

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition on behalf of Citizens of	)	
the State of Florida to require	)	DOCKET NO. 060658-EI
Progress Energy Florida, Inc. to	)	
refund to customers \$143 million	)	Filed: February 20, 2007

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**PROGRESS ENERGY FLORIDA, INC.'S MOTION TO STRIKE OR,  
ALTERNATIVELY, MOTION IN LIMINE TO EXCLUDE  
THE TESTIMONY OF BERNARD WINDHAM**

Progress Energy Florida, Inc. (“PEF” or the “Company”) moves the Florida Public Service Commission (“FPSC” or the “Commission”) to strike or, alternatively, in limine to exclude, the testimony of Mr. Windham filed on February 14, 2007 (with the exhibits filed February 15, 2007 and amended on February 20, 2007). Regardless of whether Mr. Windham is offered as a fact or expert witness in this case, Mr. Windham’s testimony is legally insufficient and should be excluded as a matter of law. If offered as a fact witness, Mr. Windham’s testimony is irrelevant and immaterial to any issue in this case and is therefore unhelpful and improper. If offered as an expert witness, Mr. Windham’s testimony is also legally insufficient because Mr. Windham takes no position and renders no formal opinion beyond simply noting alleged “possibilities” that he suggests “appear” from certain data. In either scenario, the Commission is legally precluded from considering such testimony.

**BACKGROUND**

This docket was opened in August, 2006 to address OPC’s Petition to require PEF to refund customers \$143 million. The sole issue in OPC’s petition is whether PEF should have purchased an equal blend of bituminous coal and sub-bituminous coal from the 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. OPC's Petition is limited to this issue. Likewise, OPC's testimony in support of its Petition filed in October 2006 and all discovery in this case to date has been limited to this issue.

Staff filed the testimony of Bernard M. Windham on February 14, 2007 and filed exhibits to that testimony totaling 293 pages on February 15, 2007, which Staff amended on February 20, 2007. Mr. Windham's testimony raises an issue that was not raised by OPC's Petition and testimony. Mr. Windham's testimony attempts to insert an entirely new issue in this proceeding.

Mr. Windham purports to provide "basic information" on 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. See Testimony of Mr. Windham, p. 2, lines 2-6, p. 4, lines 10-20. Indeed, Mr. Windham says that PEF "possibly" could have purchased approximately 1 million tons per year of *foreign* coal for Crystal River units 4 and 5 on the assumption that no Powder River Basin coal should have been burned at CR4 and CR5. See Testimony of Mr. Windham, p. 11, lines 14-19. In sum, Mr. Windham appears to assert that PEF should have purchased more foreign coal -- not PRB coal -- than PEF did for CR4 and CR5 over the past ten to twelve years.

### **ARGUMENT**

To begin with, it is unclear to PEF whether Staff has offered Mr. Windham's testimony as a fact witness or an expert witness. Regardless of whether Mr. Windham is offered as a fact or expert witness, however, his testimony is improper and should be excluded.

actually take a position on the issue to be addressed and resolved in this proceeding. Because it has no bearing on the existing issue, the testimony must be stricken or excluded. Pursuant to Section 120.569(2)(g), Florida Statutes, the Commission must exclude “*irrelevant, immaterial, or unduly repetitious evidence*” (emphasis added). “Relevant evidence is evidence tending to prove or disprove a *material fact*.” See Florida Statutes, § 90.401 (emphasis added). The material fact at issue in this proceeding is whether PRB coal should have been used at CR4 and CR5, not whether any other kind of coal might have been used at these units instead under what “appears” to be “possibly” cheaper prices.

Furthermore, to the extent that Mr. Windham is offered as a fact witness, Mr. Windham’s apparent conclusions as to the comparable price of foreign bituminous coal to the bituminous coal PEF purchased are inappropriate. If he is a fact witness, then only his factual testimony can be considered. His testimony would therefore essentially amount to a pile of raw data compiled from FERC 423 Forms, with no testimony or evidence as to its import or significance. Such testimony is confusing and does not provide any useful information to the Commission in the resolution of this proceeding.

#### **Mr. Windham as an Expert Witness**

What Mr. Windham does in his testimony is review and analyze data, in this case coal pricing data, which is, of course, what experts do. But his opinion testimony should be stricken or excluded because it fails to meet the basic requirements for expert testimony. To be admissible, expert testimony must offer opinions based on the review and analysis of data that are useful and helpful to the trier of fact. See Fla. Stat. § 90.702 (“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 . . . may testify about it in the form of

### **Mr. Windham as a Fact Witness**

If Mr. Windham is offered as a fact witness, his testimony should be stricken or excluded because it is completely irrelevant to any issue in this case and is beyond the scope of the Petition in this docket. Simply put, the issue in this docket is whether PEF should have purchased and burned an equal blend of bituminous and PRB coals at CR4 and CR5 from 1996 to 2005. OPC's allegations in its Petition are all directed at this single issue. Mr. Windham's testimony is at best unclear as to his position on the sole issue in this proceeding. But necessarily, Mr. Windham either did not consider PRB coal at all in his assertions that foreign bituminous coal was possibly cheaper, or he evaluated the PRB coal option and concluded that PRB coal was not the most cost-effective option. If Mr. Windham did not consider PRB coal at all, then his testimony is unhelpful, irrelevant, and outside the scope of OPC's Petition in this docket. For example, assuming solely for the sake of argument that OPC's "PRB option" was the single most economical course of action for PEF, then Mr. Windham's "possibility" that foreign coal "appeared" cheaper than domestic bituminous coal is simply useless.

If Mr. Windham considered and rejected the PRB coal option for CR4 and CR5, his current testimony does nothing to advance the case as it currently stands, and would be expert opinion testimony that yields a conclusory opinion, rather than fact testimony that simply introduces factual information into the record. But even as expert testimony, as discussed below, Mr. Windham's testimony does nothing more than assert irrelevant "possibilities" while offering no helpful testimony to the Commission as to the positions of OPC and PEF on the sole issue in this proceeding.

In sum, the problem with Mr. Windham's testimony is that it offers conjecture that import coals may have been cheaper than what PEF purchased, but Mr. Windham fails to

an opinion”); Buchman v. Seaboard Coast Line R. Co., 381 So. 2d 229 (Fla. 1980) (expert testimony must assist the trier of fact in its search for the truth). To prove helpful to the fact finder the expert’s opinions must be more than mere possibilities. 3-M Corp. McGhan Medical Reports Division v. Brown, 475 So. 2d 994 (Fla. 1<sup>st</sup> DCA 1985) (error to permit expert opinion regarding the mere possibility of future medical damages); Whitten v. Erny, 152 So. 2d 510 (Fla. 2d DCA 1963) (expert testimony properly excluded where testimony was equivocal and indefinite so as to have no probative value).

Mr. Windham offers no opinions that rise above mere possibilities. He explains that his review and analysis of the FERC form and PSC schedule data “appears” to show that PEF “often” did not purchase the lowest price coal for CR4 and CR5. See Testimony of Windham, p. 4, lines 10-13; p. 11, lines 6-8. He also testifies that it was “possible” for PEF to purchase “approximately” one million tons of foreign low sulfur compliance coal a year. See Testimony of Windham, p. 11, lines 17-18. This testimony is inadequate to support an opinion that PEF acted in an unreasonable or imprudent manner in its coal procurement decisions. See, e.g. Murphy v. Sarasota Ostrich Farm, 875 So. 2d 767 (Fla. 2d DCA 2004) (expert testimony that dogs *may* have contributed to decreased ostrich production was insufficient evidence of causation to support award of damages). Indeed, Mr. Windham’s testimony is virtually impossible to respond to because it lacks any certainty at all regarding the amount and price of coal that he contends PEF should have purchased. Accordingly, for this additional reason, Mr. Windham’s testimony should be stricken or excluded from this proceeding.

Mr. Windham’s testimony should also be stricken or excluded from this proceeding because the testimony impermissibly relies on hindsight information. Everyone, including Commission Legal Staff, has agreed in this proceeding that PEF’s decisions cannot be

determined unreasonable and imprudent based on such information. Rather, PEF's fuel procurement decisions must be judged reasonable and prudent on the information known by or reasonably available to management at the time the decisions were made. See, e.g., Florida Power Corp. v. Cresse, 413 So. 2d 1187, 1189 (Fla. 1982); Florida Power Corp. v. Pub. Svc. Comm'n, 456 So. 2d 451, 452 (Fla. 1984); In re Tampa Electric Company, Order No. PSC-05-0312-FOF-EI, Docket No. 031033-EI, 2005 WL 733109 (Mar. 21, 2005); In re: Investigation into extended outage of Florida Power and Light Company's St. Lucie Unit No. 1, Order No. 15486, Docket No. 840001-EI-A, 1985 Fla. PUC Lexis 25 (Dec. 23, 1985). Mr. Windham's testimony, however, relies only on information that was not available to management at the time that PEF's coal procurement decisions were made.

Mr. Windham says he is determining "the most cost-effective option" for coal at CR4 and CR5 by comparing the "delivered price *reported to FERC* of foreign coal through a Gulf terminal by other utilities to the delivered price of domestic CAPP coal or synfuel *reported by PEF to FERC*." See Testimony of Mr. Windham, p. 6, lines 16-19. This means, for the information to be reported to FERC on the Form 423s, the coal has (1) already been solicited and procured by contract between the utility and supplier and (2) delivered by the supplier or utility. These events --- from the formal or informal solicitation for coal, to the selection of a supplier(s) and execution of a contract, to the delivery of the coal --- would have taken place over the course of weeks, months, or even years.

The information reported to FERC, then, is after-the-fact information. It provides details on the coal procurement decisions utilities have already made at various times in the past. It does not explain what future coal procurement decisions utilities can contemporaneously make based on the information available to each utility at the time those utilities must make coal

procurement decisions. One must look to the responses to requests for proposals and spot offers to determine what coal was available in what amount and at what price for each utility.

Mr. Windham does not compare the coal procurement decisions for PEF to the coal price information contemporaneously available to PEF. As a result, his testimony has no bearing on the issue of whether PEF's coal procurement decisions were reasonable and prudent. PEF's motion to strike or exclude his testimony should be granted for this additional reason.

### **Additional Arguments**

PEF's motion to strike or exclude also should be granted because Staff's testimony is based on facts fully available to and in fact in Staff's possession in each of the fuel docket proceedings beginning in 1996 without an inquiry of this nature ever being raised. Mr. Windham's testimony underscores the concerns raised by PEF in its motion to dismiss the petition in this docket and at the hearing on that motion to dismiss. If the Commission can entertain the issue raised by Mr. Windham in this proceeding, then the fuel proceedings for the past ten to twelve years have been a meaningless exercise.

Mr. Windham relies solely on coal price information in a database he created from reports PEF (and other electric utilities) submitted monthly in the fuel docket proceedings or to FERC that he obtained. See Testimony of Mr. Windham, p. 3, lines 17-24; p. 4, lines 1-7. He admits it was his job to review and analyze this information and (1) prepare discovery requests to PEF (and other utilities) for any additional information he needed and (2) make recommendations to the Commission for the fuel adjustment hearings. See Testimony of Mr. Windham, p. 1, lines 19-22. Nowhere in his testimony does he say he asked for some information from PEF in discovery in the fuel docket proceedings over the last twelve years that he did not receive but needed for his testimony in this proceeding. Everything he relies on he

had contemporaneously with each fuel docket proceeding yet this issue --- whether PEF should have procured more foreign bituminous coal than it did for CR4 and CR5 since 1996 --- was never raised with PEF or in any recommendation he made to the Commission in any prior fuel docket proceeding.

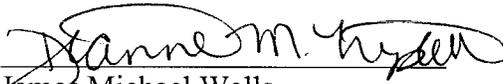
Mr. Windham's testimony underscores PEF's due process concerns raised in its motion to dismiss and at oral argument on that motion in this proceeding. His testimony is based on information PEF submitted and he had in each of the fuel proceeding dockets over the last twelve years but this issue was not raised in any of those proceedings by Mr. Windham or anyone else. Of course that is when this issue should have been raised, when the events were closer in time and recollections and documents were readily available, not twelve years later, as Mr. Windham has done. In this case, the facts that allegedly justify an inquiry have been known to Staff each year.

Mr. Windham's testimony is inconsistent with the Commission's decisions in the fuel proceedings over the past twelve years allowing PEF and the other investor-owned utilities to collect from customers hundreds of millions of dollars in fuel costs each year. Either the Staff and Commission determined at the time this information did not indicate that PEF's coal procurement decisions were unreasonable or imprudent, or the Staff and Commission allowed PEF to recover hundreds of millions of dollars in fuel costs from customers without determining that such recovery was reasonable or prudent. The Staff and Commission must have believed at the time the information in the FERC Form 423's and PSC Schedules they obtained monthly that Mr. Windham now relies on in his testimony did not indicate that PEF's coal procurement decisions were unreasonable and imprudent because they did not raise the issue Mr. Windham now raises in any of those proceedings. Indeed, Mr. Windham nowhere asserts in his testimony

that he has some new information that casts doubt on the contemporaneous fuel price information he collected from PEF and other electric utilities. He simply relies on the same coal price information he always had available to him. The Commission, therefore, should not “second guess” the implicit if not explicit determinations at the time of each fuel proceeding that PEF acted reasonably and prudently by allowing Mr. Windham’s testimony to be considered in this proceeding.

WHEREFORE, for all of the foregoing reasons, PEF requests the Commission grant its motion to strike or, alternatively, to exclude Staff’s testimony.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic and U.S. Mail this 20<sup>th</sup> day of February, 2007 to all parties of record as indicated below.

  
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