

SCANNED

Matilda Sanders

From: John W. McWhirter [jmcwhirter@mac-law.com]
Sent: Wednesday, April 25, 2007 12:35 PM
To: Filings@psc.state.fl.us
Cc: Lisa Bennett; Lorena Holley; J Michael Walls; D Triplett; Joe McGlothlin; Patty Christensen, Esq.; Paul Lewis; John Burnett; Alex. Glenn; Mike Twomey; James W. Brew; Cecilia Bradley; Schef Wright
Subject: Dkt 060658 Post hearing brief and position statement
Attachments: 07425 FIPUG Posthearing brief.doc; 07425 FIPUG Dkt 06658 Post hearing Position Statement.doc

ORIGINAL

1. John W. McWhirter, Jr., McWhirter Reeves & Davidson, P.A., 400 N. Tampa St. Tampa, FL 33602, jmcwhirter@mac-law.com is the person responsible for this electronic filing;
2. The filing is to be made in Docket 060658-EI, In re: Coal Price refund
3. The filing is made on behalf of the Florida Industrial Power Users Group;
4. The total number of pages is 21 & 6 pages respectively; and
5. The attached documents are The Florida Industrial Power User Group's Post Hearing Statement of Positions and Brief

John W. McWhirter, Jr.
 McWhirter Davidson & McLean, PA.
 400 N. Tampa St
 Suite 2450
 Tampa, FL 33602
 813.224.0866
 813.221.1854 FAX

Posthearing Statement
 DOCUMENT NUMBER-DATE

03523 APR 25 5

FPSC-COMMISSION CLERK

Brief
 DOCUMENT NUMBER-DATE

03524 APR 25 5

FPSC-COMMISSION CLERK

4/25/2007

ORIGINAL

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers \$143 million.

DOCKET NO. 060658-EI

FILED: April 25, 2007

FIPUG'S POSTHEARING STATEMENT OF ISSUES & POSITIONS

In compliance with Order No. PSC-07-0048-PCO-EI, rendered January 16, 2007; Order No. PSC-07-0132-CPO-EI, rendered February 15, 2007, establishing the prehearing procedure in this docket, and prehearing Order No. PSC-07-0266-PHO-EI rendered March 29, 2007 the Florida Industrial Power Users Group files its post hearing statement of issues.

BASIC POSITION

PEF contracted to buy coal from an in house non regulated affiliate, PFC. PFC bought coal from other affiliated mining companies and third parties then resold it to PEF at a profit. PFC processed and transported coal through other affiliated companies at a profit to them. When coal prices fell and less expensive transportation alternatives became available from non affiliated companies PFC continued to purchase more expensive coal and transportation services in house to maintain the profitability of the non regulated affiliates. These actions were imprudent. Excess prices paid for coal during the period should be refunded to customers.

ISSUES AND POSITIONS

ISSUE 1: Did PEF act prudently in purchasing coal for Crystal River Units 4 and 5 beginning in 1996 and continuing to 2005?

POSITIONS:

FIPUG: *No. When a regulated utility operates under the aegis of a public utility holding company and buys coal, coal processing and coal transportation services from affiliated companies under secret non competitive agreements it is imprudent to charge customers more than the competitive market price for the product. Evidence discloses that PEF had the capability to burn less expensive coal. Even though other utilities turned to Powder River Basin coal to lower fuel costs to customers, PEF continued to purchase more expensive bituminous coal and "synfuel" from its affiliates and pass the extra costs on to customers.*

DOCUMENT NUMBER-DATE

03523 APR 25 07

FPSC-COMMISSION CLERK

Environmental Permitting

FIPUG: *PEF specified, designed, procured power plant need certification and constructed two generating plants capable of burning PRB coal. The additional cost for this capability increased the long term cost passed through to customers in base rates. PEF was then surprisingly imprudent in failing to include the possibility that it would burn this low cost clean burning fuel when it became available in its initial Title V Air Quality Application and to perform the requisite test burn. This failure inhibited PEF's ability to give customers the benefit of the lower cost fuel it promised in return for the higher cost plant construction.*

Coal Procurement Practices

FIPUG: *PEF placed coal procurement exclusively in the hands of a non regulated affiliate that profited from the transactions and kept the dealings secret from the general public. When the scienter independent market studies demonstrates that other utilities paid from 10% to 50% less for coal during the 1996-2005 period an aura of impropriety falls upon the profitable in house transactions at customer expense. PEF's evidence that it merely published broadcast requests for proposals that included lower priced coal mines falls short of the burden it must bear to shed the mantle of misconduct.*

CR-3

FIPUG: *CR3 went into commercial operation in March 1977. CR4 and CR5 came on line years later in 1982 and 1984. At that time PEF proved twice that even if it was possibly the only utility in the world to co-locate a nuclear plant on the same site with PRB coal plants the potential fuel savings to customers justified the nuclear risk and charging customers more money for construction to obtain future fuel savings. The contention today that it is imprudent to give customers the promised fuel savings by using the CR3 nuclear disaster shibboleth must be taken with a grain of salt.*

CR-4 & CR-5 Operational Matters

FIPUG: *PEF says PRB coal increases operating costs \$ 2 million. It was imprudent not to spend this to get the promised savings. Witness Hatt testified plant improvements for cheaper coal would cost \$61.2 million. Witness Basin said it would cost nothing. Improvements to utility plants are continuous. They are irrelevant in a fuel cost proceeding. They are base rate items. Even if the

cost were needed, were relevant and the worst case scenario used, the maximum allowed return on a \$61.2 million PEF plant upgrade is \$6.1 million a year. This authorized return is more than off set by the annual depreciation charge customers already pay to renew and replace the two plants. If CR4&5 cost \$900 million to build the depreciation charge customers were initially required to pay was \$36 million a year. This is 6 times the sum required to cover the highest allowed return on Hatt's estimated plant improvements.*

Megawatt Capacity

FIPUG: *Evidence offered by OPC indicates there would be no substantial derating that would off set the anticipated fuel savings that arise from selecting a less expensive coal supply.*

Coal Availability and Costs

FIPUG: *The evidence presented by OPC and Commission Staff shows unequivocally that PRB and foreign coal was available. The evidence shows that other utilities found and bought less expensive coal. Progress Fuels appears to have done no more than advertise its interest. The existence of the Progress Energy holding company structure belies a real interest in competitively priced fuels. Miners know it and react accordingly. The holding company structure provides a disincentive to seek cheaper coal from non affiliated companies.*

Affiliates

FIPUG: *The affiliate relationship is the centerpiece of the consumers claim. PEF's fuel affiliate, PFC, did not act as broker for PEF, it bought fuel from other affiliates and third parties and then resold it to PEF at a profit. Not only PFC, but each of the other affiliates profited from the transaction. Under this arrangement great care must be taken by regulators for consumer protection. The need for careful scrutiny is exacerbated because all of the affiliate transactions are trade secrets. Independent review of the competitive market transactions during the study period disclosed the magnitude of the overcharge customers encountered.*

Other Factors

FIPUG: The potential for affiliate abuse led to the creation of market proxies for barge transportation, but this proxy fell far short of dealing with the tangled web of affiliated transactions. There is no proxy for purchases from affiliate company owned mines, unloading, mixing and processing

services from the affiliate owned shipping terminal, or for western coal purchases that could be delivered by third party rail. When independent studies show prices charged by affiliated companies resulted in higher than competitive market prices for coal customers refunds are in order.

ISSUE 2: **If the Commission determines that PEF acted imprudently in its coal purchases, should PEF be required to refund customers for coal purchased to run Crystal River Units 4 and 5 during the time period of 1996 – 2005?**

POSITIONS:

FIPUG: *Yes. The Commission is the only forum in which customers can seek refunds. The Commission has the authority to grant refunds. When the alleged overcharges deal with trade secrets between affiliates a liberal review of lengthy time periods is in order.*

ISSUE 3: **Under the circumstances of this case, does the Commission have the authority to grant the relief requested by OPC?**

POSITIONS:

FIPUG: *Yes. Order Nos. 12645, 13452, and PSC 97-0608-FOF-EI, affirm the refund authority plus an extended look-back period. When regulated utilities combine into a Public Utility Holding Company, such as, Progress Energy and deal with a plethora of unregulated affiliates in secret transactions they should understand that the transactions can and will be subject to review for extended periods.*

ISSUE 4: **If the Commission determines that PEF should be required to refund customers for coal purchased to run Crystal River Units 4 and 5, what amount should be refunded, and how and when should such refund be accomplished?**

POSITIONS:

FIPUG: *The Commission should determine savings PEF imprudently overlooked. The refund should be amortized over a twelve month period through a reduced fuel factor beginning at the earliest practicable date.*

ISSUE 5: **If the Commission determines that PEF willfully violated any lawful rule or order of the Commission or any provision of Chapter 366, Florida Statutes, should the Commission impose a penalty on PEF, and what should be the amount of such penalty?**

POSITIONS:

FIPUG: *Yes. If the Commission finds that the potential savings were overlooked in order to enhance non regulated affiliate profits a penalty based upon the nature of the misfeasance should be imposed over and above interest. Interest at the commercial paper rate normally used by the Commission falls short of the mark as it would only penalize discovered overcharges with the cost of cheap debt available to highly rated corporations.*

ISSUE 6: **Should this docket be closed?**

POSITIONS:

FIPUG: Yes upon completion of the refund.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Industrial Power Users Group's Post-Hearing Statement of Issues and Positions has been furnished by electronic mail and U.S. Mail the 25th day of April, 2007 to the following:

Lisa Bennett & Lorena Holley Florida Public Service Commission Division of Legal Services 2540 Shumard Oak Boulevard Tallahassee, Florida 32399-0850	Mike B. Twomey Attorney for AARP P. O. Box 5256 Tallahassee, FL 32314-5256
James M. Walls/Dianne M. Triplett Carlton Fields Law Firm Attorneys for Progress Energy P.O. Box 3239 Tampa, FL 33607-5736	Department of Community Affairs Valerie Hubbard, Director Division of Community Planning 2555 Shumard Oak Blvd. Tallahassee, FL 32399-2100
Office of Public Counsel H.McLean/P. Christensen/J.McGlott c/o The Florida Legislature 111 W. Madison St., Room 812 Tallahassee, FL 32399-1400	Department of Environmental Protection Buck Oven/Michael P. Halpin Siting Coordination Office 2600 Blairstone Road MS 48 Tallahassee, FL 32301
Progress Energy Florida, Inc.	PCS Phosphate - White Springs (Brickfield) James W. Brew, c/o Brickfield Law Firm

Mr. Paul Lewis, Jr.
106 East College Avenue, Suite 800
Tallahassee, FL 32301-7740

1025 Thomas Jefferson St., NW
Eight Floor, West Tower
Washington, DC 20007

Progress Energy Service Company

John T. Burnett/R. Alexander Glenn
P.O. Box 14042
Saint Petersburg, FL 33733-4042

/S/ John W. McWhirter, Jr.

R. Scheffel Wright/John T. LaVia
Attorneys for Florida Retail
Federation
225 South Adams Street, Suite 200
Tallahassee, FL 32301

Florida Bar # 53905
McWhirter, Reeves and Davidson, PA
Attorneys for **Florida Industrial Power Users Group**
400 North Tampa Street, Suite 2450
Tampa, FL 33602
813.224.0866
Fax 813.221.1854
jmcwhirter@mac-law.com