

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of coal costs for Progress Energy  
Florida's Crystal River Units 4 and 5 for 2006  
and 2007.

DOCKET NO. 070703-EI  
ORDER NO. PSC-09-0226-PCO-EI  
ISSUED: April 10, 2009

ORDER DENYING OFFICE OF PUBLIC COUNSEL'S  
MOTION TO STRIKE AND MOTION IN LIMINE

In Docket No. 060658-EI, In re: Petition on behalf of the Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund \$143 million dollars, the Commission directed Progress Energy Florida, Inc. (PEF) to file testimony in Docket No. 070001-EI (the 2007 fuel docket) regarding PEF's 2006 and 2007 coal expenditures for its Crystal River Units 4 and 5 (CR4 and CR5). The Office of Public Counsel (OPC) filed the testimony of Robert Sansom in Docket No. 070001-EI, detailing that witness's opinion of PEF's 2006 coal expenditures. Mr. Sansom was also OPC's witness in Docket No. 060658-EI.

On October 17, 2007, as part of the 2007 fuel docket, the Commission issued Order No. PSC-07-0842-FOF-EI. The Order moved the issue of PEF's 2006 and 2007 coal expenditures to this separate docket. Mr. Sansom's testimony was then administratively moved to this docket. On January 30, 2009, OPC withdrew Mr. Sansom's testimony, and on February 2, 2009, in accordance with the Prehearing Order in this docket, OPC filed the testimony of its witness, David Putman. On March 13, 2009, PEF deposed witness Putman. According to OPC, during the deposition, PEF referred to the withdrawn testimony of Mr. Sansom in an effort to compare and contrast the methodology and calculations of Mr. Sansom with the different methodology and calculations of witness Putman.

On March 16, 2009, PEF filed rebuttal testimony, including that of its witness, Sasha Weintraub. On line 2 of page 3 of witness Weintraub's testimony, he references the withdrawn testimony of prior OPC witness Robert Sansom. The rebuttal witness uses the withdrawn testimony to challenge the credibility of OPC's current witness, David Putman.

On March 24, 2009, OPC moved to strike witness Weintraub's reference to the withdrawn testimony of Mr. Sansom. Further, OPC requests that a motion in limine be granted to preclude PEF from using the testimony of witness Sansom in any manner in this proceeding. OPC states that the testimony has never been sponsored by any party, including PEF, and efforts to introduce any portion of the testimony into evidence would be inappropriate. OPC states that it is not going to sponsor the withdrawn testimony and it therefore has no status in this case. OPC argues that PEF may cross-examine witness Putman on the content of his testimony based on the merits of witness Putman's approach, but inasmuch as the withdrawn testimony is not being sponsored by any party, references to the withdrawn testimony and any effort to introduce any portion of it into evidence would be inappropriate.

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PEF opposes OPC's motion to strike and motion in limine. PEF alleges that the withdrawn testimony is relevant. PEF asserts that the Commission may exclude "irrelevant, immaterial, or unduly repetitious evidence." Section 120.569(2)(g), F.S. PEF quotes the rules of evidence, stating that "[r]elevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, F.S. PEF contends that if the evidence tends to prove or disprove a fact material to the issues in the proceeding, the evidence should not be stricken.

PEF also argues that motions in limine cannot be used to exclude relevant evidence. According to PEF, motions in limine should be narrowly construed to exclude improper evidence but not to exclude relevant evidence (citing Buy-Low Save Centers, Inc. v. Glinert, 547 So. 2d 1283, 1284 (Fla. 4<sup>th</sup> DCA, 1989)).

PEF claims that Mr. Sansom was OPC's principal witness in Docket 060658-EI on issues of coal pricing, coal transportation pricing, and coal cost effectiveness. PEF asserts that in the withdrawn testimony, Mr. Sansom states that his assignment was to "extend and implement the decision of the Commission in Docket 060658-EI to calendar year 2006." According to PEF, OPC's current witness Putman states that in performing his analysis, witness Putman is "applying the parameters of the Commission's decision in Docket No. 060658-EI, and comparing the costs of the bids submitted to PEF for delivery in calendar years 2006 and 2007." PEF argues that the two witnesses performed the same analysis regarding PEF's coal costs for calendar year 2006, but with very different results. PEF concludes that the withdrawn testimony of Robert Sansom is directly relevant, material, and probative to the claims that Mr. Putman has made in his testimony and to PEF's rebuttal testimony which challenges the conclusions of witness Putman. PEF claims that it will present the withdrawn testimony to question the credibility of witness Putman's testimony, and to support the conclusions in PEF's rebuttal testimony.

At the heart of this controversy is a statement made by an individual outside of the hearing of the tribunal. To the extent PEF is offering this testimony to prove the truth of the matters asserted by the witness, the evidence is considered hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." Section 90.801(1)(c), F.S.. While hearsay evidence cannot be used in a courtroom to prove the truth of the matter asserted (See Section 90.802, F.S.), it is admissible before an administrative tribunal such as the Public Service Commission:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Section 120.57(2)(g), F.S. PEF argues that it intends to use the withdrawn testimony to support its rebuttal testimony. To the extent PEF intends to offer the hearsay evidence to supplement or explain other evidence, it may be admissible. If the hearsay evidence is offered to prove a fact contained therein, without other supporting evidence, it may not be admissible unless PEF can demonstrate that the hearsay evidence falls within one of the exceptions to the hearsay rule. To the extent PEF intends to use the withdrawn testimony of Mr. Sansom to challenge the credibility

of OPC's witness Putman, it is not hearsay and may be used by PEF to challenge witness Putman's testimony.

As we have noted in other proceedings, the evidentiary rules for administrative hearings are liberal. (See, Order No. PSC-07-0035-PCO-EU, issued by the Prehearing Officer in Docket No. 0606035-EU, In re; Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee). We are governed by evidentiary rules found in Chapter 120, F.S.:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonable prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

Section 120.569(2)(g), F.S.. (See also Section 120.57(1)(g), F.S., referenced above, regarding the admissibility of evidence.) Therefore, hearsay is admissible in administrative proceedings and only irrelevant, immaterial or unduly repetitive evidence should be excluded. OPC's motion to strike and motion in limine does not show that the information is irrelevant, immaterial, or unduly repetitious. In its response, PEF has made a showing that the evidence appears to be relevant and material to this proceeding.

Based on the foregoing, OPC's Motion to Strike and Motion in Limine are denied. There may be need for further rulings on the admissibility of hearsay evidence during the proceeding. Those determinations will be made on a case by case basis by the presiding officer. The use of the withdrawn testimony may be the subject of further objections and parties are notified that they must be prepared to support the use of any hearsay evidence by proffering the supporting evidence or by pointing to an exception to the hearsay rule pursuant to the Florida Evidence Code.

Based on the foregoing, it is

ORDERED by Chairman Matthew M. Carter II, as Prehearing Officer, that Office of Public Counsel's Motion to Strike and Motion in Limine are denied.

By ORDER of Chairman Matthew M. Carter II, as Prehearing Officer, this 10th day of April, 2009.

  
MATTHEW M. CARTER II  
Chairman and Prehearing Officer

(SEAL)

LCB

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.