

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 000824-EI

In the Matter of:

REVIEW OF FLORIDA POWER
CORPORATION'S EARNINGS, INCLUDING
EFFECTS OF PROPOSED ACQUISITION OF
FLORIDA POWER CORPORATION BY
CAROLINA POWER & LIGHT.



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PROCEEDINGS:

AGENDA CONFERENCE
ITEM NO. 9**

BEFORE:

CHAIRMAN LILA A. JABER
COMMISSIONER J. TERRY DEASON
COMMISSIONER BRAULIO L. BAEZ
COMMISSIONER RUDOLPH "RUDY" BRADLEY
COMMISSIONER CHARLES M. DAVIDSON

DATE:

Tuesday, May 20, 2003

TIME:

Commenced at 9:40 a.m.
Concluded at 9:52 a.m.

PLACE:

Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY:

JANE FAUROT, RPR
Chief, Office of Hearing Reporter
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FLORIDA PUBLIC SERVICE COMMISSION

04624 MAY 22 2003

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1 PARTICIPATING:

2 HAROLD McLEAN, GENERAL COUNSEL, and JENNIFER
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4 Oak Boulevard, Tallahassee, Florida 32399-0850, appearing on
5 behalf of the Commission Staff.

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CHAIRMAN JABER: That takes us back to Item Number 9.

Commissioners, I wanted to tell you that I have had several requests for deferral on this item. The first one came from the company, I want to say a couple of weeks back, with a couple of dates suggested by the company for rescheduling the matter. And after my aide consulted with your aides, it looked like a couple of Commissioners were not available on the dates that were suggested.

Subsequently I denied the request for a deferral. I have had a second request for a deferral from one of the parties, Mike Twomey. In addition to that, we have had Public Counsel file a motion in limine and motion to strike, and then a recent intervention by the Attorney General, which was granted, I think, by the prehearing officer.

I am giving you all the background, because I really would like some guidance from you on this one. I don't really have strong feelings one way or the other. If I had to decide, I am inclined to allow staff enough time to address the motion in limine and to allow them to notice that item and maybe even have oral argument, but I would like to hear from the Commissioners.

Commissioner Davidson?

COMMISSIONER DAVIDSON: Thank you, Chairman. That would be my inclination, as well. While it would be nice to

1 get this case resolved, it has been on the docket for awhile, I
2 think it is important to give the intervenors and Mr. Twomey
3 time to do what they feel they need to occur. And I also think
4 it is important to allow staff to have time to address this
5 motion in limine, which may have a meaningful impact on the
6 outcome of the case.

7 I think in the long-run, deferring this is not going
8 to burden Florida ratepayers at all. Because whatever the
9 outcome is, it will have a retroactive effect. So the
10 customers in the state won't be short-changed. I have no
11 problem at all with a deferral. And, of course, I'm available
12 for any date that fits within the Commissioners' calendar,
13 except for one day this month, the 30th.

14 MR. BRADBURY: Commissioner Bradley.

15 COMMISSIONER BRADLEY: I would agree with
16 Commissioner Davidson. However, I would also like to throw out
17 some other thoughts or concepts for consideration. You know,
18 the Commission really did not have the opportunity to look at
19 all the facts in this case, which in my opinion disadvantages
20 any decision that we might make. And right now it appears as
21 if a negotiated agreement is being highly contested by both
22 parties.

23 I think that it might be more prudent for this
24 Commission to just dissolve the agreement altogether, and to
25 schedule this matter for a full blown rate case so that we can

1 do discovery, take testimony, and decide the merits of the
2 case. Or if the Commission so wishes, one other option would
3 be to send this matter, since it is a contractual disagreement
4 in my opinion, send this matter over to the appropriate court
5 to decide the merits of the contract that is in dispute. Just
6 some thoughts from me.

7 But I will go along with Commissioner Deason's
8 wishes, if my fellow Commissioners want to take that route.
9 But I think that this matter needs to either be given full
10 consideration or be sent to the appropriate venue, and I think
11 that venue is the court system.

12 CHAIRMAN JABER: Commissioner Deason.

13 COMMISSIONER DEASON: Let me just -- I will go ahead
14 and pipe in at this time and maybe have a little bit of a
15 different opinion. I certainly respect the positions just
16 indicated by my fellow Commissioners, but my position is
17 different. I am prepared to go forward today. It is my
18 preference to go forward today. This matter has been pending
19 for some time. We have had the benefit of the petition and the
20 response.

21 We have had the benefit of a staff recommendation. I
22 know that there has been some motions filed here very recently.
23 I have reviewed those this morning before coming down, and I
24 think they are pretty limited in scope. And I think that I
25 feel comfortable going ahead and ruling on those today without

1 the benefit of delaying this for staff to do any analysis on
2 that.

3 I do agree with Commissioner Davidson that there is
4 no harm to the ratepayers by deferral. And if that is the wish
5 of the Commission, I am certainly not going to object to it. I
6 just think it is preferable to go ahead and get this matter
7 behind us. And if there is to be an additional refund to
8 customers, have that done. If there is not, go ahead and
9 notify customers that there is not to be an additional refund.
10 But I guess I'm speaking more of preference and my own personal
11 perspective. I am ready to go forward, and that is what I
12 would prefer.

13 CHAIRMAN JABER: Commissioner Baez, you had your
14 microphone on, as well?

15 COMMISSIONER BAEZ: Yes, Madam Chairman. I walked in
16 ready, or at least a couple of days ago, as early as a couple
17 of days ago I was ready to move forward with this. Because
18 like Commissioner Deason, I think that we have had this
19 question, it has been percolating for some time. I would
20 support a deferral, however, for this reason. I think now --
21 the first request for deferral ran into scheduling problems.

22 I think what we have before us now is a different
23 situation. We actually have a document that although I have
24 reviewed it, I think we could all benefit from perhaps even
25 oral argument on the motion, because it does impact the actual

1 recommendation that we have before us.

2 So I think in order to give us all time to really
3 examine it closely, give staff the opportunity to analyze it
4 and to come back with some form of recommendation, I think it
5 would benefit us all to defer. Although I'm not quite sure
6 what the timelines are, and that was a question that I would
7 put to the chair. What kind of dates are we looking at and
8 what kind of time frame?

9 CHAIRMAN JABER: Yes. We have tentatively looked
10 at -- well, let me not say tentatively. There are two days
11 that I know, Commissioners, are available in the very near
12 future. And I am glad you asked that, Commissioner Baez,
13 because it gives me an opportunity to express some real
14 frustration with the parties and how this case has been
15 handled.

16 The initial difficulty in looking at the first
17 request for a deferral was to -- was because of people's
18 vacation calendar, and one attorney's unavailability. And, you
19 know, while I try to be flexible, and I know I am flexible as
20 it relates to the Commission calendar, our agenda conferences
21 are noticed and on the Internet for a long period of time. And
22 if a company who knows there is a case pending in front of the
23 Commission allows key people to be on vacation, that is their
24 problem, not my problem.

25 And it makes for a difficult scheduling issue,

1 because you have to keep in mind -- I also have to keep in mind
2 five Commissioners who have very busy hearing schedules. We
3 have other industries we regulate. And the Commissioners -- I
4 don't want to leave the impression that the Commissioners were
5 unavailable because they had personal issues. No, they were
6 coming back or at a hearing. And you have to keep that in
7 mind.

8 The other thing that makes this a very frustrating
9 situation is, unlike Commissioner Bradley, I do think we have
10 everything in front of us we need to go forward. I don't want
11 to prejudge the outcome of this, so I don't want to speak to
12 the venue, the appropriate venue. And in saying all of that,
13 there are two days, Commissioner Baez, one that I would like to
14 hold for an oral argument and disposition of the motion in
15 limine. That date is June 30th. It will involve my moving
16 Internal Affairs to the next day, but I think that is
17 acceptable.

18 The second date is the day I propose we have a
19 special agenda conference to ultimately dispose of the
20 recommendation in front of us, and that is July 9th. And I
21 want to publicly say those dates so that the parties can do
22 whatever it is they need to do to rearrange their schedules and
23 to find attorneys that are available June 30th and July 9th,
24 because requests for deferral will not be looked upon
25 favorably. And I hope I have your support there,

1 Commissioners. Saying all of that, I recognize we don't have a
2 motion.

3 COMMISSIONER DAVIDSON: Well, one comment, and then a
4 motion. I agree with the Chair. While I was not involved in
5 the dispute that gave rise to the settlement agreement, we do
6 have a negotiated signed contract that I feel it is incumbent
7 upon us to interpret and enforce. I understand the concerns
8 that have been expressed, but we can't punt. I mean, the
9 contract is before us. It arose out of a dispute that the
10 Commission handled, and we have to interpret that.

11 That said, I would move that we defer this matter to
12 -- in accordance with the schedule stated by the Chair; oral
13 argument on the motion in limine to be held on June 30th, and a
14 special agenda on the dispute itself to be held on June 9th.
15 And that is my motion.

16 CHAIRMAN JABER: Commissioner Davidson, hold onto
17 that motion, because Commissioner Bradley had a question.

18 COMMISSIONER BRADLEY: Yes. I guess my question is,
19 and I don't disagree with the motion, but to interpret and to
20 enforce without taking further testimony, in my opinion, just
21 necessitates a full blown rate case. I'm trying to figure out
22 how we are going to interpret the contract and how we are going
23 to enforce it without really having all of the facts before us.
24 And that is my only question and my dilemma. But I know that
25 we have a very competent staff, and staff that will work with

1 all the parties that have a vested interest in this matter. So
2 at this point, I will agree to the motion, but I would just
3 like for the other members to be mindful of my concerns.

4 CHAIRMAN JABER: Thank you, Commissioner Badley.

5 COMMISSIONER DAVIDSON: Chairman, as an additional
6 new commissioner, can I respond to that question?

7 CHAIRMAN JABER: Oh, absolutely.

8 COMMISSIONER DAVIDSON: And I think it would be
9 helpful, and maybe if I am on base if you all could let me
10 know, or if I am off base. My understanding, Commissioner
11 Bradley, is that the ultimate recommendation and decision on
12 the motion in limine will decide whether or not additional
13 information would be considered. If there is a basis for
14 granting -- if the motion in limine is granted, that would
15 impact, I guess, the scope of the inquiry. And I guess I can't
16 really comment more without going to the merits.

17 But I think the contract itself resolves the issue of
18 the full blown rate case. But that may be going to the merits,
19 which I guess we will hear on the 9th. But, I mean, I hear the
20 concerns that, you know, we need to understand what is going
21 on, but, again, I think that we have got it here. That is just
22 a comment.

23 CHAIRMAN JABER: Commissioner Davidson, on your
24 motion, can I get you to add that it would be an oral argument
25 and disposition of the motion in limine? I think that is what

1 you meant. You said oral argument, but I also want to make
2 clear that we will be voting.

3 COMMISSIONER DAVIDSON: I will clarify the motion,
4 then. The motion would be that on June 30th the Commission will
5 consider the motion in limine that has been filed, we will hear
6 oral argument and vote on that motion. And then on July 9th,
7 we will consider the underlying motion to enforce the
8 settlement agreement that has been filed by OPC.

9 CHAIRMAN JABER: Thank you. Well, I think there was
10 already a second. Mr. McLean, before I call it for a vote, I
11 want to be clear to staff that on July 9th I want Public
12 Counsel's motion for enforcement of the settlement to be in a
13 position to be voted on. So if there are any pending motions,
14 you be prepared to include them in the recommendation, but this
15 case will be disposed of on July 9th.

16 MR. McLEAN: Madam Chairman, on June 30th that oral
17 argument is meant to address the motion --

18 CHAIRMAN JABER: Motion in limine.

19 MR. McLEAN: Any pending motions?

20 CHAIRMAN JABER: Well, you know, let me leave that up
21 to your discretion. If something comes in, I will let you
22 bring it up to us. We have two days available. We have June
23 30th and, as it stands now, to address the motion in limine.
24 So why don't we cross the bridge when we come to it. But I
25 think it is fair to say you have the flexibility to bring any

1 motion in front of us on that date.

2 MR. McLEAN: Understood.

3 COMMISSIONER DAVIDSON: And I was going to add while
4 this is not necessary for the motion, that maybe it should go
5 onto the record that in the event there are other motions that
6 need to be disposed of, my motion would include a recognition
7 of the inherent authority of the chair to schedule procedurally
8 how those motions would be resolved. So that would really be a
9 catch-all to handle any other disputes that come in. The
10 Chair, I believe, has that inherent authority on procedural
11 matters. But I think it is important to recognize it in the
12 context of this, so that we get from none of the parties any
13 additional arguments or motions as to why this should be
14 delayed or put off any further.

15 MR. McLEAN: Understood. And, Madam Chairman, while
16 I've got my button down, let me point out that we have a number
17 of good faith parties represented by seasoned counsel and the
18 opportunity to settle is always out there.

19 CHAIRMAN JABER: Yes, I haven't gotten to that point
20 yet. Mr. McLean, the other thing that we should clarify -- you
21 didn't think I was going to let this opportunity go, did you?

22 MR. McLEAN: I thought you might. I was just
23 reminding you.

24 CHAIRMAN JABER: And if I haven't said in the last
25 five minutes how frustrated I am about how this is handled, let

1 me just say it again. Mr. McLean, with respect to the
2 prehearing officer, we do have a prehearing officer in this
3 case, so if there are procedural motions that are more
4 appropriate to go to him, don't forget that, too.

5 MR. McLEAN: Understood.

6 CHAIRMAN JABER: Okay. With respect to settlement,
7 looking at positives of every situation, I would hope that
8 parties don't lose an opportunity for today through June 30th
9 and through July 9th to dialogue and understand more fully what
10 the agreement says or what it doesn't say. And I think it is
11 just important to leave it at that. It is just real important
12 to leave it at that.

13 Commissioners, there was a motion and a second.
14 Commissioner Deason, do you have a comment?

15 COMMISSIONER DEASON: Before we vote, just let me
16 indicate that I am going to support the motion. I expressed a
17 preference. I still think that it would be the best course of
18 action to get this matter behind us. I feel comfortable going
19 forward. I certainly am capable of counting votes. I don't
20 want there to be any dissent. I think that the plan that has
21 been put forward is certainly workable. I would just encourage
22 everyone to be mindful that we do need to get this behind us.
23 And I think the Chairman has given direction to us, staff, and
24 the parties that this is going to be resolved at a time
25 certain, and I am comfortable with that, so I can support the

1 motion.

2 CHAIRMAN JABER: A motion and a second. All those in
3 favor say aye.

4 (Unanimous affirmative vote.)

5 CHAIRMAN JABER: The motion carries unanimously.
6 Item 9 is deferred as articulated by the Commissioners, and
7 that takes us back to Item 4.

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STATE OF FLORIDA)

COUNTY OF LEON)

CERTIFICATE OF REPORTER

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 21st day of May, 2003.



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