Dorothy Menasco

From: Pam Ingram [Pam.Ingram@bbrslaw.com]
Sent: Monday, April 30, 2007 4:17 PM
To: Filings@psc.state.fl.us
Subject: FW: Docket No. 060658 - Post Hearing Brief and Position Statement
Attachments: WS Post hearing Brief 4302007.doc; WS Posthearing Statement of Positions.doc

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From: Pam Ingram
Sent: Monday, April 30, 2007 4:07 PM
To: Jay Brew
Subject: Docket No. 060658 - Post Hearing Brief and Position Statement

1. James W. Brew, Brickfield, Burchette, Ritts & Stone, 1025 Thomas Jefferson Street, N.W., Washington, D.C. 20007, jbrew@bbrslaw.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 White Springs Agricultural Chemicals, Inc., d/b/a/ PCS Phosphate WHite Springs ("White Springs");
4. The total number of pages is 18 and 6 pages respectively; and
5. The attached documents are the *Post-Hearing Brief of PSC White Springs in Support of Consumer Refunds* and the *Post-Hearing Statement of White Springs*.

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SEC _____
OTH _____

BEFORE THE FLORIDA 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 30, 2007

POST-HEARING BRIEF OF PCS WHITE SPRINGS IN SUPPORT OF CONSUMER REFUNDS

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BEFORE THE FLORIDA 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 30, 2007

POST-HEARING BRIEF OF PCS WHITE SPRINGS IN SUPPORT OF CONSUMER REFUNDS

Pursuant to the Order Establishing Procedure in this docket, Order No. PSC-07-0048-PCO-EI, issued January 16, 2007, White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate White Springs ("White Springs") hereby files its Post-hearing brief in this matter.

A. ABBREVIATED STATEMENT OF FACTS

White Springs adopts as its own and supports the proposed findings of facts submitted by the Office of Public Counsel ("OPC"). In addition, White Springs submits the following uncontested facts:

Progress Energy Florida ("Progress Energy" or "PEF"), through its predecessor company, Florida Power Corp. built two coal fired generating stations at Crystal River (units 1 and 2) that entered commercial operation in 1966 and 1969, respectively. The utility also designed and constructed an 890 MW nuclear powered generating unit at the Crystal River site that entered commercial operation in March, 1977. Florida Power added two additional base-load coal fired generating units at Crystal River (units 4 and 5) that entered commercial service in 1982 and 1984.

Progress Energy Florida is a utility affiliate of Progress Energy, Inc., an exempt public utility holding company[1] those owns or controls both regulated utility and unregulated business entities. For many years, Florida Power/ Progress Energy has purchased the fuel for its coal-fired generating plants through an affiliate, (first known as Electric Fuels Corp. and later Progress Fuels Corp. ("PFC") that is tied in various ways to Central Appalachian bituminous mining and transportation operations.

Crystal River units 4 and 5 incorporated various design features (*e.g.*, a more massive boiler) expressly to allow those units to burn a 50/50 mixture of bituminous and cheaper, lower sulfur content Western sub-bituminous ("PRB") coal. Consumers paid for the added capital cost associated with those design features through a higher investment (rate) base that is reflected in PEF's base electric rates today based on the promise that this operational flexibility would lead to fuel savings and lower overall consumer costs.

Similarly situated utilities in the Southeast and elsewhere began moving to PRB coals in the mid-1990s to lower fuel and emission costs. Progress Energy did not. In its petition and testimony in this docket, the Office of Public Counsel asserts that Progress Energy should have followed suit and begun burning a 50/50 mix of bituminous and sub-bituminous coals at CR4 and 5 beginning in 1996. OPC testified that imprudent management or the conflicting influences of its unregulated affiliate entanglements kept Progress from acquiring and burning a mixture of bituminous PRB coals at Crystal River units 4 and 5.

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[1] Prior to the repeal of the Public Utility Holding Company Act of 1935 in 2005, public utility holding companies were exempt from Securities Exchange Commission regulation under certain circumstances, and Progress Energy, Inc. was organized to meet the requirements for exempt status.

B. SUMMARY OF ARGUMENT

Protecting consumers from abuses arising from utility dealings with unregulated affiliates is one of the great challenges facing utility regulatory commissions. Absent outright prohibitions on such conduct, the Commission has little choice except to scrutinize those dealings very carefully when circumstances indicate utility-affiliate conduct may be detrimental to the public interest. In this instance, the credibility of the smorgasbord of excuses that PEF offers for waiting until 2004 even to test burn RPB coal at Crystal River are all tainted by the basic fact that profits from each affiliate in the chain from mining company to transportation and terminal handling of CAPP coal benefits Progress Energy company shareholders. If, as is apparent, that conflict lead to excessive coal costs for PEF's generation, the only line of consumer defense lies in this Commission's oversight of costs recovered through the fuel clause.

The burden of proving the reasonableness of the cost of coal purchased and burned at Crystal River lies with the utility. Progress has not carried that burden. Indeed, in our view, the PEF testimony is illogical or contradictory in critical areas. For example, PEF maintains that its fuel procurement personnel at PFC solicited bids from PRB sources while arguing at the same time that significant capital upgrades would be required to accommodate PRB coals. The utility's arguments overlook this inconsistency, as well as the fact that design features already had been built into CR4 and 5 to accommodate sub-bituminous coal. Either PEF wasted ratepayer dollars by failing to design and build the units adequately to burn PRB in the first place, or the utility's testimony here overstates an issue. The more rational and consistent explanation seems to lie with OPC witness Sansom, who explained that any incremental capital additions would be nominal.

Next, PEF testimony asserts that transporting, handling, storing and burning PRB coal at the Crystal River site might possibly raise issues for the Crystal River 3 nuclear unit

that potentially could require PEF to seek a license amendment from the Nuclear Regulatory Commission (NRC). Since the Progress position, at best, is that it has no idea to this day whether the NRC will have any concerns if CR4 and 5 burn a mix of PRB and bituminous coal, Commission speculation on the point is unnecessary.

There is, however, more to this isue. The record shows that, for the years 1996-2006, at least, the presence of the CR3 nuclear at the Crystal River complex has not impeded coal procurement efforts or limited the coal types or quantities that Progress, or its purchasing affiliate, have considered buying. Progress also disclosed during the hearings that it has entertained the use of PRB coals for some time, that it conducted a test burn in 2004, that it more recently had explored permit exemptions to burn a mix of bituminous and sub-bituminous coals, and that the Progress coal procurement and operating staff had consulted with the CR3 nuclear staff at least at the time of the test burn in mid- 2004. Significantly, the CR3 staff has not begun any of the assessments it claims in this docket would be required to properly inform the NRC and to determine if a licensing revision of any kind might be required. This suggests either that the CR3 staff actually believed that any filings required by the NRC associated with changes in the coal mix at CR 4 and 5 could be accomplished in a straightforward fashion as part of regular filings, or that Progress' purchases of PRB coal in material quantities might be delayed while the CR3 evaluations are performed and NRC approvals are sought. Given the notice to the CR3 nuclear plant staff of PEF's interest in PRB coals, any such delay should be considered a *prima facie* instance of imprudence.

Overall, the Office of Public Counsel has demonstrated persuasively that more economical coal was available, and, like other utilities with coal-fired generation in the region, Progress Energy should have moved to begin burning a mixture of PRB and bituminous coal in its boilers at Crystal River units 4 and 5 (CR4 and CR5) a decade ago.

OPC has shown that the PRB coal was cheaper on a delivered basis, that transportation was available, and that the capital upgrades required to accommodate PRB coal were nominal and would not materially affect the economics of moving to a 50/50 fuel mix. PCS White Springs supports the OPC and will not repeat here the arguments we expect OPC to present on those matters.

OPC also has established a fairly intricate affiliate network involving Progress Energy, Electric Fuels Corp./Progress Fuels Corp. (which developed fuel requests for proposals, evaluated bids and made fuel purchasing decisions for PEF), and bituminous mining and transportation operations. The inter-locking relationships among these entities and their senior managements demands close scrutiny and suggests the root cause of PEF's reluctance to pursue lower cost western coal. Again, White Springs defers to OPC's testimony and supports OPC arguments in this regard.

Also, White Springs agrees with AARP's assessment that further Commission action is required if it finds that Progress willfully purchased higher cost coal at consumer expense due to the influence of unregulated affiliate pressures. Simply refunding the excess charges, with interest, is an insufficient response. AARP asserts that a penalty should be imposed in addition. In White Springs' view, AARP has a valid point and suggests an appropriate penalty, but that is not necessarily sufficient. The Commission also should take such other action in addition to the penalty as it deems appropriate to preclude future affiliate abuses.

Finally, PEF maintains through a witness and argument that, as a matter of public policy, the book should be closed on all fuel costs incurred in the years before 2006 absent evidence that a utility concealed material facts. For the most part, these matters were aired fully at the December 19, 2006 agenda conference argument denying the Progress Energy motion to dismiss OPC's petition. It is well settled in Florida that costs recovered through

the fuel adjustment clause remain subject to the continuing jurisdiction and oversight of the Commission. The blanket admonition in fuel orders that costs are permitted to be recovered in rates subject to future prudence review means exactly what the plain meaning of those words import. Significantly, there is no basis whatsoever for applying a diminished prudence standard in the event that circumstances, such as are presented here, warrant further scrutiny of costs previously flowed through the fuel clause. Fuel clause recovery, which accounts for a significant portion of total utility charges to ratepayers, is an administrative convenience and cash flow benefit for utilities. Given the volume and complexity of issues presented in a single annual state-wide fuel proceeding, the Commission absolutely requires the leeway to explore discrete issues in more detail in a prudence docket. This practice, for exactly this reason, is commonplace in other states that have similar fuel adjustment proceedings.

C. ARGUMENT

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

* No. Progress has failed to demonstrate that its coal purchasing decisions have been prudent. The record establishes that more economical sub-bituminous coal has been available as OPC has testified. PEF's reticence toward purchasing PRB coal may well have been influenced by the conflicting financial incentives of its unregulated affiliated interests, but its varied excuses do not add up. Prudent utility management would have begun burning a mix of PRB and bituminous coal in the 1990s as OPC maintains.*

a. Environmental Permitting

* White Springs endorses OPC's assessment and arguments. It is undisputed that Progress designed and constructed Crystal River units 4 and 5 to burn a 50/50 mixture of bituminous and sub-bituminous coals, at an added cost to consumers in base rates. Progress has not explained its failure to incorporate that fuel flexibility into its environmental permits for the units and inexplicably seeks to use that failure to nullify the added capital investment. *

b. Coal Procurement Practices

* White Springs supports and adopts OPC's position and arguments in this regard.*

c. **CR-3**

* The presence of the CR3 nuclear unit has not actually affected any of PEF's coal procurement actions. There is no evidence that federal nuclear regulators would take any actions to bar using PRB coals at CR 4 and 5. PEF's speculation concerning possible analyses or reporting requirements that the NRC might require is not a defense for imprudent actions. Delays by PEF CR3 staff in performing the evaluations claimed to be necessary may be a separate instance of imprudence.*

PEF witness John Franke, the general plant manager of Crystal unit 3, the Progress Energy nuclear powered generator at the site, testified that he would prefer that PRB coals not be burned at the Crystal River coal units, citing increased dust and combustibility associated with the PRB coals. Mr. Franke does not actually make any assessment of the expected safety or operational implications associated with burning PRB coals. He states only that there are a number of issues he would need to assess at some point. Thus far, the only action he has taken is to prepare a one page list of assessment topics (Exhibit 143), which he prepared for litigation purposes for his testimony in this case. (TR 856-57). Mr. Franke points to the Nuclear Regulatory Commission rules, specifically 10 CFR 50.59, which requires an amendment to the CR3 operating license to address any changes to the site that would have "more than a minimal increase to risk of plant safety." (TR 189).

Mr. Franke avers that a "rigorous" engineering assessment, which he claims could take months to perform, would need to be performed if Progress decided to burn substantial quantities of PRB at Crystal River. The CR3 Staff did not begin that assessment when Progress conducted its test burn of PRB in 2004 and consulted with the CR3 staff notwithstanding PEF witness Pitcher's assessment that PRB likely would be an economic choice. (TR 860-61). Neither did Mr. Franke or the CR3 staff begin this assessment after Progress sought an air permit exemption to burn a 20% PRB mixture in 2005. (TR 861). In fact, as of April 2007, the CR3 staff had not begun any of the evaluations Mr. Franke claims might be required to satisfy the NRC. (TR 862).

PEF also offers the testimony of Hubert Miller on this subject. Mr. Miller is a nuclear consultant, and former NRC staffer, who does not claim to have personal knowledge of the Crystal River site, but simply verifies that site changes that trigger the increased risk threshold of 10 C.F.R. 50.59 would require NRC scrutiny. He similarly offers no insight on what reports or license changes the NRC might seek since none of the pertinent factors have been assessed by Progress Energy.

In sum, at most Mr. Franke and Mr. Miller's testimonies do little more than describe the NRC rule on risk assessment and possible license amendments. Since none of the assessments Mr. Franke claims must be performed have even been started, there is only conjecture regarding what action (e.g., filing a report, mentioning PRB coal use in the next update to the FSAR, request for a license amendment, etc.) might be required by the NRC. Conjecture concerning possible future action of the NRC fortunately is as unnecessary as it is pointless in a prudence proceeding. What does matter is that CR3 staff have not initiated any action in response to Progress Energy actions that actually have been taken toward the purchase of PRB coal for CR units 4 and 5 (the 2004 test burn and the 2006 request for permit exemptions to burn a 20% PRB mix). Certainly the CR3 plant staff have been on notice since at least 2004 that PEF was beginning to pursue PRB as a fuel option. The obvious questions concern how much PRB coal would need to be on site for CR3 to take action, and whether the nuclear plant staff would be a help or impediment to timely implementation of lower cost coal options at Crystal River. At this point, it can be concluded that (1) speculation concerning possible NRC action is immaterial for prudence purposes because there are no evaluations for anyone (including the NRC) to consider, and (2) any future delays in burning PRB coal at Crystal River that might be experienced due to nuclear licensing approvals should be considered imprudent *per se*.

d. CR-4 & CR-5 Operational Matters

* White Springs supports and adopts OPC's position and arguments in this regard.*

e. Megawatt Capacity

* White Springs supports and adopts OPC's position and arguments in this regard.*

f. Coal Availability and Costs

* White Springs supports and adopts OPC's position and arguments in this regard.*

g. Affiliates

* White Springs supports and adopts OPC's position and arguments in this regard.*

Progress Energy Florida is a wholly owned affiliate of Progress Energy, Inc., a utility holding company. Through Electric Fuels, Inc., and its successor, Progress Fuels Corp. (PFC), Progress Energy, Inc. has affiliated interests in the entire chain from mining Central Appalachian (CAPP) coal, its transportation and handling at receiving terminals. Each of these affiliates operates as its own profit center, and senior management commonly held multiple titles in different affiliates as part of an inter-locking affiliate structure. Profits from each unregulated affiliate benefit the shareholders of the parent company, Progress Energy, Inc. This holding company structure undoubtedly created pressure to favor continued reliance on bituminous and coal synfuels manufactured by affiliates rather than resort to less expensive PRB coals, particularly as long as the ultimate costs flowed through to consumers through the fuel clause. While the specific impact of this interlocking chain may not be apparent in every discrete procurement decision, it is an undeniable factor that steered PEF from purchasing the most economical coal available.

h. Other Factors

* White Springs supports and adopts OPC's position and arguments in this regard.*

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?**

* Yes. The Commission's basic statutory charge in setting rates under Chapter 366.03 Fla. Stats. is to protect Florida consumers from unreasonable and excessive charges. Coal related fuel costs recovered through the fuel adjustment clause are subject to prudence review and findings of imprudently incurred coal costs require refunds to consumers.*

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

* Yes. Fuel cost recoveries are always subject to subsequent prudence review when circumstances, as here, warrant. The Commission has exclusive jurisdiction to provide that relief. The relief requested by OPC does not constitute retroactive making and is not barred by the concept of administrative finality.*

PEF argued in its 2006 motion to dismiss the OPC petition that regulatory principles pertaining to retroactive ratemaking and administrative finality preclude granting the relief that OPC requests (refunds of the excessive costs to consumers). The Commission correctly determined in denying the PEF motion to dismiss that it possesses the authority, indeed it has the responsibility, to evaluate the prudence of PEF's coal purchase decisions and to order refunds to consumers of all costs determined to be imprudently incurred.

In addition to its legal claims, PEF also sponsored testimony by Steven Fetter, a utility financial analyst, who contends that, once fuel costs have been recovered through the fuel clause, the Commission should not entertain the prudence of those costs absent "concealment of material facts" by the utility. (Tr. 167). Further, Mr. Fetter asserts that his proffered standard is the *de facto* process typically applied by Florida and other states that conduct periodic fuel adjustment clause proceedings. *Id.* In fact, the record shows just the opposite.

First, and most obviously, Florida fuel orders provide that cost recovery is subject to subsequent prudence review. This requirement is essential to the Florida process, which involves all regulated utilities in a single docket and accounts for the majority of costs actually charged consumers in electric rates. Indeed, the current process is streamlined and provides expeditious recovery to utilities of fuel related costs precisely because this process contemplates prudence inquiries of specific matters should, as is the case here, circumstances warrant. Mr. Fetter professed to have a general knowledge of the fuel recovery process in Florida, but actually had no idea of the number or complexity of issues that Staff, Intervenors, and eventually the Commission, must confront in these dockets. (TR. 210).

Adopting Mr. Fetter's view that fuel cost prudence should be conclusively and finally decided in annual fuel dockets, absent concealment or mis-representation of material facts, would require a more complex and impractical process as discovery would necessarily probe deeper into utility fuel decisions and performance. By permitting a detailed assessment in a separate or sub-docket of specific prudence questions, the current Florida process reasonably balances utility interests in prompt recovery of fuel costs and the mandate to safeguard consumer interests. Mr. Fetter's proposed standard should be rejected.

Next, notwithstanding his claimed familiarity with state fuel-related processes elsewhere, Mr. Fetter exhibited a basic lack of knowledge of the role of prudence reviews in fuel dockets in other states elsewhere, including states in which he has worked in the past. For example, Mr. Fetter was unaware that the Indiana Utility Regulatory Commission regularly creates sub-dockets to its periodic fuel recovery proceedings in order to investigate potential prudence matters deemed to complicated for the abbreviated review that attends the fuel recovery process in that state. These include a prior prudence

review into an extended forced outage at the Cook nuclear plant operated by American Electric Power,[2] and a pending review of utility hedging practices and policies.[3] Similarly, Mr. Fetter was unaware that the New York Public Service Commission conducted a prudence review into the operation and maintenance practices of Niagara Mohawk Power Corporation coal fired generation in which that Commission ordered refunds recovering excessive and imprudent costs over an eight year prior period.[4] (TR. 212-14). When confronted with the fuel related prudence process other states actually take, Mr. Fetter simply acknowledged that "...states take whatever procedural steps are necessary." (TR. 214).

Moreover, in prudence cases in Florida and other states alike, the standard of prudence in fuel dockets remains what actions would have been taken by reasonably prudent utility management under prevailing circumstances. Mr. Fetter points to no state that uses the diminished standard that he advocates. Such a standard could not be reconciled with the Commission's responsibilities under Florida Statutes Chapter 366. 03.

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?

* The Commission should adopt the Office of Public Counsel's calculation of excess costs, including interest. Refunds should be provided to all PEF customers, through a reduced fuel factor, over a period not exceeding one year. *

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2 Indiana IURC Docket No. 38702-FAC-38.

3 Indiana IURC Docket No. 38707-FAC-68-S1 (Duke Energy hedging costs).

4 New York PSC Case No. 28598, Niagara Mohawk Power Corporation- Proceeding to Investigate Operating Practices, Opinion No. 85-7, 1985 N.Y. PUC LEXIS 656; 25 NY PSC 1666 (March 29, 1985).

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?**

* If the Commission determines that PEF willfully violated a rule or order of the Commission or provision of Chapter 366, Florida Statutes, by purchasing more expensive affiliate-supplied coal or coal products than reasonably available non-affiliate coal, further Commission action is warranted, and White Springs adopts AARP's position on this issue.*

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

* This docket should be closed upon completion of all Commission ordered refunds.*

D. LEGAL CONSIDERATIONS

A utility always bears the burden of demonstrating that its fuel costs are reasonable and prudent. See, e.g., *In re: Investigation into extended outage at Florida Power and Light Company's St. Lucie Unit No. 1,* Order No. 15486 at 21, Docket No. 840001-EI-A, December 23, 1985. It does not matter under this settled principle whether the docketed issues arise from a utility application, a consumer petition, or on motion of the Commission. Moreover, the Commission's review of utility fuel charges is a "continuous" process that is always subject to subsequent prudence review.[5] Finally, Commission prudence proceedings are the proper and exclusive forum for protecting consumer interests from excessive and imprudent utility charges, and Commission order refunds are the appropriate and lawful relief to correct excessive fuel cost recovery charges.[6]

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[5] *In re: Investigation of Fuel Adjustment Clauses of Electric Utilities,* Order No. 12645 at 11, Docket No. 830002-EU, November 3, 1983.

[6] Richter vs. Florida Power Corporation 366 So.2d 798 (2d DCA 1979)

CONCLUSION

For the reasons stated herein, White Springs urges the Commission to find that Progress Energy Florida incurred approximately $143 million in excessive and imprudently incurred fuel costs over the period 1996-2005 in relation to its coal purchasing practices and decisions. White Springs requests that the Commission direct PEF to refund that amount to consumers through appropriate reductions to its fuel factor. If the Commission further determines that PEF willfully violated any rule or order of the Commission with regard to the utility's fuel procurement practices, White Springs urges the Commission to adopt the recommendation of AARP that a penalty be imposed and initiate such additional actions as the Commission deems necessary to protect consumers.

Respectfully submitted the 30th day of April, 2007.

BRICKFIELD, BURCHETTE, RITTS & STONE, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Prehearing Statement has been furnished by electronic mail and U.S. Mail this 30th day of April, 2007 to the following individuals:

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