

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 June 26, 2003

COMMISSION  
CLERK

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ATTORNEY GENERAL'S MOTION FOR DISCOVERY  
AND MOTION FOR ORAL ARGUMENT

The Attorney General respectfully moves this Honorable Commission for an order granting merits discovery in this matter and an order granting oral argument on all motions to be heard by the Commission on Monday, June 30, 2003. Progress Energy, and now apparently the Commission Staff, seek to deny the Attorney General, and thus the people of Florida, a fair opportunity to resolve this dispute. This apparent concerted effort is troubling to say the least.

First, both ignore fundamental contract law in arguing for consideration of matters outside the four corners of the agreement at issue. They would then add insult to injury by denying access to discovery relative to the merits of Progress Energy's position. Therefore to the extent the Commission intends to consider anything other than the express terms of the contract at issue, the Attorney General respectfully requests the Commission permit merits discovery so as to protect both the integrity of these proceedings and the interests of the people. To do any less would be untenable.

The Commission staff has issued recommendations regarding Order No. PSC-03-0689-PCO-EI and the Motion in Limine and Motion to Strike, dated May 16, 2003. Therein, Staff recommends that "consideration of the facts and circumstances surrounding the negotiation and approval of this settlement agreement is consistent with sound contract law principles."

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Respectfully, the Commission Staff has misapprehended basic contract law which precludes consideration of factors outside the four corners of the contract unless an ambiguity is found in the contract. However, although there is no ambiguity in the contract, should one be “manufactured” in the course of these proceedings, then the citizens of this state are entitled to due process in the form of merits discovery. Indeed, even Florida Power effectively concedes that if the Commission considers matters outside the Settlement Agreement in order to interpret that Agreement, then all parties should “be afforded an appropriate opportunity to take relevant merits discovery . . . .” See Progress Energy’s Response in Opposition to the Joint Motion for Reconsideration of Order No. PSC-03-0689-PCO-EI , dated June 19, 2003 at pages 8-9. To allow this issue to come before the Commission on a consideration of what the parties interpreted the contract to mean, without allowing the parties to conduct merits discovery, would deny the due process rights of every citizen of this state. The Commission should not endorse such a miscarriage of justice.

## MEMORANDUM OF LAW

In Florida, settlement agreements are governed by the law of contracts. *See Williams v. Ingram*, 605 So.2d 890, 893 (Fla. 1st DCA 1992). Under contract law, 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. In *Schwartz v. Zaconick*, 68 So.2d 173 (Fla. 1953), the Florida Supreme Court considered this rule and stated:

It is hardly necessary to state again that the parol evidence rule is a fundamental rule of substantive law 'resting on a rational foundation of experience and policy' and is essential to the certainty and stability of written obligations.

*Id.* at 175.

In plain English, this legal principle means this Commission may not consider what the parties were thinking at the time they entered this contract nor any other matter outside the four corners of the contract. The contract must be interpreted according to its unambiguous terms.

However, should an ambiguity in the contract be "manufactured" through the course of these proceedings, then the parties must be allowed to conduct discovery as to the intent of the parties and the memos, e-mails and other writings of Progress Energy as to their understanding of the contract at the time they drafted the contract. To rule otherwise would rob the citizens of the due process to which they are entitled. As noted above, even Progress Energy concedes the parties are entitled to merits discovery if consideration of the issues ventures beyond the four corners of the contract. See Progress Energy's Response in Opposition to the Joint Motion for Reconsideration of Order No. PSC-03-0689-PCO-EI , dated June 19, 2003 at page 8-9. To

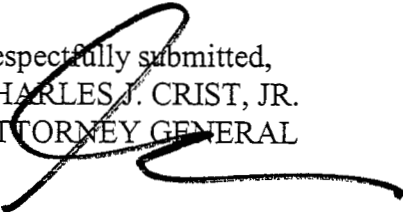
consider matters outside the four corners of an unambiguous contract and then prohibit any discovery as to those matters, would be an abuse of the Commission's discretion and would deprive the citizens of this state of a fair hearing. Therefore, in the event the Commission intends to consider matters outside the unambiguous terms of the Settlement Agreement, the Attorney general respectfully requests entry of an order permitting the parties to engage in merits discovery and providing a schedule for such discovery.

Additionally, the Attorney General respectfully submits oral argument on all matters to be considered on June 30, 2003, including without limitation the instant Motion for Discovery, will aid the Commission in the consideration and determination of the issues presented. The parties, and the people of Florida, would likewise benefit from a full and fair discussion of the relevant issues at oral argument.

Based upon the foregoing, and because these issues are of such grave concern to the citizens of Florida, the Attorney General respectfully requests entry of an order granting discovery and granting oral argument on all pending motions to be heard Monday, June 30, 2003.

DATED this 26<sup>th</sup> day of June, 2003.

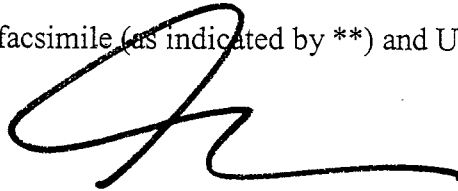
Respectfully submitted,  
CHARLES J. CRIST, JR.  
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I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Discovery and Motion for Oral Argument was furnished via facsimile (as indicated by \*\*) and U.S. Mail to the following, on this 26<sup>th</sup> day of June, 2003.



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