

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to determine
need for an electrical power
plant in Martin County by
Florida Power & Light Company.

DOCKET NO. 020262-EI
ORDER NO. PSC-02-1282-PCO-EI
ISSUED: September 19, 2002

ORDER GRANTING MOTION TO EXCLUDE WITNESSES

On September 5, 2002, Florida Power & Light Company ("FPL") filed a motion in limine to exclude two witnesses for intervenors CPV Gulfcoast, Ltd. and CPV Cana, Ltd. (collectively, "CPV"). CPV filed its response to FPL's motion on September 12, 2002. As set forth below, FPL's motion is granted.

By Order No. PSC-02-0992-PCO-EI, issued July 23, 2002, ("Scheduling Order") procedural guidelines and controlling dates were established for this case. Among other things, the Scheduling Order requires that "[e]ach party shall prefile, in writing, all testimony that it intends to sponsor" and provides that "[f]ailure to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony." Pursuant to the Scheduling Order, the prefiled testimony for intervenors' witnesses was due to be filed by August 20, 2002.

Consistent with these requirements, CPV filed the direct testimony of witness Douglas F. Egan on August 20, 2002. In its Prehearing Statement filed September 11, 2002, CPV identified two additional witnesses, Mike Green and Mike Caldwell, that CPV wishes to offer at the hearing in this docket scheduled for October 2-4, 2002. CPV had not prefiled testimony of either Mr. Green or Mr. Caldwell. In its Prehearing Statement, CPV stated that it was not able to file prefiled testimony for these witnesses because they are not under CPV's control. Further, CPV stated that it plans to call these witnesses at hearing and present direct examination at that time "as is authorized by section 120.57(1)(b), and Rule 28-106.213, F.A.C."

On September 12, 2002, FPL filed a motion in limine to exclude the testimony of Mr. Green and Mr. Caldwell in this proceeding. In its motion, FPL notes the requirements set forth in the Scheduling Order and notes that CPV has not complied with those requirements. FPL states that CPV, in a response to FPL discovery mailed five

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days prior to the deadline for prefiling intervenors' direct testimony, listed Mr. Green and Mr. Caldwell as fact witnesses whom CPV expects to call to testify at hearing in this docket. FPL states that CPV's response also indicated that Mr. Green would testify as to alleged "[u]nfairness of FPL's RFP process and related matters" while Mr. Caldwell would testify as to FPL's alleged "desire to keep competitors out of the state of Florida." FPL asserts that this response omitted all identifying information about the two witnesses and failed to provide a description of their testimony sufficient to allow the Commission, the Commission staff, and FPL to prepare for hearing. Citing Order No. PSC-95-0208-PCO-WS, issued February 15, 1995, FPL notes that the Commission requires prefiled testimony to afford parties, the Commission staff, and the Commission the opportunity to review and prepare for hearing.

FPL further asserts that it will be at an unfair disadvantage in this proceeding if it does not have the opportunity to review prefiled testimony of Mr. Green and Mr. Caldwell while CPV has the opportunity to review the prefiled testimony of every FPL witness. FPL further asserts that it is unable to adequately prepare to rebut any allegations that these witnesses might present.

In its response, CPV emphasizes that both Mr. Green and Mr. Caldwell are not employed by CPV, are not "within the control" of CPV, and will be testifying pursuant to subpoena. In addition, CPV asserts that Mr. Green's testimony could not be timely prefiled because he needed to check with his former employer about providing testimony but did not hear back from his former employer until after the filing deadline. CPV suggests that the Scheduling Order's provision stating "[f]ailure to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony" is intended to give the Commission flexibility to address situations like the one presented in this case. CPV asserts that FPL can avoid any unfair disadvantage and prepare for its rebuttal simply by deposing Mr. Green and Mr. Caldwell to determine their positions and the allegations they will likely make at hearing. CPV, citing Order No. PSC-95-0208-PCO-WS, claims that it is not unreasonable to allow deposition transcripts of these individuals to serve as prefiled testimony.

CPV further argues that FPL's motion to exclude testimony from Mr. Green and Mr. Caldwell is contrary to the provisions of Section 120.57(1)(b), Florida Statutes, which state that all parties shall have an opportunity to present evidence on all issues involved. CPV states that FPL has not and cannot cite any authority requiring exclusion of witnesses for which prefiled testimony was not submitted. CPV concludes that excluding the testimony of Mr. Green and Mr. Caldwell would be unduly harsh and punitive and would be unduly prejudicial to CPV's effective participation as a party. CPV states that neither FPL nor any other party will be inconvenienced or treated unfairly or prejudicially by allowing the testimony.

Rule 28-106.211, Florida Administrative Code, provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case. Pursuant to this authority, this Prehearing Officer issued Order No. PSC-02-0992-PCO-EI, in which procedural guidelines and controlling dates were established for this case. Among the procedural guidelines established in that Order is a requirement that each party prefile, in writing, all testimony that it intends to sponsor. Further, the Order established a schedule for prefiling such testimony. The consequence of not timely prefiling testimony is made clear in the Order: the testimony may be barred. The requirement to prefile testimony in writing pursuant to an established schedule is a long-standing practice for formal, evidentiary hearings before the Commission. Such procedures enhance the parties' ability to prepare for hearings that often involve very complex technical and policy matters and promote the ability of the parties and the Commission to focus their efforts at hearing.

As set forth above, CPV, pursuant to the requirements of the Scheduling Order, prefiled the testimony of one of the witnesses it intends to sponsor, Douglas F. Egan, on August 20, 2002. Pursuant to the Scheduling Order, FPL then had the opportunity to rebut witness Egan's prefiled testimony through prefiled rebuttal testimony due September 11, 2002. CPV did not inform the Commission of its intent to sponsor any other witness until it filed its Prehearing Statement on September 11, 2002. Although it was clearly aware of the Scheduling Order's procedural requirements

and knew that it wished to sponsor the testimony of Mr. Green and Mr. Caldwell at least five days prior to the deadline for prefiling intervenors' testimony, CPV did not request an extension of time to prefile the testimony of those individuals. Nor did CPV request an exception to those procedural requirements to allow it to offer witnesses at hearing who had not prefiled testimony. Instead, CPV disregarded those requirements and stated in its Prehearing Statement that it plans to call Mr. Green and Mr. Caldwell at hearing and present direct examination at that time as is authorized by Section 120.57(1)(b), Florida Statutes, and Rule 28-106.213, Florida Administrative Code.

Section 120.57(1)(b), Florida Statutes, provides, among other things, that all parties to a formal administrative proceeding shall have the opportunity to present evidence on the issues. That opportunity is clearly provided through the Scheduling Order issued in this docket. The Scheduling Order governs only the manner in which testimony is provided. Nothing in Section 120.57(1)(b), Florida Statutes, precludes the Commission from requiring that testimony be prefiled in writing. Likewise, nothing in Rule 28-106.213, Florida Administrative Code, precludes the Commission from establishing such a requirement.

CPV's explanation for not prefiling the testimony of Mr. Green and Mr. Caldwell in accordance with the Scheduling Order is that neither individual is within CPV's "control," apparently because neither individual is a CPV employee. However, CPV does not indicate that either individual was unwilling to provide prefiled written testimony on CPV's behalf. The brief description of these individuals' testimony, provided in CPV's Prehearing Statement, makes clear that neither individual is being offered as an adverse witness to CPV. Further, while CPV has at least contacted Mr. Green and offered an explanation as to why his testimony could not be timely prefiled, it is not clear whether CPV has even contacted Mr. Caldwell. It is not at all uncommon in Commission proceedings for a party to prefile the testimony of a witness it intends to sponsor, where the witness may not be in the direct "control" of the party as an employee. CPV has not sufficiently explained why it could not do the same in this case.

In addition, allowing CPV to present the testimony of Mr. Green and Mr. Caldwell at hearing would clearly prejudice and

inconvenience the parties to this case. The requirement of prefiled written testimony allows parties to review and conduct discovery related to each party's direct case to promote a more efficient and focused hearing. If CPV is permitted at this late date to avoid prefilng the direct testimony of Mr. Green and Mr. Caldwell, all other parties are prejudiced in that they have provided their direct case in advance for the benefit of CPV and other parties' review and discovery efforts but are left to conduct extensive discovery late in the case just to learn what CPV intends to offer as its direct case. Further, permitting CPV to avoid the Scheduling Order's requirement for prefilng the testimony of these individuals would put FPL and, possibly, other parties in the position of being unable to prefile responsive rebuttal testimony pursuant to the Scheduling Order's requirements. Finally, permitting CPV to offer these individuals as witnesses without prefilng testimony would inconvenience parties who have relied upon the terms of the Scheduling Order and who would have to set aside time shortly before hearing, amid other hearing preparation, to glean CPV's direct case and question it through discovery.

Citing Order No. PSC-95-0208-PCO-EI, CPV suggests that it would be reasonable to allow deposition transcripts for these individuals to function in the place of prefiled testimony. In that Order, the Commission required parties who did not prefile the testimony of adverse witnesses to prefile deposition transcripts for those witnesses instead. Clearly, this case is distinguishable because neither Mr. Green nor Mr. Caldwell are being offered by CPV as adverse witnesses. CPV's reliance on Order No. PSC-95-0208-PCO-EI is misplaced.


The purpose of a motion in limine is to afford the trier of fact the opportunity to rule on the admissibility of evidence prior to trial or hearing, so that irrelevant and immaterial matters, or evidence whose probative value is outweighed by the danger of unfair prejudice, may be excluded. Anise DeVoe v. Western Auto Supply Company, 537 So. 2d 188 (Fla. 2d DCA 1989); 75 Am. Jur. 2d TRIAL §94. While FPL's motion goes more to procedural issues than evidentiary issues of admissibility, it is, for the reasons set forth above, well-taken. Accordingly, FPL's motion is granted.

Based on the foregoing, it is

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ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that Florida Power & Light Company's motion in limine to exclude the testimony of Mr. Mike Green and Mr. Mike Caldwell in this proceeding is granted.

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 19th day of September, 2002.



J. TERRY DEASON
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida

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Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.