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September 13, 2006

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Blanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 060001-EI

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' Memorandum in Opposition to PEF's Motion to dismiss Citizens' Petition. A diskette in Word format is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

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Sincerely,

Joe A McGlothlin

Joseph A. McGlothlin
Associate Public Counsel

CJB:bsr

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor	)	DOCKET NO. 060001-EI
	)	September 13, 2006

CITIZENS' MEMORANDUM IN OPPOSITION TO PEF'S MOTION TO DISMISS CITIZENS' PETITION

The Citizens of the State of Florida ("Citizens"), through the Office of Public Counsel, hereby submit their Memorandum in Opposition to Progress Energy Florida Inc's ("PEF") Motion to Dismiss Citizens' Petition For Order Requiring Progress Energy Florida, Inc. To Refund to Customers $143 Million, Representing Past Excessively High Fuel Costs Stemming From failure To Utilize The Most Economical Sources Of Coals For Crystal River Units 4 and 5. For the reasons that follow, the Commission must deny the Motion to Dismiss.

Standard governing disposition of motions to dismiss. The purpose of a motion to dismiss is to test the sufficiency of the complaint (here, Citizens' Petition) to state a cause of action (here, allegations which frame a basis on which the Commission can award relief to Citizens). For purposes of ruling on PEF's motion to dismiss, the Commission must deem all of Citizens' allegations in the Petition to be admitted. *Brown v. Moore, 765 So.2d 749 (*Fla. 1st DCA 2000*), reh. Den. (July 11, 2000).* When considering PEF's motion to dismiss, the Commission must consider all of Citizens' allegations in a light most favorable to Citizens. *Ingalsbe v. Stewart Agency, Inc.,* 869 So.2d 30 (Fla. App. 4th DCA 2004), review granted, 880 So. 2d 1213 (Fla. 2004), rev. dismissed 889 So.2d 779 (2004). Under the settled legal principles governing a motion to dismiss, the

Commission cannot dismiss Citizens' Petition unless PEF establishes beyond any doubt that Citizens could prove no set of facts whatever in support of their claim. *Morris v. Fla. Power & Light Co.,* 753 So2d 153, 154 (Fla. 4th DCA 2000); *Wausau Ins. Co. v. Haynes,* 683 So.2d 1123 (Fla. App. 4th DCA 1996). The Commission must deny PEF's motion to dismiss if Citizens have set forth facts in the Petition upon which relief can be granted on any theory. *Orlovsky v. Solid Surf, Inc.,* 405 So.2d 1363, 1364 ((Fla. 4th DCA, 1981). When evaluating the sufficiency of the Petition to withstand a motion to dismiss, the Commission must confine its consideration to the matters contained within the four corners of the Petition. *Rohatynsky v. Kalogiannis,* 763 So.2d 1270 (Fla. 4th DCA 1996). The Commission cannot consider any affirmative defenses or evidence that PEF may intend to present when the matter proceeds to an evidentiary hearing. *Ingalsbe, supra,* at 35; *Wausau Ins., supra.*

Summary of allegations. In light of the standards governing the disposition of PEF's Motion to Dismiss, the Commissioners need to have Citizens' allegations in mind as they consider, based solely on the contents of the Petition which they must take to be true, whether Citizens have alleged facts sufficient to establish a basis for relief.

The essential factual allegations of the Petition are these:

(1) PEF purposely, and at a cost that is being borne by customers, designed and built Crystal River Units 4 and 5 to have the flexibility to burn a 50/50 mixture of Eastern bituminous and Western sub-bituminous coal;

(2) In 1978, PEF informed regulators that it intended to source fuel for Crystal River Units 4 and 5 from Eastern and Western sources in approximately equal quantities;

(3) From the time the units were placed in commercial service in the early 1980s, PEF burned only bituminous coal in the units, much of which it purchased from its sister companies;

(4) By the early 1990s, the opening of higher-Btu-content sub-bituminous coal deposits in the Powder River Basin area of Wyoming and the advent of competition for the transportation of coal by rail in the region caused Western sub-bituminous coal to become cheaper than Eastern coal on a delivered, Btu-adjusted basis;

(5) In light of these developments, numerous Midwestern and southeastern utilities promptly converted to Western sub-bituminous coal to lower fuel costs borne by their customers;

(6) Delivery of sub-bituminous coal from the Powder River Basin to Crystal River was both economically advantageous and logistically feasible during the 1996-2005 time frame addressed in the Petition;

(7) PEF knew or should have known of this information at the time the changes in the relative economics of Western sub-bituminous and Eastern bituminous coals occurred;

(8) PEF unilaterally abandoned its right under environmental permits to burn sub-bituminous coal in Crystal River 4 and 5, and later tried to justify its decision to buy more expensive bituminous coal for these units by citing the very permit limitations it had authored;

(9) In 1999 PEF requested environmental regulators to allow PEF to burn "synfuel" produced by its affiliates for the purpose of participating in a $24 per ton tax credit program;

(10) PEF continued to purchase bituminous coal and tax credit-laden, bituminous-derived synfuel from its sister companies when sub-bituminous coal from the Powder River Basin was cheaper than either;

(11) based on the prices PEF paid for bituminous coal and sister company synfuel, as compared to the lower market price of delivered sub-bituminous coal that was known to be available at the time of the purchases, during the period 1996-2005 PEF charged its customers for fuel costs that were excessive by the amount of $143 million, excluding interest.

PEF's Motion to Dismiss fails to demonstrate any basis for dismissing the Petition. In their Petition, Citizens allege with specificity the manner in which PEF (as used here, PEF includes predecessor Florida Power Corporation) failed its obligation to act prudently and in its customers' interests, and provide the basis for the Commission's jurisdiction and obligation to shield ratepayers from the excessive fuel charges associated with that failure. In its Motion to Dismiss, PEF chiefly asserts that granting Citizens' Petition would involve "prohibited retroactive ratemaking," and that Citizens have asked the Commission to decide the case based on "hindsight." PEF is wrong on both counts. PEF also asks the Commission to consider matters that are irrelevant and that in any event would violate the standard governing the disposition of a motion to dismiss.

(a) The Commission has the authority to order the refunds demanded by Citizens. When it revamped the fuel cost recovery clause process in 1980, the Commission was aware that the adoption of a fuel cost recovery clause that allows utilities to collect fuel

and fuel-related expenses on a *current* (i.e., collected at the same time they are expended) basis rather than a historical one constituted a policy decision that conferred a significant benefit to the utilities. It was also aware that the process associated with such an approach, which involves the use of projections, necessarily would not permit the Commission to scrutinize the claimed costs with care prior to initial approval of the collections. Soon after it implemented the utility-favoring, forward-looking fuel cost recovery clause, the Commission considered the issue of the extent of its ability to adjust the amounts that flow through the clause if subsequent, more detailed evidence discloses the amounts were imprudent or unreasonable. The Commission teed up the issue formally in the 1983 edition of the ongoing fuel cost recovery proceeding. Staff and OPC recommended that the Commission adopt a mechanism that would require the Commission to identify any explicit issues within three years of the date collection is approved at the pertinent true-up hearing; from that point, the Commission would retain jurisdiction over the flagged transaction until it issued a final order on the subject. Florida Power Corporation, PEF's predecessor, advocated a "reasonable period" beyond the 6 month true-up opportunity that was part of the fuel clause regime at the time, without defining what would constitute a "reasonable period." In its decision, the Commission rejected all attempts to limit its ability to identify issues linked to past collected amounts to a specific time frame:

> "At the true-up hearing that follows a six month period a utility will still be free to present whatever evidence of prudence it chooses to provide. We note that certain utilities have periodically presented broad statements as to the prudence of their fuel procurement activities. Such presentations are not inappropriate, but they hardly elucidate the subject matter. Fuel procurement is an exceedingly complex

matter and a determination of the prudence of procurement decisions requires a complex analysis.

While a utility may feel satisfied that it has properly met its burden by such a presentation, we expect the quality and quantity of evidence to be presented in support of the prudence of fuel procurement decisions to match the complexity of the subject matter. We will therefore accept any relevant proof a utility chooses to present at true-up, but we will not adjudicate the question of prudence, nor consider ourselves bound to do so until all relevant facts are analyzed and placed before us. *We will be free to revisit any transaction until we explicitly determine the matter to be fully and finally adjudicated."*

. . . .

". . .The issuance of a true-up order does not adjudicate the question of prudence per se. As pointed out by staff, the true-up hearings have never been relied upon by the Commission or any other party as the point at which prudence is actually reviewed. With rare exception, prudence has not been alleged, proven nor ruled upon during those proceedings. An actual adjudication of prudence depends on whether an allegation of prudence was made, evidence was presented thereon and a ruling made. Where an expenditure has been disputed and its prudence examined on the record, a ruling in favor of prudence should be inferred even if none is explicitly made."

. . . .

"Staff is also correct in stating that the nature of the clause and the way costs are passed through it belies any finality to a true-up order. As stated in Order No. 11572, the effect of expenditures during any six month period extends beyond that period and utilities frequently pass retroactive price adjustments through the clause."

"The nature of the fuel adjustment is continuous and the segregation of charges to fuel costs into 6-month periods is for ease of administration only. Indeed, fuel purchases in any one period will affect future periods, as fuel cost is charged on an "as burned" basis at weighted average inventory cost. Thus, instead of fuel costs collected in any one period reflecting only fuel purchased during that period, those costs reflect the weighted average cost of purchases during and prior to that period. In addition, it is quite common for utilities to receive retroactive adjustments to fuel price and transportation costs well after the close of the original transaction to which they relates (sic)."

Order No. 12645, entered in Docket No. 830001-EU on November 3, 1983 (emphasis provided).

No party (including Florida Power Corporation, PEF's predecessor) appealed Order No. 12645 to contest the Commission's determination of the extent of its ability to adjust prior collected amounts based on a subsequent showing of imprudence.

Concurrently with its consideration of the issue in Order No. 12645, the Commission was called upon to move from the generic issue to a specific example of a challenge to amounts previously collected through the clause. The case involved a review of certain costs associated with Gulf Power's contract to purchase coal from the Maxine coal mine in Alabama. While the costs of coal from the Maxine mine originally were not unreasonable, after Gulf extended its contract to purchase more Maxine coal it became some of the most expensive coal in the country. When in 1983 the Commission considered adjustments to costs that had flowed through the clause in 1980, 1981, and 1982 on the grounds that Gulf should have negotiated and administered the extension of its contract differently, Gulf Power argued that the Commission could not reach back to a period prior to a 1981 true-up order. The Commission properly regarded the subject of its jurisdiction over past collected amounts as having been decided in Order No. 12645, entered in Docket No. 830001-EU on November 3, 1983:

> "A significant controversy has arisen over our authority to require the refund of fuel expenditures from previous periods. The staff and Public Counsel proposed that we consider disallowing fuel costs incurred beginning January, 1980. Gulf, on the other hand, asserted that we could not review fuel costs in any period prior to April 1, 1982. . . .Gulf has revised its position, however, and now asserts that the next previous true-up order. . .cuts off the

Commission's power to disallow expenses for any period prior to October 1, 1981. Gulf apparently now concedes that certain language in Order No. 11066 and the order spinning off the Maxine case preserved the issue of prudence for the October 1, 1981 through March 30, 1982 period."

We have already established the standard by which we will determine whether we may go back to prior true-up periods. Order No. 12645 dealt with this issue.

The approach announced in Order No. 12645 is fair to all involved. In normal ratemaking a utility is not entitled to receive a rate increase until after it has demonstrated that it is not earning a fair rate of return on its investment in property used and useful in the public service. The utility must demonstrate that its investment in property used and useful in the public service. The utility must demonstrate that its investment was prudent, its capital costs are reasonable, and that its expenses were prudently incurred. The delay in receiving rate relief under normal ratemaking is referred to as regulatory lag. Regulatory lag arises because it is the utility and not the Commission that possesses the information needed to decide the issues. The time needed by the Commission to collect and analyze relevant information causes regulatory lag.

. . . .

. . .A utility may now recover its entire fuel cost concurrent with the expense. . . Although the effect of regulatory lag on a utility's rates is now eliminated, regulatory lag still exists. It still takes time for the Commission to collect and analyze information relevant to the accuracy and prudence of fuel delay in recovery. Under the new clause recovery is immediate. There is a trade-off under the new clause, however, as a utility remains uncertain as to whether the Commission will ultimately determine its expenditures to be prudent.

. . . .

Because of the very time consuming nature of reviewing fuel Procurement decisions *and because the utility has possession of the information relevant to the case*, the burden to demonstrate prudence

necessarily falls on the utility. When a utility does not come forward to demonstrate the prudence of its expenditures, that issue is still viable for this Commission to determine. The fact that it takes a long time for the Commission staff to reconstruct fuel procurement decisions weighs very heavily in favor of continued jurisdiction, particularly in light of the fact that the issue of prudence has not previously been decided.

Our view of the fuel adjustment clause involves a trade off. In exchange for quick rate relief a utility is subject to the risk, whether large or small, that the Commission may ultimately determine that a portion of the rate award should be disallowed. If a utility does not come forward and inform the Commission as to the prudence of its actions as a predicate to rate relief, it should expect to have the Commission visit the question of prudence *when it becomes aware of facts that justify an inquiry. The ratepayers of this state are entitled to consideration in all ratemaking proceedings.*

Order 13452, at pages 18-19 (emphasis supplied)

Gulf Power appealed the Commission's disposition of the time frame issue to the Florida Supreme Court. In *Gulf Power Company v. Florida Public Service Commission*, 487 S. 2d 1036 (Florida 1986), the Court affirmed the Commission's order. The Court stated:

"The issues presented are whether there is competent substantial evidence to support the commission's findings of managerial imprudence, whether the calculation for the amount of the refund is proper, and *whether the refund order constitutes retroactive ratemaking and is therefore prohibited.* . . . ."

"Nor do we find that the order constitutes prohibited retroactive ratemaking fuel adjustment (sic) Fuel adjustment charges are authorized to compensate for utilities' fluctuating fuel expenses. The fuel adjustment proceeding is a continuous proceeding and operates to a utility's benefit by eliminating regulatory lag. *This authorization to collect fuel costs close to the time they are incurred should not be used to divest the commission of the jurisdiction and power to review the prudence of these costs.* The order was predicated on adjustments for 1980, 1981, and 1982. We find them to be permissible."

The order of the Public Service Commission is affirmed.

(at page 1037) (emphasis supplied)

It is clear that the Commission, after weighing the arguments of parties and Staff, concluded -first generically and then by applying the general standard to a specific factual situation- that its ability to adjust amounts that flowed through the clause is not subject to an arbitrary time limit, but instead is a function of when it receives evidence that demonstrates the utility was imprudent. Since (as the Commission emphasized) the utility benefits from the rapid collection of fuel costs, the burden of proof to demonstrate prudence is on the utility, and the information needed to assess prudence is in the possession of the utility, this is only fair and reasonable. It is equally clear that the Florida Supreme Court approved the Commission's rationale and the Commission's legal conclusion regarding its jurisdiction; indeed, the reference in the Court's order to the "continuous" nature of the fuel cost recovery proceeding reflects that the Court embraced, not only the order that Gulf Power appealed, but the rationale expressed in earlier Order No. 12645, which the Commission cited and invoked in its Maxine Mine decision as the order in which it earlier had put the jurisdictional issue to rest.

The sequence of the establishment of the Commission's jurisdiction over amounts collected through the "continuous" fuel cost recovery clause, then, is as follows: In Order No. 12645, the Commission concluded that, because the burden of proof is on the utility that possesses the pertinent information, its ability to consider evidence of imprudence is not barred by an arbitrary time frame, and it will adjudicate prudence only when all of the pertinent facts are before it. In Order 13452, the Commission applied this determination to an issue specific to Gulf Power, and in the course of the decision pointed

to Order No. 12645 as having settled the issue. In *Gulf Power, supra,* the Florida Supreme Court noted the continuous nature of the fuel proceeding (as did the Commission in Order 12645) and the benefit to the utility of the ability to collect costs concurrently with the expense (as did the Commission in Order Nos. 12645 and 13452), ruled that the preliminary authorization to collect costs close to the time the costs are incurred does not operate to divest the Commission of jurisdiction to consider prudence, and *affirmed, without qualification or limitation, Order No. 13452* (in which the Commission confirmed and applied the conclusion it had reached earlier in Order No. 12645).

In the face of the rulings by the Commission and affirmation by the Florida Supreme Court in *Gulf Power,* at page 15 PEF asserts:

> In the event of this prudence review, however, for the Commission to avoid the jurisdictional prohibition on retroactive ratemaking, there must be notice of a genuine issue with respect to a particular fuel transaction or cost, before that transaction has occurred or that cost has been incurred, and an adequate opportunity to be heard on the issue.

An examination of the PEF's argument reveals it is audaciously self-serving, illogical, baseless, and, from the Commission's perspective, *dangerous.* Moreover, the argument conflicts with the very precedent that PEF cites to support it.

To appreciate the dangerous ramifications of PEF's assertion, one must consider it in context. In past orders, the Commission recognized and articulated the "tradeoff" associated with a fuel clause procedure that allows utilities to collect fuel expenses on a current basis. The Commission recognized that (1) the utility typically presents less than a full-blown "proof of prudence" case when it requests authority to collect fuel expenses; (2) the information necessary to gauge prudence is in the possession of the utility; and

(3) following the collection period, Staff and parties require time to investigate the prudence or lack of prudence associated with the transactions underlying the costs being collected. When it modified the paradigm of the cost recovery clause to allow utilities to bill customers for fuel expenses as the utility incurs them, the Commission adamantly maintained its ability to protect ratepayers' interests. The retention of jurisdiction for that purpose, and the rejection of artificial time limits on its ability to consider evidence of imprudence, constituted the essential *quid pro quo* that the Commission established in return for the benefit it conferred on utilities. The retention of jurisdiction, with the concomitant ability to act on imprudence when evidence is presented, is particularly important in cases such as this one, in which Citizens allege that PEF consciously abandoned its right to burn sub-bituminous coal at Crystal River Units 4 and 5 in 1996, then later claimed the reason it did not buy the cheapest fuel was because PEF is not permitted to burn it. To say that PEF withheld critical information bearing on the Commission's ability to review prudence is an understatement. If the Commission accepts PEF's argument that it is without authority to address such behavior, the lesson for all utilities will be to provide as little information as possible when requesting approval to collect, and withhold as much as possible when parties attempt to investigate the prudence of purchases.

PEF asserts that the Commission has jurisdiction only over expenditures *that have not yet been made,* and this jurisdiction attaches *only after the Commission puts the utility on notice of a specific issue.* In its argument, PEF attempts to preserve the benefit side of the Commission's fuel expense policy, while neatly excising the balancing measure that the Commission deemed essential to protect ratepayers' interests.

PEF does not explain how this standard could possibly work in an environment of *projections* and *current cost recovery,* in which the "transaction," in the form of a contract to purchase fuel, occurs prior to a hearing, and associated "costs," in the form of deliveries under the contract to which the utility has committed, are "incurred" before parties ever hear of them. For instance: Under the "standard" proffered by PEF, when would the Commission ever have the ability to review, and adjust, if warranted, the amount collected from customers to reimburse the utility for an imprudent spot purchase that transpired before the parties or Commission ever learned about it? The so-called "standard" is an exercise in wishful thinking on PEF's part and a practical impossibility from the regulators' perspective. If PEF has its way, it may present superficial presentations of fuel costs, so as to thwart any effort of the Commission, Staff, or parties to identify—much less challenge—any issues in its projections when they are made. PEF could then collect associated expenses at the same time parties are conducting discovery or otherwise educating themselves on any prudence issues related to PEF's presentation. According to PEF, any amounts associated with the projection that PEF collects prior to a "notice" of an issue would be beyond the reach of the Commission, even if parties diligently obtained and reviewed more information from the utility or other sources. Importantly, if accepted, PEF's argument would not simply insulate PEF from the risk of refunds in this case: PEF's "standard" would hamstring the Commission in its review of all utility filings in the future. The utility would retain the benefit of "current recovery," but the ratepayer protection aspects that the Commission required in Order No. 12645 effectively would be severed from the equation.

In support of its contention, PEF asserts that the standard it advances reflects the holding in *Gulf Power v. Florida Public Service Commission,* and that in its opinion the Court limited the "broader" language of Order Nos. 12645 and 13452 that supports Citizens' Petition. To use a non-legal term, in attempting to (1) confine the Commission's jurisdiction and (2) ascribe its confining "standard" to the Florida Supreme Court's opinion in *Gulf Power,* PEF is swinging for the fences. As soon as one reads Gulf Power, PEF strikes out.

Strike one: If the intent of the Court was to pronounce a new standard in the form of a required "notice of a genuine issue" delivered "before the transaction has occurred or that cost has been incurred," one would reasonably expect to find the new standard expressed in the language of the opinion to which PEF attributes it. Search the opinion – PEF's test is nowhere in it. PEF created it out of whole cloth.

Strike two: If the "principle" that is the subject of PEF's pronouncement is not in the explicit language of the decision, to support PEF's argument it would have to be implicit in the opinion. A reading of the Court's decision establishes that PEF's "limiting standard" is foreign to it. According to PEF, the Commission (or party) must deliver notice of a "genuine issue" before the utility's dollars are at risk of refund. The Court's opinion recites that the Commission adjusted amounts that Gulf had collected in 1980, 1981, and 1982. It also recites that the Staff did not become concerned over the cost of Maxine coal until *1981.* In other words, the Court approved an adjustment that predated the earliest "notice" that Gulf received regarding the existence of an issue with the cost of

Maxine coal, and required Gulf Power to refund amounts that Gulf had collected prior to receiving the "notice". [1]

Not only, then, does the opinion of the Court fail to support PEF's argument implicitly: on the face of it, the decision refutes the "interpretation" that PEF tries to impose on it.

Strike three: PEF asserts that in its decision the Florida Supreme Court "limited" the "broader" language of Order Nos. 13452 and 12645. This assertion is incredible. In Order No. 13452 (the order on appeal in *Gulf Power,* the Commission said of Order No. 12645, "The approach announced in Order No. 12645 is fair to all involved." It proceeded to implement the jurisdiction it claimed in Order No. 12645 by reaching back to the earliest point in time advocated by any party—a point in time that predated the true-up order cited by Gulf at the time, and that predated the "notice" that PEF claims to be necessary in this case. When it reviewed this decision, in *Gulf Power* the Court observed that the fuel cost recovery proceeding is *continuous* (borrowing the term that the Commission used in Order No. 12645); that it is structured to provide to the utilities the benefit of collecting fuel expenses close in time to the point at which they are incurred; and that the conferring of this benefit does not divest the Commission of its jurisdiction to later review the prudence of the expenditures. Of Order No. 13452, in which the Commission explicitly adopted the "broader" language of Order No. 12645,

[1] Noting that the adjustments related to 1980, 1981, and 1982, the Court found them to be permissible. PEF argues this means the Court acknowledged that there might be, under different circumstances, "prohibited" retroactive ratemaking in the fuel adjustment. See Motion to Dismiss, at page 16. One can always conjure "different circumstances" and speculate as to whether facts that were not before the Court similarly would pass muster. However, the point relevant to the Commission's consideration of PEF's motion is that the Court approved adjustments that predated the earliest "true-up" cited by Gulf Power order and the earliest "notice of issue." Further, it is clear from Order No. 13452 that 1980 was the earliest adjustment date that any party to the case before the Commission advocated.

the Court stated, "The order of the Public Service Commission is affirmed." To paraphrase a popular expression, what part of "affirmed" does PEF not understand?

Citizens' request for relief is fully consistent with the jurisdiction over past collected amounts that the Commission articulated in its orders and that the Florida Supreme Court affirmed in the *Gulf Power* case. The Commission should reject PEF's strained effort to rewrite the Court's opinion, alter a Commission decision regarding its jurisdiction over past collected amounts that it did not contest at the time, and skew all future proceedings in a manner that would cripple the ability of the Commission to protect customers from imprudent fuel expenses of any regulated electric utility.

(b) **In their Petition, Citizens do not ask the Commission to employ "hindsight." In its argument, PEF mischaracterizes the Petition and seeks to inject affirmative defenses, in violation of the principles governing the consideration of a motion to dismiss.**

PEF states that the PSC must judge management's decisions based on the information available to management at the time the decision was made, without the benefit of knowledge acquired after the decision. That is precisely the standard the Citizens call on the Commission to apply. In the early paragraphs of the Petition, Citizens recite the factual developments within the coal and electric utility industries that resulted in a dramatic reversal of the earlier comparative economics of Powder River Basin sub-bituminous and Eastern bituminous coals and a rush by prudent, cost-conscious utilities to exploit the savings associated with cheaper Powder River Basin coal for their customers. In Paragraph 38, Citizens state, "An examination of PEF's own description of

the units' design, PEF's own initial fuel strategy, market prices for coals over time, and the availability and cost of transportation from the Powder River basin region to PEF's Crystal river site demonstrate that such a shift was both feasible and economically desirable. Further, this information was known, or was available, to PEF at the time." At page 7 of the Motion to Dismiss, PEF acknowledges that in their Petition Citizens allege the information they rely on to show that burning sub-bituminous coal at Crystal River Units 4 and 5 from 1996 to 2005 was feasible and economically desirable was known or was available to PEF at the time. PEF contends that this allegation is "contradicted" by "express or implicit allegations of fact in the pleading." The claim is untrue. Citizens' Petition is perfectly consistent in its assertion that PEF knew, or should have known, of the developments in the coal industry that led to a reversal of the prior cost relationships of Eastern bituminous and Western sub-bituminous coals, and failed to act in its ratepayers' interests.[2] PEF's "hindsight" claim is a pretext for PEF's improper attempt to inject into the consideration of a motion to dismiss what the Commission should see as "anticipatory affirmative defenses." They appear in the form of thinly disguised attempts to rehearse before the Commission the idea that Powder River Basin coal was rife with risks. PEF first wrongly defines "hindsight." At page 2 of the Motion, PEF states, "OPC's Petition should be dismissed because OPC requests the commission to second-

[2]As the Commission is guided in its consideration of a motion to dismiss by principles developed in the context of civil litigation, it is instructive to note that Florida has adopted pleading rules that require only a short-form "notice" type of initial pleading. See Rule 1.110(b), Florida Rules of Civil Procedure: "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, must state a cause of action and shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled". Citizens' Petition contains such a "short and plain statement" that PEF knew, or should have known, the facts alleged in the Petition that demonstrate PEF's imprudence in failing to protect its customers by purchasing sub-bituminous coal beginning no later than 1996. Any "contradictions" to Citizens' allegations are in the form of arguments external to the Petition that PEF improperly tries to introduce in its Motion to Dismiss.

guess PEF's coal procurement decisions over the last decade based on information that was fully known only after those decisions were made." By "fully known," apparently PEF means it should not be held accountable if it was not in a position prior to its procurement decision to know what would happen to coal prices and transportation for a full decade. See Motion to Dismiss at pages 7-10. Here, PEF mischaracterizes the concept of "hindsight," Citizens' Petition, and the procurement process. Citizens allege that PEF built a unit having the flexibility to burn bituminous coal or a blend of bituminous and sub-bituminous coals. Citizens allege and intend to prove that PEF should have chosen PRB coal, based on information available to PEF at the time, during individual procurement decisions that occurred during that decade.

PEF wants the Commission to accept that PEF ruled out PRB coal because of analyses of, for instance, the possibility that the Western sub-bituminous mines might collapse or the producers might have difficulty "finding an adequate vein in the mine." Motion to Dismiss, at page 8. Effectively, PEF is attempting to "testify" in its Motion to Dismiss. In making such arguments, PEF ignores of the limited purpose of a motion to dismiss.[3] Based on the four corners of the document, taking the allegations as true, the Petition presents a cause of action, without calling on the Commission to employ hindsight. At the hearing on the Petition, if it still sees the wisdom of doing so, PEF will be free to try to explain how the Power River Basin sub-bituminous coal *surface mines*, in which huge draglines excavate the coal from atop after removing shallow overburden, creates concerns of "mine collapse" and how PEF vetoed PRB coal for fear that the miners

[3] "The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. . . In determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produce by either side. . . Significantly, all material factual allegations of the complaint must be taken as true. *Varnes v. Dawkins,* 624 So. 2d 349 (Fla 1st DCA 1993).

would have trouble finding an "adequate vein" in the enormous, 30 foot- thick-and-greater deposit of sub-bituminous coal that stretches through much of the Powder River Basin of Wyoming. Similarly, at the hearing PEF will be free to try to explain why it should not make a procurement decision unless it can see 10 years of price advantages into the future when its fuel procurement process consists largely of frequent RFP's and a combination of contracts lasting one or two years and spot purchases lasting less than a year.

In the Motion to Dismiss, PEF describes Citizens' references to the "market price" of PRB coal as an indication that Citizens want the Commission to rely on "hindsight." The claim is untrue. At page 9 of the Motion to Dismiss, PEF admits that "At the times PEF made the relevant decisions to procure certain coal, it necessarily only had the knowledge of the then-current market price and projected market prices." PEF then adds, "It (PEF) did not have the benefit, as OPC does now, of what actually occurred in the market regarding coal prices." Implicit in PEF's argument is the notion that it was necessary for PEF to know what would happen to prices for the coming decade before the Commission can hold it accountable for not acting on the information bearing on individual fuel procurement decisions. Nonsense. During the decade that is the subject of the Petition, at a given point in time producers and buyers in the coal markets knew the "market price" at which PRB coal could be obtained. Similarly, if PEF conducted a competitive procurement process for the supply of coal to Crystal River Units 4 and 5 that included PRB producers, PEF would have obtained specific bids reflecting the market price in effect at the time. "Market prices" are not determined after the fact; they are known, or ascertainable, at any point in time *prior to* the entering of a transaction. A

compilation of historical market prices does not involve hindsight if the market price at a given point in time was available to the utility before it committed to a fuel purchase transaction. The market prices at which the commodity of PRB coal was available at points of time within the period 1996-2005 can be placed within a data base, so that, without the use of hindsight, the Commission can compare the price that PEF paid for bituminous coal and bituminous-derived synfuel with the price it would have paid if it instead had purchased PRB coal at the time.

In their Petition, Citizens ask the Commission to apply the same test and the same measure of excessive costs that the Commission applied to Gulf Power in Order No. 13452 (the order that the Florida Supreme Court affirmed)[4]. In Order No. 13452, the Commission said this about market prices:

> We have judged Gulf's actions on the facts that were known or that should have been known at the time of the decision. Market prices and projected market prices at the time of a fuel procurement decision are relevant to the determination of prudence of that decision, but actual prices paid after the decision is made do not affect a determination of prudence. If no imprudence is found, market prices paid after the decision is made are irrelevant. However, if a utility's actions are imprudent, market price is material to a determination of overcharges, particularly when the decision affects the choice among alternative fuels.

Order No. 13452, entered in Docket No. 830001-EU on November 3, 1983 at page 13.

Contrary to PEF's assertion (see Motion to Dismiss, at page 9), in Order No. 13452 the Commission recognized the need to assess market prices that were current at the time

[4] In its Motion to Dismiss, at page 5, PEF cites Order No. 13452 as authority for its proposition that the Commission cannot employ hindsight. In that order, after the self-admonition against hindsight the Commission reviewed the market information that was available to Gulf Power at the time it decided to extend its Maxine contract, determined that Gulf Power acted imprudently, and required the utility to refund excessive fuel charges to customers that related to three prior years.

a procurement decision was made when gauging prudence, *and* the value of actual prices paid in measuring the impact of imprudence once that finding has been made.

PEF quotes the case of *Richter v. Florida Power Corp.*, 366 So.2d 798 (Fla. App. 2d DCA 1979)for the proposition that the Commission cannot determine that costs previously incurred and recovered were imprudent because "hindsight makes a different course of action look preferable." The quotation is incomplete. Immediately after the reference to the prohibition against hindsight quoted by PEF, the court stated:

> However, here the allegations of the consumers' complaint do not fall within the normal instance of hindsight as mentioned above. The complaint alleges that the consumers were forced to pay unreasonably high fuel adjustment charges because of an illegal scheme (known as "daisy-chaining") conducted by a fuel consultant employed by FPC; that through this daisy-chaining scheme FPC paid 54 cents per gallon for oil that had an actual value of only 21 cents per gallon; that FPC knew of this scheme, or should have known of it, yet allowed the excessive fuel costs to be passed on to the consumers through the fuel adjustment charges. So the complaint alleges actions on the part of FPC which prevented the PSC from having the true facts before it when it sanctioned the fuel adjustment charges here in question.

To fully appreciate the import of this language, it is necessary to understand that *Richter* involved a class action brought by customers who claimed damages stemming from a scandal in which Florida Power Corporation's fuel consultant engaged in a series of fraudulent paper transactions to inflate the price of oil purchased by Florida Power Corporation from 21 cents per gallon to 54 cents per gallon. Florida Power Corporation paid the higher price and passed the cost to customers through the fuel clause. The customers sought refunds related to overcharges that occurred between 1973 and 1979. After the customers filed the class action, Florida Power Corporation moved to dismiss

the case on the grounds that the Commission had exclusive jurisdiction over the subject matter. The customers resisted the motion to dismiss by arguing the Commission could not provide relief to them because of the prohibition against "retroactive ratemaking." The trial court ruled for Florida Power Corporation, and the customers appealed. At the appellate court's invitation, the Commission submitted an *amicus* brief in which the Commission asserted it had jurisdiction to require Florida Power Corporation to refund excessive, past collected fuel adjustment charges.

In the course of considering the issue before it, the appellate court was guided in part by the decision of the Supreme Court of Ohio in the case of *Ohio Power Co. v. Public Utilities Commission,* 376 N.E. 2d 1337 (1978):

> We find support for this view from a recent opinion form the Supreme Court of Ohio. . .the Public Utilities Commission ordered the refund of unreasonable fuel adjustment charges collected by Ohio Power Company. Ohio, like Florida, has statutes giving the Public Utilities Commission power to set reasonable rates for regulated utilities. The power company appealed to the supreme court arguing (as the consumers do here) that the Commission did not have the power to retroactively change its rates and grant refunds. The supreme court rejected this argument, saying:
>
> > We perceive that the requirement of fairness which compels adjustment in rates to compensate utilities for escalating fuel costs also compels retrospective reconciliation to exclude charges identifiably resulting from unreasonable computations or inclusions.
>
> . . .(citation omitted) we think the rationale of this Ohio decision represents a pragmatic approach to the problem before us.
>
> *Richter,* at pages 800-801

In *Richter,* the court observed that PEF's predecessor, Florida Power Corporation, had entered into a settlement agreement that was presented to the Commission for approval, as well as a federal district court. The court concluded, several years prior to the Florida Supreme Court's decision in *Gulf Power,* "We hold that the PSC does have

exclusive jurisdiction to decide the issue raised by the consumer's complaint. The PSC is best equipped to investigate the consumers' allegations, and, if necessary, to establish the mechanism whereby refunds could be made to the thousands of consumers affected."

Whereas its predecessor referred to the Commission's jurisdiction over past collected fuel adjustment charges in support of its effort to dismiss a class action suit in circuit court, PEF attempts to deny that jurisdiction. PEF can't have it both ways—and it *certainly* cannot argue that the *Richter* case supports its cause.

PEF's attempted use of *Richter* fails for a second reason. The *Richter* court said that Chapter 366 ". . .still indicates that the PSC cannot retroactively alter previously entered final rate orders just because hindsight makes a different course of action look preferable." *Richter, supra,* at page 800. In Order Nos. 12645 and 13452, among others, the Commission has painstakingly pointed out that—because the utility makes a superficial showing and time following preliminary approval of a fuel factor is necessary to gauge prudence—the fuel cost recovery proceeding is "continuous" and orders approving fuel factors are *not* "final rate orders." This concept is important to the instant case, in which Citizens allege that PEF unilaterally and imprudently abandoned its right to burn sub-bituminous coal under environmental permits, and, without disclosing that fact, later tried to justify the purchase of more expensive coal on the grounds that its permit did not authorize PEF to burn sub-bituminous coal. This egregious act against customers' interests, coupled with the fact that PEF concealed it when PEF later claimed its environmental permits prohibited it from burning sub-bituminous coal in Units 4 and 5, alone would suffice to take the situation out of the "administrative finality" doctrine,

even if the Commission did not have the ability to review past collected amounts stemming from PEF's imprudence under the *Gulf Power* standard.

In the Motion to Dismiss, PEF cites several Commission orders and court decisions in support of its "hindsight" argument. The first observation to be made is that each of the cases involved matters for which the Commission conducted an evidentiary hearing, as opposed to orders granting a motion to dismiss based on a review of the four corners of the petition. The second is that the determination of whether a particular analysis employs "hindsight" is fact-specific. A consideration of two court cases involving the Commission's treatment of replacement fuel costs during nuclear outages—both of which PEF cited in its Motion to Dismiss-- makes the point. In *Florida Power Corporation v. Public Service Commission,,* 456 So.2d 451 (Fla. 1984), the Florida Supreme Court reversed a Commission order in which the Commission determined that FPC management failed to have procedures in place to require workers to test the capacity of crane hooks, and thus was responsible when a crew using an untested hook dropped a test weight onto a stack of fuel rods and caused an outage to be extended. The Court seems to have married the notion of "hindsight" to the fact that the Commission based its conclusion on findings by the Nuclear Regulatory Commission that were related to its investigation of the issue of whether the incident posed a risk of releasing radiation outside the reactor building—a risk that the Court described as very different than the Commission's ratemaking standard. On the other hand, in *FPC v. Cresse,* 413 So.2d 1187 (Fla. 1982), which also presented the Florida Supreme Court with an order disallowing certain replacement fuel costs associated with a nuclear outage, the Court reached a different conclusion:

> "It is improper, FPC contends, to use hindsight and hold it responsible for the lack of a spare when, in the utility's opinion, its actions were reasonable. We, however, do not agree that there is no evidence of mismanagement. . .The PSC's finding of management "imprudence" cannot be characterized as "hindsight" in view of FPC's experience with the heat pump prior to the incident with which we are concerned."

At page 10, PEF cites Commission Order No. 19042 for the proposition that the Commission "has been down this path before." The order does not support PEF's Motion to Dismiss. In the case that led to Order No. 19042, Occidental criticized Florida Power Corporation for having taken approximately four months longer to negotiate a gas contract than Occidental believed was necessary. The matter was the subject of a hearing. The evidence included indications of possible FERC-approved retroactive rate increases that would have accompanied the contract, and evidence that the other side to the negotiations was responsible for the delay. In its order, the Commission said it was not convinced that, based on the information available to FPC at the time, the length of time required to complete the transaction was imprudent.

In contrast to the situation described in Order No. 19042, PEF's Petition presents a picture far more similar to the Gulf Power Maxine situation that led to the issuance of Order No. 13452. In that order, the Commission noted that the original contract to purchase Maxine Mine coal did not adversely affect customers' interests. Similarly, Citizens do not fault PEF for having purchased bituminous coal exclusively during the 1980s, when bituminous coal enjoyed a cost advantage over Western sub-bituminous coal. In the Gulf Power situation, the utility reached a point at which it continued its original path when information it knew or should have known argued for measures to protect ratepayers' interests. Similarly, in their Petition Citizens allege that changes occurred in the coal industry that made sub-bituminous coal cheaper for PEF than the

bituminous coal and synfuel PEF was purchasing from its affiliates, but PEF failed to adjust to the change. In the Gulf Power situation, Gulf Power complained to the Commission and subsequently to the Florida Supreme Court that the Commission was using hindsight to measure prudence. In Order No. 13452, the Commission stated:

> An approach that limits the review of prudence to contemporaneous events fails to recognize the duty of this Commission to protect the ratepayers interest and the fact that utilities are not entitled to recover expenses prudently incurred. On the other hand, the use of pure hindsight in assessing the prudence is (sic) past action is patently unfair.
>
> The prudence of decision making should be viewed from the perspective of the decision maker at the time of the decision.
>
> In this case, we have looked at the prudence of Gulf's actions in terms of the facts that were known or that should have been known at the time of the decision. . . In this case we have determined that Gulf acted imprudently, that Gulf's imprudence resulted in excessive costs, and that the excessive costs should be disallowed and refunded to gulf's ratepayers.

On appeal, the Florida Supreme Court said, "Contrary to Gulf's contentions, the commission sought to evaluate Gulf's managerial decisions under the conditions and times they were made."

As in the Maxine Mine case, Citizens allege that PEF's actions were imprudent as a result of information that PEF had or was available to PEF at the time. Taking Citizens' assertions to be true, no hindsight is involved in granting Citizens the relief they request.[5]

Other matters. At page 14, PEF cites Order No. PSC-97-0608-FOF-EI for the proposition that "utilities are entitled to recover the actual cost of fuel purchased to

[5] In the Maxine Mine order, the Commission used market prices and projected market prices known at the time of management procurement decisions to gauge prudence of Gulf's management, and noted that, if imprudence is found, market prices are then material to a determination of the extent of overcharges. On appeal, the Florida Supreme Court sustained both the finding of imprudence and the adequacy of the methodology and supporting data used to quantify the refund. The allegations of the Petition are consistent with the standard for gauging prudence and the methodology used to measure the impact of imprudence. The Maxine case, not the Occidental order, better illustrates the "path" that Citizens intend to follow through their Petition.

generate electricity." The quotation is taken out of context, and is grossly misleading. Order No. PSC-97-0608-FOF-EI addressed a situation in which OPC sought reconsideration of a projection filing in the fuel case due to claimed insufficiently of evidence of prudence during a nuclear outage. Interestingly, in that case Florida Power Corporation, PEF's predecessor, took the position that to require proof of prudence "is simply inapplicable to a proceeding, such as the general rate case or the fuel adjustment, in which the Commission allows interim cost recovery subject to refund." The issue led the Commission to expound on the nature of the fuel cost recovery process:

> In Florida, the procedure by which utilities recover fuel costs has evolved from allowing recovery through rates set in a rate case to a *continuous* rate adjustment proceeding. *Gulf Power Company v. Florida Public Service Commission,* 487 So.2d 1036, 1037 (Fla. 1986) (Fuel adjustment charges are set in a continuous proceeding to ensure utilities are compensated for the fluctuating cost of fuel).
>
> The fuel adjustment procedure allows utilities to recover fuel costs near the time they are incurred; however, *this practice does not prohibit us from reviewing the prudence of fuel costs at a later date. . . .*In addition, because of the continuous nature of the clause, the Florida Supreme Court has sanctioned our authority to go back several years to review the prudence of costs.[6]

At page 20, PEF complains of "unfairness" and says notice should have been provided to PEF as early as a decade ago, because the "type, quantity, and cost of the coal procured for Crystal River Units 4 and 5 has been a matter of record in the fuel proceeding. Fundamentally, in this case PEF hopes to convince the Commission to shift the burden of proof in the fuel cost recovery proceeding from PEF to the parties and the Commission. As the Commission has said repeatedly, the burden of proof never leaves the utility

[6] At page 14 of the Motion to Dismiss, PEF acknowledges that the collection of fuel costs from customers "has evolved from recovery through base rate proceedings to a continuous rate proceeding under the Fuel Clause."

seeking authority to collect fuel costs from customers; if the utility does not come forward with proof of prudence, then prudence remains a "viable" issue for the Commission to consider when it receives evidence that prior collected amounts were imprudent. PEF provided information regarding the cost and type of fuel burned at the units, but for a decade PEF did not make "a matter of record" its unilateral decision to abandon its authority under environmental permits to burn sub-bituminous coal, and did not make "a matter of record" its decision to ignore cheaper sources of fuel in favor of transactions with affiliates bent on maximizing synfuel tax credits. If there is any "unfairness" to the process, it is in the manner in which utilities collect costs in the absence of all relevant facts, and customers are called upon to bear the costs of activities such as those that are the subject of the Petition unless and until a party other than the utility raises the matter. The information bearing on prudence or imprudence is in the possession of the utility. If the utility does not bring comprehensive information forward, it is not in a position to claim "unfairness" if time elapses before another party raises the matter. Citizens assert the extent to which the utility has or has not been forthcoming with parties and the Commission is a relevant consideration when the utility complains of the time that has elapsed.

At page 20, PEF cites *Gulf Power v. Bevis,* 289 So.2d 401, 403 (Fla. 1974) in support of its proposition that the relief requested in Citizens' Petition would amount to an unconstitutional taking. The case is wholly inapposite to the situation before the Commission. *Gulf Power v. Bevis* involved the Commission's consideration, in the context of a revenue requirements case, of the then new Florida corporate income tax. In the order on appeal, the Commission acknowledged the tax is a legitimate cost of doing

business, but excluded it from the calculation of the revenue requirement of the utility that base rates are designed to generate, on the grounds the date the tax was imposed fell outside the test period adopted for the case. Calling the action arbitrary in light of the known and definite nature of the tax obligation, the Court reversed the Commission's exclusion of the tax from the calculation of revenue requirements. Unlike this case, in *Gulf Power v. Bevis* there were no issues of imprudence, or failure to protect customers' interests, or disputes over amounts to be deemed legitimate costs, or bias toward transactions with affiliates. Nor does the case stand for the proposition that the Commission cannot cull out from costs borne by customers—whether in a base rate case or in the fuel cost recovery proceeding--costs that are imprudent, unnecessary, or unreasonable in amount. Here, PEF had the "opportunity" to guard against disallowances by conducting its fuel procurement activities prudently and in a manner that did not subject customers to unnecessarily high costs. Citizens allege PEF failed to do so, and the Commission has the *obligation* to consider and act on Citizen's allegations. The Constitution does not protect PEF from orders disallowing costs that are imprudent or unreasonable.

At page 14, PEF states, "The justification for the recovery of fuel costs through the Fuel Clause is the elimination of regulatory lag that occurs as a result of the 'difference between the actual cost of fuel for an electric utility and the amount allocated for fuel in the utility's current general rate structure'." The passage quoted by PEF is from the *dissenting* opinion in *Citizens of the State of Florida v. Florida Public Service Commission,* 403 So.2d 1332, 1333 (Fla. 1981). The dissenting opinion from which PEF quotes does not support the statement for which PEF offers it. Justice Overton's

statement did not refer to the elimination of regulatory lag. He said, "it (the fuel cost recovery clause) is intended to eliminate the difference between the actual cost of fuel for an electric utility and the amount allocated for fuel in the utility's current general rate structure." In fact, he wrote the dissent to express his view that the utilities had failed to prove a lag ever existed.[7]

At page 14, PEF quotes from *Pinellas County v. Mayo,* 218 So.2d 749, 750 (Fla. 1969) in support of the notion that customers benefit when the fuel factor is adjusted closer in time to when the costs are incurred and the lag between incurrence and recovery through base rates is eliminated. The case does not support the statement which cites it. *Pinellas County* was decided in 1969, prior to the adoption of a hearing process for the fuel cost recovery proceeding, and at a time when a portion of fuel costs was built into base rates, so that the fuel adjustment factor served to collect or refund the differential between the fuel cost embedded in base rates and the actual cost of fuel. The order reviewed did nothing to change the *timing* of recovery; instead, the Commission allowed the utility to peg the fuel factor amount to a level closer to the utility's current cost. The case had nothing to do with "elimination of lag".

PEF cites the case of *GTE Florida Inc. v. Clark,* 668 So.2d 971 (Fla. 1996) in support of its claim that entertaining Citizens' Petition would violate principles of fairness and equity. The case gives no comfort to PEF. *GTE Florida* involved a claim by the

[7] The case involved a challenge to the Commission's decision to allow utilities to bill customers for a "transition adjustment" to collect two months of "lagging" and therefore uncollected fuel costs when the Commission moved to the present regime of projections and current recovery. In the case before the Commission an issue arose as to whether an actual lag existed, or whether instead historical costs were used as a proxy in calculating a factor for recovery of current costs. The Commission allowed the transition adjustment. In a short *per curiam* decision the Court affirmed the Commission's order. Justice Overton dissented.

Comission that GTE's failure to seek a stay of an order denying its request for authority to collect certain affiliate-related costs meant GTE could not later collect the costs related to the period of the appeal when the Florida Supreme Court reversed the Commission's order. The Court disagreed, and authorized a surcharge. It noted that had the situation been reversed, the Commission would have ordered a refund. At page 973, the Court stated, "It would clearly be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall, from an erroneous PSC order. The rule providing for stays does not indicate that a stay is a prerequisite to the recovery of an overcharge or the imposition of a surcharge." Here, however, the Commission is not dealing with the appeal of an erroneous order, or the implications of a failure to seek a stay of such an order. This case involves allegations of imprudent conduct that the Commission must assume to be admitted for purposes of ruling on the Motion to Dismiss. It is worth noting that in *GTE Florida,* the Court faulted the Commission for disallowing costs of affiliate transactions merely because they were with related parties, without more. In this case Citizens allege that PEF purchased bituminous coal and synfuel from related parties when it knew or should have known that cheaper fuel was available from other sources—a very different set of facts than those presented to the Court in *GTE Florida.*

CONCLUSION

For the reasons developed above, the Commission must deny PEF's Motion to Dismiss.

Respectfully submitted,

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DOCKET NO. 060001-EI
CERTIFICATE OF SERVICE

I HEREBY, CERTIFY that a true and correct copy of CITIZENS' MEMORANDUM IN OPPOSITION TO PEF'S MOTION TO DISMISS CITIZENS' PETITION has been furnished by electronic mail and U.S. Mail on this 13th day of September, 2006, to the following:

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