the case, they should not be heard now to complain that they have not "tested" the statements contained in Mr. Portuondo's affidavit.

CONCLUSION

For the foregoing reasons, Progress Energy respectfully requests that the Commission deny the Motion in Limine and Motion to Strike.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of foregoing has been furnished via facsimile (as indicated by **) and U.S. Mail to the following this 19th day of May, 2003.

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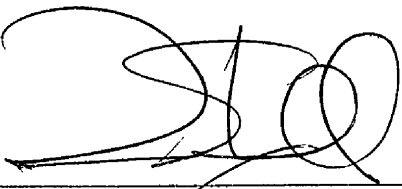
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