



Public Service Commission

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DATE: JUNE 18, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BRUBAKER) & DIVISION OF ECONOMIC REGULATION (SLEMKEWICZ)

RE: DOCKET NO. 000824-EI - REVIEW OF FLORIDA POWER CORPORATION'S EARNINGS, INCLUDING EFFECTS OF PROPOSED ACQUISITION OF FLORIDA POWER CORPORATION BY CAROLINA POWER & LIGHT.

AGENDA: 06/30/03 - SPECIAL AGENDA - ORAL ARGUMENT RECOMMENDED IN ISSUE 1

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\000824\june30.rcm

CASE BACKGROUND

The Commission opened Docket No. 000824-EI on July 7, 2000, to review the earnings of Florida Power Corporation (FPC), now known as Progress Energy Florida, Inc. (PEFI), and the effects of the acquisition of FPC by Carolina Power & Light Company. A hearing was scheduled to begin on March 20, 2002. On that date, however, the parties filed a Joint Motion To Postpone Scheduled Hearings to afford the parties the opportunity to finalize the terms of a settlement stipulation. The motion was granted by Order No. PSC-02-0411-PCO-EI, issued March 26, 2002, and by Order No. PSC-02-0412-PCO-EI, issued March 26, 2002, the Commission suspended the hearing schedule. On March 27, 2002, FPC filed a Joint Motion for Approval of Stipulation and Settlement and Further Postponement of Hearings and a Stipulation and Settlement. The Commission approved the stipulation and settlement agreement (Settlement) in Order No. PSC-02-0655-AS-EI, issued May 14, 2002. Among other things, the

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Settlement required PEFI to make refunds to customers if its revenues should exceed certain thresholds during the years 2002, 2003, 2004, or 2005. For the period ended December 31, 2002, PEFI calculated a refund amount of \$4,954,413, excluding interest.

On February 24, 2003, the Office of Public Counsel, Florida Industrial Power Users Group, Florida Retail Federation, Buddy Hansen/Sugarmill Woods Civic Association, and Publix Super Markets, Inc. (Movants) filed a Motion To Enforce Settlement Agreement. The Movants contend that PEFI's refund calculation made three adjustments that are inappropriate and not contemplated by the Settlement. On March 7, 2003, PEFI filed both a response in Opposition to the Motion To Enforce Settlement Agreement and a Request for Oral Argument and, in the Alternative, for an Evidentiary Hearing. Attached to PEFI's response was an affidavit from Mr. Javier Portuondo, Manager of Regulatory Services Florida for Progress Energy Service Company, LLC, which discusses matters in support of PEFI's position with regard to the refund.

Staff's recommendation on the Motion to Enforce Settlement Agreement was filed May 8, 2003, for consideration at the May 20, 2003, Agenda Conference. On May 16, 2003, the Movants filed a Motion in Limine and Motion to Strike with respect to certain matters raised in PEFI's March 7 response. On May 19, 2003, PEFI filed a Response in Opposition to Motion in Limine and Motion to Strike (Response).

A decision on the refund issue was deferred from the May 20, 2003, Agenda Conference to permit oral argument on the Movants' Motion at a June 30, 2003, Special Agenda Conference, at which time the Commissioners will rule on the Motion. The Commissioners noted that any other pending procedural matters would also be addressed and decided at the June 30 Special Agenda. On June 13, 2003, PEFI filed a notice of withdrawal of Javier Portuondo's affidavit that was attached to its response to the Motion to Enforce Settlement Agreement. On June 16, 2003, OPC and the Florida Attorney General filed a Joint Motion for Reconsideration of Order No. PSC-03-0687-PCO-EI. A separate recommendation addressing the Motion for Reconsideration is scheduled to be filed on June 23, 2003, for consideration at the June 30 Special Agenda Conference. At the time of filing this recommendation, staff is aware of no other procedural matters to be addressed. A decision on the Motion to Enforce Settlement Agreement is currently scheduled to be made at a July 9, 2003, Special Agenda Conference.

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Issue 1 of this recommendation addresses oral argument by the parties, Issue 2 addresses the Motion to Strike and PEFI's Notice of Withdrawal, and Issue 3 addresses the Motion in Limine. The Commission has jurisdiction over this matter pursuant to Sections 366.04, 366.05, and 366.06, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should oral argument be permitted?

RECOMMENDATION: Yes. Each side should be permitted ten minutes to present oral argument with respect to the Motion in Limine and Motion to Strike. (BRUBAKER)

STAFF ANALYSIS: At the May 20, 2003, Agenda Conference, the Commission deferred making a decision on the refund issue in order to permit oral argument on the Motion in Limine and Motion to Strike at a June 30, 2003, Special Agenda Conference.

Staff believes that oral argument would aid the Commission in comprehending and evaluating the issues before it, due to the importance and complexity of this matter. Further, staff notes that since no hearing has been held with respect to these issues, parties and interested persons may participate at the Special Agenda Conference at the Commission's discretion. Staff recommends that each side be permitted ten minutes to present oral argument.

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ISSUE 2: Should the Motion to Strike be granted?

RECOMMENDATION: No. In light of PEFI's withdrawal of Javier Portuondo's Affidavit, the Motion to Strike is moot. (BRUBAKER)

STAFF ANALYSIS: On June 13, 2003, PEFI filed a Notice of Withdrawal of Affidavit and Suggestion of Mootness. Staff believes that it is unnecessary to rule on the Motion to Strike, because PEFI's withdrawal of Mr. Portuondo's affidavit renders the Motion to Strike moot.

ISSUE 3: Should the Motion in Limine be granted?

RECOMMENDATION: No. To the extent the Motion in Limine seeks to exclude the affidavit of Mr. Portuondo, the June 13, 2003, Notice of Withdrawal renders that portion of the Motion in Limine moot. The remainder of the Motion in Limine should be denied on the merits. (BRUBAKER)

STAFF ANALYSIS:

Movants' Position

The Movants' Motion to Enforce Settlement Agreement urges the application of the parole evidence rule, which holds that the terms of a contract speak for themselves; that absent an ambiguity in the terms, they may not be explained by extrinsic evidence or by reference to any other matter. In other words, the Movants believe that the refund should be calculated based only upon the information contained in the Settlement. The Movants contend that PEFI's March 7, 2003, Response in Opposition to the Motion To Enforce Settlement Agreement can not rely on matters lying outside of the Settlement in order to change its obligations or to make adjustments to the provisions contained in the Settlement.

The Motion in Limine and Motion to Strike request that the Commission enter an order prohibiting PEFI from commenting on or arguing at the July 9, 2003, Special Agenda Conference, any facts or matters not explicitly set forth in the Settlement or Order No. PSC-02-0655-AS-EI. Since the Commission has not conducted an evidentiary hearing, the Movants contend that there is no evidence other than the Settlement itself and the Order approving the Settlement. The Commission should therefore prohibit PEFI from commenting on or arguing at the Agenda Conference any facts or matters not explicitly set forth in the Agreement or the Order.

The Motion also notes that Attorney General Charles J. Crist, who was granted intervention in this docket by Order No. PSC-03-0605-PCO-EI, issued May 16, 2003, agrees with and supports the position of the Movants.

PEFI's Position

PEFI states that the Movants base their Motion in Limine on the same grounds as their Motion to Enforce Settlement Agreement,

namely, that the Settlement clearly and unambiguously calls for a greater refund than the one PEFI has provided. PEFI believes that the Commission can not grant the requested relief without deciding the merits of the underlying dispute, because one of the issues the Commission will consider on the merits of the underlying dispute is whether the Settlement is ambiguous. This means that the Commission cannot grant the Motion in Limine without disposing of the underlying controversy, namely, whether or not the Settlement is ambiguous. PEFI argues that it demonstrated at length in its response in Opposition to the Motion to Enforce Settlement Agreement that parole evidence can and should be considered whenever a contract is ambiguous and calls for interpretation. See, e.g., Miller v. Kase, 789 So. 2d 1095, 1097-98 (4th DCA 2001) ("in the absence of clear and unambiguous language, the court must engage in judicial interpretation" and may accept parol evidence); Berry v. Teves, 752 So. 2d 112, 114 (2nd DCA 2000) (when a contract is ambiguous, "parole evidence is admissible to determine the parties intent"). Further, PEFI contends that motions in limine can not be used in lieu of motions for summary judgment to force a determination of the merits of a dispute. Buy-Low Save Centers, Inc. v. Glinert, 547 So. 2d 1283 (Fla. 4th DCA 1989) ("use of a motion in limine is improper when it is used to do more than merely exclude irrelevant or improperly prejudicial evidence"); Brock v. G.D. Searle & Cow, 530 So. 2d 428, 431 (Fla. 1st DCA 1988) ("trial courts should not allow motions in limine to be used as unnoticed motions for partial summary judgment or motions to dismiss").

On these grounds, PEFI requests that the Commission deny the Motion in Limine. As mentioned in the case background, and as discussed in Issue 1, PEFI has withdrawn the affidavit of Javier Portuondo that was the subject of the Motion to Strike.

Staff's Recommendation

The purpose of a motion in limine is to exclude irrelevant and immaterial matters or to exclude evidence when its probative value is outweighed by the danger of unfair prejudice. Devoe v. Western Auto Supply Co., 537 So. 2d 188 (Fla. 2d DCA 1989), cited in Order No. PSC-98-1089-PCO-WS, issued August 11, 1998, in Docket No. 970657-WS.¹ A motion in limine is designed to prevent the

¹ The Commission has addressed motions in limine under various circumstances in several prior cases. See, e.g., Order No.

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introduction of evidence, the mere mention of which at trial would be prejudicial. Dailey v. Multicon Development, Inc., 417 So. 2d 1106 (Fla. 4th DCA 1982). A motion in limine

. . . seeks a protective order prohibiting the opposing party, counsel, and witnesses from offering offending evidence at trial, or even mentioning it at trial, without first having its admissibility determined outside the presence of the jury. The motion affords an opportunity to the court to rule on the admissibility of evidence in advance, and prevents encumbering the record with immaterial or prejudicial matter . . .

55 Fla Jur 2d, Trial § 71 (2003).

A trial court has discretion in determining whether to rule on a motion in limine prior to trial or to rule on the admissibility of the evidence when it is actually offered. Order No. PSC-98-1089-PCO-WS, citing Erhardt, Florida Evidence, § 15 (2d ed. 1984).

While it is true that motions in limine are appropriate in certain circumstances in administrative proceedings, it is important to ensure that they are used to enforce the correct evidentiary standards. Administrative proceedings are not subject to the same strict evidentiary standards used in trial courts. Section 120.569(2)(g), Florida Statutes, states that in administrative hearings to determine the substantial interests of the parties:

PSC-02-1282-PCO-EI, issued September 19, 2002, in Docket 020262-EI (testimony of witnesses at hearing was excluded as prejudicial and inconvenient to other parties, when prefiled testimony for those witnesses had not been filed); Order No. PSC-02-0876-PCO-TP, issued June 28, 2002, in Docket No. 020129-TP (denied motion in limine to strike legal arguments made in prefiled testimony, reasoning that the Commission has the discretion of allowing such testimony to be presented and simply giving it the weight that it is due in its deliberations); Order No. PSC-00-1549-PCO-WS, issued August 25, 2000, in Docket No. 990080-WS (motion in limine granted to the extent that the issues in dispute in the motion were those raised in the protest).

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

(Emphasis added). This evidentiary standard is fully consistent with the Commission's longstanding practice of including evidence for consideration in its decision-making, rather than excluding it. Also, the concern that improperly allowed evidence will prejudice a trial jury does not necessarily apply to administrative matters heard before the Commission with technical expertise in those matters. Commissioners have the judgment to weigh the evidence presented, and accord it the weight that it is due, if any. See Order No. PSC-02-0876-PCO-TP, supra.

Furthermore, consideration of the facts and circumstances surrounding the negotiation and approval of this settlement agreement is consistent with sound contract law principles. In interpreting the language of this settlement it is appropriate to consider the parties' intent when they executed the agreement, as well as their actions at the time of execution and thereafter.

It is axiomatic that the primary task in interpreting a contract is determining the intent of the parties in entering into the agreement. Florida East Coast Railway Co. v. CSX Transportation, Inc., 43 F.3d 1125 (7th Cir. 1994). The determination of the parties' intent need not occur in a vacuum. Even if the language of the contract does not appear ambiguous on its face, "it cannot be properly understood if it is read without attention to the circumstances under which it was written." Id. at 1128. As the Florida Supreme Court noted in St. Lucie County Bank & Trust Co. v. Aylin, 114 So. 438 (Fla. 1927), it is the duty of the court,

as near as may be, to place itself in the situation of the parties, and from a consideration of the surrounding circumstances, the occasion, and apparent object of the parties, to determine the meaning and intent of the language employed.

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See also, Triple E Development Co. v. Floridagold Citrus Company,
51 So. 2d 435 (Fla. 1951).

Staff believes that the matters discussed in PEFI's Response in Opposition to the Motion to Enforce Settlement Agreement may be discussed at the July 9, 2003, Special Agenda Conference, without engendering prejudice to the Movants' case. The Commission has the expertise and the discretion to consider relevant matters outside of the four corners of the settlement agreement and the order approving it when ruling on the Motion to Enforce Settlement Agreement. To the extent the Motion in Limine seeks to exclude the affidavit of Mr. Portuondo, the June 13, 2003, Notice of Withdrawal renders that portion of the Motion in Limine moot. Staff recommends that the remainder of the Motion in Limine should be denied.

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ISSUE 4: Should the docket be closed?

RECOMMENDATION: No. The docket should remain open pending final disposition of this matter. (BRUBAKER)

STAFF ANALYSIS: The docket should remain open pending final disposition of this matter.