ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earning, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light	)	Docket No. 000824-EI
		Filed: June 27, 2003

MOTION FOR COMMISSION TO REFILE "REAL" STAFF RECOMMENDATION ON AMOUNT OF REFUND DUE AND OWING TO CUSTOMERS AND FOR RECUSAL OF COMMISSIONERS BRADLEY AND DAVIDSON FOR THEIR DEMONSTRATED BIAS IN CHANGING THE CURRENTLY FILED STAFF RECOMMENDATION

Sugarmill Woods Civic Association, Inc. pursuant to Rule 25-22.0376, F.A.C., by and through its undersigned counsel, moves the Florida Public Service Commission to direct its Staff to withdraw the pending staff recommendation filed in this docket on May 8, 2003, and to replace it with the Staff recommendation that would have otherwise been filed, but for the interference of Commissioners Bradley and Davidson in directing Staff to change the recommendation so that it stated no preference, or recommended course of action, and, instead merely offered up three options. As obtained through a public records demand, and as will be discussed in greater detail below, the draft Staff recommendation most likely reflecting the Staff's actual professional view as to the correct amount of the refund owing to Progress Energy's customers is the May 6, 2003 draft, which is attached as Exhibit A. Furthermore, Sugarmill Woods moves that Commissioners Bradley and Davidson voluntarily recuse themselves from further participation in this docket as a result of their bias against the customers demonstrated by their respective actions in requiring that the staff change its recommendation in the manner described above and more fully detailed below. If Commissioners Bradley and

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Davidson refuse to remove themselves from further participation in this docket, then Sugarmill Woods would request that the remainder of the commissioners remove them involuntarily.

Background

Pursuant to a settlement agreement entered into between the parties, including Sugarmill Woods, and approved by this Commission in Order No. PSC-02-0655-AS-EI, dated May 14, 2002, Progress Energy Florida, Inc. (the "Utility") was to make a refund to its customers in each of the four following years if its annual revenues exceeded certain agreed upon amounts. Following the Utility's announcement that it would make certain adjustments to the revenue figures in order to reduce the refund and unsuccessful negotiations between the parties to resolve whether the adjustments were appropriate, Public Counsel, Sugarmill Woods and the other customer parties to this docket filed their motion to enforce the settlement agreement on February 24, 2003. The Utility filed its response on March 7, 2003 and the customers presumed the Commission Staff would prepare and file a recommendation on what course of action the Commission should take under the circumstances.

The Commission Staff filed a recommendation on May 8, 2003 providing the Commission with three options without indicating which option the Staff thought was most correct given the law and facts of the case. A subsequent public records demand by Sugarmill Woods revealed that the staff had prepared four or more draft recommendations preceding the May 8 filing, the first of which recommended solidly the customer position that $23,034,004, excluding interest, should be refunded; two subsequent drafts primarily recommending the customers position should prevail, but with a single alternative position that the refund should "split the difference" between the Utility and customer positions, but based on different

rationalizations in each draft; and the third, and final, style of recommendation that was filed, which said essentially "take your pick" among the customers winning, the Utility winning, or splitting the difference. Among the other documents provided in response to the public records demand were written communications in the offices of Commissioners Bradley and Davidson from former Commissioner Julia Johnson, acting in her capacity as a consultant to the Utility, which documents would clearly constitute ex parte communications prohibited by Section 350.042, F.S. if considered by either commissioner.

Subsequent depositions of senior Commission Staff, noticed by Sugarmill Woods and the Public Counsel, revealed that the initial draft would have been filed "but for" the intervening actions of Commissioners Bradley and Davidson requiring: (1) that an alternative recommendation be filed, then later (2) that a recommendation be filed not stating an affirmative recommendation, but including all the possible outcomes or party positions as options.

The Customer Parties and the three non-interfering Commissioners are entitled to the recommendation that would have been filed "but for" the Staff being pressured to modify the recommendation.

While there is apparently no Commission rule on the subject of when one or more individual commissioners should be allowed to direct the Staff to modify a recommendation, there clearly should be. Staff recommendations should reflect the best professional efforts of the Staff in reflecting what course of action they think the Commission should take in any case based upon the relevant law and evidence of record[1] in a docket and that recommendation should be

[1] Apparently the Utility, and perhaps members of the staff, think that "the record" includes all of the MFRs and other filings in this docket up to the time the Settlement Agreement was approved by this Commission. They are wrong! Evidence to be in the record must be subject to cross-examination and then entered into the record. There is no such evidence in this case. Rather, the record in this case consists of the Settlement Agreement and, loosely, the

prepared and filed without influence from any commissioner. There should be no objection heard from any quarter that such a procedure will somehow have "the staff running the place or deciding cases as opposed to the appointed commissioners." Such a position is simply absurd. The place of the staff is to recommend and that of the commissioners to decide cases. No commissioner has ever had the technical and legal expertise and background equal to that of the combined Staff. Having a staff recommendation that a certain outcome should prevail has never precluded commissioners from overruling staff and voting differently. Confident and knowledgeable commissioners should never be concerned about "voting against staff," especially if they are prepared to explain their rationalizations for doing so. Even if they are not so prepared, there is no requirement that a commissioner explain his or her vote, although the prevailing side should express some reasoning to be reflected in the final order.

The documents obtained by Sugarmill Woods, coupled with the depositions of senior staff involved in the case, reveal that two commissioners essentially compelled the staff to change the recommendation from one completely favoring the customers to one with three options, which would have allowed a commissioner to vote for any of the three options without "voting against staff." This action not only deprived all of the Utility's customers of the advantage of having a professional staff recommendation favoring an initial refund of some $23 million, excluding interest, but, just as importantly, it deprived Chairman Jaber and Commissioners Deason and Baez of the true and honest recommendation of their staff and it did so without their knowledge. This result shouldn't be tolerated in this or any case.

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transcript of the Agenda Conference at which the Commission accepted the Settlement Agreement.

The First and Second Drafts

The first and second drafts,[2] which were prepared by John Slemkewicz, a Public Utilities Supervisor with 24 years of PSC electrical utility experience, were straightforward and concluded as follows:

> Conclusion
>
> Based on the foregoing discussion, staff agrees with OPC's assertions that the Settlement does not provide for any adjustments to PEFI's actual base rate revenues in calculating the amount that is subject to the sharing mechanism. Though not explicitly stated in the Settlement, the $24,630,00 adjustment related to the interim refund was specifically addressed at the Agenda Conference and was agreed to by all of the parties as an appropriate clarification/modification of the written Settlement.
>
> Staff would note that in prior settlements with PEFI and Florida Power & Light Company (FPL) that involved revenue sharing mechanisms, no adjustments were made to the actual base rate revenues. Although FPL's current settlement is similar, but not identical, to PEFI's, no adjustments to base rate revenues are allowed. Because the making of adjustments to base rate revenues is a significant departure from the provisions of previous settlements, it is staff's opinion that any such proposed adjustments should have been specifically addressed in the provisions of the settlement itself.
>
> In conclusion, staff recommends that the OPC's calculation of a $23,034,004 refund, plus interest, is the appropriate amount to be refunded under the revenue sharing mechanism for 2002.

This draft staff recommendation was not blindly made or uninformed. While recognizing that it had not participated in the negotiations leading to the Settlement, Staff stated at page 4 of the drafts, "Staff, however, can provide its interpretation of the Settlement based on the plain language contained with the 'four corners' of the pages of the document." (Emphasis supplied.) Noting that both the Utility and OPC agreed that the interim refund should be $35 million, but

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[2] Slemkewicz testified that changes between drafts 1 and 2 were "mainly spelling and stylistic changes." Slemkewicz deposition at page 51.

disagreed as to the level of adjustments to be made, Staff said, at page 5 of the draft:

> The amount of the interim refund to be included in the actual revenues for 2002 is the easiest to resolve. During its review of the Settlement, staff noticed that the provision regarding the $35 million interim refund was silent regarding the apportionment of the interim refund between the amount attributable to 2001 and the amount attributable to 2002. In its recommendation, staff pointed out the need for clarification of this point and proposed that only $10,370,000 of the interim refund was related to 2002. At the April 23, 2002, Agenda Conference, all of the parties, including PEFI and OPC, agreed with the staff's calculation which was subsequently approved by the Commission.

Staff went on, at the same page, to state that while the Utility was attempting to increase revenues by the full $35 million, OPC had only increased revenues by the net amount of $24,630,000, which was the $35 million minus the $10,370,000 previously agreed upon as being related to 2002. Staff concluded on this point, saying: "It is staff's opinion that the appropriate adjustment is $24,630,000 based on the Commission's approval of staff's clarification of the Settlement."

With respect to the Utility's attempt to exclude from the refund calculation $9,338,000 of lighting and service fees, Staff noted that "although the Settlement contains various explicit provisions, there is no provision for excluding any revenues from base rate revenues in determining the amount of revenues that are subject to the sharing mechanism." Staff added with respect to this one adjustment:

> There was ample opportunity at the Agenda Conference for the parties to offer their own clarifications if the provisions of the Settlement, as plainly written, did not reflect their intent and understanding. Based on a reading of the Settlement, staff is unable to identify any provision to justify the excluding of the lighting and service fee revenue increases from the revenues subject to the sharing mechanism.

(Emphasis supplied.)

Lastly, Staff addressed the Utility's attempt to adjust out $41,625,000 of revenues for the

January 1, 2002, to April 30, 2002 period prior to the actual implementation of the $125 million rate reduction, saying, at page 6:

> Paragraph 6 of the Settlement clearly states how the refund, if any, is to be calculated for 2002. It provides for a $1,296 million sharing threshold at which sharing is to begin. It also clearly states that, for 2002 only, the amount to be refunded "...will be limited to 67.1% (May 1 through December 31) of the 2/3 customer share:. (Opposition, Exhibit A, Page 16) The purpose of the 67.1% limitation is to recognize that the $125 million rate reduction was not effective until May 1, 2002. Neither Paragraph 6 nor any other paragraph of the settlement provides for any adjustment to the base rate revenues subject to the sharing mechanism.

(Emphasis supplied.)

Mr. Slemkewicz stated at his deposition that drafts 1 and 2 were "just my part of the recommendation" and that the Issue 1 legal discussion was the responsibility of the staff attorney, Jennifer Brubaker.[3] On further questioning by Public Counsel, Mr. Slemkewicz testified that he had attended a meeting with others in the office of Commissioner Bradley, at which Commissioner Bradley requested a copy of the staff recommendation and, when one was apparently not immediately forthcoming, indicated that he might want to see an alternative to the staff recommendation if he did not like what Staff recommended. This is what Mr. Slemkewicz recounted in response to questions from Deputy Public Counsel Charlie Beck:

23 Q Did Commissioner Bradley indicate why
24 he wanted to see a draft of the staff
25 recommendation?
1 A Yes, he did.
2 Q What did he say?

[3] Pages 52 and 53, Slemkewicz deposition.

A He said that if he did not agree with the staff recommendation, that he would like to see an alternative in there.

Q What was the response of the participants to that statement by Commissioner Bradley?

A I don't remember. I can't say what everybody else said. From my standpoint, it was not something that I wanted to do.

Q Now, you say -- I want to make sure I understand correctly. You said Commissioner Bradley said if the staff recommendation were going to be one he disagreed with, he wanted an alternative, or am I stating that incorrectly?

A He said he might want to see an alternative in the recommendation.

Q In what case though? In what event would he want to see an alternative?

A If he did not agree with the staff's recommendation.

Pages 61 and 62, Slemkewicz deposition.

The Third Draft

The third draft recommendation obtained through Sugarmill Woods' public records demand included the text of the legal issue, which recommendation stated the Utility's request for oral argument should be granted, but that the request for an evidentiary hearing should be denied because:

> PEFI's concerns present matters which require a legal, rather than a factual, determination. Staff does not believe that the aduction of additional evidence is necessary in order for the Commission to fully and fairly resolve the matter before it.

The second issue in this draft was substantially unchanged in the primary recommendation as to the size of the refund, but included expanded legal discussion of the parole evidence rule, presumably contributed by Ms. Brubaker, including the following at page 6 of the draft:

> Staff believes the Settlement is unambiguous, and does not require further amplification. Neither the Settlement nor Order No. PSC-02-0655-AS-EI contains any language which supports the position urged by PEFI. Staff recommends that the Commission grant the Motion to Enforce the Settlement Agreement, and require PEFI to refund an additional $18,079.591, plus interest, beginning with the first billing cycle for September 2003.

(Emphasis supplied.) What was significantly different, and unexpected to the customers, in the third draft was the appearance of an "alternative position." This position purported to accept some of the Utility's assumptions, although only begrudgingly and in a highly qualified manner. For example, there is this passage at page 10: "It appears that PEFI assumed these adjustments would be made, although there was no explicit mention in the stipulation." (Emphasis supplied and question why any Staff would accept and repeat that such assumptions existed.) Nonetheless, the alternative position goes on to accept that the Commission could look at the

appropriateness of the Utility's adjustment by using its normal rate making treatment, which in this case it was said would support two of the three Utility adjustments and a net increase to the customer refund of only $6,388,000. Again, keep in mind that this is not a rate case, but, rather, a negotiated settlement that was entered into by the parties, reviewed by, and accepted by this Commission.

As disclosed by the depositions, the alternative position was not the Staff's idea, but one pressed on them by Commissioner Bradley. Tim Devlin, Director of the Commission's Economic Regulation Division and a supervisor several levels above Mr. Slemkewicz, testified that he approved of the initial recommendation favoring the substantially larger customer refund. He testified at pages 8 and 9 of his deposition:

Q If you could just briefly look at that recommendation. And what I would like to represent to you is that that recommendation recommends that the Commission go along with the Public Counsel's position, and it contains no alternative position in the document. Could you see whether you agree with that?

A I agree with that.

* * *

Q Did you give him feedback on that recommendation?

A I probably did. Essentially, as I

recall, I was in support of that recommendation.

* * *

Q Let me just make sure I got this clear. At first when Mr. Slemkewicz only had one recommendation and that was to agree with the Public Counsel's position, you agreed with that recommendation?

A That's correct.

* * *

Q As I understand it, and correct me if I am wrong, you initially approved of Mr. Slemkewicz's recommendation that contained no alternative?

A I didn't approve it. I said I agreed with it when I first read it.

Page 15 of Tim Devlin Deposition.

Q Okay. Did Commissioner Bradley say anything about the inclusion of an alternative recommendation by staff?

A Yes, he did.

Q What did he say?

A He said he -- as I recall, and it has

been a while, that he would be interested in considering an alternative, something to that effect.

Q And by considering an alternative, an alternative to what?

A To Public Counsel's position, I assume. Again, I'm going by my recollection.

Pages 13 and 14 Devlin Deposition.

Q Okay. I take it as a result of -- or subsequent to discussions with staff management decided to include an alternative in the recommendation?

A I was asked to see whether there was a possibility to present an alternative position, if there was a reasonable alternative.

Q Who asked you that?

A Dr. Bane.

* * *

Q To the best of your recollection, did Dr. Bane just ask you to consider it, or did she tell you to include an alternative?

A She asked me to consider and see

whether there are any reasonable alternatives.

Q What did you do as a result of that?

A I did just that.

Q Considered whether there were alternatives?

A I considered and put one together that I thought was defensible.[4]

Pages 15 - 17 of Devlin Deposition.

* * *

Q Okay. You mentioned that Dr. Bane had asked you to consider whether there were alternatives. Was her request to you for that, did that take place after the meeting with Commissioner Bradley that you described?

A I believe it did. I am not sure. I'm not a hundred percent sure.

Q Would it be -- would I be correct to conclude that that discussion occurred sometime between the meeting with Commissioner Bradley on

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[4] Actually, Mr. Devlin's first proposed alternative didn't cut it with Executive Director Dr. Mary Bane as is was too simplistic and "arbitrary" in that it simply proposed "splitting the difference" between the parties' positions without much more explanation. Mr. Devlin rethought his alternative and came up with a more acceptable rate case adjustment model. Pages 17-21, Devlin Deposition.

April 17th and April 30th when you came up with an alternative?

A That's probably true.

* * *

Q Okay. Would you have included that alternative in the staff recommendation but for Dr. Bane asking you to consider it?

A No.

Pages 19 and 20, Devlin Deposition.

Q Had you seen the May 6th recommendation or the May 6th draft of the recommendation?

A I am sure I have.

Q Were you in agreement with that recommendation at that time?

A Yes.

Q Okay. The recommendation that was ultimately filed on May 8th contained no affirmative recommendation by staff but instead included three options; did it not?

A That's right.

Q How did that change come about?

22 A That was due to a directive that I
23 received by Harold McLean that -- who is our
24 General Counsel, that one or more Commissioners do
25 not want a recommendation.

Page 22, Devlin Deposition.

It is clear the Utility's agents knew the Staff was supporting the customers' position prior to the recommendation being filed because Mr. Devlin told both Mr. Paul Lewis and Ms. Bonnie Davis, both employees or attorneys for the Utility. Pages 36 and 39, respectively, of Devlin Deposition.

Dr. Mary Bane, Executive Director of the Commission testified at her deposition that the change in the recommendation from a primary recommendation with a single alternative was changed to one with no affirmative recommendation, but merely options, as a result of General Counsel Harold McLean stating that two commissioners wanted such a recommendation. She testified at Page 19 of her deposition:

4 Q Okay. But on the morning of May 6th,
5 the recommendation was to side with Public
6 Counsel, but also had an alternative
7 recommendation as well?
8 A Yes, that's correct.
9 Q Would it be true that the
10 communication from Mr. McLean that two
11 Commissioners did not want an affirmative

recommendation, was that the cause of the recommendation being changed?

A Yes.

Q And had it not been for that communication, the staff recommendation on the morning of May 6th would have been the final recommendation?

A I think we would have tweaked it some, because that was still a rough draft. That was the first time I had seen it. But, yes, it would have had the same basic structure. It would have had the staff's recommendation and then an alternative.

Dr. Bane also acknowledged that it was generally the tradition and practice at the Commission for Commissioners not to influence the direction of a Staff recommendation. She testified at Page 30 of her deposition:

Q You said that -- just moments ago, you told Mr. Beck something to the effect that -- I'm paraphrasing somewhat -- we don't want even the perception that the Commissioners have influenced the recommendation. Is that essentially what you just said as a basis for not

showing them the recommendations?

A Traditionally, yes. Traditionally, the Commissioners have wanted staff to be totally independent and to bring their best professional recommendation to the Commissioners.

Dr. Bane also acknowledged that she did not inform the other three commissioners of the requests of Commissioners Bradley and Davidson that the recommendation be changed to have only three options and no affirmative recommendation, from an earlier draft that had initially been just a recommendation, followed by one with a primary recommendation with a single alternative. At Pages 35 and 36 she testified:

Q Now, you told Mr. Beck that when it was reported to you from Mr. Devlin that Commissioner Bradley was inquiring about seeing a draft, that you took it upon yourself to apprise the Chairman of that, correct?

A Correct.

Q Yet, if I understand your testimony correctly, after Mr. McLean had advised you that two Commissioners were pressuring, if that's the correct word, or pushing for an option type recommendation, with no primary recommendation by the staff at all, you did not go and report that

to the Chairman; is that correct?

A That was a different issue. No, I did not.

At Page 41 of her deposition, Dr. Bane confirmed that the switch to an all option, no affirmative recommendation came as a result of a communication from two commissioners transmitted through General Counsel McLean:

Q Okay. But then subsequent to even Mr. Devlin arriving at his normalization ratemaking adjustment alternative, then there were outside pressures, outside the staff, that is, to suggest that there should not be any primary recommendation at all, right?

A Mr. McLean so indicated.

Q Okay. And the desired result, according to Mr. McLean, was that there would be one or two or three options that -- with no preference stated by the staff?

A Correct.

Q Okay.

Which, if any, staff members, Dr. Bane, had been supporting the -- I was going to say Power Corp. again -- the Progress Energy

position on the refund prior to suggesting that there should be an alternative? Were there any that you were aware of?

A I had no discussions with staff.

Harold McLean, the Commission's General Counsel, confirmed that Commissioners Bradley and Davidson communicated to him their desire for an options type staff recommendation:

Q We've had some testimony previously that on May 6th you told some staff members that two Commissioners wanted an options recommendation.

A Yes.

Q Did such an event occur?

A Yes.

Q Could you describe it?

A I had meetings with two Commissioners over time.

Q Okay. Who were the two Commissioners?

A Commissioners Bradley and Commissioner -- what is his name?

Q Davidson?

A Davidson, yes.

Q Could you relay to us -- or tell us what was told to you by them?

A Yes. I don't want you to get the impression that there was a single meeting. I met with both of those Commissioners several more times than once to brief them generally on what was going on with the case, but in both instances at their request.

Mr. Davidson, as I discussed with him the likely direction of the staff recommendation, he and I discussed what he would like to see, what he expected, the kinds of justification he wanted for whatever position came before him. I had the impression then, I had it then and now that Commissioner Davidson would prefer a number of options, and that the staff should furnish justification for each of those options. And that the staff should remain non-partisan, if you will.

By partisan, I mean supporting one particular option over and to the exclusion of any other.

* * *

The notion that there should be three neutral discussions, or any number, actually, three seems -- one side wins or the other side wins or something in the middle, some reference to traditional ratemaking or something like that that should be offered up.

That was as much my notion as it was theirs. I can say that I received instructions from them in the end to follow that course, but that was partially on advice from me as well.

Pages 6-9 , McLean Deposition. (Emphasis supplied.)

Mr. McLean also confirmed that Commissioners Davidson and Bradley knew the Staff was intending to recommend the larger customer refund be granted when these commissioners were requesting that the recommendation be changed to be non-partisan with just options:

Q Had you told Commissioner Davidson that the staff recommendation, as it existed at the time of your meeting with him, that the staff recommendation sided with Public Counsel but had an alternative?

A Essentially, yes, although I wouldn't use that term. I would say that it resolved the

issue similar to the way Public Counsel wanted it.

* * *

Q You also had discussions with Commissioner Bradley --

A Yes.

Q -- which led you to the same result that he wanted options and not an affirmative staff recommendation?

A Yes.

Q Did you advise Commissioner Bradley what the substance of the staff recommendation was at that point in time?

A In pretty much the same way I did with Commissioner Davidson, yes.

Pages 7 and 14, McLean Deposition.

Mr. McLean also confirmed that Utility lobbyist/agent Paul Lewis related to him that he thought the Utility already had the benefit of two commission votes on the issue of the size of the refund:

Q There has been mention of a discussion with Paul Lewis that you may or may not have had. Can you help us sort that out?

A I might can help sort some of that

out.

I heard, and I have labored from whom I heard it, that Mr. Lewis had indicated to a staff member that Commissioner Deason had some position. And I found that not credible. Mr. Lewis did not tell me that. I just heard that. I'm not even sure who I heard it from. I don't know. I didn't find that credible.

Paul Lewis in a discussion with me, and I met with -- Paul Lewis came by my office and comes by my office with some frequency. In the course of people representing the industry, sometimes even consumers when they come by my office, it is often their thesis that the Commission has taken a direction and that wouldn't it be good if the staff took that direction, too, and supported generally the direction of the Commission. That was the gist of Paul's conversation with me and conversations.

Now, I take that as Mary does, Dr. Bane, with a grain of salt. It comes in, if I were to characterize it on a level of five on a

scale of 10, normally Paul was a six. That worried me a little bit. Not a whole lot. But that worried me a little bit.

And I believe I told Dr. Bane -- I am pretty sure I told Dr. Bane about that. I did not keep it to myself.

Q Why did you conclude or why did you rate it a six on a scale of one to 10 or whatever?

A It seemed -- I wish I could remember the precise English words used. It would be nice, but I can't. It seemed to me like it was a little bit stronger and a little bit shorter than I was comfortable with. Whether that was Paul's personal style, I don't know. Whether it was his -- he is not a stranger to superlatives and to alarm. I find him effective, and I don't take any offense in all of that. But it was a little bit stronger.

Everyone that comes to my office with rare exception suggests to me that the Commission has, will or whatever have a direction. And that staff should fall into line and give them

something they would like. I hear that all of the time.

Q Did he indicate he had two Commissioners on his side? Where did the number 2 come from?

A I don't know. Oh, from him.

Q He indicated two Commissioners?

A Yes. He did not say, "I have two votes." He did not say, "I have two commitments." He said nothing like that. He said things like two Commissioners are with me or something. I can't remember the precise terminology.

I had the impression that it was something a little different than the ordinary, but I wasn't sure whether that was just Mr. Lewis or whether it was true or not. I didn't inquire further.

Q Did he tell you which two Commissioners they were?

A No.

Q And you didn't ask either?

A No.

Pages 19-22, McLean Deposition.

Mr. McLean also related that there was no Staff member supportive of the Utility's position prevailing in the recommendation and, further, discussed his role in editing the recommendation with the goal of removing the Staff's previously stated preference for the customers' larger refund:

Q Who was the staff member that was supporting the going solely with the Florida Power Corporation?

A I don't think we had one. You misunderstood. With respect to the three options, none of them suggested any course of action be taken. Nobody was behind any one of them.

Q That's why you had one lawyer do them all?

A Yes. I'm sorry, yes.

Q After you communicated to staff that two Commissioners wanted an options type of recommendation, were you involved in the process, then, of changing the staff recommendation to that?

A Yes.

Q Did you have meetings with people?

What happened?

A As late as the morning of the recommendation issued, I met in this room with -- Dr. Bane was there, I think John Slemkewicz was there, I'm sure Tim was there, I'm not sure whether Jennifer Brubaker was or not. And my purpose was to eliminate any particular support from any particular position, because at that point, I had, through discussions with two Commissioners, I had the notion and held it myself that the staff recommendation should be neutral in tenor and should present alternatives, or actually options.

Q So your goal, then, was to take out any notion that the staff was siding with one party or the other and make it so that they weren't siding with any?

A That's correct.

Q And the fruit of that was the recommendation that was ultimately filed?

A Yes. And I'm smiling because I don't think I did a perfect job on that. Anyone who is

capable of reading can detect a bias in the recommendation I think. But I came to the point mid-Thursday morning that it was time to get out a recommendation. And at the same time, I was also dealing with scheduling the case.

Q So there were at least two Commissioners who knew that the staff recommendation at least two days before filing favored the Public Counsel, and that would be Commissioners Bradley and Davidson?

A I would say agreed with it.

Q Okay. They agreed with it?

A Yes.

Q And then ultimately the recommendation was supposed to take that out, so the recommendation had no sides, took no sides?

A Yes, correct.

Q Did the three other Commissioners, to your knowledge, did they ever know that the staff recommendation had previously been decided with the Public Counsel or agreed with the Public Counsel's position?

A I can't say whether they did or not. The answer is I don't know, and I didn't tell them.

Q So unless they found out through some other mechanism, they would not know that the staff had actually sided or agreed with Public Counsel's position?

A That's correct, at that point.

Pages 27-29, McLean Deposition.

Mr. McLean also articulated the problem presented to Staff of having to deal with one or more commissioners directing Staff to modify a recommendation without the knowledge or concurrence of the other commissioners:

Q Are you saying that if you were a Commissioner, that you would not need a recommendation that supported your view if you were prepared?

A No.

Q And you could vote against staff?

A No, that's not what I'm saying at all. I'm saying that if it were the Commission policy that no Commissioner should influence the staff without the knowledge of the others, that I

would look to see whether I had taken any measure to articulate that policy anywhere. Otherwise, you put staff, that Commissioner in your hypothetical me, would put staff in the position of deciding which Commissioner to obey, which Commissioner to ignore and which Commissioner to tattle on and so forth.

For example, Commissioner A says, "Here, I will draw the recommendation this way," and I'm that Commissioner's lawyer. Do I run down the hall and tell the other Commissioners and tattle on Commissioner A? I think not, that's disloyal to Commissioner A. My best course is to wait and hear from Commissioners B, C and D.

Q Once they find out.

A If they find out. And I think it would be a good idea for them to articulate this policy. But so far as I know there is no policy to be violated.

Q Isn't the safer and better course for the staff being put in this position to have a policy whereby the staff issues a professional

recommendation on whatever they think is supported by the facts and the law, and gives it to the full body and the Commissioners vote without any -- Commissioners trying to prejudge or direct the recommendation?

A That would be a good policy for the Commission to adopt, and I would recommend it to them. So far as I know, they don't have it.

Q I mean, doesn't this case, to the extent we've gotten into it so far, suggest that that is not a bad idea?

A It is a suggestion I did not need, and the answer is yes.

Pages 47 and 48, McLean Deposition.

Mr. McLean reaffirmed that the change in the Staff recommendation from a primary recommendation to one with just three options was solely at the insistence of Commissioners Bradley and Davidson:

Q At some point, the primary recommendation with the inclusion of an alternative was not still sufficient for two Commissioners?

A I don't know that they ever saw that.

I don't know that. I don't know that the Commission -- that any Commissioner rejected the notion of a primary and an alternative. I don't know that. If so, I was never told that by either Commissioner, I don't think.

Q Correct me then. I thought I heard you tell Mr. Beck that Commissioner Davidson left it clear with you that he wanted to have a staff recommendation that was unbiased.

A Yes.

Q And that that -- either you were told or you inferred from that that there should be options that were -- whether there were two or three, that were placed out there with no bias, and that the Commissioners could choose amongst them.

A Yes. But in the course of that, I don't think Commissioner Davidson rejected the notion of an alternate -- of a primary and an alternate. And I took your question to mean that.

Q Yes.

A I don't think he did.

Q Did Commissioner Bradley want the three options?

A They both wanted three options. I never communicated to either one of them, I don't think, that staff was contemplating doing an alternate and -- I mean, a primary and an alternate. I didn't -- I'm pretty sure I never communicated that to them, because I was not especially enthusiastic about that route anyway. But it is most assuredly the case that after discussions with both Mr. Bradley and Davidson, I had the notion that they wanted option A, option B and option C, and that they did not want the staff to express a preference for any one of the three.

And that was a recommendation that may have been partially brought about by my recommendation to them, and to this moment supports my personal feeling about what the correct course to take in this docket is.

Q Isn't it necessarily true that if you have different positions with no bias, you can't

12 have a primary and an alternative?

13 A Of course.

14 Q And that necessarily results in the

15 take your pick of three options?

16 A Yes.

17 Q And I think you admitted that perhaps

18 because of time pressures and completing the

19 recommendation, the bias, if you will, of the

20 first option still shines through?

21 A Yes.

Pages 56-58, McLean Deposition. (Emphasis supplied.)

Mr. McLean's deposition concluded with him reiterating: (1) that the Staff recommendation, absent the communications from Commissioners Bradley and Davidson directed through him, would likely have remained, at most, a primary recommendation favoring the larger customer refund with the Tim Devlin alternative recommendation; (2) that the three option recommendation was clearly the result of the expressed desires of Commissioners Bradley and Davidson, but that he, McLean, was more than just a "conduit" in the process; but that, importantly, (3) "but for" the intervention of Commissioners Bradley and Davidson in requesting the three option, unbiased recommendation, he would not have interceded to change the initial recommendation:

14 Q I don't want to belabor anything, but

15 I want to approach this one more time.

A Sure.

Q I think it is a fair characterization that the testimony of the three witnesses that came before you today said that, especially the first two, John Slemkewicz and Tim Devlin, that left to their own devices but for the interjection of recommendations or persuasion by upper management at the Commission, they would have gone with the initial, favors Public Counsel recommendation.

MR. HARRIS: Are you stating your belief as to what their testimony was?

MR. TWOMEY: Exactly.

BY MR. TWOMEY:

Q And Dr. Bane, as I heard her testimony and you were here, I thought she said that with regard to the three options scenario, while she played a role in the alternative recommendation, that the three options scenario came at your direction?

A Yes.

Q And that it was expressed to her that

that was the desire of two Commissioners?

A Yes.

Q So what I want to be clear on, is that true?

A Yes, I think so.

Q Because --

A Let me say this: Yes, I believe it is true, because that was the staff recommendation from the beginning. I think -- there was an erosion of Tim Devlin's certainty that the movants' position was the correct one. But left to their own devices, I think staff recommendation would have issued at the very least as a primary recommendation to support the movants' position and perhaps an alternative, something less than that or maybe one of those -- maybe some of the adjustments would be made and some not. I think left to their own devices, I think that is the direction it would have taken.

I am sure that I changed the direction of staff recommendation by my communications with staff, yes.

Q What I want to be abundantly clear on is that your instructions to staff, which they say you purported came from two Commissioners --

A Yes.

Q -- did, in fact, come from two Commissioners, and it was not you acting as a sole agent?

A No.

Q It is clear in your mind that the instructions you related to the remainder of the staff, that there needed to be an unbiased option recommendation --

A Yes.

Q -- was the direction you received from Commissioners Bradley and Davidson?

A Directions seems to imply that I was a conduit. I was more than a conduit. I played a material role in formulating that course of action. So I was something more than a conduit. They didn't write it on a piece of paper, and me read it to these folks. I was more than a conduit.

Q I understand.

A I do believe that what I said in this room and told the staff changed the direction of the staff recommendation materially.

Q Right.

And, again, in terms of the but for stuff, is it your testimony that but for the intercession of either Commissioner Bradley or Commissioner Davidson or the two of them, you would not have engaged in the conduct of telling the Commission staff to pick a -- to deliver a non-biased three option --

A Yes, that's the case. I would not have spontaneously come up with that plan and seen it through. I was relatively comfortable with the recommendation initially. And given my discussion with the Commission, given my own inclination and thinking a whole lot more about it, I became less comfortable with. But I think but for -- I think it would have run its course, and there would have been a recommendation favorable to the position taken by the movants. I think that's fair.

4 MR. TWOMEY: Thank you.

5 THE WITNESS: Thank you, Mr. Twomey.

Pages 61-64, McLean Deposition. (Emphasis supplied.)

The Utility's Customers and Commissioners Jaber, Deason and Baez Were Deprived of the "True" Staff Recommendation in this case by the interference of Commissioners Bradley and Davidson, which interference was with their knowledge that the "true" recommendation, if issued, would support an over $23 million refund.

The documents obtained through Sugarmill Woods's public records demand and the four senior Staff depositions taken thereafter make clear that: (1) "but for" Commissioner Bradley's expressed desire for an alternative position in case he didn't like the primary staff recommendation, there would have been no alternative position stated; and that (2) both the legal and technical recommendations would have been that the Settlement Agreement, coupled with the discussions had at the Agenda Conference approving the Settlement, were clear and unambiguous and supported the Public Counsel's position that the 2002 refund should total over $23 million, excluding interest; (3) "but for" the later pressure or expressed preferences of Commissioners Bradley and Davidson for a three option, unbiased "recommendation," the Staff recommendation would have, at most, consisted of a primary recommendation favoring the Public Counsel's position for the larger refund, plus, perhaps, the alternative position prepared by Mr. Devlin; and (4) the remaining three commissioners of this collegial body appear to have not been informed of the pressures of Commissioners Bradley and Davidson until after the May 8, 2003 filing of the recommendation in this docket and only then because of the public records demand and ensuing depositions.

The May 8, 2003 Staff recommendation does not reflect the true professional legal and technical views of the Staff of this Commission, but, rather, the preferences of two commissioners, who knew the Staff favored Public Counsel's position and wanted the recommendation diluted or "watered down" to the point that no position or outcome was favored, and so that all positions, including the Utility's and a "split-the-difference" option, were equally favored, or at least would appear equally favored in the public's eye. This outcome is unacceptable! This Commission is the "Florida Public Service Commission" with the emphasis placed on the word "Public." The public, generally, and the Utility's customers, specifically, in this case, are entitled to trust that a written Staff recommendation reflects the true professional views of the Staff on what an outcome should be given the applicable law and the record facts of a given case. A commissioner is entitled to vote any way he or she wants, with or without explanation, but no commissioner or group of commissioners is entitled to a Staff recommendation reflecting his or her bias of the outcome they want to see approved.

Just as importantly, each commissioner should feel confident that each and every Staff recommendation they receive is the best professional work product of the Commission Staff and not a product that has been tainted by the interference of one or more other commissioners. This is a collegial body consisting of five commissioners and the Staff, as testified to by Mr. McLean, should not be put in the untenable position of having to bend to the desires of one or more commissioners in shading a recommendation and then be worried about whether they should "tattle" to the remaining commissioners so they are made aware the recommendation has been shaded to reflect the bias of another commissioner. This Commission should adopt an announced policy, if not a formal rule, prohibiting any commissioner from attempting to

influence the direction or form of a Staff recommendation.

Given that the May 8, 2003 Staff recommendation clearly does not represent the view of the Commission's professional staff, Sugarmill Woods requests that the Commission direct its Staff to republish a recommendation reflecting what they would have filed "but for" any interference or direction from Commissioners Bradley and Davidson prior to considering this matter at an Agenda Conference, even if doing so results in additional delay. The parties now know what the Staff intended to recommend and that recommendation, if it is readopted, should be on the table for all to see. Ideally, this recommendation would recognize that the Settlement Agreement, coupled with Agenda Conference clarifications, is completely clear and unambiguous and that it clearly supports an over $23 million refund for the Utility's customers. At worse, a republished recommendation should contain a primary recommendation favoring the customers, plus the rather tepid alternative coaxed out of Mr. Devlin.

The Interference of Commissioners Bradley and Davidson Demonstrate a Clear Bias on their part against the customers and they should voluntarily recuse themselves from further participation in this docket, or, absent that, be removed by the remaining commissioners.

The discovery taken in this case, consisting of the Sugarmill Woods' public records demand and the transcripts of the depositions of the four senior Commission employees reveal the following: (1) Commissioner Bradley stated that he might want an alternative to the Staff recommendation if he did not like it; (2) Commissioner Bradley was made aware of the thrust of the initial Staff recommendation, at least by Mr. McLean, and still communicated a desire for an alternative to it, which can only be taken to mean that he "disliked," or was biased against, the primary recommendation favoring the customers; (3) both Commissioners Bradley and

Davidson, being advised by Mr. McLean that Staff was favoring Public Counsel's position, persisted in pressing for a recommendation that was essentially an "un-recommendation," that favored or recommended no course of action and, thus, equally favored all possible outcomes including the one favoring the Utility.

This case is a quasi-judicial proceeding affecting the substantial interests of all the parties, the Utility and its customers alike. The first year difference in the refunds proposed by the parties exceeds $18 million and the three year follow-on impact of this decision amounts to tens of millions of dollars more. Commissioners in these cases sit as administrative law judges and Commission cases often involve the largest dollar disputes of all Florida administrative law cases. The parties are entitled to unbiased judges in these cases, but Commissioner Bradley's and Davidson's behavior here in compelling a change in a Staff recommendation they knew favored the customers clearly demonstrates a strong bias against those customers.

Commissioners Bradley and Davidson are the two most junior commissioners and may not have been aware of the controversial and unacceptable nature of lobbying Staff for a change in its recommendation, although there is evidence that Mr. McLean made at least one of them aware of that potential. Nonetheless, their actions in steering the recommendation away from one favorably disposed to the customers can only be interpreted as bias against the customers and in favor of the one remaining party to the case: the Utility. This demonstrated bias is especially troubling in light of the fact that only these two commissioners acknowledged their offices being in possession of the non-record, lobbying materials provided to them by the office of Julia Johnson, a consultant paid to represent the positions of the Utility in this case.

Given their demonstrated bias against the customers in this case, Commissioners Bradley and Davidson should voluntarily recuse themselves from any further participation in this docket. If they decline to recuse themselves, the remaining commissioners should vote to remove them for their demonstrated bias.

WHEREFORE, Sugarmill Woods Civic Association, Inc. respectfully requests: (1) this Commission direct its Staff to republish its recommendation in this case, which should be the recommendation the Staff would otherwise have published and filed "but for" the successful efforts of Commissioners Bradley and Davidson to influence the form and direction of the recommendation; (2) that Commissioners Bradley and Davidson voluntarily recuse themselves from further participation in this docket in order to remove any further cloud over the proceedings as a result of their perceived bias against the customers; and (3) failing Commissioners Bradley and Davidson voluntarily removing themselves from the docket, that Commissioners Jaber, Deason and Baez remove them as a result of their successful efforts in altering the Staff recommendation.

Respectfully submitted,

Michael B. Twomey
Attorney for Buddy Hansen and
Sugarmill Woods Civic Association, Inc.
Post Office Box 5256
Tallahassee, Florida 32314-5256
(850) 421-9530

CERTIFICATE OF SERVICE
DOCKET NO. 000824-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 27th day of June, 2003.

Charles J. Beck
Deputy Public Counsel
Office of the Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Room 812
Tallahassee, Florida 32399-1400

Christopher M. Kise
Solicitor General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050

Mary Ann Helton, Esquire
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

James A. McGee, Esquire
Progress Energy
Post Office Box 14042
St. Petersburg, Florida 33733

Vickie Gordon Kaufman
McWhirter, Reeves
117 S. Gadsden Street
Tallahassee, Florida 32301

John W. McWhirter, Jr. Esquire
McWhirter, Reeves
P.O. Box 3350
Tampa, Florida 33601-3350

Gary L. Sasso, Esquire
Carlton Fields Law Firm
P.O. Box 2861
St. Petersburg, Florida 33731

Ronald C. LaFace, Esquire
Greenburg Traurig Law Firm
101 East College Avenue
Tallahassee, Florida 32301

Thomas A. Cloud, Esquire
Gray, Harris
301 East Pine Street, Suite 1400
P.O. Box 3068
Orlando, Florida 32801

Attorney

(5)

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: MAY 8, 2003 G:\PEFI_REFUND1.wpd 5/6/03

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

FROM: DIVISION OF ECONOMIC REGULATION (SLEMKEWICZ, DEVLIN)
OFFICE OF THE GENERAL COUNSEL (BRUBAKER)

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: 05/20/03 - REGULAR AGENDA - ORAL ARGUMENT REQUESTED IN ISSUE 1 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\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. The acquisition was consummated on November 30, 2000. By Order No. PSC-01-1348-PCO-EI, issued June 20, 2001, in Docket No. 000824-EI, the Commission directed FPC to file Minimum Filing Requirements (MFRs) to provide the Commission and all other interested parties the data necessary to begin an evaluation of FPC's level of earnings on a going-forward basis.

The 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

" EXHIBIT A "

granted by Order No. PSC-02-0411-PCO-EI, issued March 26, 2002. By Order No. PSC-02-0412-PCO-EI, issued March 26, 2002, the Commission suspended the 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, Florida Industrial Power Users Group, Florida Retail Federation, Buddy Hansen/Sugarmill Woods Civic Association, and Publix Super Markets, Inc. (Movants) filed a Motion To Enforce Settlement Agreement (Motion). The Movants contend that PEFI's refund calculation made three adjustments which are inappropriate and not contemplated by the Settlement.

On March 7, 2003, PEFI filed both a response in Opposition to the Motion To Enforce Settlement Agreement (Response) and a Request for Oral Argument and, in the Alternative, for an Evidentiary Hearing. In an effort to facilitate a possible resolution of these issues, staff held a noticed meeting with the parties on March 27, 2003. The parties were unable to resolve their differences at the meeting.

By letter dated April 9, 2003, PEFI provided its initial Revenue Sharing Refund Report per Order No. PSC-02-0655-AS-EI, indicating that $4,995,649 had been refunded to its customers as of March 28, 2003.

Issue 1 of this recommendation addresses PEFI's request for oral argument or, in the alternative, for an evidentiary hearing. Issue 2 addresses the Movants' Motion and PEFI's Response.

The Commission has jurisdiction over this matter pursuant to Sections 366.04, 366.05, and 366.06, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Progress Energy Florida, Inc.'s Request for Oral Argument And, in the Alternative, for an Evidentiary Hearing, be granted?

RECOMMENDATION: Progress Energy Florida Inc.'s request for oral argument oral argument should be granted. Progress Energy Florida, Inc.'s request for an evidentiary hearing should be denied. (BRUBAKER)

STAFF ANALYSIS: In its request, PEFI contends that oral argument will be essential to the Commission's resolution of this matter, and that after oral argument, the Commission will be in a position to rule in PEFI's favor on the current state of the record. If however, the Commission believes that it does not have a sufficient record to rule on the merits in PEFI's favor, PEFI requests that the Commission schedule an evidentiary hearing to resolve the dispute. No party filed a response either in opposition to or in support of PEFI's request.

Staff believes that oral argument would aid the Commission in comprehending and evaluating the issues before it, due to the importance and complexity of this matter. Further, staff notes that since no hearing has been held with respect to these issues, parties and interested persons may participate at the Agenda Conference at the Commission's discretion. Accordingly, for purposes of this recommendation, staff recommends that oral argument should be granted.

Staff recommends that the Commission deny PEFI's alternative request that the Commission schedule an evidentiary hearing in this matter. A proceeding pursuant to Section 120.57, Florida Statues, is designed to address matters involving disputed issues of material fact. PEFI's concerns present matters which require a legal, rather than factual, determination. Staff does not believe that the aduction of additional evidence is necessary in order for the Commission to fully and fairly resolve the matter before it. As such, this matter has been noticed as a matter of final agency action, to which the appropriate recourse is to seek further relief from a court of competent jurisdiction. Staff therefore recommends that PEFI's alternative request to set this matter for an administrative hearing should be denied.

ISSUE 2: Should the Motion for Enforcement of Settlement Agreement be granted?

RECOMMENDATION: Yes, the Motion for Enforcement of Settlement Agreement should be granted. The appropriate amount to be refunded to PEFI's ratepayers for the period ended December 31, 2002, is $23,034,004, plus interest. Therefore, Progress Energy Florida, Inc. should be required to refund an additional $18,079,591, plus interest, beginning with the first billing cycle for September 2003. (SLEMKEWICZ, BRUBAKER, DEVLIN)

STAFF ANALYSIS: In its response, PEFI calculated a refund amount of $4,954,413, excluding interest, based on its understanding of the intent of the provisions of the Settlement and its interpretation of those provisions. The Movants calculated a refund amount of $23,034,004, excluding interest, based on their understanding of the intent and interpretation of those same provisions. The difference in the two amounts stem from three adjustments PEFI made in its refund calculation, which the Movants contend are inappropriate and not contemplated by the Settlement. The adjustments made by PEFI to its actual revenues for calculation of its 2002 refund are as follows:

- Increased actual revenues by $35 million to account for the refund of interim revenues as required by Order No. PSC-02-0655-AS-EI.

- Reduced actual revenues by $9.3 million, related to the Service Fee/Lighting rate increase

- Reduced 2002 actual revenues by $41.6 million to account for the rate reduction not being in effect for the entire year

For informational purposes, the three adjustments are addressed in greater detail below.

The Movants contend that PEFI entered into an agreement that set forth specific calculations determining the amount it would refund for 2002. The adjustments Now that the year 2002 is over, PEFI cannot change those calculations to suit its tastes, and cannot rely on matters lying outside of the agreement in order to change its obligations. The Movants contend that the Commission must issue an order enforcing the settlement agreement so that PEFI's customers will get the refund to which they are entitled.

In its Response, PEFI states that:

> Traditionally, the Commission has used an authorized Return on Equity ("ROE") to limit earnings levels. When the utility earns above the top of the range, the Commission or OPC might initiate a rate review to reduce the utility's rates. In their Settlement Agreement in this case, however, the parties agreed to a revenue sharing plan in lieu of a traditional limit on ROE as a means to limit earnings levels. Under this revenue sharing plan, when Progress Energy receives more revenues than projected, the excess revenues are shared on a 1/3 - 2/3 basis between shareholders and customers.
>
> The key to the plan is that expected - i.e., projected - base rate revenues must be compared on an apples-to-apples basis with actual base rate revenues for the periods in which revenue sharing is in effect in order to identify excess revenues that should be shared.

Response at page 2 (emphasis added). PEFI states that the dispute about how to treat the transition year, 2002, arises from the fact that the revenue sharing plan commences part way through that year, on May 1, 2002. PEFI contends that the fact that the revenue sharing plan commences part way through the year necessitates some adjustments; however, "the basic premise of the plan remains unchanged: the object is still to identify whether there are any excess revenues over those projected." Response at page 2, emphasis added. PEFI believes that when the Settlement and Order PSC-02-0655-AS-EI are applied "in a sensible manner, consistent with both the language and explicit intent of those documents, it becomes clear that a refund of excess revenues in the amount $4,998,489 is called for in the year 2002."

Staff was not privy to the negotiations that took place among the parties in developing the Settlement. Therefore, staff is unable to provide an opinion regarding the intent and understanding of the various parties when they agreed to the provisions and amounts contained in the Settlement. Staff, however, can provide an interpretation of the Settlement based on the plain language contained within the four corners of the document.

PEFI contends that the key to the Settlement is that projected base rate revenues must be compared on an apples-to-apples basis

with actual base rate revenues for the periods in which revenue sharing is in effect in order to identify excess revenues that should be shared. However, this "key" is never stated in the Settlement, nor was it incorporated in the Order whereby the Commission approved the Settlement. PEFI contends that the objective of the Settlement is to identify whether there are any excess revenues over those that are projected. Staff disagrees. The plain language of the Settlement provides that the object is to identify whether there are any excess revenues over the 2002 threshold amount of $1,296 million in retail base rate revenues. Settlement at page 3.

Had the intent of the agreement been as asserted by PEFI, language to that effect should have been incorporated in the Settlement. PEFI might also have requested to make a clarification of such an understanding at the April 23, 2002, Agenda Conference. As discussed below, a staff clarification regarding the interim refund portion of the Settlement was raised at the Agenda Conference, agreed to by all parties to the Settlement, and thereafter incorporated as part of the Settlement through Order No. PSC-02-0655-AS-EI. To interpret the Settlement as urged by PEFI contradicts the plain language of the Settlement, which provides a hard number - $1,296 million - as the threshold from which any revenues to be shared are to be calculated.

The Movants' point out that the parol evidence rule prohibits the use of 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. Motion at page 4. PEFI contends that the most "natural reading" of the Settlement's terms indicate that the revenue sharing mechanism was intended to limit excessive revenues in lieu of an authorized ROE, and that a comparison of base rate revenues to the sharing threshold must take into account the annualized effect of all rate reductions, increases, and refunds authorized elsewhere in the Settlement and Order No. PSC-02-0655-AS-EI. Response at pages 19 and 20. Staff believes the Settlement is unambiguous, and does not require further amplification. Neither the Settlement nor Order No. PSC-02-0655-AS-EI contains any language which supports the position urged by PEFI. Staff recommends that the Commission grant the Motion to Enforce the Settlement Agreement, and require PEFI to refund an additional $18,079,591, plus interest, beginning with the first billing cycle for September 2003.

Interim Refund

During its review of the Settlement, staff noticed that the provision regarding the $35 million interim refund was silent regarding the apportionment of the interim refund between the amount attributable to 2001 and the amount attributable to 2002. In its recommendation, staff pointed out the need for clarification of this point and proposed that only $10,370,000 of the interim refund was related to 2002. At the April 23, 2002, Agenda Conference, all of the parties, including PEFI and the Movants, agreed with the staff's calculation which was subsequently approved by the Commission.

The $35 million interim refund was made during the May 2002 through December 2002 period, thereby reducing 2002's actual revenues by $35 million. While both PEFI and the Movants agree that an adjustment to increase revenues is necessary, each has proposed a different amount. PEFI has increased revenues by the entire $35 million while the Movants have increased revenues by the net amount of $24,630,000 ($35,000,000 - $10,370,000). It is staff's opinion that the appropriate adjustment is $24,630,000 based on the Commission's approval of staff's clarification of the Settlement. This adjustment only effects the revenue sharing refund calculation for 2002.

Staff would also note that PEFI has stated that an adjustment of $24,630,000 would be appropriate if it reduced its "rate reduction not in effect" adjustment from $41,625,000 to $31,255,000. Response at page 10, footnote 2.

Lighting/Service Fee Increases

The second area of contention involves the treatment of the approximately $14 million annual revenue increase related to the increases in lighting and service fees. PEFI has made an adjustment to reduce its revenues by $9,338,000 to remove the portion of the increased lighting and service fee revenues that it collected between May 1, 2002, and December 31, 2002. PEFI claims that the increased lighting and service fee revenues should not be included as "base rate revenues" that are subject to the revenue sharing mechanism. As noted on Pages 5 and 6 of the Company's Response, the term "base rate revenues" is not defined in the Settlement. On Page 4 of its Motion, the Movants disagree with this adjustment and states that "No such adjustment is allowed by

the agreement". Although the Settlement contains various explicit provisions, there is no provision for excluding any revenues from base rate revenues in determining the amount of revenues that are subject to the sharing mechanism.

At the April 23, 2002, Agenda Conference, several Commissioners asked numerous clarifying questions to obtain a better understanding of the meaning and intent of various provisions in the Settlement. As previously discussed, staff also expressed its concerns about the apportionment of the $35 million interim refund in its recommendation and offered a proposed treatment for clarification. There was ample opportunity at the Agenda Conference for the parties to offer their own clarifications if the provisions of the Settlement, as plainly written, did not reflect their intent and understanding. Based on a reading of the Settlement, staff is unable to identify any provision to justify the excluding of the lighting and service fee revenue increases from the revenues subject to the sharing mechanism. This adjustment, if made, could also affect the calculation of any revenue sharing refund for each subsequent year during the term of the Settlement.

Rate Reduction Impact

PEFI had made another adjustment to reduce revenues by $41,625,000 for the January 1, 2002, to April 30, 2002, period prior to the actual implementation of the $125 million rate reduction. The Movants contend that the Settlement "sets forth a very specific calculation for 2002," and that PEFI "cannot simply add an additional adjustment of $41,625,000 when the agreement does not allow this adjustment." Motion at page 4.

Paragraph 6 of the Settlement clearly states how the refund, if any, is to be calculated for 2002. It provides for a $1,296 million sharing threshold at which sharing is to begin. It also clearly states that, for 2002 only, the amount to be refunded "...will be limited to 67.1% (May 1 through December 31) of the 2/3 customer share". Response at page 16, Exhibit A. The purpose of the 67.1% limitation is to recognize that the $125 million rate reduction was not effective until May 1, 2002. Neither Paragraph 6 nor any other paragraph of the settlement provides for any adjustments to the base rate revenues subject to the sharing mechanism. This adjustment only effects the revenue sharing refund calculation for 2002.

Conclusion

Based on the foregoing discussion, staff agrees with the Movants' assertions that the Settlement does not provide for any adjustments to PEFI's actual base rate revenues in calculating the amount that is subject to the sharing mechanism. Though not explicitly stated in the Settlement, the $24,630,000 adjustment related to the interim refund was specifically addressed at the Agenda Conference and was agreed to by all of the parties as an appropriate clarification/modification of the written Settlement.

Staff would note that in prior settlements with Gulf Power Company and Florida Power & Light Company (FPL) that involved revenue sharing mechanisms, no adjustments were made to the actual base rate revenues. Although FPL's current settlement is similar, but not identical, to PEFI's, no adjustments to base rate revenues were requested by FPL, nor were any allowed. Because the making of adjustments to base rate revenues is a significant departure from the provisions of previous settlements, it is staff's opinion that any such proposed adjustments should have to have been specifically addressed in the provisions of the Settlement itself.

In conclusion, staff recommends that the Movants' calculation of a $23,034,004 refund, plus interest, is the appropriate amount to be refunded under the revenue sharing mechanism for 2002. Therefore, PEFI should be required to refund an additional $18,079,591 ($23,034,004 - $4,954,413), plus interest, beginning with the first billing cycle for September 2003.

Alternative position: PEFI maintains that it agreed to a revenue sharing threshold based, in part, on its calendar year (CY) 2002 budget. It is true that the agreed upon threshold of $1.296 billion equals PEFI's original budget of $1.421 billion less the full effect of the $125 million base rate reduction. According to PEFI, the rate increases (street lighting and service) and interim refund were not part of its budget and therefore, the related effects should be removed so CY2002 revenues are on a comparable basis to the $1.296 billion threshold considering full effect of the rate reduction. Since the $1.296 billion threshold is an unusual number, there is logic to PEFI's stated derivation of that number.

Under PEFI's interpretation, revenue sharing would only take place if revenues exceeded budget. This is a very conservative

interpretation of revenue sharing where ratepayers only benefit if revenues exceed budget which is, for the most part, outside the control of the company and dependent on the weather. It is uncertain whether the derivation of the revenue threshold or adjustments to CY2002 revenue were discussed by the parties during negotiations. It is also uncertain whether the parties would have agreed to the settlement if they had known that these adjustments would need to be made to CY2002 revenues.

It appears that PEFI assumed these adjustments would be made, although there was no explicit mention in the stipulation. In evaluating the appropriateness of the adjustments, the Commission could look at its normal rate making treatment. Generally, the Commission "normalizes" a test period when determining earnings for rate setting. The Commission may find that the appropriate calculation of CY2002 revenue for revenue sharing should be based on normalizing adjustments. This would make CY2002 and subsequent revenue sharing years (CY2003, CY2004 and CY2005) comparable. Since the parties are at odds over the appropriate determination of CY2002, then the Commission may employ its normal rate making model.

Two out of the three proposed adjustments can be classified as normalizing adjustments. These are the annualization of the $125 million rate reduction and the removing the effects of the one-time $35 million refund. To be consistent with the normalization philosophy, the annualization of the $14.3 million worth of rate increases (street lighting and services) should also be made. This last adjustment is contrary to PEFI's position that the effects of the rate increases should be removed.

The following depicts the positions of PEFI, OPC and this alternative position:

	(000) PEFI	(000) OPC	(000) Alternative
Actual CY 2002 revenue	$1,323,004	$1,322,836	$1,323,004
Interim refund	35,000	24,630	35,000
Streetlight/service fee	(9,338)	0	4,962
Rate reduction	(41,625)	0	(41,625)
Adjusted revenues	1,307,070	1,347,466	1,321,341
Sharing threshold	(1,296,000)	(1,296,000)	(1,296,000)
Excess revenue	$11,070	$51,466	$25,341
Refund amount excluding interest	$4,954	$23,034	$11,342

Under the alternative, PEFI would be required to refund an additional $6,388,000 ($11,342,000 - $4,954,000) plus interest.

ISSUE 3: Should the docket be closed?

RECOMMENDATION: If the Commission approves staff's recommendation in Issue 2, this docket should be closed upon staff's verification that Progress Energy Florida, Inc., has completed the refund as ordered by the Commission. (BRUBAKER)

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 2, this docket should be closed upon staff's verification that Progress Energy Florida, Inc., has completed the refund as ordered by the Commission.