

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of two unit power sales agreements with Southern Company Services, Inc. for purposes of cost recovery through capacity and fuel cost recovery clauses, by Progress Energy Florida, Inc.

Docket No. 041393-EI

Filed: May 24, 2005

**PROGRESS ENERGY FLORIDA'S RESPONSE IN OPPOSITION
TO WHITE SPRINGS MOTION FOR RECONSIDERATION**

Progress Energy Florida, Inc., (PEF) hereby responds in opposition to the Motion for Reconsideration ("Motion") filed by White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs ("White Springs") on May 23, 2005. As discussed below, White Springs' Motion does not identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering Order No. 05-0538-PCO-EI (May 16, 2005), which granted PEF's Motion for Leave to File Supplemental Testimony and denied White Springs' Emergency Motion to Suspend the Procedural Schedule or Alternatively to Dismiss Progress Energy's Application ("Prior Motion"). Accordingly, the Motion must be denied on its face.

1. This is the third motion that White Springs has filed seeking to delay this proceeding without citing a shred of legal authority. As this Commission has stated many times, the standard of review for a motion for reconsideration of a Prehearing Officer's order is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the order. See e.g., Order No. PSC-04-0251-PCO-EI, at p. 2 (March 8, 2004), citing Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974), Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962), and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). White Springs's latest Motion does not even acknowledge that standard, let alone meet it.

2. A motion for reconsideration should not be granted “based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review.” Order No. PSC-04-0251-PCO-EI, at p. 2, citing Stewart Bonded, supra. White Springs’ Motion includes only conclusory allegations of a need for additional time and a vague reference to “fundamental fairness and due process rights.” Motion at p. 3. It does not even purport to identify any specific point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Order at issue. Nor is it based on “specific factual matters set forth in the record and susceptible to review.” Accordingly, the Motion must be denied.

3. As to White Spring’s reference to “fundamental fairness and due process rights,” Rule 28-106.211, Florida Administrative Code, gives the Prehearing Officer broad authority to “issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case[.]” The Florida Supreme Court has recognized this broad authority by reviewing procedural orders by the Commission under the highly deferential abuse of discretion standard. Panda Energy v. Jacobs, et al, as the Public Service Commission, 813 So. 2d 46, 49 (Fla. 2002) (citations omitted). White Springs’ Motion provides no basis to conclude that the Prehearing Officer’s May 16 order constitutes an abuse of discretion or somehow fails to provide “due process.” Indeed, White Spring cites no cases whatsoever in support of its claim that “due process” somehow warrants a suspension of the procedural schedule. See Motion, at p.3.

4. Without presenting any evidentiary support, White Springs’ latest Motion simply reargues the bald assertion in its Prior Motion that the revised five-year cost-savings analysis presented in the Supplemental Testimony filed by PEF somehow warrants suspension or even

dismissal¹ of this proceeding. As explained in the supplemental testimony, the revised five-year cost savings analysis still shows significant savings over the five-year term of the agreements, and it does not affect the results of the PEF's long-term cost analysis. Moreover, the five-year cost analysis is just one of several bases for PEF's request for approval of the agreements. Most importantly, it does not in any way relate to the strategic benefits of the agreements, such as access to coal-fired capacity via firm transmission rights. Indeed, this Commission less than four months ago found those strategic benefits significant enough in their own right to justify approval of Florida Power & Light Company's (FPL's) similar UPS agreements despite evidence that the FPL agreements were projected to result in net costs of \$69 to \$117 million. See Order No. PSC-05-0084-FOF-EI.

5. Likewise, White Springs provides no evidentiary support for its suggestion that additional time is needed “for an adequate opportunity to understand Progress Energy’s case as it is now postured.” Motion, at p. 3. On the same day that PEF filed the supplemental testimony, it provided White Springs counsel and consultant the spreadsheets underlying the revised cost savings analysis. See Exhibit “A” hereto. Moreover, White Springs has had ample opportunity

¹ White Springs provides no legal authority whatsoever for its suggestion that it would be “appropriate” to dismiss PEF’s petition. As in any *de novo* proceeding under Section 120.57, Florida Statutes, the parties are entitled “to present evidence and argument on all issues involved and to conduct cross-examination[.]” § 120.57(1)(b), Fla. Stat. If White Springs contends that PEF’s revised analysis was flawed or incomplete, it is entitled cross-examine PEF’s witness and to present evidence in support of its case. By the same token, PEF is not limited to present only the information included in its Petition. See Gulf Court Nursing Center v. Department of Health and Rehabilitative Services, 483 So.2d 700, 710 (Fla. 1st DCA 1986) (Hearing officer in a section 120.57 proceeding is not limited to consideration of the record made by HRS during its preliminary investigation . . . and may freely consider any and all additional evidence presented by the parties, including evidence of changed conditions since the preliminary review, so long as it is relevant[.]”).

to depose Mr. Waters, the sponsor of the supplemental testimony, but it has chosen not to do so. Thus, White Springs' claim that it needs more time to "understand" PEF's case is baseless.


6. Finally, White Springs simply repeats its argument that there is no need for an expedited schedule "[f]or the same reasons set forth in [its] Emergency Motion." Motion, at p.4 As explained in PEF's response to White Springs' Prior Motion, however, an expedited decision is still needed; indeed, even more than before. As indicated in its discovery responses, PEF has signed a System Impact Study Agreement and placed a deposit for a System Impact Study under the time deadline established in Southern Transmission's Open Access Transmission Tariff. In light of that development, Southern could grant PEF's request at any time, thereby leaving PEF at risk of being obligated to take the transmission without assurance that the UPS agreements will be approved.

7. As discussed above, White Springs' Motion does not identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering Order No. 05-0538-PCO-EI (May 16, 2005). Instead the White Springs simply reargues matters already considered, which is inappropriate in a motion for reconsideration. See Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959), citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Accordingly, White Springs' Motion for Reconsideration must be denied.

WHEREFORE, Progress Energy Florida, Inc., respectfully requests that the Commission deny the Motion for Reconsideration filed by White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs on May 23, 2005.

Respectfully submitted, this 24th day of May, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Progress Energy Florida's Response in Opposition to White Springs Motion for Reconsideration has been provided by e-mail and by U.S. Mail, postage pre-paid, on May 24th, 2005, to the following:

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