

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earnings, including Effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.

Docket No. 000824-EI Submitted for Filing: May 29, 2003

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MOTION FOR PROTECTIVE ORDER AGAINST THE TAKING OF DEPOSITIONS OF GARY ROBERTS AND H. WILLIAM HABERMEYER, JR.

Progress Energy Florida, Inc. ("Progress Energy"), through its undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.280(c), moves this Court to enter a protective order quashing the Notice of Deposition directed to H. William Habermeyer, Jr. and Gary Roberts, and states as follows:

1. On May 19, 2003, Charles J. Beck, deputy counsel for the Office of Public Counsel ("Public Counsel"), issued a Notice of Deposition directed to Paul Lewis, Bonnie Davis, Vincent M. Dolan, H. William Habermeyer, Jr. and Gary Roberts. The depositions, set unilaterally, are presently scheduled to commence on June 4, 2003, at 9:00 a.m.¹

2. This proceeding involves a dispute between the parties concerning the amount of the refund that Progress Energy is required to pay its customers pursuant to the Settlement Agreement approved by the Commission to resolve all of the issues in Progress Energy's rate case. The depositions that have been noticed by Public Counsel as recited above, however, are entirely unrelated to the merits of the parties' positions on the refund issue. Instead, they relate to a suspicion of counsel for Sugarmill Woods Civic Association, Inc. ("Sugarmill Woods"), Mr.

Michael Twomey, that "some commissioners" received ex parte communications "from employees and other representatives of Progress Energy," which suspected communications

¹ Progress Energy has moved to continue these deposition, however, the Commission has not yet ruled on this motion.

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were not properly made a part of this docket by the Commissioner(s) receiving the communications. Public Counsel now seeks to investigate these suspicions, and to that end, has set depositions of the Commission Staff and Progress Energy personnel, including H. William Habermeyer and Gary Roberts.

3. H. William Habermeyer, Jr. is the President and Chief Executive Officer of Progress Energy Florida. As President and Chief Executive Officer, Habermeyer's responsibilities are substantial and his schedule requires that he devote all of his working time and effort to those responsibilities.

4. Gary Roberts is the Director of Public Affairs for Progress Energy Florida. Roberts' duties involve representing Progress Energy on legislative issues of interest to the Company and educating the Legislature on the Company's position on such issues.

5. Florida law requires that prior to taking the depositions of high-ranking employees, the party seeking the deposition must demonstrate that the information sought cannot be obtained from lower level (or other) employees. See Dept. of Agriculture & Consumer Services v. Broward County, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002) (holding that the agency head could not be deposed, over objection, "unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources."); see also Dept. of Health and Rehabilitative Services v. Brooke, 573 So. 2d 363, 371 (Fla. 1st DCA 1991). This rule recognizes the burdensome and debilitating affect depositions of high-level executives, also known as "apex" officials, can have on corporate defendants, especially where alternative and less intrusive discovery techniques are available but eschewed. See Thomas v. International Business Machines, 48 F.3d 478, 483 (10th Cir. 1995). The apex rule generally applies to

prevent deposing high-ranking officials where the opposing party has not demonstrated that the party cannot obtain the needed discovery through other corporate officials or where the high-ranking officials have only limited knowledge of the issue subject to suit. See Adam M. Moskowitz, Deposing “Apex” Officials in Florida: Shooting Straight for the Top, Fla. Bar Journal, 10, 14 (Dec. 1998). The apex rule applies not only to the chief executive officer, but also to all high-level corporate officials. See In re El Paso Healthcare System, 969 S.W.2d 68, 73 (Tex. App. 1998).

6. In this case, Public Counsel has not shown that Mr. Habermeyer or Mr. Roberts have any knowledge that is necessary, relevant, or otherwise unavailable from lower level or other employees in this case. Indeed, neither Mr. Habermeyer nor Mr. Roberts have personal knowledge of any ex parte communications between any Progress Energy employee, consultant, or contractor and any Commissioner or the Commission Staff relating to the March 27, 2002 Settlement in the rate case or the amount of the refund that is or should be required. Both individuals have executed affidavits attesting to their lack of participation and lack of knowledge ex parte communications, if any, with any Commissioner or the Commission Staff, which are attached as Exhibits A & B.

7. Progress Energy will make Bonnie Davis, Vincent M. Dolan and Paul Lewis available for deposition. These individuals are directly involved in this matter for Progress Energy and would be in the best position to know if any impermissible contacts occurred.

8. Mr. Habermeyer and Mr. Roberts are extremely busy individuals whose duties require substantial time commitments. In light of their sworn affidavits as to their lack of knowledge regarding the allegations of ex parte communications, the availability of other corporate personnel whom Progress Energy will make available for deposition, and the

availability of less intrusive and time intensive discovery methods, Public Counsel's scheduled depositions of Mr. Habermeyer and Mr. Roberts have no legitimate purpose and constitute undue hardship under Florida law.

WHEREFORE, Progress Energy moves this Commission to enter a protective order prohibiting the presently scheduled depositions of H. William Habermeyer, Jr. and Gary Roberts from taking place.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of foregoing has been furnished via facsimile (as indicated by **) and U.S. Mail to the following this 29th day of May, 2003.

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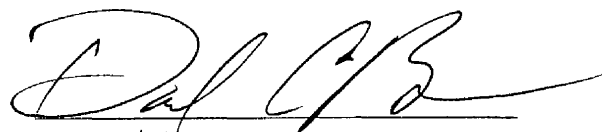
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earnings, including Effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.

Docket No. 000824-EI

Dated May 29, 2003

AFFIDAVIT OF H. WILLIAM HABERMEYER, JR

STATE OF FLORIDA

COUNTY OF PINELLAS

BEFORE ME, the undersigned authority duly authorized to administer oaths, personally appeared H. William Habermeyer, Jr., who being first duly sworn, on oath deposes and says that:

1. My name is H. William Habermeyer, Jr. I am over the age of 18 years, and competent to give this affidavit in the above-styled proceeding. The facts recited in my Affidavit are based upon my personal knowledge and they are true.

2. I am the President and Chief Executive Officer ("CEO") of Florida Power Corporation d/b/a Progress Energy Florida, Inc.. In my position as President and CEO, I establish the goals and policies of the company in collaboration with other top executives. I meet frequently with subordinate executives to ensure that operations are implemented in accordance with these policies. Additionally, I delegate several responsibilities to subordinate executives who implement the company's policies on a day-to-day basis. My duties also include reporting to the Board of Directors on a regular basis.

3. My position at Progress Energy is very demanding and requires frequent travel and meetings with various officers within the company and other outside organizations. Attendance for a deposition in this case would seriously impair the performance of my duties and constitute a material hardship on both myself and Progress Energy.

4. I am aware of the fact that a dispute has arisen between Progress Energy and other interested parties concerning the amount of the refund owed by Progress Energy under the parties March 27, 2002 Settlement Agreement approved by the Commission to resolve all of the issues in Florida Power's rate case. I am also generally aware of the positions of the parties on these issues and the questions being presented to the Commission for its consideration. Recently, I became aware that Public Counsel and others were alleging that there have been improper ex parte communications between Progress Energy or its representatives and any Commissioner or the Commission Staff concerning the merits of Progress Energy's position.

5. Other than my general knowledge referenced above, I have not actively participated in nor am I aware of possessing any unique, direct, and/or relevant knowledge or information about this proceeding, nor have I been called upon by Progress Energy or its attorneys to provide testimony or evidence in this matter. To the extent that I do possess any information or knowledge relevant to this proceeding, such information or knowledge would be available through lower-level employees of Progress Energy who would have much more detailed information than I would have regarding matters relevant to this proceeding.

6. I have personally had no communications with the staff of the Public Service Commission or any Commissioner relating to the March 27, 2002 Settlement in the rate case or the amount of the refund that is or should be required.

7. I am also unaware of any ex parte communications that have occurred between any Progress Energy employee, consultant, or contractor and any Commissioner or the Commission Staff relating to the March 27, 2002 Settlement in the rate case or the amount of the refund that is or should be required.

8. This concludes my affidavit.

Further affiant sayeth not.

Dated the 29th day of MAY, 2003.

H. William Habermeyer
(Signature)
H. William Habermeyer.

Address:
100 Central Avenue
Saint Petersburg, Florida 33701

STATE OF FLORIDA
COUNTY OF PINELLAS

THE FOREGOING INSTRUMENT was sworn to and subscribed before me this 29th day of MAY, 2002 by H. William Habermeyer. He is personally known to me, or has produced his _____ driver's license, or his _____ as identification.

Anne M. SheLoski
(Signature)
ANNE M. SHELOSKI
(Printed Name)
NOTARY PUBLIC, STATE OF FLORIDA
4-12-2006
(Commission Expiration Date)
DD 0936 04
(Serial Number, If Any)

(AFFIX NOTARIAL SEAL)
Anne M. SheLoski
MY COMMISSION # DD093604 EXPIRES
April 12, 2006
BONDED THRU TROY FAIN INSURANCE, INC

Recently, I became aware that Public Counsel and others were alleging that there have been improper ex parte communications between Progress Energy or its representatives and any Commissioner or the Commission Staff concerning the merits of Progress Energy's position.

5. Other than my general knowledge referenced above, I have not actively participated in nor am I aware of possessing any unique, direct, and/or relevant knowledge or information about this proceeding, nor have I been called upon by Progress Energy or its attorneys to provide testimony or evidence in this matter. To the extent that I do possess any information or knowledge relevant to this proceeding, such information or knowledge would be available through other employees of Progress Energy who would have much more detailed information than I would have regarding matters relevant to this proceeding.

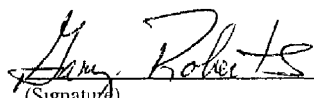
6. I have personally had no communications with the staff of the Public Service Commission or any Commissioner relating to the March 27, 2002 Settlement in the rate case or the amount of the refund that is or should be required.

7. I am also unaware of any ex parte communications that have occurred between any Progress Energy employee, consultant, or contractor and any Commissioner or the Commission Staff relating to the March 27, 2002 Settlement in the rate case or the amount of the refund that is or should be required.

8. This concludes my affidavit.

Further affiant sayeth not.

Dated the 29th day of May, 2003.


(Signature)
Gary Roberts

Address:
106 E. College Ave., Suite 800
Tallahassee, FL 32301

STATE OF FLORIDA
COUNTY OF PINELLAS

THE FOREGOING INSTRUMENT was sworn to and subscribed before me this 29 day
of MAY, 2003 by Gary Roberts. He is personally known to me, or has
produced his — driver's license, or his — as identification.



Katrina Cleaver Cochran
MY COMMISSION # DD064447 EXPIRES
February 2, 2006
BONDED THRU TROY FAIN INSURANCE, INC.

(AFFIX NOTARIAL SEAL)

Katrina Cleaver Cochran
(Signature)
KATRINA CLEAVER COCHRAN
(Printed Name)
NOTARY PUBLIC, STATE OF FL
Feb. 2, 2006
(Commission Expiration Date)
DD 06 4447
(Serial Number, If Any)