

State of Florida



Public Service Commission

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DATE: JUNE 23, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BRUBAKER) *Walt*
DIVISION OF ECONOMIC REGULATION (SLEMKEWIZC) *102*

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.

AGENDA: 06/30/03 - SPECIAL AGENDA - REQUEST FOR RECONSIDERATION -
ORAL ARGUMENT HAS NOT BEEN REQUESTED; ORAL ARGUMENT MAY BE
GRANTED AT THE COMMISSION'S DISCRETION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: STAFF RECOMMENDS THAT THE COMMISSION
CONSIDER THIS RECOMMENDATION PRIOR TO
CONSIDERING THE RECOMMENDATION ON THE
MOTION IN LIMINE AND MOTION TO STRIKE,
FILED PREVIOUSLY ON JUNE 18, 2003

FILE NAME AND LOCATION: S:\PSC\GCL\WP\000824.RCM

CASE BACKGROUND

The 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. A 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, and by Order No. PSC-02-0412-PCO-EI, issued March 26, 2002, the Commission suspended the

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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. The Commission 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 (OPC), Florida Industrial Power Users Group, Florida Retail Federation, Buddy Hansen/Sugarmill Woods Civic Association, and Publix Super Markets, Inc. filed a Motion To Enforce Settlement Agreement. These parties contend that PEFI's refund calculation made three adjustments that are inappropriate and not contemplated by the Settlement. On March 7, 2003, PEFI filed a response in Opposition to the Motion To Enforce Settlement Agreement.

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 7 response. On that same date, by Order No. PSC-03-0605-PCO-EI, the Florida Attorney General was granted intervenor status in this docket. On May 19, 2003, PEFI filed a Response in Opposition to Motion in Limine and Motion to Strike.

A 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. The Commission noted that any other pending procedural matters would also be addressed and decided at the June 30 Special Agenda. A decision on the Motion to Enforce Settlement Agreement is currently scheduled to be made at a July 9, 2003, Special Agenda Conference.

By Order No. PSC-03-0659-PCO-EI, issued May 29, 2003, PEFI was required to respond to OPC's Second Set of Interrogatories and Third Set of Requests for Production of Documents 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, PEFI filed a Motion for Protective Order to Limit the Scope of Discovery. On May 30, 2003, PEFI filed a Motion for Protective Order Against the Taking of Depositions of Gary Roberts and H. William Habermeyer, Jr.. On June 4, 2003, a joint response to both PEFI Motions was filed by OPC and the Florida Attorney General. By Order No. PSC-03-0687-PCO-EI, issued June 9, 2003, the Prehearing Officer granted PEFI's Motion for Protective Order to Limit the Scope of Discovery. Specifically, the Order provided that the discovery sought by OPC 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 Motion for Protective Order Against the Taking of Depositions was granted with respect to the deposition of Mr. Roberts, and denied with respect to the deposition of Mr. Habermeyer.

On June 16, 2003, OPC and the Florida Attorney General (Movants) filed a Joint Motion for Reconsideration of Order No. PSC-03-0687-PCO-EI. On June 19, 2003, PEFI filed a response to the Joint Motion for Reconsideration.

This recommendation addresses the Motion for Reconsideration and PEFI's response thereto. The Commission has jurisdiction over this matter pursuant to Sections 350.01(5), 366.04, 366.05, and 366.06, Florida Statutes.

ISSUE 1: Should the Joint Motion for Reconsideration be granted?

RECOMMENDATION: No. The Joint Motion for Reconsideration demonstrates no error of fact or law upon which reconsideration should be granted, and therefore should be denied. (BRUBAKER)

STAFF ANALYSIS:

Movants' Joint Motion for Reconsideration

The Movants state that they are aware of the Commission's practice of limiting review of Prehearing Officers' orders to a clear mistake of law or fact. However, they argue that the disputes here are not garden variety discovery disputes, and that important questions have arisen about the fundamental fairness of the process leading to the filing of the May 8, 2003, staff recommendation, including the influence PEFI may have had on that process. The Movants contend that recently developed facts raise questions as to whether there was a technical violation of law by PEFI, as well as the fundamental fairness of the process used at the Commission to develop recommendations and decide cases. Although the Movants believe their Motion for Reconsideration meets the traditional standard applied by the Commission for reconsideration, they believe that the "unique importance of resolving issues concerning the fundamental fairness of processes used at the Commission warrants a *de novo* review of the Prehearing Officer's order."

By limiting discovery only to documents and matters occurring since November 22, 2003, the Movants contend that the Prehearing Officer precluded a full inquiry into claims made by PEFI extrinsic to the agreement. As long as PEFI claims that the Commission should consider matters not contained in the agreement, the Movants contend that the Commission must allow full discovery related to those claims, including an inspection of their internal documents related to the agreement.

With respect to the allegations of whether an *ex parte* communication may have taken place, the Movants note that Section 350.042, Florida Statutes, requires that 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 Movants contend that the matter of refunds for the years 2002 through 2005 has been pending since the Commission approved the

Settlement, and that even if the Commission closed this docket after approving the Settlement, the matter of the refund still remained. The Movants contend that the Prehearing Officer's ruling implies that it would be proper for PEFI to engage in *ex parte* communications with Commissioners between May 14, 2002 (the date of the order approving the Settlement) and November 26, 2002, concerning the amount of refund owed for 2002. This reading of the *ex parte* statute does not make sense in this case, particularly since PEFI began advocating its position to parties and staff by no later than July of 2002.

With regard to granting the protective order with respect to the deposition of Mr. Roberts, the Movants note that Mr. Roberts works with Paul Lewis, who in turn is the person "who boasted to staff that two Commissioners were favorably disposed toward Progress Energy's position on the amount of refund due customers." Order No. PSC-03-0687-PCO-EI states that the "better course of obtaining information about Mr. Lewis' statements is by deposing Mr. Lewis himself." However, the Movants contend that they would thereby have to take everything said by Mr. Lewis at face value, and would be "denied the opportunity to investigate his credibility or check with others for inconsistencies about his statements." The Movants contend that the credibility of statements by a witness is always an issue, and that they see no basis for the Prehearing Officer's order precluding such inquiries.

In conclusion, the Movants contend that it is as much in the Commission's interest as it is the parties' interest to resolve the refund issue and the issue of any alleged *ex parte* communication, and that these matters can not be resolved if the Commission "ties [their] hands behind [their] backs during the investigation."

PEFI's Response

In its response, PEFI states that the Movants have asked that the full Commission reconsider and overturn Order No. PSC-03-0687-PCO-EI, which limited the scope of the Movants' discovery to the question the Movants themselves initially raised, namely, whether there have been any improper *ex parte* communications concerning the resolution of the pending Motion to Enforce Settlement Agreement. In seeking reconsideration, PEFI believes that the Movants have raised nothing new and have not met their burden on reconsideration to demonstrate that the Prehearing Officer overlooked some critical legal or factual point. To the contrary, PEFI contends that the

Joint Motion for Reconsideration simply reiterates arguments already considered and appropriately rejected by the Prehearing Officer. Moreover, PEFI contends that the Prehearing Officer's Order correctly applied the established law and principles governing the proper scope of discovery, and that the limitations imposed on discovery were carefully calculated to permit the Movants to proceed with the inquiry permitted by the Commission's deferral of the pending Motion to Enforce Settlement Agreement at the May 20, 2003, Agenda Conference.

PEFI also disagrees with the Movants' assertion that the Commission should review Order No. PSC-03-0687-PCO-EI on a *de novo* basis, in view of the Movants' concerns about the fairness of the process associated with the issuance of the staff's recommendation in this docket. However, PEFI contends that the Movants fail to cite any legal authority for their position. PEFI cites to several prior Commission orders, which PEFI believes in fact demonstrate that the Commission has repeatedly declined to review rulings of its prehearing officers *de novo*, even when presented with purely legal or jurisdictional challenges for which the Commission has ultimate institutional responsibility.

Staff's Recommendation

As a preliminary matter, the Movants argue that the correct standard of review in this type of motion for reconsideration is not whether the Prehearing Officer made a clear mistake of fact or law, but is instead some variant of *de novo* review by the entire Commission. However, this is not the standard in granting reconsideration. Were the Movants' argument to be accepted, any party, for any reason, could seek reconsideration to the full Commission of any decision a Prehearing Officer made, rendering the Prehearing Officer's Order superfluous at best. In fact, both PEFI and the Movants cite to Order No. PSC-02-1754-FOF-EI, issued December 12, 2002, in Docket No. 020953-EI, in which the Commission rejected a *de novo* standard for reconsideration of a Prehearing Officer's decision to grant intervention, and denied reconsideration on the basis that the Prehearing Officer had already considered and rejected the arguments on reconsideration. The Movants, however, fail to justify why a *de novo* standard would be appropriate to apply in this instance, other than to say that the disputes here are not garden variety discovery disputes, that important questions have arisen about the fundamental fairness of staff's May 8, 2003, recommendation, and what influence, if any,

PEFI may have had on the recommendation process. Staff is unpersuaded by this argument.

The Commission has consistently held that the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or that the Prehearing Officer failed to consider in rendering his Order. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). A motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Staff recommends that the Joint Motion for Reconsideration does not meet this standard. The Movants have not demonstrated any point of fact or law which the Prehearing Officer overlooked or failed to consider in reaching his decision to grant the Motion for Protective Order to Limit the Scope of Discovery, and granting in part and denying in part the Motion for Protective Order Against the Taking of Depositions of Messrs. Roberts and Habermeyer. Further, it has not been demonstrated that, had additional facts been considered, the decision clearly would have been different.

The Prehearing Officer had the facts and law before him, and Order PSC-03-0687-EI was a reasonable exercise of the Prehearing officer's discretion. No error of fact or law has been demonstrated, and the purpose of reconsideration is not reargument or disagreement with the Prehearing Officer's interpretation or application of the law to the facts. Staff therefore recommends that the Joint Motion for Reconsideration of Order No. PSC-03-0687-PCO-EI should be denied.

Staff's recommendation herein is consistent with prior Commission decisions. See Order No. PSC-02-1754-FOF-EI, issued December 12, 2002, in Docket No. 020953-EI; and Order No. PSC-01-0029-FOF-EI, issued January 5, 2001, in Docket No. 001064-EI.

DOCKET NO. 000824-EI

DATE: June 23, 2003

ISSUE 2: Should the docket be closed?

RECOMMENDATION: No. The docket should remain open pending final disposition of this matter. (BRUBAKER).

STAFF ANALYSIS: The docket should remain open pending final disposition of this matter.