

ORIGINAL

Matilda Sanders

From: Frank, Dan [Daniel.Frank@sablaw.com]
Sent: Thursday, May 26, 2005 8:02 AM
To: Filings@psc.state.fl.us
Subject: Answer in Opposition for filing in Docket No. 041393-EI
Attachments: WO_395561_3.DOC

Please accept for e-filing the attached document.

- a. The person making this filing is: Daniel E. Frank, Sutherland Asbill & Brennan LLP, 1275 Pennsylvania Avenue, N.W., Washington, DC 20004-2415, telephone 202-383-0100, fax 202-637-3593, e-mail daniel.frank@sablaw.com.
- b. The docket number is: 041393-EI, 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.
- c. This document is filed on behalf of White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate - White Springs.
- d. There are a total of 8 pages in the attached document.
- e. The document is the Answer of White Springs Agricultural Chemicals, Inc. in Opposition to Progress Energy Florida, Inc.'s Request for Official Recognition.

Thank you for your attention to this matter.

<<WO_395561_3.DOC>>

The information contained in this message from Sutherland Asbill & Brennan LLP and any attachments are confidential and intended only for the named recipient(s). If you have received this message in error, you are prohibited from copying, distributing or using the information. Please contact the sender immediately by return email and delete the original message.

CMP _____
 COM 5
 CTR _____
 ECR _____
 GCL _____
 OPC _____
 MMS _____
 RCA _____
 SCR _____
 SEC 1
 OTH Kump

5/26/2005

DOCUMENT NUMBER-DATE

05114 MAY 26 05

FLORIDA COMMISSION OF ENERGY REGULATION

ORIGINAL

**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 26, 2005

**ANSWER OF
WHITE SPRINGS AGRICULTURAL CHEMICALS, INC.
IN OPPOSITION TO PROGRESS ENERGY FLORIDA, INC.'S
REQUEST FOR OFFICIAL RECOGNITION**

White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs (“White Springs”) hereby files its Answer in Opposition to the Request filed by Progress Energy Florida, Inc. (“Progress Energy”) for Official Recognition of Thomas K. Churbuck’s Post-Hearing Brief in Docket No. 040001-EI. In support thereof, White Springs states the following:

1. On May 24, 2005 Progress Energy submitted its Request for Official Recognition of the “Post-Hearing Statement of Issues and Positions, Brief, and Proposed Findings of Fact and Conclusions of Law” of Mr. Thomas K. Churbuck (“Churbuck Brief”) in Docket No. 040001-EI, a matter involving certain sales agreements between Florida Power and Light Company (“FPL”) and Southern Company Services, Inc. (“SCS” or “Southern”). Significantly, the Churbuck Brief does not address Progress Energy or the unit power sales agreements (“UPS Agreements”) that Progress Energy filed in this proceeding. Mr. Churbuck is not a party to this proceeding and is not in any way related to White Springs. Nor was White Springs an intervenor in the FPL proceeding in which the Churbuck Brief was filed.

DOCUMENT NUMBER-DATE

05114 MAY 26 05

FPSC-COMMISSION

2. White Springs urges the Commission to decline to provide official recognition to the Churbuck Brief in this proceeding. The Churbuck Brief is irrelevant to the disposition of the issues set for hearing in this proceeding. Those issues include (a) whether Progress Energy adequately considered alternatives to Progress Energy's proposed UPS Agreements; (b) whether Progress Energy's cost-effectiveness analysis is reasonable and supported by the evidence; (c) whether Progress Energy's claimed "non-price" benefits are reasonable and supported by the evidence; and (d) whether there is sufficient reliable transmission to support Progress Energy's proposed UPS Agreements. These issues are not addressed in the Churbuck Brief or the FPL proceeding, and in that regard the Churbuck Brief is unhelpful to the resolution of the issues in this proceeding. The issues in this proceeding must be decided on the record evidence in this proceeding. The simple, undeniable fact is that the Churbuck Brief and FPL proceeding involved (among other things) a different utility system, a different power purchase agreement, different cost analyses, and different transmission arrangements. There would be no point in taking official recognition of the Churbuck Brief, and doing so would unfairly prejudice White Springs in this proceeding.

3. To justify taking official recognition of the Churbuck Brief, Progress Energy cites two issues addressed in the Churbuck Brief – the “potential relevance of a transmission System Impact Study” and “pending FERC investigations of whether Southern Company exercises market power.”¹ Yet, the relevance of a system impact study to an FPL request for transmission service to implement an FPL power purchase

¹ Progress Energy Request, at 2.

agreement has no bearing on the relevance of a system impact study to *Progress Energy's* request for transmission service to implement *Progress Energy's* proposed UPS Agreements. As noted by White Springs's witness Maurice Brubaker in his Direct Testimony in this proceeding, the results of the system impact study that Southern must perform in connection with Progress Energy's redirect request may have an impact on the costs that Progress Energy (and its ratepayers) will incur in connection with the proposed UPS Agreements.² The disposition of a system impact study concerning FPL has little bearing on that analysis as it relates to Progress Energy. Indeed, because the system impact study for the Progress Energy request has not yet been completed, the Churbuck Brief obviously could not address that study.

5. In addition, the Churbuck Brief was filed on December 1, 2004, before the formal investigations of Southern Company's power pool and Intercompany Interchange Contract were initiated at the Federal Energy Regulatory Commission ("FERC"). As explained by White Springs's witness Mr. Brubaker in his Direct Testimony in this proceeding, the outcome of the FERC proceedings could have a substantial impact on the viability of Progress Energy's proposed UPS Agreements which are the subject of the instant proceedings, particularly if FERC decides to open the Southern power pool to outside competitors or make changes to Southern Company's market-based rate authority. Without having the knowledge of these additional investigations, the

² Brubaker Direct, at p. 29, lines 1-14.

Churbuck Brief cannot fully “elucidate”³ the issues raised by White Springs or support the assertions of Progress Energy in support of its proposed UPS Agreements.

6. Progress Energy claims that the Churbuck Brief “may aid the Commission in interpreting its order regarding FPL’s UPS agreements.”⁴ Progress Energy apparently believes that the order in the FPL proceeding will be dispositive of the issues in this proceeding. But the fact that *at some general level* there is some identity of issues in the two cases – *i.e.*, each case involved a system impact study and Southern’s market power is implicated in each case – does not mean that the outcome of one case dictates the outcome of the next one. Instead, each case must be decided upon the record evidence in its own proceeding.

7. Moreover, granting Progress Energy’s request would unduly disrupt this proceeding. Although White Springs strongly believes that the Commission must act based on the record evidence in this proceeding, granting official recognition of one document from the FPL proceeding would raise the question of whether fundamental fairness requires the Commission to determine whether other documents also should be granted official recognition. Moreover, the parties and the Commission would be forced to devote their resources to address how documents from an unrelated proceeding involving different parties and different agreements could possibly be relevant to the Commission’s determination in this proceeding. To do so would necessitate a postponement in the procedural schedule.

³ Progress Energy Request at 2.

⁴ Progress Energy Request at 2.

8. Progress Energy's reliance on past instances in which administrative tribunals have granted official recognition is misplaced. For instance, Progress Energy relies upon an "Order Granting Additional Motion for Official Recognition" in *OHM Remediation Services Co. v. DOT*, DOAH Case No. 00-0495BID (issued May 4, 2001). That order involved a request for official recognition of the briefs filed in an appellate case if the tribunal officially recognized the opinion and mandate in that case. The tribunal in that case noted that the request was *not opposed by any party*. Similarly, Progress Energy cites Order No. PSC-4-1044-FOF-TP, a Commission order granting official recognition of a brief filed by the Federal Communications Commission ("FCC") in a matter before the Circuit Court of Appeals for the District of Columbia. Again, *no party opposed the official recognition* of the FCC brief.

9. Here, in contrast, *White Springs opposes Progress Energy's request* that the Commission take official recognition of the Churbuck Brief. That factor alone materially distinguishes the cases relied upon by Progress Energy, and provides suitable grounds for denying Progress Energy's request.

10. When a motion for official recognition is not opposed, the tribunal can safely conclude that there is no issue of material fact in dispute with respect to the item, document or information to be noticed. When no issue of material fact exists, it is appropriate for the Commission to presume the truth of that fact. However, in granting official recognition – essentially "taking judicial notice" – the tribunal (including this Commission) must ensure with some degree of certainty that the noticed fact is indeed

true.⁵ The Florida Supreme Court has stated that “some facts need not be proved because knowledge of the facts judicially noticed is so notorious that everyone is assumed to possess it”⁶ and that “[c]are must be taken [to ensure] that the requisite notoriety exists.”⁷

11. Here, White Springs has made credible claims and submitted substantial evidence concerning the issues in the Churbuck Brief identified by Progress Energy as being relevant, as those issues apply to Progress Energy. Those issues include disputed issues of fact, policy and law. They should be decided based on the facts and arguments submitted in this proceeding, not the FPL proceeding. Indeed, PEF recognizes that a case should be decided on the evidence presented at hearing – PEF quotes from the order in the FPL proceeding in which the Commission noted that that case had been decided “*based upon the evidence presented at the hearing* and in consideration of the parties’ post-hearing briefs.”⁸

12. As White Springs was not an intervenor in the FPL proceeding, White Springs never had the opportunity to examine and rebut Mr. Churbuck’s beliefs and assertions in that matter, present evidence on the issues raised in the Churbuck Brief, or submit briefs in support of or in response to the Churbuck Brief. Officially recognizing the Churbuck Brief would eliminate White Springs’s right to test or support both the factual and legal basis of the evidence and arguments set forth in the Churbuck Brief.

⁵ See *Huff v. State*, 409 So.2d 145, 151 (Fla. 1986).

⁶ *Huff*, 409 So.2d at 151.

⁷ *Amos v. Mosley*, 77 So. 619, 623 (Fla. 1917) (quoting *Brown v. Piper*, 91 U.S. 37 (1875)) (internal quotations omitted).

⁸ Progress Energy Request at 2 (emphasis added).

That would result in a fundamental violation of White Springs's due process rights. White Springs appreciates PEF's offer to submit brief that had been submitted in opposition to a Florida utility's request for approval of a unit power sales agreement, but respectfully submits that the public interest and due process require that this case – involving a different Florida utility, different unit power sales agreements, and different analyses – be decided on the record evidence and briefs in this proceeding.

Wherefore, White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs respectfully requests that the Prehearing Officer deny Progress Energy's motion and deny official recognition of the Churbuck Brief.

Respectfully submitted,

/s/ Daniel E. Frank

James M. Bushee
Daniel E. Frank
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004-2415
(202) 383-0100 (phone)
(202) 637-3593 (fax)

*Attorneys for
White Springs Agricultural Chemicals, Inc.
d/b/a PCS Phosphate – White Springs*

May 26, 2005

Certificate of Service

I hereby certify that a true and correct copy of the foregoing “Answer of White Springs Agricultural Chemical, Inc. in Opposition to Progress Energy Florida, Inc.’s Request for Official Recognition” has been furnished by electronic mail this 26th day of May, 2005 to the following:

Via E-mail

Paul Lewis, Jr.
Progress Energy Florida, Inc.
106 East College Avenue, Suite 800
Tallahassee, FL 32301-7740
paul.lewisjr@pgnmail.com

Via E-mail

Gary V. Perko
Hopping Green & Sams, P.A.
123 S. Calhoun Street (32301)
Post Office Box 6526
Tallahassee, FL 32314
garyp@hgslaw.com

Via E-mail

Adrienne Vining
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
avining@psc.state.fl.us

/s/ Daniel E. Frank

Daniel E. Frank