

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery
clause with generating performance incentive
factor.

DOCKET NO. 050001-EI

FILED: November 7, 2005

**PROGRESS ENERGY FLORIDA'S RESPONSE IN OPPOSITION
TO THE FLORIDA INDUSTRIAL POWER USERS GROUP'S
REQUEST FOR OFFICIAL RECOGNITION**

PROGRESS ENERGY FLORIDA, INC., (PEF) hereby responds in opposition to the Florida Industrial Power Users Group's ("FIPUG's") Request for Official Recognition filed shortly before the close of business on Friday, November 4, 2005. For the reasons discussed below, FIPUG's Request for Official Recognition should be denied because the information offered for official recognition is subject to dispute.

As noted in FIPUG's Request for Official Recognition, in order to qualify for official recognition, the information offered by FIPUG must be either "facts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court," pursuant to § 90.202(11), Florida Statutes ("F.S."), or "facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned," pursuant to § 90.202(12), F.S. The chart in Exhibit A to FIPUG's Request was derived from the website of the New York Mercantile Exchange, Inc. (NYMEX) and provides information about the futures prices paid during a single session on a single day for natural gas to be delivered at times ranging from December 2005 to December 2010.

The Supreme Court has stated that judicial notice is appropriate where "knowledge of the facts [offered for judicial notice] is so notorious that everyone is assumed to possess it." Huff v. State, 495 So.2d 145, 151 (Fla. 1986). The Court has described the standard as follows: "first,

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the facts to be judicially noticed must be of common notoriety, and second, courts should exercise great caution when using judicial notice.” Huff, 495 So.2d at 151, citing Amos v. Moseley, 74 Fla. 555, 77 So. 619 (Fla. 1917). The Supreme Court has also stated: “The established rule in respect to judicial notice is that it should be exercised with great caution. The matter judicially noticed must be of common and general knowledge. Moreover, it must be authoritatively settled and free from doubt or uncertainty.” Makos v. Prince, 64 So.2d 670, 673 (Fla. 1953), also citing Amos v. Moseley, 74 Fla. 555.

The NYMEX Natural Gas futures prices for which FIPUG seeks official recognition are not “facts that are not subject to dispute.” As explained in the “Viewing and Usage Agreement” to which one must agree prior to viewing the chart on the NYMEX website, the publisher itself states that it does not warrant the accuracy of the data set forth:

DISCLAIMER OF WARRANTIES. VIEWER AGREES THAT NYMEX MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO NYMEX MARKET DATA, OR THE TRANSMISSION, TIMELINESS, ACCURACY OR COMPLETENESS THEREOF . . . (Emphasis in original.)

Accordingly, this chart is not a proper subject for official recognition.¹

Moreover, knowledge of natural gas prices and futures prices is a particularized area which requires specialized experience and training. Such prices are not a matter of common knowledge or common notoriety, such that they should be accepted by judicial notice. If such prices are to be introduced, they should be introduced with the assistance of an expert who can explain their

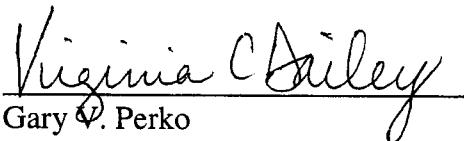
¹ It should also be noted that the Viewing and Usage Agreement for the NYMEX chart of Natural Gas futures prices specifies the permissible uses of that chart, which uses do not include the FIPUG’s apparent intended use.

significance and merit in order to allow the Commission to evaluate the worthiness of the evidence.

WHEREFORE, Progress Energy Florida, Inc., respectfully requests that the Commission deny the Request for Official Recognition filed by the FIPUG on Friday, November 4, 2005.

Respectfully submitted, this 7th day of November, 2005.

HOPPING GREEN & SAMS, P.A.

By: 
Gary V. Perko
Carolyn S. Raepple
Virginia C. Dailey
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, FL 32302

Attorneys for Progress Energy Florida, Inc.

#232814

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by hand-delivery (*) or by regular U.S. mail to the following this 7th day of November, 2005.

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

John T. Butler, Esq.
Squire, Sanders & Dempsey, L.L.P.
200 S. Biscayne Bay Blvd, Suite 4000
Miami, FL 33131-2398

Lee L. Willis, Esq.
James D. Beasley, Esq.
Ausley & McMullen
P.O. Box 391
Tallahassee, FL 32302

Joseph McGlothlin, Esq. (*)
Office of Public Counsel
111 West Madison Street, Rm. 812
Tallahassee, FL 32399

Jeffrey A. Stone, Esq.
Russell A. Badders, Esq.
Beggs and Lane
P.O. Box 12950
Pensacola, FL 32576

John W. McWhirter, Jr. (*)
McWhirter Reeves
400 North Tampa Street, Suite 2450
Tampa, FL 33602

Timothy J. Perry, Esq. (*)
McWhirter Reeves, et al.
117 South Gadsden Street
Tallahassee, FL 32301

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

Florida Power & Light Co.
Bill Walker
215 S. Monroe Street, Suite 810
Tallahassee, FL 32301

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

Gulf Power Company
Susan Ritenour
One Energy Place
Pensacola, FL 32520-0780

Tampa Electric Company
Angela Llewellyn
Regulatory Affairs
P.O. Box 111
Tampa, FL 33601-0111

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

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

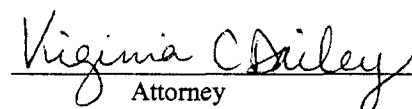
CSX Transportation, Inc.
Mark Hoffman
500 Water St., 14th Floor
Jacksonville, FL 32202

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

R. Alexander Glenn
Deputy General Counsel - Florida
Progress Energy Service Company, LLC
P.O. Box 14042
St. Petersburg, FL 33733

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

Major Craig Paulson (*)
AFCESA/ULT
139 Barnes Drive
Tyndall Air Force Base, FL 32403


Attorney