

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Progress Energy Florida, Inc.'s
Petition for Approval of Storm Cost
Recovery Clause for Extraordinary
Expenditures related to Hurricanes
Charley, Frances, Jeanne, and Ivan

Docket No. 041272-EI

Filed: March 25, 2005

**OFFICE OF PUBLIC COUNSEL'S RESPONSE IN OPPOSITION TO
PROGRESS ENERGY FLORIDA'S REQUEST FOR OFFICIAL NOTICE**

The Citizens of the State of Florida, by and through undersigned counsel with the Office of Public Counsel, hereby files their Response in Opposition to Progress Energy Florida, Inc.'s (Progress) Request for Official Notice.

1. On March 18, 2005, Progress filed its Request for Official Notice pursuant to Section 120.569(i), Florida Statutes. As part of its Request, Progress includes documents that it would be inappropriate for the Commission to take Official Notice of those documents. Specifically, these documents are as follows: 1) American Red Cross-Hurricane Season 2004 Stewardship Report; 2) Governor's Executive Orders Nos. 04-182, 04-192, 4-206, and 04-217; 3) Petition by Florida Power & Light Company to the Commission for authorization to increase the annual storm fund accrual and to establish a corresponding storm fund reserve objective, filed September 28, 2001, Docket No. 011298-EI; 4) Testimony and Exhibits of Moray Dewhurst, In re: Review of Retail Rates of Florida Power & Light Company, dated January 28, 2002, Docket No. 0001148-EI; 5) Direct Testimony of Theodore J. Kury on behalf of Publix Supermarkets, Inc., In Re:

Review of the Retail Rates of Florida Power & Light Company, filed March 4, 2002, Docket No. 001148-EI; and 6) Transcript of the Special Agenda Conference held In Re: Review of the Retail Rates of Florida Power & Light Company.

2. Section 120.569(i), Florida Statutes, states that "[w]hen official recognition is requested, the parties should be notified and given an opportunity to examine and contest the materials." In Order No. PSC-97-0915-FOF-TL, issued August 4, 1997, in Docket No. 960786-TL, the Commission referred to the evidence rule on judicial notice to determine whether it was appropriate to grant official recognition of documents as requested by a party. Specifically, the Commission found that ". . . the FCC's Order is a document for which we may, in our discretion, take official recognition pursuant to Section 90.202(5) of the Florida Evidence Code." Given the Commission use of the Florida Evidence Code on judicial notice as the appropriate guideline for determining whether official recognition should be taken, case law on judicial notice should also be considered persuasive in determining whether a document should be officially recognized. As one administrative law judge stated "[i]n view of the similarities between "judicial notice" and "official recognition," cases providing guidance regarding the appropriate use of judicial notice are useful guides in the application of official notice." 2002 WL 31125166 (Fla. Div. Admin. Hrgs.), Palamara v. Department of Business and Professional Regulation, Case No. 02-1268, Recommended Order, issued September 3, 2002.

3. As the Florida Supreme Court noted in Huff v. State, 495 So. 2d 145 (1986), "[t]he concept of judicial notice is essentially premised on notions of convenience to the court and to the parties; some facts need not be proved because the knowledge of the

facts judicially noticed is so notorious that everyone is assumed to possess it." The Court further noted that ". . . the facts to be judicially noticed must be of common notoriety, and second, court should exercise great caution when using judicial notice." The American Red Cross document should not be officially recognized by the Commission. Progress is offering this document for the truth of the facts presented within the document. While the Red Cross document contains certain facts which are notorious, such as four hurricanes hit the State of Florida, not every statement expressed within the document meets the criteria of being notorious. Essentially, this document is an informational type article for the Red Cross. This document is not of a type that falls within criteria set forth in Rule 90.202, Florida Evidence Code, of those matters which may be judicially noticed by the Courts.

4. While the Governor's Executive Orders are a type of document which may be judicially noticed pursuant to Rule 90.202 (5), Florida Evidence Code, as an official action of the executive department of the state, the particular documents Progress submitted are unsigned and not attested to. Only Executive Order No. 04-192 has the signature of the Governor, but even this document is not attested to by the Secretary of State. Without the appropriate signatures and attestations, the Commission should not grant official recognition of these Executive Orders.

5. Pursuant to Rule 90.202(5), Florida Evidence Code, the Commission may take judicial notice of the official action of the legislative and executive branches of the state government, the Petition filed by Florida Power & Light (FPL) in Docket No. 011298-EI, does not fall within that category. Nor does the document fall within the meaning of an official record of a court. To the extent it is considered part of the official file maintained

by the Commission as part of its quasi-judicial function, the document still should not be granted official notice. The Court noted in Milton v. State, 429 So. 2d 804, 805 (4th DCA 183) that “[w]hat is meant by taking judicial notice of court records? There exists a mistaken notion that this means taking judicial notice of the existence of facts asserted in every document of a court file, . . . a court *cannot* take judicial notice of *hearsay allegations* as being true, just because they are part of a court record or file. . . .(Emphasis in original)” While the Commission may, at its discretion, take official notice that a Petition was filed in that docket, it can not take official notice of content of the document for the purpose of establishing the content as facts in this proceeding.

6. Similarly, the Commission may, at its discretion, take official notice that Mr. Moray Dewhurst and Mr. Theodore J. Kury prefiled testimony in Docket No. 01148-EI, but cannot take official notice of the content of the prefiled testimony. The Florida Supreme Court in the Huff case noted that “judges may not judicially notice evidence presented before the court in another proceeding absent a stipulation from the parties.” (Citations omitted) Id. at 151. The Florida Supreme Court further noted in the Huff case citing State v. Lynch, 115 Ariz. 1, 562 P.2d 1386 (Ct. App. 1977) that “judicial notice cannot be taken of the truth of testimony received in another action.” Id. The prefiled testimony of Mr. Dewhurst and Mr. Kury was never made part of the Commission’s official record, since this matter did not proceed to hearing but was resolved by stipulation. Thus, the prefiled testimony is nothing more than unsworn, hearsay statements. In addition, it appears to be an attempt to avoid the requirements of prefiling rebuttal testimony. For all these reasons, the prefiled unsworn testimony in a previous docket should not be granted official recognition.

7. Again, the Commission may, at its discretion, take judicial notice that a Special Agenda Conference was held in the matter of In Re: Review of the Retail Rates of Florida Power & Light, however, it is not appropriate for the Commission to take judicial notice of content of the transcript to prove the truth of the matter asserted therein. As noted previously, the Florida Supreme Court in the Huff case stated that “judicial notice cannot be taken of the truth of testimony received in another action.” Id. at 151. Similarly, the Commission should not take official notice of the discussions held by the Commission during the Special Agenda of another utility regarding its stipulation in that utility’s rate proceeding. For this reason, the Commission should not grant official recognition to the Special Agenda Conference transcript in the FPL matter.

THEREFORE, the Citizens of the State of Florida requests that this Commission deny Progress’ Request for Official Recognition as set forth in the body of this Response.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Response has been furnished by U. S. Mail and Electronic mail to the following parties on this 25th day of March, 2005, to the following:

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