

ORIGINAL

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

Submitted for Filing: May 29, 2003

COMMISSION CLERK

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PROGRESS ENERGY'S MOTION FOR PROTECTIVE ORDER TO LIMIT THE SCOPE OF DISCOVERY

Florida Power Corporation d/b/a Progress Energy Florida, Inc. ("Progress Energy") by and through undersigned counsel hereby moves for entry of an protective order to limit the scope of written discovery and discovery obtained through depositions by the Office of Public Counsel and other participating parties (hereinafter "Public Counsel et al.") to the topic of communications by Progress Energy (including its consultants or contractors), if any, with the Commissioners and the Commission Staff concerning the merits of the refund issue during the period beginning November 24, 2002 through the present. In support of its motion, Progress Energy states as follows:

Background

This proceeding involves a dispute between the parties concerning the amount of the refund that Progress Energy is required to pay its customers pursuant to the Settlement Agreement approved by the Commission to resolve all of the issues in Progress Energy's rate case. However, the "discovery" that has been commenced by the Public Counsel, et al., in this docket is entirely unrelated to the merits of the parties' positions on the refund issue. The discovery effort by the Public Counsel, et al., is in the nature of ancillary investigation based on the suspicion of counsel for Sugarmill Woods Civic Association, Inc. ("Sugarmill Woods"), Mr. Michael Twomey, that "some commissioners" received ex parte communications "from employees and other representatives of Progress Energy," which suspected communications

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were not properly made a part of this docket by the Commissioner(s) receiving the communications. According to Mr. Twomey's May 15, 2003 letter to Chairman Jaber, his suspicion is based on an "anonymous communication" and a staff recommendation that is "fishy" in his opinion. (Letter attached as Exhibit A) (Emphasis added).

Based on these suspicions, Sugarmill Woods and the Public Counsel have served Progress Energy with written discovery and have set the depositions of five (5) Progress Energy employees. Putting aside for the question of whether parties to a contested proceeding should be the self-appointed investigators of such allegations, the scope of the discovery directed to Progress Energy should be strictly limited to the topic of whether any prohibited ex parte communications occurred within the time frame posited by the laws governing such communications.

Argument

Progress Energy is willing to respond to inquires concerning suspected ex parte communications. However, any inquiry should be limited to just that issue and to the potentially relevant time frame established by the laws governing such communications. Public Counsel's Third Request for Production of Documents, however, covers an overly broad time frame and contains a request for documents outside the scope of the issue at hand.

Specifically, Public Counsel seeks documents dating back to January 1, 2002 – over a year before this issue came before this Commission on February 24, 2003 through Public Counsel et al's filing of the Motion to Enforce Settlement Agreement. 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. The rules have only limited application to communications with the Commission Staff after a docket is pending. See § 350.042(1), Fla. Stat. and Rule 25-22.033(1). If the proposed discovery

by the Public Counsel, et al., is proper at all, it can only be appropriate if limited to the subject of ex parte communications and to time frames imposed by these laws on the making or receipt of ex parte communications.

Further, Public Counsel's request number five (5) seeks discovery that ranges far beyond the scope of the issue raised by Public Counsel:

Please provide all e-mails, memoranda and other communications or documents in your possession, custody or control regarding (1) the settlement agreement dated as March 27, 2002, (2) meetings or communications with Florida Public Service Commission staff members, (3) meeting or communications with Florida Public Service Commissioners, (4) or the amount of the refund or refunds required under the stipulation and settlement dated as of March 27, 2002.

(Numerals and emphasis added). Given the appropriate date restrictions as established by the laws governing ex parte communications, Progress Energy is willing to provide documents identified in subsection's two (2) and three (3). However, the other categories of documents have nothing to do with the alleged ex parte communications. Rather, they encompass Progress Energy's internal work product concerning the merits of the refund dispute.

Public Counsel et al., have admitted that they do not need any discovery on the merits of the refund issue before this Commission, and they did not seek to pursue any based on their position that all such information should be off limits to the Commission's resolution of the merits of this controversy. They reaffirmed this position in their recent Motion in Limine and Motion to Strike, specifically relying on the fact that no evidentiary hearing has been scheduled in this docket.

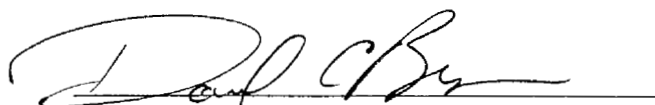
Further, in its recent response to Progress Energy's Motion to Continue Depositions and Establish a Reasonable Discovery Schedule, the Public Counsel again reiterated that the sole purpose of its investigation was to determine whether Progress Energy had any involvement – by means of improper ex parte communications – in the conduct of two Commissioners who

undertook certain action. Based on the deposition testimony of Commission staff members given on May 23, 2003 in this docket, it is clear that the Commissioners' action, which was undertaken with the advice of the Commission's General Counsel, to request that the Commission Staff offer a recommendation containing options for the Commission to consider, was entirely appropriate. In any event, however, there is no reason to permit Public Counsel, et al., to propound "discovery" that strays far afield from and goes well beyond the narrow matter at issue.

Accordingly, Progress Energy requests that the Commission limit its scope of written discovery and the depositions of Progress Energy witnesses to the issue at hand. To accomplish this, Progress Energy seeks a Protective Order limiting the scope of any written discovery or deposition inquiry to the topic of communications, if any, by Progress Energy (including its consultants or contractors) with the Commissioners and the Commission Staff concerning the merits of the refund issue during the period beginning November 24, 2002 to date.

Wherefore, Progress Energy asks this Commission to issue a Protective Order as described herein reasonably to limit the nature and extent of discovery in this ancillary investigation to the relevant topics of inquiry for a time period having some reasonable basis in law as set forth above.

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 29~~th~~ day of May, 2003.

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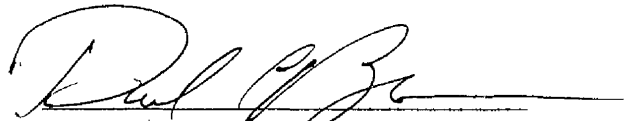
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May 15, 2003

Lila A. Jaber, Chairman
Florida Public Service Commission
2540 Shumard Oak Blvd.
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Re: Docket No. 000824-EI - Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.

Dear Chairman Jaber:

I am writing you and your fellow commissioners individually as a follow-up to my public records request yesterday asking for certain documents and other communications related to the above-cited docket. That request was made as the result of an anonymous communication I received within the last ten days stating that some commissioners were receiving unlawful ex parte communications from employees and other representatives of Progress Energy, Florida, in connection with this docket and the size of the refund customers are due from this utility. This communication, coupled with the highly unusual form of the staff recommendation published last Thursday, convinced me that additional inquiries were warranted.

Lest any commissioner forget, Chapter 350, Florida Statutes, is clear on the prohibition against ex parte communications in this type proceeding. I have attached the full text of Section 350.042, F.S., but the foundation, of course, is that no commissioner shall receive ex parte communications regarding the merits of a case such as the one cited above because the other parties are disadvantaged by being unaware of the communications and by, necessarily, being unable to rebut them. As you will recall, the sanctions for not timely reporting ex parte communications can be severe, to include removal from office and a fine not to exceed \$5,000.

I hope no ex parte communications have taken place. In the event they have, you should recall that they may be "purged" by reporting them as provided by Section 350.042(4), F.S. Such a report not only clears the commissioner involved of any charges of wrongdoing, it also allows the other parties to a case to respond to the "merits" of the inappropriate communications.

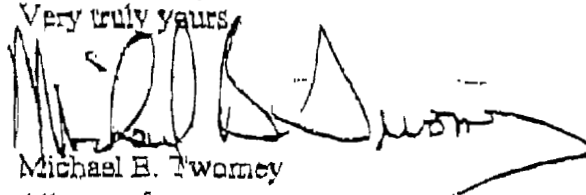
I will not go into any detail here, but my clients think Florida Progress' thesis for reducing the required refunds are legally ridiculous. Just the same, the staff recommendation is, in my view, in a "fishy" form, and I have to ask myself why that is the case.

sugermll woods: ex parte letter to Lila Jaber May 15, 2003, wad

EXHIBIT **A**

I am going to recommend to the Office of Public Counsel, the Attorney General and other parties that we consider taking the necessary depositions to determine whether any prohibited communications have been made. To do that, we will need additional time beyond that allowed by the current schedule of considering this matter at Agenda next Tuesday. Accordingly, on behalf of Sugarmill Woods Civic Association, Inc., I would request that you defer consideration of this matter for a minimum of two to three weeks.

Very truly yours,



Michael E. Twomey
Attorney for
Sugarmill Woods Civic Association, Inc.

cc: Commissioners
Florida Attorney General
Office of Public Counsel
Parties

Text of Ex Parte Statute

350.042 Ex parte communications.--

(1) A commissioner should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, shall neither initiate nor consider ex parte communications concerning the merits, threat, or offer of reward in any proceeding other than a proceeding under s. 120.54 or s. 120.565, workshops, or internal affairs meetings. No individual shall discuss ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days. The provisions of this subsection shall not apply to commission staff.

(2) The provisions of this section shall not prohibit an individual residential ratepayer from communicating with a commissioner, provided that the ratepayer is representing only himself or herself, without compensation.

(3) This section shall not apply to oral communications or discussions in scheduled and noticed open public meetings of educational programs or of a conference or other meeting of an association of regulatory agencies.

(4) If a commissioner knowingly receives an ex parte communication relative to a proceeding other than as set forth in subsection (1), to which he or she is assigned, he or she must place on the record of the proceeding copies of all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received and all oral responses made, and shall give written notice to all parties to the communication that such matters have been placed on the record. Any party who desires to respond to an ex parte communication may do so. The response must be received by the commission within 10 days after receiving notice that the ex parte communication has been placed on the record. The commissioner may, if he or she deems it necessary to eliminate the effect of an ex parte communication received by him or her, withdraw from the proceeding, in which case the chair shall substitute another commissioner for the proceeding.

(5) Any individual who makes an ex parte communication shall submit to the commission a written statement describing the nature of such communication, to include the name of the person making the communication, the name of the commissioner or commissioners receiving the communication, copies of all written communications made, all written responses to such communications, and a memorandum stating the substance of all oral communications received and all oral responses made. The commission shall place on the record of a proceeding all such communications.

(6) Any commissioner who knowingly fails to place on the record any such communications, in violation of the section, within 15 days of the date of such communication is subject to removal and may be assessed a civil penalty not to exceed \$5,000.

(7)(e) It shall be the duty of the Commission on Ethics to receive and investigate sworn complaints of violations of this section pursuant to the procedures contained in ss. 112.522-112.5241.

(b) If the Commission on Ethics finds that there has been a violation of this section by a public service commissioner, it shall provide the Governor and the Florida Public Service Commission Nominating Council with a report of its findings and recommendations. The Governor is authorized to enforce the findings and recommendations of the Commission on Ethics, pursuant to part III of chapter 112.

(c) If a commissioner fails or refuses to pay the Commission on Ethics any civil penalties assessed pursuant to the provisions of this section, the Commission on Ethics may bring an action in any circuit court to enforce such penalty.