

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into affili-) DOCKET NO. 860001-EI-G
 ated cost-plus fuel supply relation-) ORDER NO. 21820
 ships of Florida Power Corporation.) ISSUED: 9-5-89
)

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
 THOMAS M. BEARD
 BETTY EASLEY
 GERALD L. GUNTER
 JOHN T. HERNDON

Pursuant to Notice, an oral argument on the above matter was held before the Florida Public Service Commission on May 17, 1989.

ORDER GRANTING MOTION TO STRIKE

On April 17, 1989, Occidental Chemical Corporation (OCC) filed a Motion to Expunge the Record of testimony by Florida Power Corporation (FPC) Witness W. David Carter and to Compel Responses to Interrogatories (Motion). This Motion was filed just two days prior to the last day of scheduled hearings in this investigation. On April 19, 1989, this Commission inquired regarding the status of the Motion and FPC advised the Commission they had just received the Motion and wanted an opportunity to review and respond to the Motion made by OCC. The Commission granted FPC's request after assurances by the parties that the Motion need not be resolved prior to the conclusion of the hearings in this investigation and directed that the Motion be set for oral argument.

Specifically, in its Motion, OCC asked that certain statements made by FPC's Witness Carter on December 16, 1988, at Transcript 1233, lines 15-22, be expunged from the record. OCC also requested that related testimony of record and discovery on file with the Commission regarding this issue also be expunged from the record. OCC maintains that these portions of the record should be expunged because the statements are false and scurrilous, unresponsive to cross-examination and irrelevant. In addition, OCC requested that the Commission

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compel FPC to respond to certain interrogatories propounded by OCC to determine whether FPC was engaged in an effort to harm Dr. Sansom and EVA with the Electric Power Research Institute (EPRI).

FPC filed its response to OCC's Motion on April 28, 1989, maintaining that the Motion to Expunge was untimely and unsupported by precedent. FPC also maintains that the statements by Witness Carter were his opinion, not scurrilous in nature, responsive to the cross-examination and relevant to the extent that the party has a right to bring to the Commission's attention a violation of its rights. FPC also argued that OCC's request to compel answers to interrogatories and production of documents contradicts the Motion to Expunge, seeks information which is irrelevant to this proceeding and finally is moot since the hearing was over. On May 17, 1989, the Commission held oral argument on OCC's Motion.

We believe it appropriate to treat OCC's motion to expunge the record as a motion to strike. Generally, a motion to strike is appropriate where there is no opportunity for counsel to make a timely objection, as for example where improper or unresponsive testimony is given to a proper question. Snelling v. State, 39 So. 917 (1905). In this case, the objectionable statement was made at the end of Witness Carter's appropriate response to an appropriate question. The statement OCC seeks to strike does not appear to be related to the question asked of the witness. Later OCC's Witness Sansom took the stand and denied the allegation made by FPC's Witness Carter. At that time FPC reserved the right to cross-examine Witness Sansom on this issue. Counsel for OCC then sought clarification regarding FPC's witness' contention and was advised that FPC would "let them know later." Prior to the final day of hearings scheduled in this matter, both parties engaged in discovery in an effort to discover the foundation of Mr. Carter's statements. Finally, OCC filed its Motion to Expunge the statements of Mr. Carter.

FPC argues that OCC's Motion is untimely and urges this Commission to deny the Motion on that basis. However, due to the unique circumstances surrounding the statements of Witness Carter, the concern OCC's counsel expressed at the time the

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statements were made and OCC's diligent efforts to discover the foundation of Mr. Carter's statements, we do not view OCC's Motion as untimely.

FPC suggests further that if the Commission wishes to reach a factual determination regarding whether Mr. Carter was right or wrong, then the parties should be allowed to gather evidence and another hearing be held by the Commission to consider that evidence. We do not believe that it is necessary to go that far to resolve the status of OCC's Motion.

Under Section 90.1(1), Florida Statutes, a motion to strike may be granted based upon certain specific grounds. Among the enumerated grounds for granting a motion to strike is that the response is unresponsive to the question asked or immaterial. We believe either of these two grounds are sufficient to support OCC's Motion to strike the statements of Mr. Carter.

The allegations contained in Mr. Carter's statements are certainly not responsive to the question being asked at the time he made his remarks. In fact, Mr. Carter had already completed his response to the question asked and his statements (which are the subject to this Motion) appear to be an afterthought.

With respect to the question of materiality, both parties acknowledged during the final day of hearings in this matter and during the oral argument on this Motion, that the statements were not material or relevant to a determination of whether FPC was prudent in its investments in affiliated fuel supply and transportation modes.

We believe it is appropriate to note that if FPC or its witness Mr. Carter believes that any party to this proceeding has violated any order of this Commission the appropriate remedy is to file a complaint fully outlining the basis of their complaint so that an investigation of the alleged misconduct can be conducted. We do not believe that it is appropriate to make unsupported allegations during cross-examination.

We find that Mr. Carter's statement was unresponsive to the question asked by OCC's counsel and was immaterial to the issues under investigation in this proceeding and therefore it

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is appropriate to grant OCC's motion. In view of our disposition of the motion to strike, OCC is withdrawing its request to Compel Responses to Interrogatories thus making it unnecessary to rule on that portion of their request.

In view of the above, it is

ORDERED that Occidental Chemical Corporation's Motion to Strike is granted. It is further

ORDERED that the following passages be stricken from the record in this proceeding: transcript p. 1223, lines 15-22; transcript p. 1482, lines 21-25; transcript pp. 1483-1487, all said lines and transcript p. 1488, lines 1 and 2. It is further

ORDERED that all related discovery on file with the Commission be expunged from the record in this proceeding.

By ORDER of the Florida Public Service Commission,
this 5th day of September, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

JD

by: Kay Flynn
Chief, Bureau of Records