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From: James A. McGee [jmcgee@tampabay.rr.com]
Sent: Wednesday, April 14, 2004 4:38 PM
To: Filings@psc.state.fl.us
Cc: Cochran Keating; Vicki Gordon Kaufman; Vandiver, Rob
Subject: PEF REsponse to OPC's Motion to Compel - Docket 031057-EI

This electronic filing is made by

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Docket No. 031057-EI
In re: Review of Progress Energy Florida's benchmark for
Waterborne Transportation Transactions with Progress Fuels.

On behalf of Progress Energy Florida

Consisting of 8 pages.

The attached document for filing is the
Response of Progress Energy Florida in
Opposition to Public Counsel's Motion to
Compel Answers to Interrogatories,
including a filing letter and certificate of service.

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JAMES A. MCGEE
ASSOCIATE GENERAL COUNSEL
PROGRESS ENERGY SERVICE COMPANY, LLC

April 15, 2004

VIA ELECTRONIC FILING

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 031057-EI

Dear Ms. Bayó:

Enclosed for filing in the subject docket is the Response of Progress Energy Florida in Opposition to Public Counsel's Motion to Compel Answers to Interrogatories.

Please acknowledge your receipt of the above filing as provided in the Commission's electronic filing procedures. Thank you for your assistance in this matter.

Very truly yours,

s/ James A. McGee

JAM/scc
Enclosures

cc: Parties of record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Progress Energy
Florida's benchmark for Waterborne
Transportation Transactions with
Progress Fuels.

Docket No. 031057-EI

Submitted for filing:
April 14, 2004

**RESPONSE OF PROGRESS ENERGY FLORIDA
IN OPPOSITION TO PUBLIC COUNSEL'S MOTION
TO COMPEL ANSWERS TO INTERROGATORIES**

Progress Energy Florida, Inc. (Progress Energy or the Company), pursuant to Rule 28-106.204, Florida Administrative Code, and Rule 1.280, Florida Rules of Civil Procedure, hereby responds in opposition to the First Motion to Compel Answers to Interrogatories filed in this proceeding on April 6, 2004 by the Office of Public Counsel (OPC), and states as follows.

1. OPC's motion seeks to compel answers to six related interrogatories asking for detailed information about the so-called "backhaul" business of Dixie Fuels Limited (DFL) performed under contracts with unaffiliated third parties that are completely separate and apart from DFL's contract for cross-Gulf coal transportation to Progress Energy's Crystal River plant site. DFL is a partnership in which Progress Energy's affiliated coal supplier, Progress Fuels Corporation (PFC) has a 65 percent ownership interest and a 50 percent voting interest.

2. As a result of the Commission's 1989 decision to abandon cost-plus regulation of utility fuel transactions with affiliates in favor of market-based

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pricing,¹ and its 1993 decision implementing market-based pricing for waterborne transportation services provided to the Company by PFC (then Electric Fuels Corporation),² DFL's third-party business can have no possible effect on costs charged to Progress Energy and its customers. It is only where a utility's affiliate can have an impact customer costs that Section 366.093, Florida Statutes, authorizes access to the affiliate's records "to ensure that a utility's ratepayers do not subsidize nonutility activities."

3. In its motion, OPC contends the first and foremost problem with Progress Energy's rationale is that "ratepayers are paying the cost of getting coal to Crystal River in any case, whether through the proxy methodology or a cost-based system. Ratepayers 'support,' 'fund,' 'foot the bill,' 'pay the freight' for every lump of coal that enters the Crystal River facility." This is a peculiar statement to be characterizes by OPC as the Company's "first and foremost" problem, given that it is simply and flatly wrong. It is fundamental to the market-based pricing concept adopted by the Commission, in its past form and in whatever form it may be applied as a result of this proceeding, that ratepayers do not pay the cost of getting coal to Crystal River, as OPC claims. They pay a market-based price that is independent of an affiliate's cost to provide transportation services for the utility. And, with respect to OPC's motion in particular, ratepayers most certainly do not pay, nor are they in any way affected

¹ Order No. 20604, issued January 13, 1989 in Docket No. 860001-EI-G.

² Order No. PSC-93-1331-FOF-EI, issued September 13, 1993 in Docket No. 930001-EI.

by, the affiliate's cost to provide unrelated transportation services under contracts with unaffiliated third parties.

4. OPC next claims that its motion is supported by the Prehearing Officer's recent Order No. PSC-04-0118-PCO-EI granting OPC's motion to compel in the pending Tampa Electric proceeding, Docket No. 031033-EI. That order went to considerable lengths to carefully consider the three factors set forth in Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127 (D. Del 1986), to be considered when deciding whether a party may be compelled to obtain information from an affiliate for discovery purposes. The three factors or prongs of this test, which the Commission has relied upon to resolve similar issues in prior cases, are stated in Afros as (1) the corporate structure, (2) the non-party's connection to the transaction at issue, and (3) the degree to which the non-party will benefit from an outcome favorable to the corporate party to the litigation. When applied to the third-party contractual backhaul information of DFL, a different result from that reached in the Tampa Electric case becomes apparent.

5. With respect to the first prong of the Afros test, the corporate structure is distinctly different from that presented in the Tampa Electric case. Unlike Tampa Electric's non-party affiliate, DFL is not a wholly-owned subsidiary within the Company's corporate structure. DFL has significant independence in its affiliation with Progress Energy's corporate structure by virtue of the 50 percent voting interest vested with its unaffiliated partner, as noted above.

Because of this, DFL's operation is based largely on consensus and compromise between the partners in the pursuit of common business interests. As a result, DFL is not simply a regular member of the corporate family, the even split in voting rights between its partners make DFL a distinctly different affiliate than the affiliate relationship presented in the Tampa Electric case.

6. The market-based pricing parameters previously established by the Commission provide a commonality to the second and third prongs of the Afros test, *i.e.*, DFL's connection to the transaction at issue -- the pricing of waterborne transportation service provided to Progress Energy, and the degree to which DFL will benefit from an outcome favorable to Progress Energy in this proceeding. The conclusion reached by considering either of these two related prongs will essentially provide the conclusion for the other prong as well. For example, the outcome of this proceeding favorable to Progress Energy is the position it has advocated on the pricing of waterborne transportation services in this docket and, prior to its spin off, in Docket No. 030001-EI. That position is the competitive bidding process recommended by Staff witness McNulty, as reflected in the Company's agreement with Staff presented at the November fuel hearing and supported by the testimony of its witnesses in both dockets. There is nothing in that competitive bidding process favored by Progress Energy that will benefit DFL. In fact, an underlying purpose of Mr. McNulty's proposal is to ensure that waterborne transportation services, including those of DFL, are provided at

market prices and thus are unaffected by affiliate considerations. In other words, the outcome favored by Progress Energy – the adoption of Mr. McNulty’s position – will not only provide no benefit to DFL, its underlying purpose is to achieve precisely that result.

7. For much the same reason, the second prong of the Afros test produces a similar result. DFL has no connection to the issue in this proceeding; the pricing of waterborne transportation services provided to Progress Energy. Under any possible approach for implementing the Commission’s requirement for market-based pricing, DFL’s only connection to the approach that will be established as a result of this proceeding would be as the successful participant in a competitive solicitation. This, of course, is the same connection that any potential bidder in a competitive solicitation would have and, as such, it clearly fails to support OPC’s attempt to obtain DFL’s third-party business information.

8. The points discussed in the analysis above are more than simply argument over an abstract legal standard. It is also the practical, common sense reason why DFL’s third-party business information sought by OPC is unnecessary, as well as legally unsupportable. Under any approach to market-based pricing that solicits competitive bids, DFL will have no choice but to bid the best transportation rate it can. To the extent DFL has the ability to improve its bid by factoring in cost advantages available from coordination with its other

transportation business, including its backhaul business, it will have every incentive to do so. :

For the reasons discussed in this response, Progress Energy submits that OPC's motion to compel DFL's third-party backhaul information is unsupported by Section 366.093, Florida Statutes, and the Afros standard previously relied upon by the Commission, and should therefore be denied.

Respectfully submitted,

s/ James A. McGee

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Attorney for
PROGRESS ENERGY FLORIDA, INC.

PROGRESS ENERGY FLORIDA

DOCKET NO. 031057-EI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response in Opposition has been furnished to the following individuals by electronic mail this 14th day of April, 2004.

Wm. Cochran Keating, IV, Esquire
Office of the General Counsel
Economic Regulation Section
Florida Public Service Commission
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Tallahassee, FL 32301

s/ James A. McGee
Attorney