BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

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

AARP'S POSTHEARING BRIEF ON PENALTY ISSUE

AARP, by and through its undersigned counsel, submits its Posthearing brief on the issue of whether Progress Energy Florida ("PEF" or the "Utility") should be financially penalized, in addition to making a refund of fuel overcharges, if the Commission determines that the Utility intentionally purchased higher cost coal from its affiliates than was otherwise available to it for its Crystal River 4 & 5 units.

The specific issue on this point at hearing was Issue 5, which asked:

> 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?

AARP took the following position in the Prehearing Order:

> **AARP:** *Yes. Chapter 366, F.S. and the Commission's relevant fuel adjustment orders require that all rates and charges demanded or received by any public utility for any service rendered shall be fair and reasonable. An intentional or willful act to financially harm customers in order to benefit a corporate parent or affiliate is not "fair and reasonable." Section 366.095, F.S. provides that the Commission may penalize a utility for willfully violating a lawful rule or order or law. Commission precedent and case law support a penalty.*

Public Counsel Makes The Case For Imprudence And Intentional Conduct

AARP concedes that its case for a penalty is dependent upon the Commission accepting the Public Counsel's well demonstrated case that the Utility continued to

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purchase bituminous coal and synfuel from its affiliated companies when it knew, or reasonably should have known, that it could have purchased less expensive Powder River Basin sub-bituminous coal to the benefit of its ratepayers. In fact, AARP concedes that the case for a penalty accompanying a refund of the overcharges is further dependent upon the Commission's determination that the Utility knew that lower cost sub-bituminous coal was available to be burned in CR 4 & 5, but that it intentionally continued to purchase the higher cost bituminous coal and synfuel for a number of self-serving reasons. Those reasons include the fact that its corporate parent earned tax credits from some of the synfuel purchased and the fact that the Utility's affiliated river barge, transloading and Gulf transportation companies benefited financially by carrying the bituminous coal and synfuel, the tonnage of which they would largely, if not completely, have been deprived of if the Utility had timely switched to the lower cost sub-bituminous coal.

AARP will not repeat the points ablely advanced by Public Counsel arguing that the Utility knew of the lower cost sub-bituminous fuel, knew that it could safely and efficiently burn it in CR 4 & 5, and yet intentionally determined not to burn it to the detriment of its customers and for the financial advantage of its corporate affiliates. To find that a penalty is appropriate here, the Commission must effectively find that the Utility set out to cheat its customers by the device of charging them higher fuel costs than were otherwise reasonably obtainable and that it did so for the benefit of its affiliates. AARP believes that Public Counsel has made such a case. Moreover, AARP believes there is a statutory basis for the Commission to impose a penalty and that the

Commission is compelled to do so in order to adequately protect consumers and the public interest.

There is a Penalty Statute

If PEF intentionally overcharged its customers through the fuel adjustment clause for the specific purpose of increasing the profits of its affiliated companies, then one would hope that there is a statutory basis for punishing such behavior. AARP submits that there is. Section 366.095, F.S. states:

> Section**366.095 Penalties.**--The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter that is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty for each offense of not more than $5,000, which penalty shall be fixed, imposed, and collected by the commission. Each day that such refusal or violation continues shall constitute a separate offense. Each penalty shall be a lien upon the real and personal property of the entity, enforceable by the commission as a statutory lien under chapter 85.

So, there is a penalty statute, but did the Utility refuse to comply with, or did it willfully violate "any lawful rule or order of the commission or any provision of this chapter?" AARP would submit that public utilities have a statutory general duty not to intentionally overcharge their customers. They must charge rates that are "fair and reasonable." Furthermore, this Commission has a statutory duty to see that all rates charged are "fair and reasonable." Specifically, as to the first, Section 366.03, F.S. provides:

> **366.03 General duties of public utility.**--Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission. No public utility shall be required to furnish electricity or gas for resale except that a public utility may be required to furnish gas for containerized resale. All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.

(Emphasis supplied.) The Commission has a statutory responsibility to see that only fair and reasonable rates are charged, namely that there is no cheating on the customers and to change rates if they are found either unfair or unreasonable. Section 366.07, F.S. provides:

> **366.07 Rates; adjustment.**--Whenever the commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law, or any service is inadequate or cannot be obtained, the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts or service, to be imposed, observed, furnished or followed in the future.

In short, this Utility had an ongoing statutory obligation to charge its customers only fair and reasonable rates, which it intentionally or willfully failed to do in this case if it knowingly charged its customers higher than reasonable fuel charges in order to enrich its corporate affiliates. Furthermore, in addition to repeated assurances in fuel adjustment orders that only fair and reasonable costs would be flowed through to customers, there is a specific statute compelling the Commission to halt unfair and unreasonable rates and make them fair and reasonable: Section 366.07.

The Commission Has Imposed Substantial Financial Penalties In A Rate Case

As testified to by AARP witness Stewart at hearing, in 1990 this Commission imposed a 50 basis point equity penalty on Gulf Power Company when setting its base rates. The penalty was for mismanagement in connection with "corrupt practices that took place at Gulf Power Company from the early 1980s through 1988, including but not

limited to theft of company property, use of company employees on company time to perform services for management personnel, utility executives accepting appliances without payment, and political contributions made by third parties and charged back to Gulf Power Company." The 50 basis point reduction on the return on equity on which rates were established was to be in place for two years and was, as stated by the Commission:

> . . . meant as a message to management that the kind of conduct discussed above, which was endemic for at least eight years at this company, will not be tolerated for public utilities which operate in Florida.

The Gulf Power penalty was substantial because its impact was felt for two years not only on the additional $26.3 million increase that was being requested, but on all of Gulf Power's rates for the period. As also testified to by witness Stewart, Gulf Power appealed the penalty to the Florida Supreme Court, which upheld it, finding that it was permissible for the Commission to reduce a utility's authorized ROE for mismanagement so long as did not "impose a penalty that would deny Gulf Power a reasonable rate of return." Gulf Power Company v. Wilson, 597 So.2d 270 (Fla. 1992) at 273.

Penalties Cannot Rationally Be Confined To Base Rates Cases

While it is true that the Commission in Gulf Power penalized that utility for mismanagement in the course of a base rates case, there is nothing AARP has found in that opinion or elsewhere to suggest that the Commission's power to penalize errant utilities is confined to base rates cases. If there was such a limitation, it would be a severe one on the Commission and the public interest because, as pointed out by counsel for FIPUG often, and is otherwise common knowledge, more than half of all rates charged by electric public utilities now are recovered through fuel and other adjustment

clauses. To provide that these revenue recovery means are a safe haven from punishment for utility mismanagement would be a huge and unacceptable limitation on this Commission's ability and responsibility to protect consumers from rates and charges that are "unfair and unreasonable." In short, although there are no precedents AARP could find in which the Commission imposed a penalty pursuant to Section 366.095, F.S., the statute exists and its need should be apparent if the Commission finds that PEF intentionally overcharged its customers by purchasing higher cost coal from its affiliated companies.

Conclusion

The Office of Public Counsel has made a highly credible case that this Utility long overcharged its customers for the price of coal burned at CR 4 & 5 by purchasing more expensive bituminous coal from its affiliated companies, by purchasing synfuel that its corporate parent received federal tax credits on, or by purchasing unaffiliated bituminous coal that was transported or handled by affiliated companies. The Commission should cause PEF to refund to its customers the difference between the higher cost coal charged through the fuel adjustment clause and the lower cost sub-bituminous coal available to it for the period that there was a difference in the cost of the two and when it was available for purchase. In addition to the refund of overcharges, the Commission should impose a meaningful statutory penalty, pursuant to Section 366.095, F.S., to deter this Utility and others from attempting the same conduct in the future.

Respectfully submitted,

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For AARP

CERTIFICATE OF SERVICE

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

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