

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery
clause with generating performance incentive
factor.

DOCKET NO. 050001-EI

FILED: November 7, 2005

**PROGRESS ENERGY FLORIDA'S RESPONSE IN OPPOSITION
TO OPC'S MOTION TO DEFER ISSUE OF PRUDENCE
AND REASONABLENESS OF PEF'S COAL COSTS**

PROGRESS ENERGY FLORIDA, INC., (PEF) hereby responds in opposition to the OPC's Motion to Defer Issue of Prudence and Reasonableness of PEF's Coal Costs (OPC Motion to Defer) filed on the eve of hearing shortly before the close of business on Friday, November 4, 2005. For the reasons discussed below, OPC's Motion to Defer should be denied because the issue can be efficiently and fully explored at hearing in this proceeding through cross-examination of PEF's witness and because OPC's motion presents no basis other than OPC's own delay for the relief requested. Furthermore, the Commission should reject OPC's untimely attempt to interject testimony in the form of an affidavit submitted after OPC's deadline for filing testimony and after the close of discovery in this proceeding.

Introduction

As noted in OPC's Motion to Defer, "[a]lthough the burden of proving the prudence of its actions will remain with the utility, *the question of prudence will arise only as the facts regarding fuel procurement justify scrutiny.*" OPC Motion, at 4 (quoting Order No. 12645, at p.7). In other words, utilities are not required to present evidence regarding each and every procurement decision unless there are facts justifying further scrutiny.

In accordance with long-standing practice in this docket, PEF has presented its fuel costs for the relevant true-up and projection periods for the Commission's review. At Staff's request,

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

PEF also presented direct testimony showing a comparative analysis of prices paid for coal delivered in 2004 with market indicators at the time the purchases were made.

After PEF submitted its direct testimony, OPC raised an issue concerning PEF's coal procurement. See OPC's Preliminary List of Issues, filed October 3, 2005, at p. 2. OPC then let the deadline for filing testimony pass without submitting any evidence to support its position. Now, having failed to timely present any testimony providing facts justifying further scrutiny of PEF's fuel procurement, OPC belatedly seeks to defer consideration of the very issue OPC itself raised. For the reasons discussed below, the Commission should reject OPC's dilatory tactics and proceed with consideration of the issue at this time.

OPC has had more than sufficient time to address this issue.

OPC cites no legitimate basis to suggest that additional time is needed to evaluate PEF's coal prices. Contrary to OPC's suggestion, information about the quantity of and price for coal actually delivered in 2005 and 2006 is not necessary to address OPC's prudence issue. The purchases at issue were the result of *competitive* solicitations conducted in April and September, 2004. Under well settled law, the reasonableness and prudence of those procurement decisions can only be determined based on the market conditions and other circumstances *at the time the procurement decisions were made*, which can be fully explored in the current proceeding. See Florida Power Corp. v. Public Service Comm'n, 456 So. 2d 451 (1984) (Prudence of utility's actions must be determined based on facts known at the time rather than 20-20 vision of hindsight.).

OPC also fails to acknowledge that it could have conducted discovery at any time during the past year to inquire about the coal solicitations and resulting contracts at issue. Unlike

Staff,¹ however, OPC failed to avail itself of that opportunity. As the Prehearing Officer recognized in denying OPC's prior motion to create a "spin-off" docket to address this issue, OPC has had sufficient opportunity to review PEF's coal costs and supporting documentation through the course of this ongoing docket. See Transcript of October 24, 2005, Prehearing Conference, at p. 12. OPC's current motion should be denied for the same reason.

There are no "significant" or "complex" issues that justify deferral.

Ignoring the fact that it sat on its hands until the eleventh hour, OPC attempts to cast doubt on coal purchases from Progress Fuel Corporation ("PFC") based on documents, factual assertions and expert opinions that it chose not to present before its October 3 deadline for filing direct testimony and exhibits. The Commission should reject this improper attempt to circumvent the deadlines set forth in the Order Establishing Procedure. Nevertheless, PEF feels compelled to briefly address these documents and assertions to demonstrate that they do not support OPC's suggestion that PEF's fuel procurement raises "significant" or "complex" factual issues.

First, OPC's reference to PEF's 423 Form Fuel Reports identifying prices paid to Progress Fuels Corporation ("PFC") that were higher than prices paid other suppliers of coal delivered in certain months is misleading. See Motion to Defer, at p.1. At best, this reference demonstrates an unfamiliarity with the nature of 423 Forms, as OPC fails to acknowledge the indisputable fact

¹ Shortly after last year's hearing in this ongoing docket, Staff requested and received unredacted copies of documents pertaining to coal (and other fuel) solicitations conducted throughout 2004, including the solicitations conducted in April and September 2004 which OPC references in its Motion to Defer. See Staff's Fourth Request for Production of Documents (Nos. 8-10) served Nov. 14, 2004 (Copy attached as Exhibit "A"). By contrast, OPC did not initiate any discovery on its coal price issue until September 14, 2005, a full year after the last solicitation which OPC now claims needs further examination. See Citizens' Second Set of Interrogatories (Nos. 6-14) (Copy attached as Exhibit "B").

that the 423 Forms only provide costs for coal at the time it is *delivered* during a particular month and that, in any given month, coal is delivered under purchases made at different times under different market conditions.² The 423 Forms provide no information whatsoever regarding the market conditions *at the time* a particular procurement decision was made and, thus, shed no light on the prudence or reasonableness of the particular purchase. The mere fact that some 423 Forms show that prices paid to PFC were higher for coal *delivered* in a particular month than prices paid to other suppliers does not support OPC's unsupported and insupportable insinuation that the PFC purchases were imprudent. By the same token, the fact that 423 Forms for other months indicate the prices paid other suppliers were higher than prices paid PFC does not support any suggestion that those purchases from other suppliers were imprudent. The 423 Forms simply have no bearing on the issue for which PFC seeks deferral.

Second, as noted above, there is no basis for OPC's suggestion that the issue of prudence and reasonableness of PEF's coal purchases for 2005 and 2006 is premature until the exact quantities of and prices for coal delivered are known at the end of 2006. See Motion to Defer, at p.3. That is because the prices for deliveries in 2005 and 2006 are established by the contracts already in place. The quantities of deliveries in 2005 and 2006 have no bearing on the reasonableness and prudence of procurement decisions made in 2004.

Finally, contrary to OPC's suggestion, the opinions of its newly hired witness-by-affidavit do not demonstrate the existence of "significant, substantive, and complex factual issues." Motion to Defer, at p. 5. If anything, the affidavit shows that OPC has had adequate time to

² As explained in the deposition of PEF's witness, Albert W. Pitcher, the purchases reflected on the 423 forms were made in different time-frames as far back as 2003. See excerpts of deposition transcript attached as Exhibit "C." Thus, OPC should have been well aware of this before its submittal of its Motion to Defer.

examine PFC's coal prices since its newly hired consultant, Robert L. Samson, purports to have reached several "conclusions" within 72 hours or less after he was hired. See Exhibit "D" (November 2, 2005, letter from OPC regarding retention of Mr. Samson). PEF disputes those conclusions, as well as many of the facts stated in the affidavit. For example, Mr. Samson's opinion that PEF failed to award a contract to the "lowest bidder in the 2004 RFP Process" fails to reveal that the referenced bids either offered *sub-bituminous* coal which the Crystal River units cannot burn under existing environmental permits or they involved transportation logistics that would not provide efficient and reliable delivery of the coals offered. Likewise, Mr. Samson's opinions regarding PEF's September 2004 informal competitive solicitation fails to consider the factual circumstances under which the solicitation was made. These facts can adequately and succinctly be established through cross-examination of PEF's witness, Albert W. Pitcher, in the current proceeding.

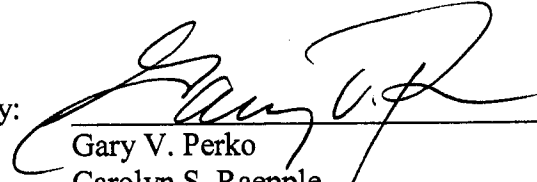
In any event, the issues belatedly raised in Mr. Samson's affidavit are not complex and they can be adequately addressed through well-targeted cross-examination of PEF's witness. Whether or not "OPC must spend considerable time and effort" on such cross-examination depends on counsel's approach to exploring these straightforward issues and, in any event, has no bearing on whether the issue should be deferred.

WHEREFORE, Progress Energy Florida, Inc., respectfully requests that the Commission deny the "Motion to Defer Issue of Prudence and Reasonableness of PEF's Coal Costs" filed by the OPC on Friday, November 4, 2005, and strike the affidavit attached to OPC's motion as an improper attempt to interject testimony after OPC's deadline for filing testimony and after the close of discovery in this proceeding.

Respectfully submitted, this 7th day of November, 2005.

HOPPING GREEN & SAMS, P.A.

By:

A handwritten signature in black ink, appearing to read "Gary V. Perko", written over a horizontal line.

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Hopping Green & Sams, P.A.
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Attorneys for Progress Energy Florida, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by hand-delivery (*) or by regular U.S. mail to the following this 7th day of November, 2005.

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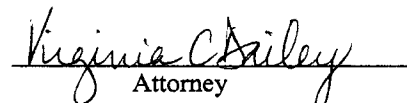
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Attorney

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery
clause with generating performance incentive
factor.

DOCKET NO. 040001-EI

DATED: NOVEMBER 16, 2004

STAFF'S FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS TO
PROGRESS ENERGY FLORIDA, INC. (NOS. 8-10)

Pursuant to Rule 28-106.206, Florida Administrative Code, and Rule 1.350, Florida Rules of Civil Procedure, the Staff of the Florida Public Service Commission, by and through its undersigned attorney, hereby serves the following Request for Production of Documents upon Progress Energy Florida, Inc.

Please produce the following documents at the Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, no later than thirty days after service of this request for the purpose of inspection and copying.

DEFINITIONS

As used herein, the word "documents" shall mean the original and any non-identical copies of any writing or record, including but not limited to a book, pamphlet, periodical, letter, memorandum, telegram, report, study, interoffice or intraoffice, handwritten or other notes, working paper, draft, application, permit, chart, paper, graph, survey, index, tape, disc, data sheet or data processing card, computer printout, or any other written, recorded, transcribed, filed or graphic matter, however produced or reproduced.

DOCUMENTS REQUESTED

8. Please provide a copy of each contract for fuel or fuel transportation that the utility has entered into since January 1, 2004.

9. For each contract referenced in Request for Production of Documents No. 8, please provide a copy of each solicitation of bids for fuel or fuel transportation that the utility requested.

10. Please provide a copy of each response to each bid solicitation referenced in Request for Production of Documents No. 9.

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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery
clause with generating performance incentive
factor.

DOCKET NO. 040001-EI

DATED: NOVEMBER 16, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and one correct copy of STAFF'S FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS TO PROGRESS ENERGY FLORIDA, INC. (NOS. 8-10) has been served by electronic mail and U. S. Mail to James McGee, Progress Energy Florida, Inc., 100 Central Avenue, Suite CX1D, St. Petersburg, Florida, 33701, on behalf of Progress Energy Florida, Inc., and that a true and correct copy thereof has been furnished to the following, by U.S. Mail, this 16th day of November, 2004:

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DOCKET NO. 040001-EI
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(850) 413-6183

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power)
Cost Recovery Clause with)
Generating Performance Incentive)
Factor)
_____)

DOCKET NO. 050001-EI
FILED: September 14, 2005

**CITIZENS' SECOND SET OF INTERROGATORIES
TO PROGRESS ENERGY FLORIDA, INC. (NOS. 6 – 14)**

Pursuant to § 350.0611(1), Fla. Stat. (2004), Fla. Admin. Code R. 28-106.206, and Fla. R. Civ. P. 1.340, Florida's Citizens (Citizens or OPC) propound the following interrogatories to Progress Energy Florida, Inc. (PEF) to be answered on or before October 4, 2005.

DEFINITIONS

As used herein, the following words shall have the meanings indicated:

- (i) "Progress Energy Florida, Inc.", "PEF" or "the company" means Progress Energy Florida, Inc. and its subsidiaries and affiliates, including, but not limited to, their present and former officers, employees, agents, directors and all other persons acting or purporting to act on behalf of PEF;
- (ii) Responses to any questions directed at PEF regarding historical information should also encompass PEF's predecessor's name, Florida Power Corporation.
- (iii) "you" and "your" shall refer to PEF, its agents, employees, servants, and/or representatives;

- (iv) "person" or "persons" shall mean and include natural persons, corporations, partnerships, associations, joint ventures, proprietorships, entities and all other forms of organizations or associations;
- (v) "employee" shall include any individual employed by PEF, its operators or owners;
- (vi) "identify" shall mean, with respect to any document or report; set forth the title, if any, describe the relevant page or pages and line or lines thereof (or annex a copy to the answer to these interrogatories, with appropriate designations of such page or pages and line or lines), and state the present location and custodian of the original and all copies of the documents, who prepared the document, and when it was prepared.

INSTRUCTIONS

- A. Documents or reports to be identified shall include all documents in your possession, custody and control and all other documents of which you have knowledge.
- B. To the extent an interrogatory calls for information which cannot now be precisely and completely furnished, such information as can be furnished should be included in the answer, together with a statement that further information cannot be furnished, and a statement as to the reasons therefore. If you expect to obtain further information between the time answers are served and the time of hearing, you are requested to state this fact in each answer. If the information which cannot now be furnished is believed to be

available to another person, identify such other person and the reasons for believing such person has the described information.

- C. In the event any Interrogatory herein calls for information or for the identification of a document which you deem to be privileged, in whole or in part, the information should be given or the document identified to the fullest extent possible consistent with such claim of privilege and specify the grounds relied upon for the claim of privilege.
- D. Separate answers shall be furnished for each interrogatory, although where the context permits, an interrogatory may be answered by reference to the answer furnished to another interrogatory.
- E. For each interrogatory, identify the name, address, telephone number and position of the person responsible for providing the answer.

INTERROGATORIES

- 6. Referring to FPSC FORM NO. 423-2, May 2005, please explain, justify, and support the F.O.B. Plant Price for IMT fuel purchased from Progress Fuels Corporation. In your answer, please refer specifically to contract terms, characteristics of the fuel, and prices paid for fuel from sources other than Progress Fuels Corporation in the same time frame. Identify and explain all factors the Company deems relevant that bear on the differences in prices from the different sources.

7. Please state the average F.O.B. Plant price and the total tons of coal purchased from Progress Fuels for the year 2005 to date and the projection for 2005 year end.

8. Please state the average F.O.B. Plant price and the total tons of coal purchased from Central Coal Co., Drummond Coal and from Guasare Coal sales, stated separately, for the year 2005 to date and the projection for 2005 year end.

9. Please describe the methodology and the contractual amount that the company has used to apply the transportation costs reflected in the FPSC Form No. 423-2 for 2005 and the methodology that the company will use when, and if, the FPSC approves the new waterborne transportation contracts that have been submitted for approval in this docket, utilizing the following format:

	OLD RATE	NEW RATE
Mine to barge transport		
River transport		
--Kanawa River		
--Big Sandy		
--Cora		
Terminal		
--Storage		
--Direct Transfer		
Cross Gulf		
--IMT		
--McDuffie		

10. Please state the effective date of new rates specified in the preceding interrogatory.

11. Please state the methodology for calculating administrative expense associated with waterborne and rail transportation of fuel, and the amount of administrative expense that PEF has included for recovery in the 2005 fuel clause.

12. Please state the total amount and the average cost per ton of waterborne transport and terminal services costs claimed by the company for recovery in 2005 through the fuel clause under the stipulation with Public Counsel.

13. Please state the total amount of waterborne transport costs and the average cost per ton actually spent by the company in 2005 under the contracts that it has executed for waterborne transport and terminal services. Explain any difference between this amount and the amount provided in the answer to (12) above.

14. FPSC Form No. 423-2C for the month of April, 2005 reflects the purchase of low sulfur coal at the IMT from Guasare Coal Sales. Please state the total amount of coal purchased from Guasare Coal in 2005, the amount paid, and identify where those transactions are reflected in the 423 forms for the Crystal River coal plants.

Harold McLean
Public Counsel

Joseph A. McGlothlin

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and U.S. Mail on this 14th day of September, 2005, to the following:

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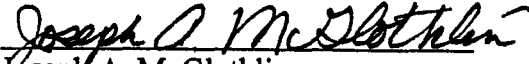
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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 050001-EI

In re: Fuel and purchased power
cost recovery clause with
generating performance incentive
factor.

COPY

REDACTED

CONFIDENTIAL TRANSCRIPT

DEPOSITION OF: ALBERT W. PITCHER
TAKEN AT THE INSTANCE OF: Office of Public Counsel
DATE: October 21, 2005
TIME: Commenced at 9:15 a.m.
Concluded at 12.26 p.m.
LOCATION: 123 South Calhoun Street
Tallahassee, Florida
REPORTED BY: MARY ALLEN NEEL, RPR
Notary Public, State
of Florida at Large

ACCURATE STENOGRAPHY REPORTERS, INC.
2894 REMINGTON GREEN LANE
TALLAHASSEE, FLORIDA 32308
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CONFIDENTIAL

Exhibit "C"

1 purchase on a spot basis? Is that ever done when
2 you're looking for spot coal?

3 **A.** It is done. I don't know that we did it in
4 this time period that you're talking about.

5 **Q.** Would you have any information or
6 documentation that would demonstrate whether providers
7 other than Progress Fuels Corporation submitted bids
8 or offers to provide spot coal during January 2005?

9 **A.** We have all those records, yes.

10 **Q.** Okay. Would you provide that information by
11 a late-filed exhibit?

12 **A.** Yes.

13 **MR. MCGLOTHLIN:** Late-filed Exhibit Number 8
14 would be "Bids for Spot Coal, January 2005."

15 (Late-filed Deposition Exhibit Number 8 was
16 identified.)

17 **THE WITNESS:** Can we go off the record a
18 minute, please?

19 (Discussion off the record.)

20 **THE WITNESS:** I would like to clarify
21 something on this discussion that we were having
22 on this Form 243, where you talked about the two
23 spot purchases of [REDACTED] made in January of 2005 and
24 you characterized them as significantly different
25 from what was purchased from Progress Fuels. I

1 would like to point out that the purchases made
2 on all the others were made in different time
3 frames, and some as far back as 2003. So the
4 time frames are not compatible with what you're
5 looking at on this spot buy.

6 BY MR. MCGLOTHLIN:

7 **Q.** What were the time frames, if you know,
8 for --

9 **A.** B&W and Sequoia -- I can give you some of
10 them. B&W and Sequoia were part of the April 2004
11 RFP. Consolidated Coal, those were carryover tonnages
12 from a previous contract from last year. Massey Coal
13 Sales likewise was carryover tonnage from a previous
14 contract. The date of that contract might have been
15 2003. I think we would need to check that for you.
16 But they were significantly different time periods
17 than the purchase from Progress Fuels.

18 **Q.** Okay. What efforts would you have made,
19 either you individually or Progress Fuels Corporation
20 in its capacity of procuring fuels for Progress
21 Energy, to ascertain that [REDACTED] reflected the market
22 price for coal in January of 2005?

23 **A.** As I described before, if we received bids,
24 as we receive bids in, we log them in and we evaluate
25 them. We will compare them with each other. We will

TOM LEE
President

ALLAN BENSE
Speaker



Harold McLean
Public Counsel

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Joseph A. McGlothlin
Associate Public Counsel

November 2, 2005

VIA FAX

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RE: Confidentiality Agreement

Dear Gary:

OPC has engaged Bob Sansom of Energy Ventures Analysis, Inc. to assist OPC in the review of the coal purchase issue pending in Docket 050001-EI. I sent him the confidentiality agreement that I received from you. I am forwarding a faxed copy of the signature page of the agreement and of the signed certificate. As we discussed yesterday, today I will begin forwarding some of the documents that PEF designated as confidential to Mr. Sansom.

Sincerely,

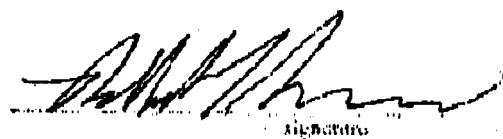
Joseph A. McGlothlin
Associate Public Counsel

JAM/dsb

EXHIBIT "A"

NON-DISCLOSURE ACKNOWLEDGEMENT

The undersigned hereby certifies that, prior to the disclosure to him or her of certain information and documents belonging to, or in the possession of, or made available through a Party to this Confidentiality Agreement, which are Confidential Information or Designated Confidential Information as those terms are defined in this Agreement, he or she has read the Agreement and agrees to be bound by its terms.


Signature

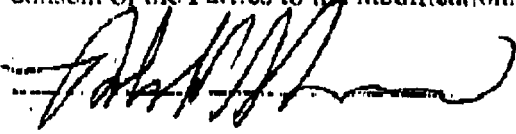
Robert L. Sanson
Printed name

ENERGY VENTURES Analysis Div.
Affiliation

Date 11/2/05

7. Modifications.

This Agreement may be modified only in writing and only upon the mutual consent of the Parties to the modification.



Date

11/2/05

Progress Energy Florida

Date