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Subject: FPSC Docket 120009-EI - PCS Phosphate's Post-Hearing Statement
Attachments: P-PCS 2012 NCRC Post-Hearing Statement FINAL.pdf

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b. Docket No. 120009-EI, In Re: Nuclear Cost Recovery Clause

c. Filed on behalf of White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs

d. Total Pages = 10

e. PCS Phosphate's Post-Hearing Brief and Statement of Issues and Positions

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause	)	**Docket No. 120009-EI**
	)	**Filed: October 1, 2012**

POST-HEARING BRIEF AND STATEMENT OF ISSUES AND POSITIONS OF WHITE SPRINGS AGRICULTURAL CHEMICALS, INC. d/b/a PCS PHOSPHATE – WHITE SPRINGS

Pursuant to the Florida Public Service Commission's February 20, 2012, *Order Establishing Procedure*, Order No. PSC-12-0078-PCO-EI, ("*Procedural Order*") and the June 29, 2012 *First Order Revising Order Establishing Procedure*, Order No. PSC-12-0341-PCO-EI ("*Revised Procedural Order*"), White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs ("PCS Phosphate" or "PCS"), submits its post-hearing statement of issues and positions. Except as described below, the PCS Phosphate positions on issues remain as stated in the Pre-hearing Order issued August 31, 2012.

OVERVIEW

The comprehensive rate stipulation and settlement agreement approved by the Commission in Order No. PSC-12-0104-FOF-EI established the level of costs associated with the Levy Nuclear Project ("LNP" or "Levy") that may be recovered from consumers through the nuclear cost recovery clause in 2013. Consistent with the terms of that stipulation, PCS Phosphate does not challenge Progress Energy Florida's ("Progress") proposed Levy component of nuclear cost recovery for 2013.

With Levy cost recovery basically settled for several years, the primary focus of nuclear cost recovery for Progress now concerns the recovery in consumer rates of nuclear clause-eligible costs tied to the proposed power uprate ("EPU") to Progress's damaged Crystal River 3 nuclear unit ("CR3"). There are two substantial issues related

to the EPU at this time. First, the estimated cost to complete the uprate has increased 35% (from $456 million to $616 million). Second, and of far greater consequence, is that it is not at all clear whether the upgrade will, or should be, completed. The uprate project is in an extended state of limbo while Progress, and the new Duke Energy management team, attempt to determine whether it is practical to attempt to repair CR3's damaged concrete containment structure. At the time of this filing, Progress has been examining repair options, approaches, risks and costs for approximately a year and a half, but a decision by utility management concerning the attempted repair likely will not be made before the Commission renders its determination in this docket.

Facing the same unresolved questions surrounding the future of CR3 last year, at Progress' request, the Commission deferred consideration of the long-term feasibility of completing the CR3 Uprate as well as deciding the prudence of the 2011 CR3 Uprate expenditures. *See* Order No PSC-11-0547-FOF-EI at 5 (noting deferral granted as a preliminary matter at hearing). Deferring those decisions, which PCS supported last year, aimed to allow the Commission time to decide those core questions regarding the power uprate in the proper sequence (*i.e.*, after Progress decides whether and when it will repair CR3).

The passage of another year unfortunately has not provided the expected clarity in direction with respect to the repair of CR3. Progress has continued its engineering assessment of the contemplated containment repair, and its new parent company, Duke Energy, has initiated its own independent evaluation of the planned repair. Utility management has not announced whether a decision has been made to proceed with the containment repair or not.

This on-going dilemma poses a considerable challenge within the context of rate

treatment authorized by the nuclear cost recovery rule. Although the statute and rule intend to support nuclear-related investment in Florida, neither contemplates requiring rate-payer funding of hundreds of millions of dollars on a useless project. Indeed, the Commission has an affirmative duty to safeguard Florida consumers from such waste. *See* Section 366.05, F.S. In this docket, Progress recognized the need to address this circumstance, and proposed to again defer Commission consideration of the feasibility of the power uprate as well as recovery of EPU-related actual and estimated costs for 2012 and 2013. The Commission approved that request at the September 5, 2012 hearing. That determination left only Progress's request for a prudence determination of 2011 actual uprate costs, which as noted above the Commission decided to defer last year.

Because the feasibility of continuing with the power uprate project is plainly linked to the threshold questions of whether the CR3 containment should or can be repaired, Progress cannot establish that the EPU project is feasible until a repair decision is made. Moreover, both the timing and character of that decision are solely and exclusively within the control of Progress / Duke Energy management. Accordingly, because the Commission lacks the basic factual predicate to determine whether Progress' 2011 CR3 expenditures were prudent since the burden of establishing those basic facts lies with the utility, the Commission must deny recover of the 2011 CR3 uprate expenditures.

I. BACKGROUND AND ABBREVIATED STATEMENT OF FACTS

Levy. Pursuant to the terms of the stipulation and settlement approved by the Commission in March 2012, the LNP component of Progress' NCRC charges should be set at $3.45/1,000 kWh, for a residential customer, and a corresponding adjustment from the current LNP factors should be made for commercial and industrial rates. The

Progress filing in this docket must conform to that agreement. The Commission must still determine whether the Levy Project remains feasible and if the 2011 LNP expenditures (totaling over $116 million in jurisdictional costs, including carrying costs) predating the stipulation and settlement were prudently incurred.

Crystal River Unit 3 Power Uprate. There are few, if any, material facts in dispute at this time. Progress planned to accomplish the roughly 180 MW power uprate in three stages during planned outages, beginning with Refueling Outage 16 that began in the Fall of 2009. The majority of the equipment upgrades for the uprate were slated to be accomplished at the next refueling outage, which at that time PEF planned to conduct in 2011. The containment delamination that occurred in October 2009 during the attempted steam generator replacement prompted the extended outage that continues to this day. On March 14, 2011, Progress experienced another delamination of the CR3 containment during the final stages of its efforts to repair the October 2009 concrete delamination. The March 2011 delamination completely altered perceptions of the scope and difficulty of the containment repairs that would be required. In light of that circumstance, in August 2011, the Commission granted Progress' motion to defer consideration of the feasibility and prudence of Progress' 2011 expenditures for the CR3 Uprate. *See* Order No PSC-11-0547-FOF-EI at 5. Subsequently, the stipulation and agreement approved by the Commission in Docket No. 120022-EI permitted Progress to recover carrying costs and other NCRC recoverable costs related to the power uprate through the NCRC. Next, in this docket Progress once again sought and received Commission approval to defer the determination of reasonableness for the 2012 and 2013 projected expenditures as well as a Commission finding concerning the feasibility of the uprate project. As a result, in this proceeding, the primary remaining Progress issue is Progress' request for a determination

of the prudence of Progress' 2011 CR3 Uprate expenditures, which totaled approximately $66 million in jurisdictional costs, including $16 million in carrying costs. *See* Progress Prehearing Statement at Issue 15.

Progress initially relies on the 2012 feasibility analysis for the power uprate sponsored by Progress witness Jon Franke, which Progress claims demonstrates the regulatory and technical feasibility of the CR3 Uprate project. That analysis presumed a timely repair of the CR3 containment structure and further assumed that those repairs would be underway in 2012. Neither presumption is valid because, as Progress noted in its August 14, 2012 motion to defer, the new Duke Energy Board is not ready to decide whether a repair of the containment structure should be attempted. Mr. Franke admitted that at the time he filed his testimony, he knew that there was a risk that Progress will not attempt to repair the containment structure. Tr. 711. Mr. Franke also testified that the Progress is still, almost four months after the filing of his feasibility assessment in this docket, working through its evaluation of whether the repair to the containment structure is technically feasible. Tr. 712. In addition, Mr. Franke admitted that neither Progress' consultants nor its Board of Directors have decided if the needed repairs to the containment structure are economically feasible. Tr. 713. Finally, there is no dispute that, as Mr. Franke testified, "[w]ithout repair of the unit and return to service, the uprate project would not be placed in service" and in the event of such a result, that all of the money spent on the uprate will not produce measurable benefits for Progress' ratepayers. Tr. 657-58.

In short, Progress concedes that proceeding with the power uprate is pointless unless Progress successfully repairs the CR3 containment structure. Progress has not made a repair / retire decision concerning the containment and there are risks that the

repair effort, if attempted, will not be successful. For this reason, the basic uprate feasibility question (Issue No. 12) has been tabled from consideration this year. Given this circumstance, Office of Public Counsel's ("OPC") witness Dr. William Jacobs recommended that Progress minimize all uprate expenditures until the containment repairs are well advanced. PCS supports OPC's testimony in that regard.

II. SPECIFIC ISSUES

Issue 14: **Were all of the actual Crystal River Unit 3 Uprate project expenditures prudently incurred or expended in 2011 in the absence of a final decision to repair or retire Crystal River Unit 3 in 2011?**

PCS Phosphate: *No. Progress has failed to demonstrate that the Crystal River Unit 3 Uprate project remains feasible and thus the Commission lacks sufficient evidence to find that all of the actual Crystal River Unit 3 Uprate project expenditures were prudently incurred.*

Section 366.93, Florida Statutes expressly aims "to promote utility investment in" nuclear power plants. To that end, Section 366.93(2) required the Commission to "establish, by rule, alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of a nuclear power plant . . ." However, the statute limits the costs that can be recovered to those that the Commission determines to have been "prudently incurred." Moreover, as the Commission noted in 2011 nuclear cost recovery order, the statute places the burden on "the utility [to] prove that its costs in new nuclear power plant capacity were prudently incurred." Order PSC-11-0095-FOF-EI at 7.

Rule 25-6.0423, F.A.C. represents the required alternative cost recovery mechanisms required by the Legislature. Rule 25-6.0423(5)(c)2 provides that the Commission shall conduct a hearing each year and determine the prudence of actual pre-construction expenditures expended by the utility. As part of that annual hearing, the

utility must submit for Commission review and approval a detailed analysis of the long-term feasibility of completing the power plant. Rule 25-6.0423(5)(c)5, F.A.C. As the Commission has explained, its review of a project's feasibility "provides the appropriate checks and balances to ensure that the construction of the nuclear units continues to be in the best interest of PEF's ratepayers." Order No. PSC-08-0518-FOF-EI at 21.

As Progress witness Jon Franke testified, in order for Progress ratepayers to receive any value from the CR3 Uprate, the CR3 containment structure must first be repaired and CR3 returned to service. Tr. 657-58. However, at this time, Progress is unable to establish that CR3 will ever produce another megawatt of electricity, or that any of the millions of dollars still being sunk into the CR3 Uprate will produce a tangible benefit for Progress customers. Moreover, that uncertainty persisted throughout most of 2011 (i.e., following the March 2011 delamination event).

It seems plain enough that without a Progress decision to attempt the CR3 containment repair, Progress cannot demonstrate that the power uprate invest is feasible. Progress' request for a prudence determination relating to its 2011 EPU costs effectively asks the Commission to find that it was prudent for Progress to presume the containment repairs would be made by the end of 2014 (the thinking at the time last year), when there was, and remains, no tangible support for that presumption.[1] Indeed, the presumptive strategy tied to the EPU project spending in 2011 (*i.e.*, adoption of a repair plan, cost and schedule for the CR3 containment structure) was never adopted by Progress'

[1] In fact, Progress management asserted commitment to the CR3 repair in advance of a complete vetting of repair costs, risks and options was cited as a strong contributing factor to the abrupt decision of Duke Energy's board of directors to remove Progress CEO Bill Johnson as CEO of the combined utilities on the day of the merger. *See, e.g.*, "The Duke Snafu: Who Picks the CEO?" The Wall Street Journal, p. 11 (Aug. 15, 2012), available online at http://online.wsj.com/article/SB10000872396390444318104577588900561657284.html.

management in 2011. As of October 1, 2012, Progress / Duke Energy management still has not made that decision.

The 2011 delamination events necessarily changed the scope required of a feasibility analysis, as acknowledged by Progress' motion in the 2011 NCRC proceeding to defer determination of feasibility and prudence of the 2011 costs. As a result of Progress' 2011 deferral motion, the feasibility analysis for the CR3 Uprate incorporated in Progress' 2011 filing was not admitted into the record, and cannot serve as a basis for finding the 2011 expenditures prudent. Because Progress' 2012 feasibility analysis suffers from the same lack of foundation concerning the containment repair, the Commission cannot rely on the proffered feasibility analysis originally filed in this docket. Absent that feasibility finding, Progress cannot satisfy its burden of proof, and the Commission has no basis to conclude that Progress' 2011 expenditures for the CR3 Uprate were prudent. As result, the Commission must, consistent with its statutory obligations established in Section 366.93, FS, reject Progress' 2011 expenditures on the CR3 Uprate.

Progress claimed in its 2012 motion for deferral that the Commission must issue a ruling on the prudence of a utility's nuclear expenditures absent a request for deferral from that utility. Progress August 14, 2012 Motion for Deferral at 4 (noting that every other deferral in a Section 366.93 proceeding was agreed to by the subject utility). In effect, the utility seeks a ruling that its spending on a project it cannot show is feasible is nonetheless prudent. The logical fallacy of that request is obvious, and it should be equally apparent that the nuclear cost recovery statute and rule do not require or permit such an incongruous rate-setting outcome. Consequently, because Progress is no longer seeking deferral of that decision, based on the clear requirements of Section 366.93 F.S.

and Rule 25-6.0423, F.A.C., the Commission must find that Progress has failed to establish that requested costs were prudently incurred. Moreover, the Commission should order Progress to refund the 2011 CR3 Uprate expenditures already recovered from ratepayers and deny recover of any carrying costs associated with those expenditures.

Issue 15: **What system and jurisdictional amounts should the Commission approve as PEF's 2011 prudently incurred costs and final true-up amounts for the Crystal River Unit 3 Uprate project?**

PCS Phosphate: *$0. Due to Progress' inability to demonstrate the continued feasibility of the CR3 Uprate, the Commission lacks sufficient evidence to find that all of the actual Crystal River Unit 3 Uprate project expenditures were prudently incurred.*

Respectfully submitted this 1st day of October, 2012.

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s/ James W. Brew

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Dated: October 1, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of October 2012 a true copy of the foregoing has been furnished by U.S. and/or electronic mail to the following:

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