

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power)
Cost Recovery Clause with) DOCKET NO. 050001-EI
Generating Performance Incentive) FILED: November 4, 2005
Factor)
_____)

**OPC’S MOTION TO DEFER ISSUE OF PRUDENCE AND
REASONABLENESS OF PEF’S COAL COSTS**

The Citizens of the State of Florida, through the Office of Public Counsel, move to defer the issues associated with the prudence and reasonableness of certain of PEF’s coal procurement decisions and related costs of coal until future proceedings in this docket, and in support state:

1. The hearing scheduled for November 7, 2005 encompasses the request of Progress Energy Florida, Inc. (“PEF”) for approval of true-up amounts related to 2005 and the reasonableness and prudence of fuel costs projected for 2006.

2. In September of 2005, OPC received from PEF responses to its request for unredacted versions of the Form 423 that PEF submits to the Commission. Specifically, OPC received the forms applicable to the first six months of 2005. (Because of the lag involved in the preparation and submission of the forms, the form for June 2005 was the most recent available at the time.) The confidential forms indicated that PEF was paying its affiliate, Progress Fuels Corporation, prices that were significantly higher than the costs of other transactions reported on the forms. In a motion filed on September 30,

2005, OPC requested the Commission to establish a separate docket for the purpose of scrutinizing the transactions that led to the higher prices paid to PEF's affiliate. In its motion, OPC referred to its intent to secure the input of a consultant to assist OPC in gauging whether the prices paid by PEF to its affiliate are reasonable. During the Prehearing Conference of October 24, Prehearing Officer Bradley denied the motion for a separate spinoff docket. His ruling was memorialized in the Prehearing Order, issued on November 3, 2005.

3. Prior to and following the motion for a separate docket, OPC has pursued discovery related to the issue of PEF's 2005 and 2006 coal costs. On October 21, 2005 OPC deposed Mr. Al Pitcher, Vice President of Progress Fuels Corporation. OPC promulgated to PEF its Second and Third Sets of Interrogatories, in which OPC requested information regarding the procurement decisions that underlie the higher costs being paid to PEF's affiliate. Most recently, after receiving the results of this discovery, including exhibits to Mr. Pitcher's deposition that detail the procurement process used by Progress Fuels Corporation when arranging for the supply of coal to Crystal River during 2005 and 2006, OPC engaged the services of Robert L. Sansom, President of Energy Ventures Analysis, Inc. Pursuant to the terms of a confidentiality agreement, Mr. Sansom has reviewed the information that OPC acquired during the discovery process. His analysis to date reinforces OPC's belief that PEF's procurement activities that underlie some of

the coal costs it is incurring in 2005 and will incur in 2006 do not meet the standards of prudence and reasonableness.

4. The procurement decisions at issue relate to deliveries of coal throughout 2005 and 2006. Thus, parties and the Commission have a continuing opportunity to question the prudence of those transactions within the ongoing fuel cost recovery proceeding; indeed, the information necessary to assess the quantities actually delivered and amounts paid will not be known until the end of 2006. Clearly, then, the opportunity is not limited to the hearing of November 7, 2005; if anything, the matter is premature at this point. OPC proposes to present testimony of Mr. Sansom during the hearings in 2006 that will encompass the costs incurred by PEF during 2005 and 2006. To achieve administrative efficiency and economy of effort, it will be in the interests of the Commission and parties to defer the hearing on the prudence and reasonableness of 2005 coal costs until next year, at which time the parties' presentations can be consolidated and heard at once. Absent such a deferral, OPC must spend considerable time and effort in the cross-examination of PEF's witness during the hearing scheduled to begin on November 7, 2005.

5. The deferral requested by OPC is entirely consistent with the policy and procedure that the Commission articulated in Order 12645, issued on November 3, 1983. There, the Commission recognized the significance of the utilities' burden of proof as it

relates to the prudence and reasonableness of their procurement decisions. While the statement was made in the context of the six month projection periods that were being used at the time, the substance of the Commission's observations is fully applicable to the current proceedings. Specifically, the Commission stated:

When a question arises as to the prudence of a utility's expenditures, proper time should be taken to fully analyze the question and resolve the matter on all of the facts available. Often, a full staff analysis should be made before the matter is formally included within the fuel adjustment proceeding.

From now on, each utility will be required at true-up only to demonstrate how the amounts actually expended for fuel and purchased power compare with the amounts projected for the prior six month period. The true-up approved at that time will reflect the reconciliation of projected to actual results (with the appropriate calculation of interest, other true-up amounts, etc.). Although the burden of proving the prudence of its actions will remain with the utility, *the question of prudence will arise only as facts regarding fuel procurement justify scrutiny.* Hopefully, we will be presented with complete analyses of procurement decisions in a timely manner.

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 a 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.

Order No. 12645, at page 7 (emphasis provided)

6. In further support of this Motion, OPC is attaching the affidavit of Robert L. Sansom. OPC proffers the affidavit at this time solely to demonstrate the existence of significant, substantive, and complex factual issues relating to the prudence or imprudence of PEF's procurement decisions affecting prices to be paid to its affiliate in 2005 and 2006. These facts have not yet been developed before the Commission. They warrant the time necessary to scrutinize the transactions carefully. Such a careful scrutiny can be accomplished in the ongoing cost recovery docket, but only if the Commission defers the issue until next year. In addition to the additional time for analysis the deferral would provide, at that time the Commission will have far more information regarding the quantities of coal that PEF received from its affiliate during the 2005-2006 term of the transactions under review.

7. In this affidavit, based on his review of materials that OPC obtained during discovery, Mr. Sansom concludes: (1) PEF failed to award any portion of the need for 2005-2006 coal to the lowest bidder in its 2004 RFP process: (2) PEF, through its proxy, Progress Fuels Corporation, subsequently failed to conduct an adequate survey

of the market before awarding a portion of the balance of 2005-2006 coal requirements to Progress Fuels Corporation.

8. None of the facts essential to a consideration of the prudence of PEF's transactions have been placed before the Commission by PEF. While the burden of proof is on PEF to demonstrate the prudence of its procurement process, OPC has worked diligently to develop the information it needs to evaluate PEF's performance. Despite its diligence, OPC was unable to meet the requirement of the existing schedule that required intervenors to profile testimony by October 3, 2005. In late September, OPC regarded a spin-off as the best solution to the logistical problem presented by the complexity of the issue and the compressed time frames that always attend the fuel cost recovery hearings. OPC has accepted the ruling of the Prehearing Officer denying OPC's motion to establish a separate docket. OPC instead proposes to present the testimony in a future hearing to be held in the ongoing fuel cost recovery docket. To require OPC and other parties to conduct cross-examination of PEF on issues that will be the subject of detailed testimony in future proceedings would result in a disjointed and administratively inefficient proceeding.

9. OPC is authorized to represent that FIPUG, Florida Retail Federation, and AARP support the granting of this motion. OPC contacted counsel for PEF, who stated that PEF opposes the granting of this motion. Time did not permit OPC to contact other parties.

WHEREFORE, OPC moves for an order deferring any consideration of the prudence and reasonableness of prices paid by PEF to its affiliate(s) for coal delivered to its Crystal River site during 2005 and 2006 to a future hearing in the ongoing fuel cost recovery proceeding, at which time all parties may be heard.

Respectfully submitted,

HAROLD MCLEAN
Public Counsel

s/ Joseph A. McGlothlin
Joseph A. McGlothlin
Associate Public Counsel

Office of Public Counsel
111 W. Madison Street, Room 812
c/o The Florida Legislature
Tallahassee, FL 32399-0850

(850) 488-9330

Attorney for the Citizens
of the State of Florida

**CERTIFICATE OF SERVICE
DOCKET NO. 050001-EI**

I HEREBY CERTIFY that a true and correct copy of the foregoing OPC's Motion to Defer Issue of Prudence and Reasonableness of PEF's Coal Costs has been furnished by electronic mail and U.S. Mail to the following parties on this 4th day of November, 2005:

Jennifer Rodan
Adrienne Vining
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Jon C. Moyle
Moyle Law Firm
118 N. Gadsden Street
Tallahassee, FL 32301

James Beasley
Lee Willis
Ausley Law Firm
P.O. Box 391
Tallahassee, FL 32302

John McWhirter, Jr.
McWhirter, Reeves Law Firm
400 North Tampa St., Suite 2450
Tampa, FL 33602

Bill Walker
Florida Power & Light Company
215 S. Monroe Street, Suite 818
Tallahassee, FL 32301-1859

R. Wade Litchfield
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408-0420

R. Alexander Glenn
Progress Energy Florida, Inc.
100 Central Avenue
St. Petersburg, FL 33701-3324

Susan D. Ritenour
Richard McMillan
Gulf Power Company
One Energy Place
Pensacola, FL 32520-0780

Tim Perry
McWhirter Law Firm
117 South Gadsden Street
Tallahassee, FL 32301

Norman H. Horton, Jr.
Fred R. Self
Messer Law Firm
P.O. Box 1876
Tallahassee, FL 32302-1876

John T. Butler, P.A.
Squire, Sanders and Dempsey
200 S. Biscayne Blvd., Suite 4000
Miami, FL 33131-2398

Angela Llewellyn
Tampa Electric Company
P.O. Box 111
Tampa, FL 33602-0111

Thomas K. Churbuck
911 Tamarind Way
Boca Raton, FL 33486

Gary V. Perko
Hopping Law Firm
P.O. Box 6526
Tallahassee, FL 32314

Myron Rollins
Black & Veatch
11401 Lamar Avenue
Overland Park, KS 66211

Cheryl Martin
Florida Public Utilities Company
P.O. Box 3395
West Palm Beach, FL 33402-3395

Robert Scheffel Wright
John LaVia, III
Landers Law Firm
P.O. Box 271
Tallahassee, FL 32302

Jeffery A. Stone
Russell Badders
Beggs & Lane Law Firm
P.O. Box 12950
Pensacola, FL 32591

Mark Hoffman
CSX Transportation, Inc.
500 Water St., 14th Floor
Jacksonville, FL 32202

Michael B. Twomey
Post Office Box 5256
Tallahassee, FL 32314-5256

s/ Joseph A. McGlothlin
Joseph A. McGlothlin
Associate Public Counsel