

**Marguerite McLean**

---

**From:** Russell Kent [Russell.Kent@myfloridalegal.com]  
**Sent:** Friday, September 04, 2009 4:28 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** larry.r.allen  
**Subject:** Attorney General's Motion in Limine - Dkt No. 090079

**Attachments:** motion in limine-progress.doc



**MOTIO  
E-PROG**

**Attached is the Attorney General's Motion in Limine for filing in Docket No. 090079.  
Thank you for your consideration of this matter.**

**(See attached file: motion in limine-progress.doc)**

**Please note that Florida has a broad public records law, and that all correspondence to me  
via email may be subject to disclosure.**

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Petition for increase in rates by            )  
Progress Energy Florida, Inc.                )  
\_\_\_\_\_)

Docket No. 090079-EI  
  
Filed: September 4, 2009

**ATTORNEY GENERAL'S MOTION IN LIMINE**

The Attorney General, by and through undersigned counsel, submits this motion in *limine* and states in support thereof as follows:

1. The Attorney General respectfully submits that an issue has arisen in certain recent rate hearings where the Commission requested late-filed exhibits and parties were not allowed an opportunity to cross examine the witness who prepared the exhibit or to offer testimony or exhibits in opposition thereto. In one case, the party presenting the exhibit added additional information other than that information requested by the Commission, resulting in confusion over the issues involved. By this motion, the Attorney General is seeking to prevent the possibility of such confusion at the upcoming hearing by asking the Commission to exercise its inherent authority to control the proceedings.

2. The scheduling order in this case set deadlines for parties to identify witnesses and exhibits for the hearing in this case. Such a practice is customary for these proceedings; however, the Commission has recently been allowing late-filed exhibits in contravention of the prehearing orders. The courts have previously addressed such late-filed exhibits and held that "failure to disclose the subject of witness testimony and documents that will be introduced into evidence in violation of discovery rules and court orders amounts to "trial by ambush," another way of saying a denial of due process. *See Menard v. Univ. Radiation Oncology Assocs.*, 976 So. 2d 69, 72 (Fla. 4<sup>th</sup> DCA 2008) ("Once the trial starts the lawyers are engaged in the unfolding of the evidence they have already collected. That is why there are discovery cutoffs. *All the discovery rules and the extensive efforts of parties to discover the other party's case would be for naught if one side were able to wait until after the trial started to establish key pieces of evidence such as*

DOCUMENT NUMBER-DATE  
**09260 SEP-4 8**

FPSC-COMMISSION CLERK

what occurred in this case ....” (quoting *Grau v. Branham*, 626 So. 2d 1059, 1061 (Fla. 4<sup>th</sup> DCA 1993) (emphasis added).

3. Accordingly, the Attorney General would request the entry of an order specifying that any late-filed exhibits should be limited to the information requested or approved by the Commission. The Attorney General would further request the order provide that if any late-filed exhibit is allowed, it should not be admitted as an exhibit unless and until the other parties have reviewed the exhibit, cross-examined the witness who prepared the exhibit, and had the opportunity to file testimony and exhibits in opposition to the late-filed exhibit. Indeed, section 120.569(2)(j), Florida Statutes, provides that “[a] party shall be permitted to conduct cross-examination when testimony is taken or documents are made a part of the record.”

**WHEREFORE**, for the aforesaid reasons, the Attorney General respectfully requests that the Commission grant this motion and enter an appropriate order.

**Respectfully submitted,**

**BILL McCOLLUM**  
Attorney General

s/ Cecilia Bradley  
CECILIA BRADLEY  
Senior Assistant Attorney General  
Florida Bar No. 0363790

Office of the Attorney General  
The Capitol - PL01  
Tallahassee, FL 32399-1050  
(850) 414-3300  
Fax: (850) 488-4872

**DOCKET NO. 090079-EI**  
**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **Attorney**

**General's Motion in Limine** has been furnished by electronic mail on this 4th day of September 2009, to the following: John T. Burnett  
Progress Energy Service Co., LLC  
P.O. Box 14042  
St. Petersburg, FL 33733-4042

Connissa Pease  
1550 S. Belcher Road #513  
Clearwater, FL 33764

Katherine Fleming  
Keino Young  
Caroline Klancke  
Erik Saylor  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

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

Vicki G. Kaufman  
Jon C. Moyle, Jr.  
Florida Industrial Power Users Group  
118 North Gadsden Street  
Tallahassee, FL 32301

Richard D. Melson  
705 Piedmont Drive  
Tallahassee, FL 32312

JR Kelly, Public Counsel  
Charles Rehwinkel  
Charlie Beck  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street  
Room 812  
Tallahassee, Florida 32399-1400

Robert Scheffel Wright  
John T. LaVia  
Young van Assenderp  
Florida Retail Federation  
225 South Adams Street, Suite 200  
Tallahassee, FL 32301

Kay Davoodi  
Director, Utility Rates  
c/o Naval Facilities Eng'g Comma  
1322 Patterson Avenue SE  
Washington Navy Yard, DC  
20374

Scott Boyd  
Administrative Procedures Committee  
Executive Director / General Counsel  
Holland Building, Room 120  
Tallahassee, FL 32399-1300

Joseph L. Adams  
IBEW System Council U-8  
4314 N. Suncoast Blvd.  
Crystal River, FL 34428

Audrey Van Dyke  
c/o Naval Facilities Eng'g Comma  
720 Kennon Street  
SE Building 36 R  
Washington Navy Yard, DC  
20374

J. Michael Walls  
Diane M. Tripplett  
Carlton Fields  
P.O. Box 3239  
Tampa, FL 33601-3239

James W. Brew  
F. Alvin Taylor  
PCS Phosphate – White Springs  
1025 Thomas Jefferson St. NW  
8<sup>th</sup> Floor  
Washington, DC 20007

Marco Iannella  
701 Milwaukee Ave.  
Dunedin, FL 34698

Dan Moore  
Ass'n for Fairness in Rate Making  
316 Maxwell Road, Suite 400  
Alpharetta, GA 30009

Stephanie Alexander  
Tripp Scott, P.A.  
200 West College Avenue, Suite 216  
Tallahassee, FL 32301

**/s/ Cecilia Bradley**