

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers \$143 million.

DOCKET NO. 060658-EI  
ORDER NO.PSC-07-0270-PCO-EI  
ISSUED:March 30, 2007

**ORDER DENYING PROGRESS ENERGY FLORIDA INC.'S MOTION TO STRIKE OR, ALTERNATIVELY, MOTION IN LIMINE TO EXCLUDE TESTIMONY**

**I. BACKGROUND**

On August 10, 2006, the Office of Public Counsel ("OPC") filed a Petition to require Progress Energy Florida, Inc. ("PEF") to refund its customers \$143 million. In its Petition, OPC alleged that PEF should have purchased a blend of bituminous coal and sub-bituminous coal from the Powder River Basin in Wyoming to fuel its Crystal River Units 4 & 5 between 1996 and 2005. By Order No. PSC-07-0048-PCO-EI (original Order Establishing Procedure), a hearing date was scheduled for the Commission to take up this petition. The Order Establishing Procedure also identified a list of four tentative issues for determination by the Commission. According to the provisions of the Order Establishing Procedure, "[t]he scope of this proceeding will be based upon these issues as well as other issues raised by the parties up to and during the Prehearing Conference, unless modified by the Commission."<sup>1</sup> OPC filed its direct testimony in October 2006. On February 14, 2007, staff filed the testimony of Commission staff employee Bernard Windham.

On February 20, 2007, PEF filed a Motion to Strike or, Alternatively, Motion in Limine to Exclude Testimony of Bernard Windham. On February 27, 2007, staff filed its Response to the Motion, and OPC filed a Response to the Motion. Additionally, during the March 21, 2007 Prehearing Conference, PEF's Request for Oral Argument on Motion to Strike was granted, and the parties were afforded the opportunity to give oral argument with respect to PEF's Motion to Strike.

**II. MOTION TO STRIKE & RESPONSES**

In its Motion to Strike or, Alternatively, Motion in Limine to Exclude Testimony, PEF states the testimony of staff witness Bernard Windham should be stricken or excluded from the record because Mr. Windham does not meet the legal requirements to be either a fact or expert witness; Mr. Windham's testimony relies on impermissible hindsight information; and Mr.

<sup>1</sup> Based upon input during the March 21, 2007, Prehearing Conference, the issues for the Commission to decide in this proceeding were revised and are reflected in the final Prehearing Order (Order No. PSC-07-0266-PHO-EI). Issue 1 is phrased: "[d]id PEF act prudently in purchasing coal for Crystal River Units 4 & 5 beginning in 1996 and continuing to 2005?" This issue then contains eight items to be considered in deciding this issue, including coal procurement practices, coal availability and costs, affiliates, and other factors.

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Windham's testimony violates PEF's rights since it consists of information known to the staff in each of the prior years' annual fuel proceedings.

*Fact versus Expert Testimony*

PEF first argues that if Mr. Windham is being proffered as a fact witness, his testimony must be stricken because his testimony is completely irrelevant to any issue in the case and is beyond the scope of OPC's Petition. Furthermore, PEF argues Mr. Windham's testimony contains a great deal of opinion, which is impermissible for a fact witness. In its response, staff agreed that Mr. Windham could not be tendered as a fact witness, since his testimony required special knowledge, skill, experience, or training and is being offered as expert opinion testimony to assist the trier of fact.

PEF next argues that Mr. Windham fails to meet the legal requirements for expert witness testimony, because expert testimony must offer opinions based on the review and analysis of data that is useful to the trier of fact. PEF argues that Mr. Windham's opinions do not rise above the level of "mere possibilities," and that he fails to offer any certain conclusions. Staff responds that Mr. Windham's testimony is admissible because it will assist the Commission in deciding whether PEF acted reasonably and prudently in its coal procurement activities, an issue in dispute. Staff further argues that Mr. Windham qualifies as an expert, as his opinion is based on his special knowledge, skill, experience, and training, and his opinion can be applied to the evidence offered at trial to assist the Commission with resolution of issues in dispute. In response to PEF's assertion regarding relevance, OPC argues that its Petition raises the issue of whether PEF's coal procurement decisions were prudent and that Mr. Windham's testimony is relevant to that issue.

*Impermissible Hindsight*

Next, PEF argues that Mr. Windham's testimony should be stricken as it impermissibly relies on hindsight information that was not available to PEF's management at the time the coal procurement decisions were made. PEF states that the data Mr. Windham relies on, prices of coal reported to FERC, were reported to FERC after the coal was delivered, which could have been weeks or months after the actual purchase. In response, staff alleges the Commission will be required to determine PEF's prudence based on facts that PEF's management knew or should have known at the time the coal procurement decisions were made. Staff therefore believes that Mr. Windham's testimony raises a question (what PEF knew at the time) that should be determined at the conclusion of this proceeding as a factor to be considered in our decision of the ultimate issue of prudence.

*Testimony Consists of Information Known to Staff in Each of the Prior Annual Fuel Proceedings*

Finally, PEF argues that the facts contained in Mr. Windham's testimony were known to staff at the time of each annual fuel proceeding since 1996, and should have been raised in those prior annual proceedings. Staff counters that the Commission has the power to review the

prudence of past company expenditures at any time. Staff further states that this argument was raised in PEF's Motion to Dismiss, filed August 20, 2006, and denied by the Commission.

### III. RULING

Upon consideration, PEF's Motion to Strike or, Alternatively, Motion in Limine to Exclude Testimony, is hereby denied. As argued by PEF and agreed to by staff, I find Mr. Windham is not a fact witness in this case. As cited by both PEF and staff, Section 90.702, F.S., contains the requirements for qualification of an expert witness in judicial proceedings. This section states:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Chapter 90, F.S., the Florida Evidence Code, is not, however, strictly binding in Commission proceedings. Commission proceedings fall under the Administrative Procedures Act, Chapter 120, F.S. Section 120.569(2)(g), F.S., controls the admissibility of evidence in administrative hearings, and states:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied on by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the Courts of Florida.

Using Section 90.702, F.S., as a guide only, I find that as a member of the Commission's staff who has worked on fuel proceedings for many years and has previously testified as an expert before the Commission, Mr. Windham possesses specialized technical knowledge, acquired through his experience, training, and employment at the Commission. Mr. Windham's testimony is relevant to an issue to be determined in this case, namely whether PEF's coal procurement decisions from 1996-2005 were prudent (Issue 1).<sup>2</sup> I also find that Mr. Windham's testimony will assist the Commission in the determination of facts to be weighed by the Commission in deciding Issue 1, including but not limited to our consideration of coal availability and costs. As such, Mr. Windham's testimony meets the requirements of expert witness testimony.

With respect to PEF's argument regarding impermissible hindsight information, whether and to what extent PEF's management was aware of the coal prices contained in Mr. Windham's testimony at the time of their coal procurement decision is for the Commission to determine

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<sup>2</sup> I note that at the March 21, 2007, Prehearing, PEF agreed to the list of issues to be determined, including Issue 1, reproduced in Footnote 1.

based on the evidence. Further, the Commission will determine how PEF's knowledge or lack of knowledge of these coal prices impacts the ultimate issue of the prudence of PEF's coal procurement decisions (Issue 1). Therefore, Mr. Windham's testimony should not be stricken based on PEF's allegation of impermissible hindsight.

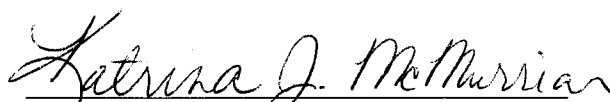
PEF's final argument is that Mr. Windham's testimony should be stricken as it is based on information available to the Commission in past annual fuel adjustment proceedings, which the Commission has not acted upon. I note that PEF's Motion to Dismiss made substantially the same argument with respect to the overall case, yet the Commission decided to move forward with this proceeding and rendered no decision that the Commission is precluded from reviewing the prudence of past expenditures. Therefore, Mr. Windham's testimony should not be stricken on this basis.

Upon consideration of the pleadings and oral argument, PEF's Motion to Strike or, Alternatively, Motion in Limine to Exclude Testimony of Bernard Windham is denied. This ruling should not be construed, however, as a decision on the credibility of Mr. Windham's testimony, the weight it should be afforded, or its ultimate probative value. Mr. Windham's testimony is merely one piece of evidence we will consider *in toto* with all other record evidence when reaching our decision in this proceeding.

Based on the foregoing, it is

ORDERED by Commissioner Katrina J. McMurrian, as Prehearing Officer, that Progress Energy Florida, Inc.'s Motion to Strike or, Alternatively, Motion in Limine to Exclude Testimony of Bernard Windham is denied for the reasons set forth in the body of this Order.

By ORDER of Commissioner Katrina J. McMurrian, as Prehearing Officer, this 30th day of March, 2007.

  
KATRINA J. McMURRIAN  
Commissioner and Prehearing Officer

( S E A L )

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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; or (2) 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 Office of Commission Clerk, 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.