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June 18, 2003

VIA FEDERAL EXPRESS

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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

Dear Ms. Bayo:

Progress Energy Florida ("PEF" or the "Company") is filing herewith an original and fifteen (15) copies of the Progress Energy's Response in Opposition to the Joint Motion For Reconsideration of Order No. PSC-03-0689-PCO-EI issued June 9, 2003.

We request you acknowledge receipt and filing of the above by stamping the additional copy of this letter and returning it to me in the self-addressed, stamped envelope provided.

If you or your Staff have any questions regarding this filing, please contact me at (727) 821-7000.

Very truly yours,

Gary L. Sasso

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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 June 19, 2003

PROGRESS ENERGY'S REPONSE IN OPPOSITION TO THE JOINT MOTION FOR RECONSIDERATION OF ORDER NO. PSC-03-0689-PCO-EI ISSUED JUNE 9, 2003

Progress Energy Florida, Inc. ("Progress Energy"), hereby files its Response in Opposition to the Joint Motion for Reconsideration of Order No. PSC-03-0689-PCO-EI filed by the Office of Public Counsel and the Attorney General ("Movants"). As we demonstrate below, Movants' request for reconsideration should be denied.

Introduction

Movants have asked that the full Commission reconsider and overturn the Prehearing Officer's June 9, 2003 discovery Order limiting the scope of Movants' discovery to the question Movants themselves initially raised, namely, whether there have been any improper ex parte communications concerning the resolution of the pending Motion to Enforce Settlement Agreement. In seeking reconsideration of the Prehearing Officer's Order, Movants have raised nothing new and have not met their burden on reconsideration to demonstrate that the Pre-hearing Officer overlooked some critical legal or factual point. To the contrary, the Joint Motion for Reconsideration simply reiterates arguments already considered and appropriately rejected by the Prehearing Officer. Accordingly, as well-settled Commission precedent makes clear, Movants' request for reconsideration should be denied.

Moreover, the Prehearing officer's Order correctly applied the established law and principles governing the proper scope of discovery. The limitations imposed on discovery were carefully calculated to permit Movants to proceed with the inquiry that the Commission acted to

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permit Movants to pursue when it deferred the resolution of the pending Motion to Enforce Settlement Agreement on May 20th.

Background

The Office of Public Counsel ("Public Counsel") and other moving parties filed their Motion to Enforce Settlement Agreement on February 24, 2003. Progress Energy filed its response in opposition to the Motion to Enforce on March 7, 2003. The matter was then scheduled for consideration by the full Commission at the Agenda Conference on May 20, 2003.

During the period between March 7, 2003 and May 19, 2003, neither Public Counsel nor any other party pursued any discovery on the merits of the refund issue (or any discovery at all). Although Progress Energy submitted with its Opposition the Affidavit of Javier Portuondo (which Progress Energy withdrew by notice filed on June 13, 2003), to this date the Movants have not sought to depose Mr. Portuondo. To the contrary, the Movants argued in their Motion to Enforce Settlement that the Commission should not consider any extrinsic evidence (matters outside the Settlement Agreement itself or the Commission's Order enforcing the Settlement Agreement) under the "parol evidence" rule.

On May 15, 2003, the eve of the May 20 Agenda Conference, Michael Twomey sent a letter to Chairman Jaber describing his suspicion based on an "anonymous" source that "some commissioners" received improper ex parte communications "from employees and other representatives of Progress Energy." On May 16, 2003, the Movants filed a Motion in Limine and Motion to Strike, asking the Commission to preclude consideration of Mr. Portuondo's Affidavit in the Commission's determination of the Movants' Motion to Enforce Settlement Agreement. Progress Energy filed its response and opposition to the Motion in Limine and Motion to Strike prior to the May 20 Agenda Conference.

On May 20, 2003, the Commission deferred ruling on the Motion to Enforce Settlement Agreement, to afford the Staff an opportunity to consider Public Counsel's Motion in Limine and Motion to Strike and to afford Mr. Twomey an opportunity to investigate his suggestion that improper ex parte communications had occurred regarding the refund issue.

On May 19, 2003, Public Counsel noticed the depositions of five (5) Progress Energy employees, and then on May 21, 2003, following the Commissions deferral of the matter, Public Counsel served written discovery on Progress Energy.

On May 29, 2003, Progress Energy filed two motions for protective order seeking to limit the scope of Public Counsel's discovery to the issue authorized by this Commission. Additionally, Progress Energy sought to prohibit the scheduled depositions of Gary Roberts and H. William Habermeyer, Jr., offering affidavits reflecting that these individuals did not have knowledge of improper ex parte contacts.

On June 9, 2003, the Prehearing Officer granted Progress Energy's motion for protective order limiting the scope of Public Counsel's requested discovery and granted in part Progress Energy's motion for protective order against the taking of depositions of Gary Roberts and H. William Habermeyer, Jr. The Prehearing Officer's Order limited discovery to the issue of whether prohibited ex parte communications may have taken place, as of November 26, 2002 (90 days prior to filing of the Motion to Enforce Settlement Agreement), the earliest date when any proscription against such contacts might come into play under applicable law. The Prehearing Officer also prohibited the deposition of Gary Roberts, but authorized the deposition of H. William Habermeyer regarding ex parte communications. It is this Order that Movants now seeks to have this Commission reconsider.

Argument

The Commission has time and again recited the standard of review to be applied to requests for reconsideration as follows:

> The proper standard of review for a Motion for Reconsideration would be whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. (citations omitted).

See In re Aloha Utilities, Inc., Order No. PSC-00-1628-FOF-WS (September 12, 2000); see also Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962). By the same token, the Commission has repeatedly confirmed that a motion for reconsideration should not be used as a mechanism for rearguing matters already considered by the Prehearing Officer. See In re: Petition to determine need for an electrical power plant in Martin County by FP&L, 2002 Fla. PUC Lexis 855, *10 (October 21, 2002) ("In a motion for reconsideration it is not appropriate to reargue matters that have already been considered."); In re Petition for a Determination of Need for Hines 3, PSC-02-1754-FOF-EI (Commission will not substitute its judgment for the Prehearing Officer's unless there is a showing that the Prehearing Officer overlooked or misapprehended the law such that his decision is clearly mistaken); In re Generic Investigation into Aggregate Utility Reserve Margin, Docket No. 981890-EU, Order No. PSC-99-1716-PCO-EU (Sept. 2, 1999) (Denial of reconsideration appropriate where FPC and FP&L had raised no matter of fact or law not considered by the Prehearing Officer).

Applying this well-settled standard, it is clear that Movants' request for reconsideration falls far short of demonstrating that the Prehearing Officer has overlooked or failed to consider any pertinent point of fact or law in this matter. Indeed, the arguments raised in Movants' request are exactly the same arguments fully addressed and rejected by the Prehearing Officer in his order. At bottom, Movants' request for reconsideration raises three arguments: (1) that

Movants should be entitled to take "merits" discovery; (2) that Movants should be entitled to take discovery concerning alleged ex parte contacts preceding 90 days prior to when the docket was opened; and (3) that Gary Roberts deposition should be permitted.

These arguments are not new. The Prehearing Officer's June, 9, 2003 Order shows on its face that the Prehearing Officer considered and rejected these arguments. As to Movant's request for merits discovery, the June 9, 2003 Order recites that "[r]espondents claim that the scope of discovery is not as limited as PEFI contends, but rather includes any matter, not privileged, relevant to the subject matter of the pending action" and that "[r]espondents contend that PEFI can not dispute the refund issue, and then claim that discovery about that issue should not be allowed." Order p. 3. Having reviewed these arguments, the Prehearing Officer concluded that "[a] decision on the refund issue was deferred from the May 20, 2003 Agenda to permit . . . the parties, including OPC, counsel for Buddy Hansen and Sugarmill Woods Civic Association, and the Florida Attorney General, to investigate whether any ex parte communication may have taken place. OPC's requests are broader in scope than is required to address this limited concern." Order p. 3

Second, as to the timing issue, the June 9, 2003 Order recognizes that Movants disagreed that discovery concerning ex parte communications should be limited to the time frame established by governing law. See Order p. 3. Once again, the Prehearing Officer addressed this matter and determined that Progress Energy's request that discovery concerning the alleged ex parte communications be limited in time – in accord with the statutorily specified timeframe – was reasonable. Order, p. 4.

The Prehearing Officer also was correct in prohibiting the deposition of Gary Roberts. Again, the argument Movants raise regarding this issue – that Mr. Roberts works with Mr. Lewis

and may have information regarding the work and statements of Mr. Lewis – were expressly addressed and rejected by the Prehearing Officer. Order, p. 4. Thus, Movants have failed to bring forward any point overlooked or not considered by the Prehearing Officer that would justify this Commission's reconsideration. Thus, on the basis of the applicable standard of review alone, Movants' request for reconsideration should be denied.

Movants assert, nonetheless, that the Commission should review these issues de novo in view of Movants' stated concerns about the fairness of the process associated with the issuance of the Staff's recommendation in this docket. Movants fail to cite any legal authority for their position. In fact, the Commission had repeatedly declined to review rulings of its prehearing officers de novo, even when presented with purely legal or jurisdictional challenges for which the Commission has ultimate institutional responsibility. In re Petition for a Determination of Need for Hines 3, PSC-02-1754-FOF-EI (Commission rejected the de novo standard for reconsideration of a legal ruling in an order granting intervention, and denied motion for reconsideration, concluding that the Prehearing Officer had already considered and rejected the legal argument being made); In re Petition for a Determination of Need for Hines 2, PSC-01-0029-FOF-EI (Jan. 5, 2001) (Commission rejected the de novo standard of review of order by Prehearing Officer where issue involved application of controlling law to scope of Commission's jurisdiction; motion for reconsideration denied). In re Generic Investigation into Aggregate Utility Reserve Margin, Docket No. 981890-EU, Order No. PSC-99-1716-PCO-EU (Sept. 2, 1999) (Commission denied reconsideration of FPC and FP&L's purely legal challenge to the Prehearing Officer's ruling that the Commission could conduct an investigation through a formal evidentiary hearing, reasoning that FPC and FP&L had raised no matter of fact or law not considered by the Prehearing Officer).

The Prehearing Officer's ruling in this matter concerns the proper scope of discovery. This is quintessentially the kind of issue that is appropriately committed to the Prehearing Officer's discretion. See In re: Petition on behalf of Citizens of the Florida to initiate investigation into integrity of Southern Bell Telephone and Telegraph Company's repair service activities and reports, 1991 Fla. PUC Lexis 2178, *2 (December 17, 1991) ("The [de novo] standard argued by Southern Bell is inappropriate because it impinges on the prehearing officer's authority to resolve discovery disputes . . . ."). Further, the Prehearing Officer's ruling expressly permits Movants to complete requested discovery concerning the investigation they started – inquiring into alleged improper ex parte contacts.

In any event, the Prehearing Officer's ruling was correct. As previously stated, this Commission deferred ruling on the Motion to Enforce Settlement Agreement for the limited purpose of affording the Staff an opportunity to consider Public Counsel's Motion in Limine and Motion to Strike and to permit the Movants to investigate whether any improper, reportable ex parte communications had occurred regarding the refund issue. Movants have steadfastly opposed the development and consideration of any additional, extrinsic evidence on the merits of the refund issue, and Movants did not seek to pursue any such discovery prior to the originally scheduled date (May 20, 2003) for final disposition of their Motion to Enforce Settlement Agreement. Movants reaffirmed their position on extrinsic evidence in their May 16, 2003 Motion in Limine and Motion to Strike. In that motion, Movants contended, inter alia, that it would be inappropriate for the Commission to take any additional evidence in this case because the Commission has not seen fit to schedule an evidentiary hearing (and the Staff recommended against scheduling any such hearing).

Further, in its recent response to Progress Energy's Motion to Continue Depositions and Establish a Reasonable Discovery Schedule, Movants again reiterated that the sole purpose of its investigation was to determine whether Progress Energy had any involvement – by means of improper ex parte communications – in the conduct of two Commissioners who undertook certain action.

Movants contend, however, that Progress Energy is seeking to have this Commission consider evidence extrinsic to the March 27, 2002 Settlement Agreement, and thus Movants should be allowed to seek their own extrinsic evidence. But Progress Energy has withdrawn the Affidavit of Javier Portuondo by notice filed June 13, 2003, and the Company does not intend to introduce any new evidence outside of the record as of the time the Commission reviewed and approved the Settlement Agreement.

In any event, Movants themselves are <u>not</u> seeking discovery for the purpose of introducing any additional evidence about the intent or proper interpretation or application of the parties' Settlement Agreement. To the contrary, Movants have consistently opposed the Commission's receipt or consideration of any such evidence. This is important because the rules of discovery limit discovery to requests that are "reasonably calculated to lead to the discovery of <u>admissible</u> evidence." Fla. R. Civ. Pro. 1.280(b)(1) (emphasis added). By their own admission, Movants are not seeking discovery for the purpose of developing extrinsic evidence for use by the Commission in resolving the pending Motion to Enforce Settlement.

As Movants point out, the Staff has not recommended that the Commission schedule an evidentiary hearing in this matter, and the Commission has not in fact scheduled any such hearing. Rather, the Commission has given notice of its intent to resolve the pending Motion to Enforce Settlement Agreement at the scheduled Agenda Conference on July 9, 2003. If the

Commission were to determine on July 9th that it will require evidence that was not before the Commission at the time it approved the Settlement Agreement in order to interpret the Settlement Agreement, then all parties would be afforded an appropriate opportunity to take relevant merits discovery prior to any evidentiary hearing. But the Commission has not indicated any intention to schedule such a hearing, and the Movants have insisted that none is either necessary or appropriate.

Further, Movants acknowledge that they seek to depose Gary Roberts only to determine what Paul Lewis might have told him about any alleged improper ex parte communications. Mr. Roberts has already executed an affidavit, however, reflecting that he has no knowledge of any ex parte communications with the staff of this Commission or any Commissioner in this matter. And Movants will have the opportunity to depose Paul Lewis himself about what Mr. Lewis said or did. Thus, the Prehearing Officer correctly concluded that Mr. Roberts' deposition would not be reasonable or appropriate.

Likewise, limiting the Movants' investigation to the timeframe established by applicable law was appropriate. Section 350.042, Florida Statutes prohibits ex parte communications with Commissioners after 90 days prior to the initiation of a docket when a person "knows" that the matter will be filed with the Commission. The administrative ex parte rules have only limited application to communications with the Commission Staff after a docket is pending. See § 350.042(1), Fla. Stat. and Rule 25-22.033(1). Therefore, the earliest possible date when these proscriptions might come into play would be November 26, 2002, even assuming that Progress Energy could "know" the exact date when Movants would file their Motion to Enforce Settlement.

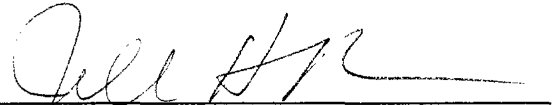
Movants do not dispute that its ex parte communication claims are based on the prohibitions contained in section 350.042. Yet, despite the time limitations contained in that statute, Movants argue that even if the rate docket was closed after approval of the Settlement Agreement (which it was), somehow the refund issue remained "open" because the refund remained to be calculated. But the fact that there are issues of <u>implementation</u> that continue from year to year after the disposition of a rate case does not mean that the <u>docket</u> itself remains open. Indeed, issues of implementation following a rate case remain unresolved for virtually every aspect of any regulated utility's operations because every rate case or rate settlement gives rise to a host of implementation issues that play out over a period of years. The Movants, themselves, point out that one of the adjustments at issue here would occur every year the rate stipulation is in effect. There is simply no basis in law for Movants' argument that the ex parte rules apply to any issue of implementation of a rate settlement no matter how indefinite in time or scope those issues may be.

Finally, the Movants argue that the issues they seek to explore may not involve any illegality at all, but, nevertheless, Movants should be permitted to take any discovery they request. But, again, the well-recognized standard for discovery is whether the discovery requested is reasonably calculated to lead to the discovery of admissible evidence. Here, the Movants have not articulated any legally supportable basis by which they would seek to admit into evidence any of the information Movants are now asking to explore. Rather they continue to insist, most recently through their Motion in Limine, that any such extrinsic evidence should be ignored.

Conclusion

For the foregoing reasons, this Commission should not reconsider the Prehearing Officer's Order, and should deny Movants' Motion for Reconsideration.

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 19th day of June 2003.

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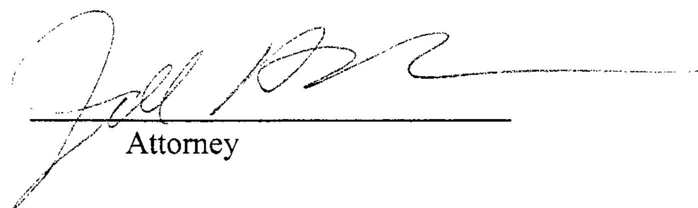

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