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COMMISSION
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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens of the State
of Florida to require Progress Energy Florida,
Inc. to refund customers \$143 million.

DOCKET NO. 060658-EI

FILED: FEBRUARY 27, 2007

STAFF'S RESPONSE TO PROGRESS ENERGY FLORIDA, INC.'S MOTION TO STRIKE
OR IN THE ALTERNATIVE EXCLUDE MR. BERNARD WINDHAM'S TESTIMONY

BACKGROUND

On February 20, 2007, Progress Energy Florida, Inc. ("PEF") moved to strike or in the alternative exclude Mr. Bernard Windham's pre-filed direct testimony filed on behalf of Commission Staff ("Staff"). PEF stated the following as grounds to strike or exclude Mr. Windham's testimony: (1) Mr. Windham's testimony does not meet the necessary requirements to be classified as an expert witness testimony; (2) his testimony does not meet the necessary requirements to be a fact witness testimony; (3) Mr. Windham's testimony is irrelevant to the issue of whether PEF should have purchased an equal blend of bituminous coal and sub-bituminous coal from Powder River Basin ("PRB") for its Crystal River Units 4 and 5 from 1996 to 2005, rather than the bituminous coal and bituminous-based coal products PEF purchased for those units; (4) Mr. Windham's testimony impermissibly relies on hindsight information; and (5) Mr. Windham's testimony should be stricken or excluded under the doctrine of Administrative Finality.

ARGUMENT

For the reasons discussed below, Staff responds in opposition and moves the Florida Public Service Commission ("Commission") to deny PEF's motion to strike or alternatively, its request to exclude Mr. Windham's testimony. The Commission should deny PEF's motion as a matter of law because Mr. Windham's testimony is legally sufficient. Mr. Windham is testifying

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as an expert under Section 90.702, Florida Statutes (F.S). His testimony is given to assist the Commission in its determination of whether PEF utilized the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5. Moreover, Mr. Windham's testimony is not given as a hindsight review of PEF's management decision.

I. **Mr. Windham's testimony is admissible because he meets the classification of an expert witness under Section 90.702 because he is testifying using specialized knowledge, skill, experience, or training that will assist the trier of fact in determining an issue in this case.**

Section 90.702, F.S., provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Section 90.702 is construed liberally when making a determination on the admissibility and qualification of an expert witness. McBean v. State, 688 So. 2d 383 (Fla. 4th DCA 1997). Under Section 90.702, a witness is classified as an expert witness and his or her testimony is admissible if: 1) the opinion evidence is helpful to the trier of fact; 2) the witness is qualified as an expert; and 3) the opinion evidence can be applied to evidence offered at trial. Meyer v. Caruso, 731 So.2d 118, 123 (Fla. 4th DCA 1999).

A. **Mr. Windham's testimony is helpful to the trier of fact because it will assist the Commission in determining an issue in the case.**

First, Mr. Windham's testimony is helpful to the trier of fact because it will assist the Commission in determining whether PEF utilized the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5. As stated, expert testimony is admissible if it is helpful to the trier of fact in determining a fact at issue in the case. Meyer v. Caruso, 731 So.2d

118, 123 (Fla. 4th DCA 1999). OPC proffered testimony from Mr. Sansom that PEF did not act reasonably and prudently in its coal procurement for Crystal River Units 4 and 5 from 1996 to 2005, concluding that PEF utilized the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5. (Pre-filed Testimony of Sansom). PEF advanced the position that it acted in a reasonable and prudent manner in its coal procurement for Crystal River Units 4 and 5 from 1996 to 2005, based on the information it had at the time. Specifically, Donna Davis and Albert Pitcher stated in their respective pre-filed testimony and through their exhibits that PEF procured the most cost effective coal for Crystal River Units 4 and 5 from 1996 to 2005. (Pre-filed Testimony of Davis and Pre-filed Testimony of Pitcher).

Mr. Windham's testimony is offered to assist the Commission, as the trier of fact, in reaching a decision on whether PEF acted in a reasonable and prudent manner based on the information it had at the time in procuring the most cost effective coal. Consequently, Mr. Windham's testimony will assist the Commission in determining whether PEF utilized the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5.

Through his testimony and exhibits, Mr. Windham supplies to the Commission data that calls into question Mrs. Davis' and Mr. Pitcher's testimony. Mr. Windham's testimony compares the cost of procuring South American and domestic coal. PEF argues domestic coal was the most cost effective coal for the company to procure at the time. In his testimony, Mr. Windham analyzed the median delivered price of foreign bituminous coal to southeastern coastal utilities from 1996 to 2005 compared to the delivered price of the coal products used by PEF. Thus, Mr. Windham's testimony will assist the Commission in deciding whether PEF acted reasonably and prudently in its coal procurement activities for the Crystal River Units 4 and 5.

B. Mr. Windham qualifies as an expert because he rendered opinions and inferences based on his special knowledge, skill, experience, or training

Second, Mr. Windham is qualified to be an expert. Under Section 90.702 a witness qualifies as an expert if he or she is testifying using his or her knowledge, skill, experience, or training. Section 90.702, F.S. Mr. Windham is qualified to be an expert on coal procurement because he rendered his opinion and inferences using his knowledge, skill, experience, or training. Mr. Windham has been an Engineer Specialist III since 2001 for the Commission. Mr. Windham's job responsibilities include performing utility fuel and fuel transportation cost analysis, reviewing coal contracts and coal procurement documents, providing engineering and statistical analysis support to the Electric Reliability and Cost Recovery Section staff as required, and advising the Commission on fuel adjustment hearings by issuing reports and recommendations. (Pre-filed Testimony of Windham, p. 1, lines 19-25). Moreover, Mr. Windham has numerous degrees and sat on numerous advisory boards relating to utility companies and coal procurement.

In addition, it is consistent with the Commission's practice to presume a witness to be an expert in the field to which he or she is testifying,¹ unless otherwise stated. Here, Mr. Windham filed testimony before the Commission, thus, he is presumed to be an expert. Based on Mr. Windham's aforementioned job duties as they relate to coal procurement and the Commission's practice, Mr. Windham is qualified to be an expert.

C. Mr. Windham's opinion can be applied to the evidence offered at trial to assist in the determination of whether PEF utilized the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5.

¹ See, Order No. PSC-95-0576-FOF-SU, issued May 9, 1995, in Docket No.940963-SU, In re: Application for transfer of territory served by Tamiami Village Utility, Inc. in Lee County, to North Fort Myers Utility, Inc., cancellation of Certificate No. 332-S and amendment of Certificate No. 247-S, and for a limited proceeding to impose current rates, charges, classifications, rules and regulations, and service availability policies.

Third, Mr. Windham's opinion can be applied to evidence offered at trial to assist in the determination of whether PEF utilized the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5. PEF asserts that Mr. Windham's testimony should be stricken from the record completely or in the alternative certain statements should be inadmissible because Mr. Windham never rendered an opinion as to whether PEF acted reasonably and prudently in procuring the most cost effective coal. (PEF Motion to Strike p. 4). PEF relies upon 3-M Corp. McGhan Medical Reports Division v. Brown, 475 So.2d 994 (Fla. 1st DCA 1985), for the premise that an expert must render an opinion. However, 3-M Corp. does not support PEF's position. In 3-M Corp., only part of the expert testimony was inadmissible because the expert was speculating about *future medical injuries*. As required by Florida law, Mr. Windham rendered an opinion based on the data he analyzed to assist the Commission in its search for the truth. Buchman v. Seaboard Coast Line R. Co., 381 So.2d 229 (Fla. 1980) (holding that expert testimony must assist the trier of fact in its search for the truth). Mr. Windham stated that "it appears [based on the data analyzed] that PEF often did not purchase the most cost effective coal." (Pre-filed Testimony of Windham, p. 4, lines 10-13; p. 11, lines 6-8). Mr. Windham's opinions were not speculations about future coal procurement.

Moreover, Mr. Windham rendered his opinions throughout his pre-filed direct testimony; therefore, PEF's assertion that Mr. Windham did not express an opinion is an incorrect statement. When asked his opinion of whether PFC on behalf of PEF generally purchased the lowest price compliance coal available that meets the specifications for Crystal Units 4 and 5, from 1996 to 2005, Mr. Windham stated "No." (Pre-filed Direct Testimony of Windham, p.9, lines 17-19). Mr. Windham then explained the rational behind his opinion. Also, he was asked

“has PEF always chosen the lowest cost U.S. coal that meets PEF fuel specifications?” (Pre-filed Direct Testimony of Windham, p.11, lines 4-5). Mr. Windham’s stated “No” and explained the rational behind his opinion. (Pre-filed Direct Testimony of Windham, p.11, lines 6-12). PEF is simply unhappy with Mr. Windham’s opinions, because they do not support the utility’s position. Thus, PEF moved to strike or in the alternative exclude Mr. Windham’s testimony. There are no Florida statutes or case law that requires an expert to state with 100 percent certainty his or her opinion. Thus, Mr. Windham’s opinion can be applied to the evidence offered at trial.

Therefore, Mr. Windham’s testimony is admissible as expert testimony because it will assist the Commission in determining whether PEF utilized the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5.

II. **Mr. Windham’s testimony is inadmissible as a fact witness under Section 90.701 because his opinions and inferences are based on special knowledge, skill, experience, and training**

Staff agrees that Mr. Windham cannot be considered a fact witness. Section 90.701(2) provides, “a fact witness cannot render opinions and inferences based on special knowledge, skill, experience, or training.” Section 90.701(2), F.S. Mr. Windham’s testimony requires a special knowledge, skill, experience, or training. He compiled and analyzed data that PEF and other investor owned utility companies submitted to the Commission and the Federal Energy Regulatory Commission (FERC) using his knowledge, skills, education, or training. Moreover, Mr. Windham adhered to standard industry practice when analyzing the data. (Pre-filed Testimony of Windham, p. 5, line 6-12). Therefore, Mr. Windham’s testimony is inadmissible as a fact witness.

III. **Mr. Windham's testimony is relevant to the issue of whether PEF utilized the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5.**

Evidence is relevant if it has any logical tendency to prove or disprove a material fact. Section 90.401, F.S. Here, the purpose of Mr. Windham's testimony is to assist the Commission in deciding whether PEF utilized the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5; therefore, it is relevant. OPC alleged in its petition that PEF failed to utilize the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5; PEF disputes this claim. In order for the Commission to make an informed and intelligent decision, one of the factors the Commission must analyze is the coal pricing for foreign and domestic coal.

Specifically, the Commission must look at the median delivered price of foreign bituminous coal to southeastern coastal utilities from 1996 to 2005 compared to the delivered price of the coal products used by PEF. Utility companies use the price of coal as an essential factor in determining the most cost effective type of coal. Mr. Windham's testimony directly relates to whether PEF failed to utilize the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5; thus, it is relevant.

IV. **Mr. Windham's testimony should not be stricken or in the alternative excluded based on impermissible hindsight information because in order to determine whether PEF utilized the most economical sources of coal for ratepayers in its Crystal River Units 4 and 5, the Commission is required to analyze the data PEF had at its disposal at the time of its purchase.**

The Florida Supreme Court and this Commission have held that the Commission can review actions to determine whether management's decisions regarding fuel procurement were prudent under the conditions and time they were made. Order No. PSC-07-0059-PCO-EI, issued January 22, 2007, in Docket No. 060658-EI, In re: Progress Energy Florida Inc.; Gulf Power

Company v. Florida Public Service Commission, 487 So. 2d 1036 (1986). Whether PEF utilized the most economical sources of coal for Crystal River Units 4 and 5 requires the Commission to review managerial decisions, which must be analyzed based on the facts PEF knew or should have know at the time of its purchases. In order to make that determination, the Commission may look at many factors PEF knew or should have known at the time. One factor that may be considered is the coal pricing for foreign and domestic coal from 1996 to 2005. For example, the Commission may review the median delivered price of foreign bituminous coal to southeastern coastal utilities from 1996 to 2005, compared to the delivered price of the coal products used by PEF, and this comparison is the basis of Mr. Windham's testimony. PEF's motion should be denied because whether the information was or was not available to its management at the time of its coal procurement decision is a question of fact at the conclusion of the proceeding. The question is not a matter of law that can be reviewed by way of a motion to strike. Moreover, Mr. Windham used the information PEF and other investor owned utility companies submitted to FERC and the Commission on a monthly and yearly basis. Thus, PEF's motion should be denied because the issue raised by PEF on whether or not the information that Mr. Windham relied upon was available to its management at the time of its coal procurement decisions is a factual determination best decided by the trier of fact.

Also, PEF alleges that its motion should be granted because the data Mr. Windham used in his testimony is "after-the-fact-information." Specifically, PEF argues that Mr. Windham did not compare the coal procurement decision made by PEF to the coal price information contemporaneously available to the company. Whether Mr. Windham compares the coal procurement decisions made by PEF to the coal prices information contemporaneously available

to PEF, goes to the weight the Commission should give his testimony, and is not grounds to strike or exclude his testimony.

Therefore, the Commission should deny PEF's motion to strike or in the alternative exclude Mr. Windham's testimony. The Commission may analyze a company's management decisions regarding fuel procurement using past data to determine whether the company's decisions were prudent at the time of procurement. The only requirement is that the Commission is limited to the information available to the company at the time of procurement. Here, Mr. Windham's testimony is based on data that was available to PEF at the time of its decisions to procure coal.

V. **PEF's motion to strike or exclude Mr. Windham's testimony as unfair or violative of PEF's due process should be denied because the Commission has the power to review the prudence of past expenditures.**

PEF's motion to strike or exclude Mr. Windham's testimony as a violation of its due process right should be denied because the Commission has the power to review the prudence of the past expenditures. Order No. PSC-07-0059-PCO-EI, issued January 22, 2007, in Docket No. 060658-EI, In re: Progress Energy Florida Inc. (holding that the Commission has the power and authority to hold an evidently proceeding to review the prudence of past expenditures). Also, the Florida Supreme Court addressed the same issue in Gulf Power Company v. Florida Public Service Commission, 487 So. 2d 1036 (Fla. 1986). In Gulf, the court held that review of past management decisions under the fuel docket does not constitute retroactive ratemaking. The court reasoned:

Fuel adjustment charges are authorized to compensate the utilities' fluctuating fuel expenses. The fuel adjustment proceeding is a continuous proceeding and operates to a utility's benefit by eliminating regulatory lag. This authorization to

collect fuel cost close to the time they are incurred should not be used to divest the commission of the jurisdiction and power to review the prudence of costs.

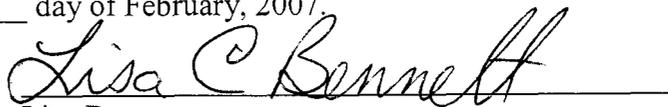
Therefore, Mr. Windham's testimony should not be stricken or excluded because he used facts that might have been available to him earlier and in his possession. As stated, the Commission has the power to review prudence of past expenditures. Mr. Windham's testimony will assist the Commission in its decision. Whether Mr. Windham made an inquiry from 1996 to 2005 into PEF's coal procurement does not bar the Commission from using his testimony to determine whether PEF's coal procurement practices were prudent. Time is not a limiting factor when reviewing prudence. Order No. 15486, issued December 23, 1985, in Docket No. 840001-EI-A, In re: Investigation into Extended Outage of Florida Power and Light Company's St. Lucie Unit. (examining the facts surrounding a decision made 16 years ago under the fuel clause), Order 12645, issued November 3, 1983, in Docket No. 8300001-EU, In re: Investigation of Fuel Adjustment Clauses of Electric Utilities. (holding that a proposal to place time limits on the Commission's jurisdiction to review prior expenditures is inappropriate).

Moreover, this issue was raised in PEF's motion to dismiss filed on August 30, 2006. The Commission denied PEF's motion holding that the Commission has the ability to review expenditures and require refunds from a utility under the facts presented at the time of PEF'S procurement of coal.

For reasons discussed above, the Commission staff requests that the prehearing officer deny PEF's request to strike or exclude Mr. Windham's testimony.

STAFF'S RESPONSE TO PROGRESS ENERGY FLORIDA, INC.'S
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Respectfully submitted this 27th day of February, 2007.

A handwritten signature in cursive script that reads "Lisa C. Bennett". The signature is written in black ink and is positioned above a horizontal line.

Lisa Bennett
Keino Young
Staff Attorney
FLORIDA PUBLIC SERVICE COMMISSION
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Telephone: (850) 413-6226

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of STAFF'S MOTION FOR
EXTENSION OF TIME TO FILE TESTIMONY. has been served by electronic and U. S. Mail
to the following this 27th day of February, 2007 :

Ausley & McMullen Law Firm
James Beasley and Lee Willis
P. O. Box 391
Tallahassee, Florida 32302

Progress Energy Florida, Inc.
John T. Burnett/R. Alexander Glenn
P. O. Box 14042,
St. Petersburg, FL 33733-4042

Florida Industrial Power Users Group
c/o John McWhirter, Jr.
McWhirter Reeves Law Firm
400 N. Tampa Street, Ste. 2450
Tampa, FL 33602

AARP
c/o Michael B. Twomey
P. O. Box 5256
Tallahassee, FL 32314-5256

Office of the Attorney General
Cecilia Bradley,
The Capitol – PL01
Tallahassee, Fl 32399-1050

Florida Power & Light Company
Bill Walker
215 South Monroe Street, Ste. 810
Tallahassee, FL 32301-1859

PCS Administration (USA), Inc.
Karin S. Torain
Skokie Boulevard, Suite 400
Northbrook, IL 60062

James W. Brew, Esquire
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, NW
Eighth Floor, West Tower
Washington, DC 20007-5201

Tampa Electric Company
Paula K. Brown
P. O. Box 111
Tampa, FL 33601-0111

McWhirter Reeves Law Firm
Tim Perry
117 S. Gadsden Street
Tallahassee, FL 32301

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Florida Retail Federation
100 East Jefferson Street
Tallahassee, FL 32301

Young Van Assenderp, P.A.
R. Scheffel Wright/John T. LaVia, III
225 South Adams Street, Suite 200
Tallahassee, FL 32301

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

R. Wade Litchfield and John T. Butler
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408-0420

Office of Public Counsel
Patricia Christensen/C. Beck/J. McGlothlin
c/o The Florida Legislature
111 West Madison Street, #812
Tallahassee, FL 32399-1400

Carlton Fields Law Firm
Mike Walls/Dianne Triplett
P. O. Box 3239
Tampa, FL 33601-3239

Federal Executive Agencies
Lt. Colonel Karen White/Capt. Damund E. Williams
AFLSA/JACL-ULT
139 Barnes Drive, Suite 1
Tyndall Air Force Base, FL 32403-5319



LISA BENNETT
KEINO YOUNG
Staff Attorney
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
(850) 413-6226