

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in rates by Progress
Energy Florida, Inc.

DOCKET NO. 090079-EI
ORDER NO. PSC-09-0413-PCO-EI
ISSUED: June 10, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER SUSPENDING PROPOSED FINAL RATES
AND APPROVING INTERIM RATES

BY THE COMMISSION:

BACKGROUND

This proceeding commenced on March 20, 2009, with the filing of a petition for a permanent rate increase by Progress Energy Florida, Inc. (PEF or Company). The Company is engaged in business as a public utility providing electric service as defined in Section 366.02, Florida Statutes (F.S.), and is subject to the jurisdiction of this Commission. PEF's service area comprises approximately 20,000 square miles in 35 of Florida's counties. PEF serves more than 1.6 million retail customers.

PEF requested an increase in its retail rates and charges to generate \$499,997,000 in additional gross annual revenues. This increase would allow the Company to earn an overall rate of return of 9.21 percent or a 12.54 percent return on equity (range 11.54 percent to 13.54 percent). The Company based its request on a projected test year ending December 31, 2010. PEF stated that this test year is the appropriate period to be utilized because it represents the conditions to be faced by the Company, and is representative of the customer base, investment requirements, and overall cost of service to be realized for the period when the new rates will be in effect.

PEF has also requested an interim rate increase in its retail rates and charges to generate \$13,078,000 in additional gross annual revenues. This increase would allow the Company to earn an overall rate of return of 7.84 percent or a 10.00 percent return on equity. The Company based its interim request on a historical test year ended December 31, 2008.

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FPSC-COMMISSION CLERK

In PEF's most recent base rate proceeding in Docket No. 050078-EI,¹ we approved a stipulation and settlement agreement (Stipulation). The Stipulation provides that retail base rates will not increase during the term of the Stipulation except for the recovery of the revenue requirements associated with certain power plants that go into service during the term of the agreement. Essentially, the Stipulation terminates on December 31, 2009.

On April 3, 2009, the Office of Public Counsel (OPC), the Florida Industrial Power Users Group (FIPUG), the Attorney General's Office, The Florida Retail Federation (FRF), and PCS Phosphate (collectively, Intervenor) filed a joint consolidated response, opposing PEF's request for interim rate relief, petition related to accounting treatment for pension and storm hardening expenses and petition for limited proceeding to include the Bartow Repowering Project in base rates. On April 8, 2009, the parties and staff met to discuss the Intervenor's joint consolidated response. At the meeting, our staff noted that while a response to a response is not normally contemplated by our rules, it might be helpful for PEF to file some additional clarifying comments regarding the Intervenor's response. The Intervenor did not object to our staff's request at that time, nor have they filed an objection to PEF's response. PEF filed a response to the joint intervenors consolidated response on April 15, 2009.

This order addresses the interim rate increase request and the suspension of the requested permanent rate increase. We must take action to suspend the permanent rates and act on the interim request within 60 days of the filing, which is on or before May 19, 2009. We have jurisdiction over this request for a rate increase and interim rate increase under Sections 366.06 and 366.071, F.S.

SUSPENSION OF RATES

PEF filed its petition, testimony, and MFRs on March 20, 2009. The Company has requested a total permanent base rate increase of \$499,997,000 based on a projected test year ending December 31, 2010.

Historically, we have suspended the requested permanent rate schedules in order to adequately and thoroughly examine the basis for the new rates. The suspension of the rate increase is authorized by Section 366.06(3), F.S., which provides:

Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent.

We find that the requested permanent rate schedules shall be suspended to allow our staff and any intervenors sufficient time to adequately investigate whether the request for permanent rate relief is appropriate.

¹ Order No. PSC-05-0945-S-EI, issued September 28, 2005, in Docket No. 050078-EI, In re: Petition for rate increase by Progress Energy Florida, Inc.

STIPULATION

Joint Intervenors' Consolidated Response

On April 3, 2009, the Intervenors filed a joint consolidated response opposing PEF's request for an interim rate increase. The Intervenors assert that the 2005 Stipulation precludes PEF from requesting interim rates during the period of the term of the Stipulation. The Intervenors argue that the Stipulation and order approving the Stipulation do not contemplate an interim rate increase being granted, and there is no express or implied language within the Stipulation that permits interim rates.

PEF's Response to Joint Intervenors' Consolidated Response²

On April 15, 2009, PEF filed its response to the Intervenors' consolidated response. PEF asserts that Section 366.071(1), F.S., provides that we may authorize the collection of interim rates during the pendency of a petition for permanent rate increase. Moreover, the Stipulation between PEF and the Intervenors does not expressly prohibit PEF's request for an interim rate increase, unlike the 2002 Stipulation. PEF asserts that when the parties negotiated the Stipulation, they eliminated the interim rate increase prohibition, while retaining the interim rate decrease prohibition. In so doing, the parties expressed their intent not to preclude PEF from seeking an interim rate increase during the Stipulation period.

2005 Stipulation

On September 1, 2005, the parties entered into the Stipulation. On September 28, 2005, in Order No. PSC-05-0945-S-EI, issued in Docket No. 050078-EI, we approved the Stipulation. For ease of reference, the relevant portions of paragraphs 4, 7, and 14 of the 2005 Stipulation are quoted below:

4. No Party to this Agreement will request, support, or seek to impose a change in the application of any provision hereof . . . [and] neither seek nor support any reduction in PEF's base rates and charges, *including interim rate decreases*, that would take effect prior to the first billing cycle for January 2010 . . . unless such reduction is requested by PEF. PEF may not petition for an increase in base rates and charges that would take effect prior to the first billing cycle for January 2010 . . . except as otherwise provided for in Sections 7 [Earning falling below 10 percent] and 10 [Storm Cost Recovery]³ of this Agreement. . . .

...

7. If PEF's retail base rate earnings fall below a 10 [percent] return on equity as reported on a Commission adjusted or pro-forma basis on a PEF monthly

² Our rules do not contemplate a response to a response; however, a response was requested at the April 8, 2009 informal meeting, which all parties attended. No objection has been filed to PEF's response.

³ Section 10 of the Stipulation pertains to Storm Cost Recovery.

earnings surveillance report during the term of the Agreement, PEF may petition the Commission to amend its base rates notwithstanding the provisions of Section 4, either as a general rate proceeding or as a limited proceeding under Section 366.076, F.S. The Parties to this Agreement are not precluded from participating in such a proceeding, and, in the event PEF petitions to initiate a limited proceeding under this Section, any Party may petition to initiate any proceeding otherwise permitted by Florida law. . . .

...

14. Effective on the Implementation Date, PEF will not have an authorized return on equity range for the purpose of addressing earnings levels, and the revenue sharing mechanism herein described will be the appropriate and exclusive mechanism to address earnings levels. However, for purposes other than reporting or assessing earnings, such as cost recovery clauses and Allowance for Funds Used During Construction (“AFUDC”), PEF will use 11.75 [percent] as its authorized return on equity percentage in such cost recovery clauses. . . .

(emphasis added)

Section 4 of the Stipulation provides that the Intervenors will not seek nor support any reduction in PEF’s base rates and charges, including interim rate decreases, that would take effect prior to the first billing cycle for January 2010. Section 4 further provides that PEF may not petition for an increase in base rates that would take effect prior to the first billing cycle for January 2010. While Section 4 explicitly prohibits the Intervenors from seeking a rate decrease, including an interim rate decrease, Section 4 does not explicitly prohibit PEF from seeking an interim rate increase. Thus, we find that Section 4 does not limit PEF’s ability to seek an interim rate increase in this proceeding.

Moreover, in 2002, PEF (then Florida Power Corporation) and the parties entered into a Stipulation.⁴ In pertinent part, the 2002 Stipulation provides:

4. No Stipulating Party will request, support, or seek to impose a change in the application of any provision hereof. The Stipulating Parties other than FPC will neither seek nor support any additional reduction in FPC’s base rates and charges, including interim rate decreases, that would take effect prior to December 31, 2005[,] unless such reduction is initiated by FPC. FPC will not petition for an increase in its base rates and charges, including interim rate increases, that would take effect prior to December 31, 2005.

⁴ Order No. PSC-02-0655-AS-EI, issued May 12, 2002, in Docket No. 000824-EI, In re: Review of Florida Power Corporation’s earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light. We note, that at the time of the 2002 Stipulation, PEF was known as the Florida Power Corporation, or FPC.

Clearly, the 2002 Stipulation expressly prohibited PEF from seeking an increase in base rates and charges, including interim rate increases. The 2005 Stipulation does not contain this express prohibition nor a similar proviso prohibiting PEF from requesting an interim rate increase during the term of the Stipulation. We believe that exclusion of this provision from the 2005 Stipulation is evidence that the parties intended to omit it in a proceeding such as this.⁵ Moreover, by comparing the two Stipulations, it is clear that the parties intended to omit the proviso prohibiting PEF from requesting an interim rate increase from the 2005 Stipulation.⁶ Therefore, we find that the Stipulation contemplates PEF's request for an interim rate increase and that such a request is not prohibited by the Stipulation.

PRIMA FACIE ENTITLEMENT FOR INTERIM RELIEF

Joint Intervenors' Consolidated Response

The Intervenors are opposed to PEF's request for interim relief. The Intervenors contend that the revenue sharing agreement contained in the Stipulation specifically excluded the setting of an authorized ROE for PEF. The 10 percent figure in paragraph 7 of the Stipulation serves only as a "trigger," authorizing PEF to seek a change in its base rates when its achieved ROE falls below that level; thus, it is not a minimum authorized ROE. The Intervenors argue that according to Section 366.071, F.S., PEF must have a previously authorized ROE in order to receive interim rates. Because it has no minimum authorized ROE, the Intervenors contend that PEF cannot make a prima facie case for requesting an interim rate increase. Moreover, the Intervenors assert that the statute requires that the interim rates formula be followed exactly, and does not provide any exceptions. Therefore, the Intervenors contend that PEF's request for an interim rate increase should be denied.

PEF's Response to Joint Intervenors' Consolidated Response

PEF asserts that while the Stipulation does not specifically provide PEF an authorized ROE, the Stipulation does provide that if PEF's earnings fall below 10 percent, then PEF may petition for a permanent rate increase. Furthermore, PEF asserts that while the Stipulation is silent on the minimum authorized ROE, the 10 percent threshold, triggering the right to petition for rate relief, should suffice as proxy for the minimum range of ROE.

PEF contends that Section 366.071(5)(b)(3), F.S., provides that the authorized ROE for purposes of interim rates may be established by voluntary stipulation approved by us. As such, PEF argues that while the Stipulation does not establish a ROE, the Stipulation establishes 10

⁵ See Azalea Park Utilities, Inc. v. Knox-Florida Development Corp., 127 So. 2d 121 (Fla. 2d DCA 1961) ("The absence of a provision from a contract is evidence of an intention to exclude it rather than of an intention to include it.")

⁶ See Jacobs v. Petrino, 351 So. 2d 1036, 1039 (Fla. 4th DCA 1976) (quoting Gulf Cities Gas Corporation v. Tangelo Park Service Company, 253 So. 2d 744 (Fla. 4th DCA 1971) ("Where a contract is simply silent as to a particular matter, that is, its language neither expressly nor by reasonable implication indicates that the parties intended to contract with respect to the matter, the court should not, under the guise of construction, impose contractual rights and duties on the parties which they themselves omitted."))

percent as the minimum required for requesting rate relief. Alternatively, PEF states that Section 366.071(5)(b)(3), F.S., provides that the authorized ROE for purposes of interim rates may be established by the utility's most recent rate case where we set ROE, which for PEF was in 1992.⁷ Based on the 1992 rate case, PEF asserts that the minimum authorized ROE would be 11 percent, and as such, PEF could have requested a higher ROE. In this case, PEF is seeking 10 percent; thus, PEF contends that we should grant interim rates in that amount.

Interim Rate Statute

Section 366.071(1), F.S., provides that we may authorize the collection of interim rates until the effective date of the final order. Section 366.071(1), F.S., further provides that we may authorize such interim rates when a public utility establishes a prima facie entitlement to interim relief. The provision of interim rates under the statute is intended to be an "expedited" process by which an utility obtains immediate financial relief during the pendency of a rate proceeding.⁸ Additionally, authorized interim rates are subject to refund with interest, thereby protecting the customers from harm.

Section 366.071(1), F.S., states that ". . . [t]o establish a prima facie entitlement for interim relief, the commission, the petitioning party, or the public utility shall demonstrate that the public utility is earning outside the range of reasonableness on rate of return calculated in accordance with subsection (5)." Thus, Section 366.071(1), F.S., contemplates that a public utility may seek interim rate relief if the utility is earning outside the range of reasonableness.

Pursuant to Section 7 of the Stipulation, the parties agreed that the Company may seek to amend its base rates in the event that PEF's retail base rate earnings fall below a 10 percent return on equity. The 10 percent threshold represents a level in which rates could be deemed to no longer be fair, just, and reasonable, and outside the range of reasonableness contemplated by Section 366.071(1), F.S. PEF has prefiled testimony and documentation which we believe makes a prima facie showing that PEF is earning below the 10 percent threshold. Thus, we find that PEF has established a prima facie entitlement to interim rate relief pursuant to Section 366.071(1), F.S.

Furthermore, Section 366.071(5)(a), F.S., states that ". . . the commission shall determine the revenue deficiency or excess by calculating the difference between the achieved rate of return of a public utility and its required rate of return applied to an average investment rate base or an end-of-period investment rate base." Pursuant to Section 366.071(5)(b)2., F.S., the required rate of return is calculated, in part, by using the last authorized rate of return on equity of the public utility. Pursuant to Section 366.071(5)(b)3., F.S., the utility's last authorized rate of return on equity is "the minimum of the range of the last authorized rate of return on equity established in the most recent individual rate proceeding of the public utility. . . ." Section 366.071(5)(b)3.,

⁷ Order No. PSC-92-1197-FOF-EI, issued October 22, 1992, in Docket No. 910890-EI, In Re: Petition for a rate increase by Florida Power Corporation.

⁸ See Order No. PSC-04-0721-PCO-GU, issued July 26, 2004, Docket No. 040216-GU, In re: Application for rate increase by Florida Public Utilities Company (citing Citizens v. Public Service Commission, 435 So. 2d 784, 786 (Fla. 1983); Citizens v. Mayo, 333 So. 2d 1, 5 (Fla. 1976)).

F.S., further provides that “[t]he last authorized return on equity for purposes of this subsection shall be established only: in the most recent rate case of the utility; in a limited scope proceeding for the individual utility; or by *voluntary stipulation* of the utility approved by the commission.” (emphasis supplied).

According to the plain language of Section 366.071(5)(b)3., F.S., PEF may satisfy the authorized ROE requirement in one of three ways. In this case, PEF entered into a voluntary stipulation which we approved and which we believe provides a proxy for an authorized ROE for purposes of calculating revenue requirements and determining whether PEF is earning outside the range of reasonableness contemplated by Section 366.071(1), F.S. Therefore, based on the analysis above, we find that PEF has satisfied the requirements of Section 366.071(5), F.S., allowing us to calculate PEF’s revenue deficiency. Moreover, based on that analysis, it appears that PEF is earning outside the range of reasonableness contemplated by Section 366.071(1), F.S.

It is well settled that a public utility is entitled to an opportunity to earn a reasonable or fair rate of return on its capital. See *United Tel. Co. of Florida v. Mann*, 403 So.2d 962, 966 (Fla. 1981). In approving the 2005 Stipulation, we clarified that, while the Stipulation did not diminish our “ongoing authority and obligation to ensure fair, just, and reasonable rates,” we would give “great weight and deference to settlements, and enforce[e] them in the spirit in which they were reached by the parties.” Order No. PSC-08-0945-S-EI, at 6-7. In keeping with the our “ongoing authority and obligation to ensure fair, just, and reasonable rates,” we find that PEF is earning outside the range of reasonableness contemplated by Section 366.071(1), F.S.

As previously discussed, the 2005 Stipulation does not prohibit PEF from requesting interim rate relief. Under Section 14 of the Stipulation, PEF does not have an authorized return on equity range for the purpose of addressing earnings levels because the revenue sharing mechanism, detailed in the Stipulation, was designed to be the appropriate and exclusive mechanism to address earnings levels.⁹ As also discussed, the Intervenor contend that PEF has no established ROE; thus, PEF cannot request interim rates. However, this argument, taken to its logical conclusion, would pose that there are no circumstances under the 2005 Stipulation under which PEF could request interim rate relief. This argument is clearly inconsistent with Section 7 of the Stipulation, which specifically contemplates interim relief may be available to PEF under the circumstances described in that section. If the Stipulation allows PEF to seek an interim increase, then this provision was not meant to preclude PEF from being able to make a prima facie case for requesting interim rates under the statute.

In this case, the 2005 Stipulation set the threshold for requesting a base rate increase to be when retail earnings fall below 10 percent. Pursuant to the Stipulation, PEF has made a prima facie case that its retail earnings have fallen below the 10 percent threshold, and may therefore seek a base rate increase. In PEF’s petition for rate increase, PEF used the threshold (earnings below 10 percent) as the lower limit for its authorized ROE when calculating interim rates.

⁹ Order No. PSC-05-0945-S-EI, at 21-22.

In Order No. PSC-05-0945-S-EI, we approved the Stipulation specifying that it established rates that are fair, just, and reasonable. Both the Intervenor as well as the Company agree that Section 7 of the Stipulation provides that the Company may seek to amend its base rates in the event that PEF's retail base rate earnings fall below the 10 percent threshold, notwithstanding Section 4. Therefore, we find that the 10 percent threshold adopted by the parties in the Stipulation represents a level below which rates are no longer fair, just, and reasonable thereby entitling PEF to petition us to amend its base rates. PEF has presented prefiled testimony and documentation supporting that it is earning outside the 10 percent threshold. Accordingly we find that PEF has shown a prima facie entitlement for interim relief and is entitled to the proposed interim increase.

INTERIM TEST YEAR RATE BASE

In its filing, the Company proposed an interim test year thirteen month average rate base of \$5,098,765,000 for the period ended December 31, 2008. We have reviewed the rate base adjustments made in the current interim filing for consistency with the Stipulation approved in the Company's last rate case proceeding.¹⁰ Based on our preliminary review, it appears that PEF has made the applicable and appropriate adjustments that are consistent with the Stipulation. Accordingly, we find that the appropriate amount of rate base for the 2008 interim test year is \$5,098,765,000. The calculation is shown on Attachment A, appended hereto and incorporated herein by reference.

It should be noted that 2008 is the historical test year that was utilized in part to develop the 2010 projected test year for the requested permanent base rate increase. The 2008 historical test year data is currently being audited as part of the normal ratemaking review process in this docket.

ROE AND OVERALL COST OF CAPITAL

For purposes of its interim rate request, PEF used an overall cost of capital of 7.84 percent based on a return on equity (ROE) of 10.00 percent and the capital structure for the historical test year ended December 31, 2008. According to PEF, both the ROE and the adjustments recognized in the capital structure are consistent with the Stipulation approved in 2005 by Order No. PSC-05-0945-S-EI.¹¹ Section 7 of the Stipulation states that if PEF's retail base rate earnings fall below a 10% return on equity the Company may petition the Commission to amend its base rates notwithstanding the provisions of Section 4. Based on its reading of the Stipulation, PEF believes this language entitles the Company to request an interim rate increase to bring the Company's earnings up to an ROE of 10.00 percent.

As discussed in the Joint Intervenor's consolidated response to PEF's request for interim relief, the "Intervenor vigorously object to this interpretation as contrary to the plain meaning of

¹⁰ Order No. PSC-05-0945-S-EI, issued September 28, 2005, in Docket No. 050078-EI, In re: Petition for rate increase by Progress Energy Florida, Inc.

¹¹ Order No. PSC-05-0945-S-EI, Issued September 28, 2005, in Docket No. 050078-EI, In re: Petition for rate increase by Progress Energy Florida, Inc.

the Stipulation and the revenue sharing mechanism that it established.” Pursuant to Section 366.071(2)(a), F.S., the appropriate ROE for purposes of determining an interim rate increase is the minimum of the Company’s currently authorized ROE range. However, at the present time, PEF does not have an authorized ROE range. In pertinent part, Section 14 of the 2005 Stipulation states: “effective on the Implementation Date, PEF will not have an authorized return on equity range for the purpose of addressing earnings levels, and the revenue sharing mechanism herein described will be the appropriate and exclusive mechanism to address earnings levels.” Because PEF does not have an authorized ROE range and therefore no “last authorized minimum return on equity,” the Intervenor contend the proposed relief is not available to PEF and the Company’s request should be denied.

We disagree with the Intervenor’s arguments and, for the reasons previously discussed, find that interim rates may be granted under the terms of the Stipulation and the interim statute. Accordingly, we find that the capital structure for the historical test year ended December 31, 2008, and an ROE of 10.00 percent results in an overall cost of capital of 7.84 percent. Attachment B, appended hereto and incorporated herein by reference, details the calculation of the Company’s overall cost of capital.

NET OPERATING INCOME

The proposed interim test year net operating income of \$391,486,000 is the twelve month amount for the year ended December 31, 2008. We have reviewed the net operating income adjustments made in the current interim filing for consistency with the Stipulation approved in the Company’s last rate case proceeding.¹² Based on our preliminary review, it appears that PEF has made the applicable and appropriate adjustments that are consistent with the Stipulation. As such, we find that the appropriate amount of net operating income for the 2008 interim test year is \$391,486,000. The calculation is shown on Attachment A, appended hereto and incorporated herein by reference.

It should be noted that 2008 is the historical test year that was utilized in part to develop the 2010 projected test year for the requested permanent base rate increase. The 2008 historical test year data is currently being audited as part of the normal ratemaking review process in this docket.

NET OPERATING INCOME MULTIPLIER

On MFR Schedule G-18, the Company calculated a net operating income multiplier of 1.6343 using a 35 percent federal income tax rate and a 5.5 percent state income tax rate. Additionally, the Company applied a .072 percent factor for regulatory assessment fees. We have reviewed the Company’s calculation of the net operating income multiplier and are not proposing any adjustments. Therefore, we find that the appropriate net operating income multiplier is 1.6343. The calculation is shown below.

¹² Order No. PSC-05-0945-S-EI, issued September 28, 2005, in Docket No. 050078-EI, In re: Petition for rate increase by Progress Energy Florida, Inc.

<u>Line</u>	<u>Description</u>	
1	Revenue Requirement	100.000%
2	Gross Receipts Tax	0.000%
3	Regulatory Assessment Fee	(0.072)%
4	Bad Debt Rate	<u>(0.313)%</u>
5	Net Before Income Taxes	99.615%
6	Combined State/Federal Income Tax @ 38.575%	<u>(38.426)%</u>
7	Revenue Expansion Factor	<u>61.189%</u>
8	Net Operating Income Multiplier (100/61.189)	<u>1.6343</u>

INTERIM RATES

PEF requested interim rate relief of \$13,078,000 for the test year ended December 31, 2009. This would allow the Company to earn an overall rate of return of 7.84 percent and the minimum return on equity of 10.00 percent. We find that the appropriate interim revenue increase for the 2008 interim test year is \$13,078,000.

After a determination of the permanent rate increase has been made, the interim rate increase will be reviewed to determine if any portion should be refunded to the ratepayers.

	<u>(000)</u>
Jurisdictional Adjusted Rate Base	\$5,098,765
Adjusted Overall Rate of Return	x <u>7.84%</u>
Jurisdictional Adjusted Revenue Requirement	\$399,488
Jurisdictional Adjusted Net Operating Income	<u>(391,486)</u>
Income Deficiency/(Excess)	\$8,002
Net Operating Income Multiplier	x <u>1.6343</u>
Interim Revenue Increase/(Decrease)	\$13,078
Annualized Base Rate Revenues	--: <u>1,438,378</u>
Percentage Increase	<u>0.91%</u>

PERCENTAGE INCREASE FACTOR

According to Rule 25-6.0435(2), F.A.C., the percentage increase factor is applied uniformly to all existing base rates and charges to derive the interim base rates and charges. PEF presented two percentage increase factor calculations in its interim rate relief MFR Schedule G-20. The first calculation uses annualized 2008 base revenues to arrive at a percentage increase factor of 0.91 percent. In addition, PEF provided a calculation based on base revenues for the period July through December 2008. In other words, PEF spread the \$13 million interim revenue increase over a 6-month period instead of a 12-month period. That calculation yields a percentage increase factor of 1.70 percent, which is the percentage increase factor for which PEF seeks approval.

In his prefiled testimony, PEF witness Toomey stated that the 1.70 percent increase was calculated in accordance with Section 366.071(5), F.S., and represents the additional revenues required to achieve a 10 percent return on equity for the calendar year 2008. We disagree with PEF's assertion that the statute prescribes how the percentage increase factor is determined. Instead, the statute prescribes how the revenue deficiency is calculated. The purpose of interim is to provide rate relief during the pendency of a rate case. Interim is not a method for the recovery of past revenue deficiencies as implied by PEF's request.

Rule 25-6.0436(2), F.A.C., states that the requested interim increase in base revenues shall be divided by interim test year base rate revenues to derive a percentage increase factor. The interim test year is 2008. It has been our practice to calculate the percentage increase factor based on annual base revenues. We last set interim rates in the Florida Public Utilities Company (FPUC) 2007 rate case.¹³ In that case, the calculation of the percentage increase factor was based on 2006 base revenues in the same manner recommended here. PEF provided no evidence that we in the past deviated from our own rule requiring the use of annual base revenues.

PEF witness Toomey attached PEF's proposed tariff sheets to his testimony filed in Docket No. 090144-EI to reflect both the 1.70 percent increase requested in this docket and the Bartow Repowering project increase factor requested in Docket No. 090144-EI.

Using a 0.91 percent increase factor will raise the 1,000 kWh residential bill by \$0.41, while using a 1.70 percent increase factor as proposed by PEF will raise the 1,000 kWh residential bill by \$0.77. We find that the appropriate percentage increase factor is 0.91 percent. Accordingly, PEF shall file revised tariff sheets to reflect our decision herein.

INTERIM REVENUE INCREASE AMONG RATE CLASSES

Rule 25-6.0435, F.A.C., requires that any percentage increase factor be applied uniformly to all existing base rates and charges to derive interim base rates and charges. In its MFRs, Schedule G-22, PEF shows present rates and proposed interim rates for all rate classes. We note

¹³ See Order No. PSC-07-0897-PCO-EI, issued November 5, 2007, in Docket No. 070304-EI, In re: Petition for rate increase by Florida Public Utilities Company.

that on MFR Schedule G-22, PEF utilized the 0.91 percent increase factor approved herein to calculate the annualized revenue requirements that PEF used in its proposed tariffs.

PEF requested that the interim rates go into effect with the first billing cycle in July 2009. The Bartow Repowering increase, if approved in Docket No. 090144-EI, would also go in effect with the first billing cycle in July 2009. The Company shall give notice to its customers of the interim increase commencing with the June 2009 bills to coincide with the notice for the Bartow Repowering project. A copy of the notice shall be submitted to our staff for approval prior to its issuance.

SECURITY TO GUARANTEE INTERIM INCREASE

PEF has requested that all funds collected subject to refund be secured by a corporate undertaking. The criteria for a corporate undertaking include sufficient liquidity, ownership equity, profitability, and interest coverage to guarantee any potential refund. We reviewed the financial statements to determine if PEF can support a corporate undertaking for a portion of the total amount of its interim rate increase of \$13,078,000. Based on an estimated six-month collection period of interim rates for PEF, we determined the maximum amount of revenues that may need to be protected is \$6,539,000. PEF's 2006, 2007, and 2008 financial statements were used to determine the financial condition of the Company. This analysis shows PEF has experienced a decline in its equity ratio in 2008, but the 42 percent equity ratio is still sufficient. The equity balance, while declining on a relative basis, is still significantly greater than the amount under consideration for a corporate undertaking. In addition, net income has been on average 53 times greater than the requested corporate undertaking amount. PEF's financial performance has demonstrated adequate levels of profitability, liquidity, and interest coverage to offset the decline in the equity ratio.

We find that PEF has adequate resources to support a corporate undertaking in the amount requested. Based on this analysis, a corporate undertaking of \$6,539,000 is acceptable. This brief financial analysis is only appropriate for deciding if the Company can support a corporate undertaking in the amount proposed and should not be considered a finding regarding our position on other issues in this proceeding.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Progress Energy Florida, Inc.'s requested permanent rate increase is suspended pending further review. It is further

ORDERED that Progress Energy Florida, Inc.'s request for interim rates is granted as set forth in the body of this Order. It is further

ORDERED that all matters contained in the schedules and attachments to this Order are incorporated herein by reference. It is further

ORDERED that Progress Energy Florida, Inc's request for an interim rate increase is appropriate and such a request is not prohibited by Order No. PSC-05-0945-S-EI. It is further

ORDERED that the interim revenues shall be collected subject to refund with interest. It is further

ORDERED that each finding in the body of this Order is hereby approved in every respect. It is further

ORDERED that the appropriate percentage increase factor is 0.91 percent. It is further

ORDERED that Progress Energy Florida, Inc. shall file revised tariff sheets to reflect our decision herein. It is further

ORDERED that Progress Energy Florida, Inc. shall file a corporate undertaking in the amount of \$6,539,000 to guarantee any potential refunds of revenues collected under interim conditions. It is further

ORDERED that this docket shall remain open pending our final action on Progress Energy Florida, Inc.'s requested rate increase.

By ORDER of the Florida Public Service Commission this 10th day of June, 2009.

ANN COLE
Commission Clerk

By: Dorothy E. Menasco
Dorothy E. Menasco
Chief Deputy Commission Clerk

(SEAL)

KEF

DISSENT BY: COMMISSIONER ARGENZIANO

The majority's decision on these items, especially that permitting interim rates, is hugely in error.

The importance of the financial health of this state's regulated utilities is a given. But in their determination to grant additional profits to a company, on the backs of struggling ratepayers, the majority contorts the plain meaning of the stipulation/settlement agreement (which I will refer to as a contract, in the interest of avoiding a nuance which does not exist) beyond all recognition.

The facts here are very simple: Progress entered into a contract, in lieu of a Commission decision, to complete its last base rate case. All the parties to that contract are bound by its terms. Had any of the parties not believed the contract to be to their benefit, they could have chosen to complete the rate case and allowed this Commission to discharge its statutory duty to determine just, fair, and reasonable rates. No party chose to do that.

Section 7 of the contract states that if Progress's return on equity ("ROE") falls below 10%, it may petition for rate relief. This is what the company has done, and its petition is scheduled for decision in late November with "rate relief" beginning in January, 2010.¹⁴

Section 14 of the contract, however, states that Progress shall have no return on equity, except for certain limited purposes. Interim rates are not one of the enumerated purposes. Yet, in order to ensure Progress maximum profits in advance of January 2010, staff recommends, and the majority accepts, that "no return on equity" actually means, "no return on equity for overearnings purposes but a return on equity to ensure a minimum of 10% AT ALL TIMES."

To support this, staff and the majority turn a basic principle of contract law, that which is not specifically included is presumed to be intentionally omitted (*See, Paddock v. Bay Concrete Indus.*, 154 So. 2d 313 (Fla. 1963), into "that which is not specifically included is ambiguous, and therefore we are entitled to interpret and re-write the contract."¹⁵ This mis-application of contract law leads not only to poor public policy generally, but also denies the ratepayers the benefit of the bargain for which they contracted in the instant case. Additionally, even in the absence of the exclusionary contract construction principle, the contract, with the statutory relief available to the utility, is perfectly reconcilable as written. (*See, Azalea Park Utilities, Inc. v. Knox-Florida Development Corp.* 127 So.2d 121 (Fla.App.2nd.Dist. 1961)).

The statute providing for interim rates (Section 366.071, F.S.), I note almost as an aside, establishes certain hoops through which the utility must jump to be entitled to rate relief. One of these hoops is a previously established ROE which, by agreement of the parties, does not even

¹⁴ And with the recent decisions of the majority, one can assume they will receive most of not all of what they request.

¹⁵ This would seem to go against the several hundred years of judicial precedents which are precisely intended to prevent those much-maligned "activist judges" from taking such actions.

exist. But the majority, empowered to mis-interpret contract law, now exhibits no hesitation in re-making statutory law.

I believe the proper result, from public policy, legal, and fundamental fairness perspectives, would have resulted from deciding that the contract actually said what it said. Progress could have filed a rate case (which it did), and received rate relief (which it will). Despite the fact that their earning may fall below 10% ROE for some portion of this year¹⁶, there would be no adverse impact on the company's ability to attract capital – if that's an argument - since Wall Street has available to it information that the company is taking steps to "correct" the situation. Ratepayers would receive the benefit of their bargain, in precisely the same fashion as has the company for the preceding four years.

But I expect that result is too obvious, too compelling, and too just.

¹⁶ Which is not at all certain, given the oft repeated fact that dire numbers presented to the Commission never seem to translate into the actual earnings reported to the SEC and Wall Street.

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.

Any party adversely affected by this order, which is non-final 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. Citizens of the State of Florida v. Mayo, 316 So.2d 262 (Fla. 1975), states that an order on interim rates is not final or reviewable until a final order is issued. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

PROGRESS ENERGY FLORIDA, INC.
DOCKET NO. 090079-EI
INTERIM TEST YEAR
DECEMBER 31, 2008

	As Filed by Company	Adjustments			Interest Synch	Total Adjustments	Total Adjusted Rate Base
RATE BASE							
Plant in Service	\$9,064,768,000					\$0	\$9,064,768,000
Accumulated Depreciation	(4,241,738,000)					0	(4,241,738,000)
Net Plant in Service	4,823,030,000	0	0	0	0	0	4,823,030,000
Nuclear Fuel - No AFUDC (Net)	76,439,000					0	76,439,000
Property Held for Future Use	26,578,000					0	26,578,000
Construction Work in Progress	157,043,000					0	157,043,000
Net Utility Plant	5,083,090,000	0	0	0	0	0	5,083,090,000
Working Capital	15,675,000					0	15,675,000
Total Rate Base	\$5,098,765,000	\$0	\$0	\$0	\$0	\$0	\$5,098,765,000
INCOME STATEMENT							
Operating Revenues	\$1,509,250,000	0	0	0	0	0	\$1,509,250,000
Operating Expenses:							
Operation & Maintenance - Fuel	7,169,000					0	7,169,000
Operation & Maintenance - Other	576,675,000					0	576,675,000
Depreciation & Amortization	277,577,000					0	277,577,000
Taxes Other Than Income	104,979,000					0	104,979,000
Income Taxes - Current/Deferred	158,945,000					0	158,945,000
Investment Tax Credit (Net)	(5,460,000)					0	(5,460,000)
(Gain)/Loss on Disposition	(2,121,000)					0	(2,121,000)
Total Operating Expenses	1,117,764,000	0	0	0	0	0	1,117,764,000
Net Operating Income	\$391,486,000	\$0	\$0	\$0	\$0	\$0	\$391,486,000
OVERALL RATE OF RETURN	7.68%					0.00%	7.68%
RETURN ON EQUITY	9.67%					0.00%	9.67%

PROGRESS ENERGY FLORIDA, INC.
DOCKET NO. 090079-EI
INTERIM TEST YEAR
DECEMBER 31, 2008

ATTACHMENT B

CAPITAL STRUCTURE

AS FILED BY COMPANY

	<u>Amount</u>	<u>Ratio</u>	<u>Cost Rate</u>	<u>Weighted Cost</u>	
Long Term Debt	\$2,138,938,000	41.95%	6.27%	2.630%	
Short Term Debt	37,355,000	0.73%	3.87%	0.028%	
Preferred Stock	21,093,000	0.41%	4.51%	0.019%	
Customer Deposits - Active	113,431,000	2.22%	6.23%	0.139%	
Customer Deposits - Inactive	630,000	0.01%	0.00%	0.000%	
Common Equity	2,551,396,000	50.04%	10.00%	5.004%	
Deferred Income Taxes	298,993,000	5.86%	0.00%	0.000%	
FAS 109 DIT - Net	(72,187,000)	-1.42%	0.00%	0.000%	
Tax Credits - Weighted Cost	9,116,000	0.18%	8.28%	0.015%	
Total	<u>\$5,098,765,000</u>	<u>100.00%</u>		<u>7.835%</u>	7.84% Rounded