

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

Filed: March 27, 2009

**PROGRESS ENERGY FLORIDA'S RESPONSE IN OPPOSITION TO OPC'S MOTION
TO STRIKE AND MOTION IN LIMINE**

Progress Energy Florida ("PEF"), hereby files its response in opposition to OPC's Motion to Strike certain portions of the rebuttal testimony of Sasha Weintraub and OPC's Motion in Limine regarding any effort by PEF to refer to certain pre-filed testimony and states as follows:

Controlling Legal Standard

Motion to Strike:

Pursuant to Section 120.569(2)(g), Florida Statutes, the Commission may exclude "irrelevant, immaterial, or unduly repetitious evidence." Thus, a motion to strike must be directed at irrelevant, immaterial, or unduly repetitious evidence. See also Rule 1.140(f), Fla. R. Civ. Pro., providing that a party "may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." Cf. McWhirter, Reeves, McGlothlin, Davidson, Rief, & Bakas, P.A. v. Weiss, 704 So. 2d 214, 216 (Fla. 1998) ("A motion to strike matter as redundant, immaterial, or scandalous should only be granted if the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision."). "Relevant evidence is evidence tending to prove or disprove a material fact." See

Section 90.401, Florida Statutes. If the evidence tends to prove or disprove a fact material to the issues in the proceeding the evidence should not be stricken.

Motion in Limine:

Likewise, motions in limine cannot be used to exclude relevant evidence. Rather, motions in limine should be narrowly construed to exclude improper but not relevant evidence. See Buy-Low Save Centers, Inc. v. Glinert, 547 So. 2d 1283, 1284 (Fla. 4th DCA 1989) (holding that generally “the purpose of a motion in limine is to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial,” and reversing order granting motion in limine). Indeed, Section 120.569(2)(g) provides that irrelevant and immaterial evidence shall be excluded “but all other evidence of a type commonly relied upon by reasonably 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.” §120.569(2)(g), Fla. Stat. If the evidence tends to prove or disprove a material fact in dispute in any way helpful to the trier of fact, then, the motion in limine must be denied.

Response in Opposition

As OPC admits in its Motion to Strike/Motion in Limine, OPC filed the pre-filed testimony of Robert Sansom in Docket 070001-EI on October 1, 2007. On October 4, 2007, PEF filed a motion to spin off the issues related to the cost of fuel at Crystal River Units 4 and 5 during 2006 and 2007 into a separate docket. The Commission granted PEF’s motion in Order No. PSC-07-0842-FOF-EI, dated October 17, 2007. The Commission Clerk administratively moved the pre-filed testimony of Mr. Sansom from Docket No. 070001-EI to this docket, Docket No. 070703-EI on December 21, 2007.


Mr. Sansom, OPC's principal witness in Docket 060658 on issues of coal pricing, coal transportation pricing, and coal cost effectiveness, stated in his testimony that the assignment given to him with regard to his testimony in Docket 070001-EI was to "extend and implement the decision of the Commission in Docket 060658-EI to calendar year 2006." Sansom Testimony, Page 4, Lines 1-5 (Attached hereto as Exhibit A). In his testimony in this docket, Mr. Putman, OPC's new witness on coal pricing, coal transportation pricing, and coal cost effectiveness, states that in performing his analysis, he is "applying the parameters of the Commission's decision in Docket 060658-EI, and comparing the costs of the bids submitted to PEF for delivery in calendar years 2006 and 2007..." Putman Testimony, Page 6, Lines 3-5. Thus, one can see from the very face of the two testimonies that Mr. Sansom and Mr. Putman were asked to perform the same analysis regarding PEF's coal costs for calendar year 2006, a fact that Mr. Putman could not dispute in his deposition. See Putman Deposition, Page 18, Line 21 to Page 19, Line 2 (Attached hereto as Exhibit B).

Despite the fact that Mr. Sansom and Mr. Putman were asked to perform the same analysis for PEF's 2006 coal costs, Mr. Sansom came to the conclusion that PEF should be required to refund \$14,235,491 (including alleged So2 damages) for PEF's 2006 coal purchases, while Mr. Putman came to the conclusion that PEF should be required to refund \$28,064,770.11 (including alleged So2 damages) for PEF's 2006 coal purchases. Compare Sansom Testimony, Page 10, Lines 6-11, to Putman Testimony, Page 17, Lines 7-14; DJP-11; Putman Deposition, Page 23, Lines 6-9. When asked about the almost 100% increase in alleged damages between his testimony and Mr. Sansom's, Mr. Putman could only offer that he did not read Mr. Sansom's pre-filed testimony because he did not think it was important to do so. See Putman Deposition, Page 17, Lines 8-21; Page 26, Lines 2-5.

In its instant motion, OPC contends that it is inappropriate for PEF to enter into evidence, ask cross-examination on, or even mention Mr. Sansom's pre-filed testimony because that testimony was withdrawn and replaced with Mr. Putman's testimony. While it is understandable that OPC would not want the Commission to hear and consider the fact that two of OPC's retained experts have come to dramatically different conclusions while performing the same analysis, such a desire does not constitute proper legal grounds to strike portions of PEF's testimony or to preclude PEF from challenging Mr. Putman's credibility in cross-examination. To the contrary, such evidence is directly relevant, material, and probative to the claims that Mr. Putman has made in his testimony and to PEF's rebuttal testimony which outlines the mistakes and errors that Mr. Putman has made in his analysis. See Putman Deposition, Page 25, Lines 2-11; Page 27, Lines 2-17.

In summary, PEF has the right to present the Commission with evidence that draws into question the credibility of Mr. Putman's testimony, as well as the right to present evidence that supports the conclusions in PEF's rebuttal testimony, and the evidence that OPC's motion seeks to exclude does both of these things. Therefore, the Commission should be provided the opportunity to hear this evidence and give it whatever weight the Commission deems appropriate, and OPC's Motion in Limine and Motion to Strike should be denied.

WHEREFORE, based on the foregoing, Progress Energy Florida respectfully requests that OPC's Motion in Limine and Motion to Strike be Denied.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Progress Energy Florida, Inc.'s Response in Opposition to OPC's Motion to Strike and Motion in Limine has been furnished electronically and by U.S. Mail to the following this 27th day of March, 2009.



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