

ORIGINAL



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June 4, 2003

Blanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RECEIVED FPSC
03 JUN -4 PM 3:16
COMMISSION
CLERK

Re: Docket No. 000384-EI

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of the Joint Response of the Citizens of Florida and the Attorney General in Opposition to Progress Energy's Motion for Protective Order to Limit the Scope of Discovery and Progress Energy's Motion for Protective Order Against Taking the Depositions of Gary Roberts and H. William Habermeyer, Jr. A diskette in Word format is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

Sincerely,

Charles J. Beck

Charles J. Beck
Deputy Public Counsel

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DOCUMENT NUMBER DATE

04974 JUN-48

FPSC-COMMISSION CLERK

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 --)
2002 Revenue Sharing)

Docket No. 000824-EI

Filed June 4, 2003

**JOINT RESPONSE OF THE CITIZENS OF FLORIDA AND THE ATTORNEY
GENERAL IN OPPOSITION TO PROGRESS ENERGY'S MOTION FOR
PROTECTIVE ORDER TO LIMIT THE SCOPE OF DISCOVERY AND PROGRESS
ENERGY'S MOTION FOR PROTECTIVE ORDER AGAINST TAKING THE
DEPOSITIONS OF GARY ROBERTS AND H. WILLIAM HABERMEYER, JR.**

The Citizens of Florida (Citizens), by and through Jack Shreve, Public Counsel, and Charles J. Christ, Jr., Attorney General, State of Florida (Attorney General) file this response in opposition to the (1) motion for protective order to limit the scope of discovery, and (2) motion for protective order against taking the depositions of Gary Roberts and H. William Habermeyer, jr., both of which were filed by Progress Energy Florida, Inc. (Progress Energy) on May 29, 2003.

Background

Progress Energy entered into a settlement agreement with the parties in this case on March 27, 2003, and the Florida Public Service Commission approved the settlement by its order PSC-02-0655-AS-EI dated May 14, 2003. The agreement contained provisions requiring a refund to customers if Progress Energy's revenues

should exceed certain amounts. Provisions of the settlement agreement concerning the sharing of revenues are as follows:

Sharing Threshold - Retail base rate revenues between the sharing threshold amount and the retail base rate revenue cap will be divided into two shares on a 1/3, 2/3 basis. FPC's shareholders shall receive the 1/3 share. The 2/3 share will be refunded to retail customers. The sharing threshold for 2002 will be \$1,296 million in retail base rate revenues. For 2002 only, the refund to the customers will be limited to 67.1% (May 1 through December 31) of the 2/3 customer share. The retail base rate revenue sharing threshold amounts for calendar year 2003 and for each calendar year thereafter in which this Plan is in effect will be increased by \$37 million over the prior year's revenue sharing threshold. Section 8 explains how refunds will be paid to customers.....

During July of 2002, Progress Energy notified Citizens for the first time that it believed certain adjustments should be made to the revenue figures included in the agreement, even though the agreement contains no provisions allowing such adjustments. Subsequent lengthy negotiations failed to resolve the matter, so the parties to the agreement, including Citizens, Florida Industrial Power Users Group (FIPUG), Florida Retail Federation (Retail Federation), Buddy Hansen / Sugarmill Woods Civic Association (Sugarmill Woods), and Publix Super Markets, Inc. (Publix) filed a motion to enforce the settlement agreement on February 24, 2003. Progress Energy filed its response on March 7, 2003.

On May 8, 2003, the staff of the Commission filed a recommendation providing the Commission three alternatives to resolve the case without indicating which option staff thought to be correct. On May 14, 2003, Sugarmill Woods filed a public records request with the Commission seeking various documents, including all previous drafts of

the staff recommendation, documents concerning the recommendation and the refund, and appointment calendars of the Commissioners. Depositions were taken on May 22, 2003, at which staff was questioned about the changes that had been made to the staff recommendation over time. Staff was also questioned about certain documents found in the possession of the aides to two Commissioners which appeared to have come from Progress Energy or one of its agents.

It turned out that the recommendation filed in this case on May 8, 2003, was preceded by a number of earlier drafts containing significantly different recommendations. The earlier drafts of the recommendation supported Public Counsel's position in its entirety and recommended requiring Progress Energy to refund an additional \$18 million to customers. Some later drafts maintained staff's recommendation to support Public Counsel's position, but they also included an alternative position recommending that Progress Energy refund some, but not all, of the amount urged by Public Counsel. The later drafts included the alternative recommendation after one Commissioner advised staff that he would like to see an alternative recommendation if he did not agree with staff's primary recommendation. Ultimately, the staff recommendation filed on May 8, 2003, contained no affirmative recommendation at all. The filed recommendation simply set forth three options from which the Commission could choose. The filed recommendation came out in this form after two Commissioners advised the Commission's general counsel that they did not want an affirmative recommendation from staff. They told this to the Commission's general counsel after being advised that the Commission staff supported Public Counsel's position.

The possible involvement of Progress Energy in this series of events is not entirely clear at this point. A few of the public records produced by the Commission on May 16, 2003, may have been provided to the Commission by Progress Energy or one of its agents. Those documents had not been provided to any of the other parties in this docket. In addition, at depositions held on May 23, 2003, the parties learned that an employee of Progress Energy had told staff that two Commissioners were favorably disposed toward Progress Energy's position on the amount of refund due customers.

Pending Discovery

Citizens filed the following requests for documents and interrogatory on May 21:

Document Request 4. Please provide all documents in your possession, custody or control provided by you (including, but not limited, by your employees, agents, attorneys, and independent contractors) to any member of the staff of the Florida Public Service Commission or any Florida Public Service Commissioner concerning refund or refunds required by your stipulation and settlement dated as of March 27, 2002.

Document Request 5. Please provide all e-mails, memoranda and other communications or documents in your possession, custody or control regarding the settlement agreement dated as March 27, 2002, meetings or communications with Florida Public Service Commission staff members, meetings or communications with Florida Public Service Commissioners, or the amount of refund or refunds required under the stipulation and settlement dated as of March 27, 2002.

Document Request 6. Please provide all e-mails, memoranda or other communications or documents in your possession, custody or control regarding actions or communications by contractors or consultants regarding the amount of refund or refunds required under the stipulation and settlement dated as of March 27, 2002.

Interrogatory 2. For each document responsive to document request 4 contained in Citizens' third set of requests for production of documents dated May 21, 2003, please identify the document and provide the following:

(a) the name and position of the person providing the document to the Florida Public Service Commissioner or to the member of the staff of the Florida Public Service Commission,

(b) the name of the person to whom the document was provided, and

(c) the date the document was provided.

Citizens also noticed five employees of Progress Energy for deposition. Pursuant to order PSC-03-0659-PCO-EI issued May 29, 2003, the Prehearing Officer gave Progress Energy until June 11, 2003, to serve its responses to the written discovery requests and ordered the parties to confer to schedule the depositions at a mutually agreeable time between June 11 and June 20, 2003.

Progress Energy's Motions

On May 29, 2003, Progress Energy filed a motion to restrict the scope of discovery and prohibit depositions of Gary Roberts and H. William Habermeyer, Jr., in their entirety. The company seeks to have all pending discovery restricted solely to the topic of communications by Progress Energy with Commissioners and staff concerning the merits of the refund issue during the period November 22, 2002, to date. Progress Energy derived the date of November 22, 2002, by applying the provisions of §350.042,

Florida Statutes¹, to the formal filing date of the motion to enforce the settlement agreement.

Argument in Response to Progress Energy's Motion to Restrict the Scope of Discovery

At the outset the Commission should recognize that the date of November 22, 2002 set forth in Progress Energy's motion has no meaning in this proceeding because this docket has been open continuously since July 7, 2000. The ex parte statute cited by Progress Energy in its motion to limit the scope of discovery applies throughout the existence of this proceeding. The statute prohibits all parties, including Progress Energy, from engaging in ex parte communications with Commissioners concerning the merits of any matter in the docket at any time the docket is open. Progress Energy has been prohibited from engaging in ex parte communications with a Commissioner concerning the merits of any matter in this case at all times since July 7, 2000.

Progress Energy also presumes too much about the scope of discovery. According to rule 1.280(b) of the Florida Rules of Civil Procedure, the scope of discovery includes any matter, not privileged, that is relevant to the subject matter of the pending action. Progress Energy argues that downward adjustments exceeding \$50 million should be made to its 2002 revenues, even though such adjustments can be found nowhere in the settlement agreement. The permissible scope of discovery in this proceeding surely includes Progress Energy's internal documents related to the

¹ §350.042, Florida Statutes, states that a commissioner shall neither initiate nor consider ex parte communications concerning the merits, threat, or offer of reward in any proceeding other than a proceeding under §120.54 or §120.565, workshops, or internal affairs meetings. No individual shall discuss ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days.

adjustments that can be found nowhere in the agreement since these adjustments are at the core of the dispute in this case. It is simply wrong for Progress Energy to put these matters in dispute and then claim that discovery should not be allowed about them.

Important questions have arisen about the fundamental fairness of the process leading to the filing of the May 8 staff recommendation, including the influence Progress Energy may have had on that process. Staff provided sworn testimony at depositions that an employee of Progress Energy had indicated that two Commissioners were favorably disposed toward Progress Energy's position concerning the refund. Given the prohibitions contained in §350.042, Florida Statutes, these statements are puzzling. We also know that actions by two Commissioners led staff to change its recommendation from one supporting the Public Counsel's position to one to one that merely listed options which the Commissioners could adopt. Before taking these actions, the two Commissioners were told that staff supported Public Counsel's position. Finally, documents produced by the aides to the two Commissioners include documents which appear to have originated by Progress Energy. These documents had not been provided to the other parties in this case.

An enormous amount of money is at stake in this proceeding concerning refunds. For the year 2002, the difference amounts to \$18.2 million. But the decision in this case will also act as a precedent on accounting for approximately \$14 million in each of the following three years. As much as \$60 million is potentially at stake by the Commissioner's decision concerning the amount of refund due customers for 2002.

The Commission should not limit discovery as advocated by Progress Energy. Given the disclosures to date, we believe the fairness of the entire process must be examined, including the role played by Progress Energy in that process.

Argument in Response to Progress Energy's Motion to Prohibit Depositions of H.
William Habermeyer, Jr., and Gary Roberts

Progress Energy seeks to prohibit any depositions of H. William Habermeyer, Jr., and Gary Roberts based on the contention that "apex" officials cannot be deposed unless it can first be shown that they have relevant information which cannot be obtained from other sources. In support, Progress Energy cites Florida District Court of Appeals decisions applying such a principle to heads of state agencies, and then Progress Energy cites cases from other areas of the country and a Florida Bar Journal article in an attempt to support its claim that the Florida decisions concerning heads of state agencies should be applied to Mr. Habermeyer and Mr. Roberts.

First, it should be noted that the settlement agreement here was personally signed by H. William Habermeyer, Jr., and that Mr. Habermeyer has more direct knowledge of the negotiations leading to the settlement agreement than any other person.² This alone warrants the taking of his deposition in this case. In fact, the Florida Bar Journal article cited by Progress Energy concludes that "... courts should not hesitate to deny protection if it appears that the apex official has personal knowledge of the relevant claims at issue or if the motivations behind corporate actions

² Citizens have filed a motion to strike the affidavit of Javier Portuondo, the person selected by Progress Energy to discuss the settlement, based in part on his lack of competence to address the issue.

are at issue."³ Thus, the very authority cited by Progress Energy supports the conclusion that Mr. Habermeyer should not be afforded protection by the Commission from having a deposition taken. Second, it appears from calendars produced in response to Sugarmill Woods' public records request that Mr. Habermeyer met with most if not all of the Commissioners individually in January, 2003. With as much as \$60 million ultimately at stake in this proceeding, Mr. Habermeyer should attempt to make time for a deposition, just as he was able to make time to visit Commissioners. Citizens will work with Progress Energy to reasonably accommodate Mr. Habermeyer's schedule.

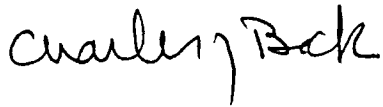
Mr. Roberts, Director of Public Affairs for Progress Energy Florida, may have information concerning the work and statements of Mr. Paul Lewis, who in turn is the person who indicated that two Commissioners were favorably disposed toward Progress Energy's position concerning the refund. Determining the basis for these

³ Adam M Moskowitz, *Deposing "Apex" Officials in Florida: Shooting Straight for the Top*, Fla. Bar Journal 10, 14 (Dec. 1998).

statements is a relevant matter to this proceeding. And in any event, as Director of Public Affairs, Mr. Roberts is not an "apex" official entitled to any protection from discovery.

Respectfully submitted,

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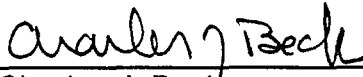
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**CERTIFICATE OF SERVICE
DOCKET NO. 000824-EI**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 4th day of June, 2003.



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