

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery
clause with generating performance incentive
factor.

DOCKET NO. 140001-EI
ORDER NO. PSC-14-0666-PCO-EI
ISSUED: November 19, 2014

ORDER DENYING FLORIDA INDUSTRIAL POWER USERS GROUP'S MOTION TO
EXCLUDE OR STRIKE INADMISSIBLE EXPERT TESTIMONY PERTAINING TO
QUESTIONS OF LAW

By its Order Establishing Procedure, Order No. PSC-14-0084-PCO-EI (OEP), issued February 4, 2014, the Florida Public Service Commission (Commission) set hearing dates for October 22-24, 2014, to consider the fuel and generating performance incentive factors (Fuel Clause) for Florida's investor-owned electric utilities. On June 25, 2014, Florida Power & Light Company (FPL) filed a petition (Petition) in the Fuel Clause seeking approval of a natural gas reserve project (Gas Reserve Issues). On August 1, 2014, FPL and the Office of Public Counsel (OPC) filed a joint motion to modify the OEP's schedule for discovery, prefiled testimony, and briefs so that the Gas Reserve Issues raised in FPL's Petition could be heard at the hearing on October 22-24, 2014, and a vote be taken before the end of the calendar year.¹ By Order No. PSC-14-0439-PCO-EI, issued August 22, 2014, the Gas Reserve Issues in FPL's Petition were deferred and a separate schedule was set for discovery, intervenor testimony, prehearing statements, and post-hearing briefs, as well as a separate prehearing conference (Deferred Proceeding). The prehearing conference for the Deferred Proceeding was held on November 6, 2014, and the hearing is scheduled for December 1st and 2nd, 2014.

On November 6, 2014, the Florida Industrial Power Users Group (FIPUG) filed a Motion to Exclude or Strike Inadmissible Expert Testimony Pertaining to Questions of Law (FIPUG Motion). Within the FIPUG Motion, FIPUG moved to strike portions of the rebuttal testimony of FPL witness Deason. On November 12, 2014, FPL filed a response in opposition to the FIPUG Motion (FPL Response). This Order addresses the FIPUG Motion and FPL Response pursuant to Rule 28-106.211, Florida Administrative Code (F.A.C).

FIPUG's Motion

In its Motion, FIPUG asserts that portions of witness Deason's testimony should be stricken because the witness gave opinions on matters of law including offering an interpretation of law, the Commission's policies, opining what the law or the policy of the Commission should be, and stating whether a particular argument is consistent with regulatory principles.

FIPUG contends that witness Deason conceded that he gave opinions as to interpretations of regulatory principles and discussed the regulatory policy basis by which the Commission should consider FPL's proposal. FIPUG further contends that these statements are inadmissible under well-established law. FIPUG relies on several Florida District Court of Appeal decisions

¹ The hearing on the fuel clause issues, except the FPL deferred issues, was held on October 22, 2014.

for the proposition that an expert witness cannot testify as to questions of law, legal interpretation of Florida law, or interpretations of regulations.² FIPUG asserts the case law it cites supports that is reversible error to allow witness Deason to testify about the intent of prior specific acts of the Commission.

FPL's Response

In the FPL Response, FPL argues that the case law relied on by FIPUG is not applicable to the testimony it is asking the Commission to strike. FPL contends that witness Deason's testimony is not an interpretation of statutes or regulation. FPL asserts instead that witness Deason's testimony is advice from a former Commissioner on how the Commission's regulatory principles and policies, including its prior precedent, should apply in evaluating FPL's proposed gas reserve project.

FPL cites in defense of its argument several prior Commission Orders, which FPL contends show that the Commission has consistently allowed witnesses to offer opinions on regulatory policy and how prior Commission decisions should be applied to the case before it. FPL further contends that if the Commission were to grant FIPUG's Motion to Strike, large portions of the testimony pre-filed by OPC and FIPUG would also have to be stricken.

Analysis

Having considered FIPUG's Motion and FPL's Response to FIPUG's Motion, applicable statutes, and relevant case law, FIPUG's Motion to Exclude or Strike Inadmissible Expert Testimony Pertaining to Questions of Law to Strike, is hereby denied. Section 90.702, Florida Statutes (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:

² In re Estate of Williams, 771 So. 2d 7 (Fla. 2nd DCA 2000) (trial court erred by awarding an estate the cost of procuring an expert witness when that witness was only called to offer legal opinion); Edward J. Seibert, A.I.A., Architect & Planner, P.A. v. Bayport Beach and Tennis Club Ass'n, 573 So. 2d 889 (Fla. 2nd DCA 1990) (trial court erred by allowing an expert to testify to their interpretation of the building code, which was a question of law); and Devin v. City of Hollywood, 351 So. 2d 1022 (Fla. 4th DCA 1976) (trial court erred by relying upon expert testimony as to the meaning of terms which were questions of law to be decided by the trial court).

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.

When applying Section 90.702, F.S., as a guide only, witness Deason, as a former Commissioner, possesses specialized technical knowledge, acquired through his experience, training, and employment at the Commission. Witness Deason's testimony is relevant to an issue to be determined in this case, namely whether FPL's proposed project falls within the framework of the Commission's duty to regulate in the public interest. Moreover, witness Deason's testimony will assist the Commission in the determination of facts to be weighed by the Commission in deciding the issues presented. As such, witness Deason's testimony meets the requirements of expert witness testimony.

Denying the FIPUG Motion is consistent with past rulings by prehearing officers. In a 2007 order, the prehearing officer allowed a staff witness to give opinion testimony as an expert in order to assist the trier of fact. Order No. PSC-07-0270-PCO-EI, issued March 30, 2007, in Docket No. 060658-EI-WU, In re: Petition of behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers \$143 million. In a 2001 order, the Commission explained that, "[a]n expert witness may offer both factual testimony, if personally known, or opinion testimony, based upon the witness' personal knowledge . . . so long as those facts are of a type reasonably relied upon by other experts in the field." Order No. PSC-01-1919-PCO-WU, issued September 24, 2001, in Docket No. 991666-WU, In re: Application for amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation.

Furthermore, Section 120.569(2)(g), F.S., is much broader than the Florida Evidence Code allowing the consideration of all relevant, non-cumulative evidence that is "the type commonly relied upon by a reasonably prudent [person] in the conduct of their affairs." This standard allows for the consideration of any type of competent evidence that may support a finding of fact, so long as it is substantial in light of the record as a whole. Miller v. State, 796 So. 2d 644, 646 (Fla 1st DCA 2001).

Upon consideration of the pleadings, FIPUG's Motion is denied. This ruling should not be construed, however, as a decision on the credibility of witness Deason's testimony, the weight it should be afforded, or its ultimate probative value. Mr. Deason'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 hereby

ORDERED by Commissioner Julie I. Brown, as Prehearing Officer, that the Florida Industrial Power Users Group's Motion to Exclude or Strike Inadmissible Expert Testimony Pertaining to Questions of Law is hereby denied.

By ORDER of Commissioner Julie I. Brown, as Prehearing Officer, this 19th day of
November, 2014.



JULIE I. BROWN
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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 25-22.0376, 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.