

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.

DOCKET NO. 100437-EI  
ORDER NO. PSC-13-0232-PCO-EI  
ISSUED: May 29, 2013

ORDER REQUIRING IN CAMERA INSPECTION

Background

Docket No. 100437-EI, In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc., was opened at the request of Progress Energy Florida (now known as Duke Energy Florida, Inc. or DEF) to address the extended outage at its nuclear plant Crystal River Unit 3 (CR3), and the resulting replacement fuel/power costs. By Order No. PSC-12-0104-FOF-EI, issued March 8, 2012, in Docket No. 120022-EI, the Commission approved a global stipulation and settlement that addressed outstanding issues in several dockets, including issues raised in this docket concerning the CR3 outage (2012 Settlement). By Order No. PSC-13-0080-PCO-EI, issued on February 13, 2013, the Prehearing Officer lifted the stay on this docket at the request of DEF after its Board of Directors made the decision to retire CR3. The remaining issues raised in Phase II and Phase III of the 2012 settlement will be addressed in this docket.

On February 12, 2013, the Office of Public Counsel (OPC) served its seventh set of requests for production of documents to DEF. This request generally covered documents related to insurance coverage for CR3 and the dispute between DEF and the Nuclear Energy Insurance Limited (NEIL) over the CR3 insurance claims. On February 18, 2013, DEF served its general and specific objections to OPC's request which, among other things, objected to request nos. 64, 65 and 66(a)-(d), claiming attorney-client privilege and work product privilege. On April 30, 2013, DEF furnished a revised privilege log that identified the documents it asserts are subject to privilege. Subsequently on May 14, 2013, OPC filed its first motion to compel, asking the Commission to conduct an in camera inspection of the subject documents and compel the production of those documents absent a showing that a valid privilege exists. DEF filed its response in opposition to OPC's motion to compel on May 21, 2013 requesting that OPC's request for an in camera inspection and its motion to compel be denied.

Decision Concerning In Camera Inspection

Rule 1.280(b)(1), Florida Rules of Civil Procedure (F.R.C.P.), provides that the scope of discovery extends to "any matter, not privileged, that is relevant to the subject matter of the pending action." The rule goes on to state that "it is not grounds for objection that the information sought will be inadmissible at the trial if the information is reasonably calculated to lead to the discovery of admissible evidence."

DOCUMENT NUMBER - DATE

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FPSC-COMMISSION CLERK

Section 90.502, Florida Statutes, establishes the attorney-client privilege and provides that communications between attorney and client are confidential if not intended to be disclosed to third persons other than “[t]hose to whom disclosure is in furtherance of the rendition of legal services to the client” or “[t]hose reasonably necessary for the transmission of the communication.” Rule 1.280(b)(4), F.R.C.P., provides that a party may obtain discovery of documents prepared in anticipation of litigation or for trial by or for another party or by or for that party’s representative, including that party’s attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. The rule goes on to state that “(i)n ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney concerning the litigation.”

When asserting a claim of privilege, Rule 1.280(b)(5), F.R.C.P., requires the party asserting the privilege to “describe the nature the documents, communication, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.”

In the past, this Commission has conducted in camera inspections of information to assist in determining whether the privilege applies. The decision to hold an in camera review may be made at the discretion of the Presiding Officer – often the Prehearing Officer - if the party asserting the privilege has not supplied sufficient information as required under Rule 1.280(b)(5), F.R.C.P., for the Presiding Officer to find that the privilege exists.<sup>1</sup>

Accordingly, upon a review of the information furnished by the DEF, we find that an in camera inspection is appropriate and will assist this Commission in determining if a privilege exists. To expeditiously resolve this matter, DEF shall produce the documents described in its revised privilege log to OPC’s seventh request for production to the Commission Clerk within seven days of the issuance of this Order. DEF may contact the Commission Clerk to coordinate delivery of the documents in such a manner as to preserve and protect the subject information as if it were deemed privileged until a final determination is made. Ruling on OPC’s motion to compel discovery is withheld pending the outcome of the in camera inspection.

Based on the foregoing, it is

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<sup>1</sup>See Order No. PSC-04-0498-PCO-EI, issued May 13, 2004, in Docket No. 031033-EI, In re: Review of Tampa Electric Company's 2004-2008 waterborne transportation contract with TECO Transport and associated benchmark; Order No. PSC-05-0837-PCO-TP, issued August 18, 2005, in Docket No. 041144-TP, In re: Complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs and for alleged violation of Section 364.16(3)(a), F.S., by Sprint-Florida, Incorporated; and Order No. PSC-02-0131-PCO-TP, issued January 30, 2002, in Docket No. 010409-TP, In re: Petition by Citizens of State of Florida for investigation of Talk America Inc. and its affiliate, The Other Phone Company, Inc. d/b/a Access One Communications, for willful violation of Rule 25-4.118, F.A.C.

ORDERED by Commissioner Eduardo E. Balbis, as Prehearing Officer, that it is appropriate to conduct an in camera inspection of the documents described in Duke Energy Florida, Inc.'s revised privilege log to OPC's seventh request for production in order to determine if a privilege applies to any of those documents. It is further

ORDERED that Duke Energy Florida, Inc. shall produce the documents described in its revised privilege log to OPC's seventh request for production to the Commission Clerk no later than June 7, 2013. The Commission Clerk shall store and secure the documents as if they were privileged information until otherwise instructed by this Commission. It is further

ORDERED that the ruling on OPC's motion to compel is withheld pending the outcome of the in camera inspection of material to be provided by Duke Energy Florida, Inc.

By ORDER of Commissioner Eduardo E. Balbis, as Prehearing Officer, this 29<sup>th</sup> day of May, 2013.



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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

MTL

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.