

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 27, 2003

**PROGRESS ENERGY FLORIDA INC'S OPPOSITION TO THE ATTORNEY
GENERAL'S MOTION FOR MERITS DISCOVERY AND ORAL ARGUMENT**

Progress Energy Florida, Inc. ("Progress Energy"), hereby files its Response in Opposition to the Attorney General's Motion for Discovery and Motion for Oral Argument. As demonstrated below, this discovery motion is a procedurally improper attempt to circumvent the Prehearing Officer's Order limiting discovery and an impermissible reply to the Staff's Recommendations on those matters properly before the Commission on June 30, 2003. Further, it is untimely and lacks merit. For all these reasons, the Attorney General's motion should be denied out of hand.

The Commission is presently scheduled to consider the merits of the dispute over the amount of the refund Progress Energy is required to make pursuant to the Rate Settlement Agreement on July 9, 2003. The matter has already been deferred once for two very narrow purposes: 1) to permit the Staff to consider public counsel's Motion in Limine and Motion to Strike; and 2) to permit Mr. Twomey (the Attorney General and Public Counsel) to conduct discovery concerning Mr. Twomey's suggestion that improper ex parte communications had occurred regarding the refund issue.

Now, the Attorney General – an intervenor in this matter who was not party to the original proceeding or the Rate Settlement Agreement – is asking the full Commission for full merits discovery in the thirteenth hour. However, this discovery has already been requested and refused by the Prehearing Officer. Thus, it is substantively and

procedurally inappropriate for the Attorney General to seek the full Commission's consideration of this matter. The Attorney General's motion is nothing more than a clear attempt to circumvent its burden of satisfying the standard of review governing his present Motion for Reconsideration of the Prehearing Officer's Order limiting discovery filed jointly with the Office of Public Counsel. The Commission should not permit this to occur and should deny the motion as redundant and procedurally improper.

Indeed, were this a proper discovery motion -- which it is not -- it would first be considered and ruled on by the Prehearing Officer. The fact that the Attorney General is attempting to raise this discovery matter in the first instance before the full Commission is a tell-tale sign that the motion is no more than an end-run around the Prehearing Officer's prior order. Thus, although there is ample basis for the outright denial of the Attorney General's motion, the Commission at a minimum should refuse to consider it on June 30th and refer it to the Prehearing Officer.

The Attorney General's Motion for Discovery should also be denied for several additional reasons. First, it constitutes an improper attempt to file a response to the Staff's Recommendation on the Motion in Limine and Motion for Reconsideration. Parties are not entitled to file a written reply or response to a Staff Recommendation, and the fact that the Attorney General has labeled his response as a motion does not alter its content nor change this long standing prohibition. The Attorney General, like all other parties, will have the opportunity to address the Staff's recommendations at the June 30th Agenda Conference.

Second, the Attorney General's Motion is untimely. Rule 25-22.039 makes clear that the Attorney General -- as an intervenor in this proceeding -- takes the case as he

finds it, and cannot seek to restart the entire process. As the Commission will recall, the Attorney General was granted intervention on the eve of the Commission's scheduled consideration of the merits of the refund matter on May 20, 2003. As mentioned above, on May 20, 2003 the Commission decided to defer the matter for two narrow purposes: 1) to permit the Staff to consider public counsel's Motion in Limine and Motion to Strike; and 2) to permit Mr. Twomey (the Attorney General and Public Counsel) to conduct discovery concerning Mr. Twomey's suggestion that improper ex parte communications had occurred regarding the refund issue.

At that point, the only merits discovery had been conducted in the early stages of the refund dispute, before the case schedule made it apparent that the Commission had not deemed an evidentiary hearing to be necessary, and the dispute was considered by the Commission and the parties to be ripe for adjudication. Against this background, it is evident that the Attorney General should not now be permitted to alter the entire course of this proceeding by requesting full merits discovery in the thirteenth hour. Nor can the Attorney General credibly claim that the citizens of Florida will be deprived of a fair opportunity to participate in this proceeding if his motion is denied. Public counsel, on behalf of those same citizens, has fully participated in this case, including the discovery process, and in fact initiated this proceeding. Accordingly, the Attorney General's Motion for Discovery should as be denied as untimely as well.

Third, the motion should also be denied based on its total lack of merit. In his motion, the Attorney General suggests that the Commission cannot consider matters outside the four corners of the Rate Settlement Agreement, as Progress Energy contends it can, on the one hand and deny the Attorney General's request for discovery on the

other hand. In making this argument, the Attorney General misapprehends Progress Energy's position concerning the matters that the Commission is entitled to consider when making its final determination on the refund issue.

To be clear in this regard, Progress Energy's position is that the Commission is not legally constrained to consider the Settlement Agreement in a vacuum when deciding the refund dispute, as the Attorney General and Public Counsel contend in their "four corners" argument. Rather, the Commission is entitled to consider the same matters in resolving the pending dispute that were available for its consideration when it approved the Settlement Agreement in the first instance. These matters include not only the Settlement Agreement itself, but the order approving the Agreement, the Commission's deliberations that led to its approval decision, and the information in the record before the Commission when it made that decision. Legally and logically, it makes no sense to contend that the Commission should be less informed about the Settlement Agreement now than it was when the Agreement was approved.

Contrary to the premise of the Attorney General's motion, however, this position does not mean that a door has somehow been opened to the development of new information, which in turn would trigger the need for merits discovery by the Attorney General and others. The development of new information would be particularly inappropriate, as well as unnecessary, given the current procedural posture of the case in which the Commission has not deemed an evidentiary hearing to be necessary.

Consistent with this procedural posture, Progress Energy has withdrawn the affidavit of Javier Portuondo which it filed in support of its Opposition to the Motion to Enforce at a time the procedure regarding an evidentiary hearing was unknown. As

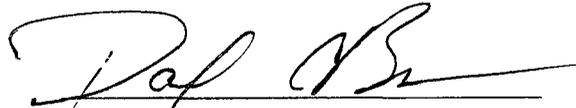
stated in its notice of withdrawal and suggestion of mootness, this was done in an effort to narrow the issues in dispute, by removing the only arguably new information provided by Progress Energy. Of particular significance with respect to clarifying the misapprehension in the Attorney General's motion, the withdrawal of the affidavit resulted in no change to Progress Energy's position regarding the information the Commission is entitled to consider in reaching its decision on the merits. It had become apparent to Progress Energy that the Commission did not need to rely on the affidavit in order to correctly consider and determine that Progress Energy's interpretation of the Settlement Agreement is correct and entirely consistent with sound legal principles and regulatory practices.

In short, Progress Energy's position regarding the permissible consideration of matters beyond the four corners of the Settlement Agreement does not and will not involve the presentation of new information to the Commission. For this reason, denial of the Attorney General's motion seeking to broaden the scope of discovery that has been permitted by the Prehearing Officer will not disadvantage or prejudice the presentation of his case in any manner whatsoever. Accordingly, for this additional reason, the Motion for Discovery should be denied.

Finally, Progress Energy would briefly address the Attorney General's request for Oral Argument on all matters to be considered by the Commission on June 30, 2003. On this point, Progress Energy would note that Commission Rule 25-22.058(1), F.A.C., specifies that "[a] request for oral argument shall be contained on a separate document and must accompany the pleading upon which the argument is requested." The rule also provides that "[f]ailure to file a timely request for oral argument shall constitute waiver

thereof.” The latter rule quotation regarding timeliness requires denial of the Attorney General’s request on all matters except this discovery motion. The former portion of the rule suggests a denial of the request for oral argument as to this motion as well. Further, even if the rule was not controlling, the Commission would be well within its rights to deny the Attorney General’s request on the same underlying considerations contained in the rule.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of foregoing has been furnished via fax (as indicated by **) and U.S. Mail to the following this 27th day of June, 2003.

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