BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor	DOCKET NO.: 060001-EI Filed: August 30, 2006

PROGRESS ENERGY FLORIDA, INC.'S MOTION TO DISMISS CITIZEN'S PETITION FOR ORDER REQUIRING PROGRESS ENERGY FLORIDA, INC. TO REFUND TO CUSTOMERS $143 MILLION, REPRESENTING PAST EXCESSIVELY HIGH FUEL COSTS STEMMING FROM FAILURE TO UTILIZE THE MOST ECONOMICAL SOURCES OF COALS FOR CRYSTAL RIVER UNITS 4 AND 5

Progress Energy Florida, Inc. ("PEF"), through its undersigned counsel and pursuant to Rule 28-106.204(2), F.A.C. and Florida Rule of Civil Procedure 1.140, moves to dismiss the petition of the Office of Public Counsel ("OPC") for an order requiring PEF to refund to customers $143 million for allegedly excessive fuel costs over the last decade, from 1996 to 2005, because OPC claims the "most" economical sources of coal for Crystal River Units 4 and 5 (hereinafter "CR4" and "CR5") were not used. As grounds for this motion, PEF asserts that:

- OPC's request for relief in its Petition is based on grounds that necessarily require the Florida Public Service Commission ("FPSC" or the "Commission") to engage in improper hindsight review of PEF's coal procurement policies. Such hindsight review is precluded under controlling law, and the Commission cannot properly grant OPC the relief it seeks.
- The Commission's statutory jurisdiction to set rates and charges is prospective; retroactive ratemaking is prohibited. Charges under the Fuel and Purchased Power Cost Recovery Clause ("Fuel Clause") are rates and, thus, subject to the prohibition on retroactive ratemaking. A limited exception exists under the Fuel Clause to account for

regulatory lag between recovery of fuel costs and a reasonable time to review them for prudence when the utility is on notice of a genuine issue regarding the cost transaction or charge **before** the costs are incurred. OPC's petition requires the Commission to exceed its jurisdictional limits by engaging in improper retroactive ratemaking. OPC requests a refund order for costs incurred and recovered for CR4 and CR5 for the past ten years, when neither OPC nor anyone else raised an issue regarding the prudence of these costs before or at the time they were incurred. Under these circumstances, the refund order OPC requests is improper retroactive ratemaking and an improper taking under the due process clauses of the state and federal constitutions.

For these reasons, as more fully explained below, OPC's Petition should be dismissed as a matter of law.

I. Summary of Grounds for Motion to Dismiss.

OPC's Petition seeks a refund of allegedly excessive coal costs recovered by PEF for coal actually purchased and burned at CR4 and CR5 for the period from 1996 to 2005. OPC claims PEF should have been purchasing and burning a mixture of sub bituminous and bituminous coal rather than the bituminous coal PEF purchased and burned.

OPC's Petition should be dismissed because OPC requests the Commission to second-guess PEF's coal procurement decisions over the last decade based on information that was fully known only after those decisions were made. The courts and the Commission are uniform in their position that such hindsight review is improper and cannot form the basis for a determination of imprudence. See, e.g., Florida Power Corp. v. Cresse, 413 So. 2d 1187, 1189 (Fla. 1982); Florida Power Corp. v. Pub. Svc. Comm'n, 456 So. 2d 451, 452 (Fla. 1984); In re Investigation of Fuel Cost Recovery Clauses of Electric Utilities (Gulf Power Company-Maxine

Mine), Order No. 13452, Docket No. 820001-EU-A, 1984 Fla. PUC LEXIS 461, *26-27 (June 22, 1984). Because OPC's Petition relies on allegations of fact that reflect the benefit of such improper hindsight review, OPC's Petition should be dismissed.

Additionally, for over a decade, PEF has had no notice that OPC (or anyone else) took issue with PEF's coal purchases in this regard and, because of this fact, PEF has not had an opportunity to address and dispute these allegations within the actual years in which they were taking place. OPC and all others that participate in the annual Fuel Clause, however, have known exactly what coal PEF purchased and burned at CR4 and CR5 and its cost in numerous Fuel Clause hearings conducted since 1996. In the course of those proceedings, the Commission has allowed PEF to recover those costs, without anyone even raising a genuine issue as to their prudence.

The Commission's prudence review cannot, as a matter of law, extend indefinitely after the utility recovers its fuel costs in rates under the Fuel Clause, as OPC suggests in its Petition. Rather, the Commission's statutory authority and prior judicial and Commission precedent demonstrate that the Commission's authority to conduct a prudence review and order a refund is not indefinite. See Gulf Power Co. v. Florida Public Service Comm'n, 487 So. 2d 1036 (Fla. 1986), and the discussion below, at pp. 11-21. The Commission's statutory authority to set rates, including rates for fuel costs in the Fuel Clause, is prospective; the Commission cannot engage in retroactive ratemaking. A limited exception, accounting for regulatory lag, exists in the Fuel Clause, but that exception requires notice of a genuine issue as to the prudence of a particular fuel transaction or cost before the utility incurs that cost in order for the costs to be subject to refund following the adequate opportunity for investigation and hearing on the prudence of the costs incurred. This provides regulatory certainty and fairness to those who rely on the utility's

cost recovery to make financial decisions, including the utility itself, its investors, and the financial community, such as credit reporting agencies. OPC's Petition requests a refund from 1996 to the present, but when OPC (nor any other party) time-after-time, year-after-year, did not put PEF on notice of a genuine prudence issue with respect to the costs recovered for coal at CR4 and CR5, PEF necessarily has been denied fair notice and a fair opportunity to respond during the time period when PEF could review and possibly change its fuel procurement policies. Under these circumstances, OPC's Petition seeking a refund from 1996 to 2005 should be dismissed as a matter of law as improper retroactive ratemaking and a violation of PEF's rights to due process under the state and federal constitutions.

II. OPC's Request for Relief in its Petition is Based on Grounds that Necessarily Require the Commission to Engage in Improper Hindsight Review of PEF's Coal Procurement Policies.

When considering whether a utility made a prudent and reasonable decision with respect to costs incurred and recovered in rates and charges, the PSC must judge that management decision based on the information available to management at the time the decision was made, without the benefits of knowledge acquired after the decision. Gulf Power Co., 487 So. 2d at 1036. It is well established under Florida law that, for an action or decision on costs to be deemed imprudent, management must have acted unreasonably at the time the relevant decision was made. See, e.g., Florida Power Corp. v. Cresse, 413 So. 2d 1187, 1189 (Fla. 1982); Florida Power Corp. v. Pub. Svc. Comm'n, 456 So. 2d 451, 452 (Fla. 1984).

Commission decisions are in accord with this well established legal standard for prudence review. Order No. 13452, at *10; In re Tampa Electric Company, Order No. PSC-05-0312-FOF-EI, Docket No. 031033-EI, 2005 WL 733109 (Mar. 21, 2005) (denying on grounds of improper hindsight review, utility's motion to recognize a prior stipulation regarding the reasonableness of

another utility's waterborne contract rates because it occurred after the request for proposal for similar contracts at issue); In re: Investigation into extended outage of Florida Power and Light Company's St. Lucie Unit No. 1, Order No. 15486, Docket No. 840001-EI-A, 1985 Fla. PUC Lexis 25 (Dec. 23, 1985) (finding utility's decision to include a thermal shield on its nuclear plant was prudent because the benefit of design and construction without a thermal shield was not available when cost-analysis of the thermal shields was done and utility's decision cannot be subject to improper hindsight review); In re Aloha Utilities, Inc., Order No. PSC-97-0280-FOF-WS, Docket Nos. 950615-SU and 960545-WS, 1997 WL 148679 (Mar. 12, 1997) (declining to deny recovery for reuse project even though utility did not know about and failed to obtain available SWFWMD funding because there was no guaranty it would have obtained funding had it known about it); In re: Petition of Florida Public Utilities Company for rate increase in Fernandina Beach Division, Order No. 22224, Docket No. 881056-EI, 1989 Fla. PUC Lexis 1710 (Nov. 27, 1989) (declining to use hindsight review to punish utility for resulting losses on certain investments that were prudent at the time made).

The principle behind improper hindsight review is straightforward: the Commission cannot determine that costs previously incurred and recovered in rates and charges were imprudent because "hindsight makes a different course of action look preferable." Richter v. Florida Power Corp., 366 So. 2d 798, 800 (Fla. 2d DCA 1979). In the Gulf Order, upon which OPC relies, the Commission explains that:

> The use of pure hindsight in assessing the prudence is [sic] past action is patently unfair. A utility should not be charged with knowledge of facts which cannot be foreseen or be expected to comply with future regulatory policies. Expectations are not always borne out.

Order No. 13452, *26-27. Even taking the allegations asserted in OPC's petition as true, as PEF must do on a motion to dismiss, the claims OPC makes regarding how PEF was imprudent in its

coal procurement decisions for CR4 and CR5 over the past decade necessarily involve improper hindsight review.[1] As a result, OPC's Petition must be dismissed as a matter of law.

OPC alleges that PEF's coal procurement decisions for CR4 and CR5 extending over the past decade were imprudent because (i) no later than 1996, PEF should have begun burning a mixture of Powder River Basin ("PRB") sub bituminous and bituminous coal, (ii) PEF should have "expeditiously" increased the portion of PRB coal in the mixture until it reached a 50/50 mixture, and (ii) PEF should have preserved and maintained the ability to burn this mixture at CR4 and CR5 in its Title V permit beginning in 1996. (OPC Petition, ¶¶21, 38). All of these allegedly more prudent courses of action that PEF should have taken, according to OPC, necessarily require the delivered price of PRB sub bituminous coal to CR4 and CR5 to be cheaper than the coal actually purchased for and used at CR4 and CR5 over this entire ten-year period of time. OPC admits as much by alleging that the "market prices for coal over time" and the "availability and cost of transportation from the [PRB] region to PEF's Crystal River site demonstrate" that a shift to a mixture of PRB sub bituminous and bituminous coal at CR4 and CR5 was "both feasible and economically desirable."[2]

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[1] PEF does not concede that the facts alleged in OPC's Petition are true or accurate, however, PEF acknowledges that, when considering a motion to dismiss, the Commission must decide "whether, with all factual allegations in the amended petition taken as true and construed in the light most favorable to the ... petitioner, the ... petition states a cause of action upon which relief may be granted." In re: Petition to Vacate Order No. PSC-01-1003-AS-EI approving, as modified and clarified, the settlement agreement between Allied Universal Corp. and Chemical Formulators, Inc. and Tampa Electric Co., Order No. PSC-04-1115-FOF-EI, Docket No. 040086-EI, 2004 Fla. PUC Lexis 1056 (Nov. 9, 2004), citing Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

[2] OPC also alleges that PEF's "own description of the unit design" and "PEF's own initial fuel strategy" (presumably a reference to the alleged design capability of burning a fuel mixture of 50% sub bituminous coal and 50% bituminous coal), demonstrate that a mixture of the two at CR4 and CR5 was "feasible" and "economically desirable." (OPC Petition, ¶38). These two allegations have no bearing on whether PEF's coal procurement decisions for CR4 and CR5 between 1996 and 2005 were imprudent because the same allegations can be made for the prior

Inherent in the allegations OPC relies on in its Petition to show that the PRB sub bituminous coal was available and that its transportation cost and market price made it more "economically desirable" for CR4 and CR5 over the period from 1996 to 2005, however, is an improper hindsight review of alleged facts that PEF could not have had available to it at the time PEF was making its coal procurement decisions.[3] As a result, OPC's Petition should be dismissed as a matter of law.[4]

First, to show the alleged availability of PRB coal, OPC alleges that an additional rail line was available to transport PRB coal and that PEF should have known this fact and its effect on the price of PRB coal. (OPC Petition ¶¶ 12-13.) OPC alleges that the rail line became available

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period of time, before 1995, but OPC concedes that PEF's coal procurement decisions for CR4 and CR5 were prudent in the 80's when only bituminous coal was purchased for and burned at the units. (OPC Petition, ¶11). Because these alleged facts about CR4 and CR5 did not change over both periods of time, when prudent and imprudent coal procurement decisions were allegedly made, OPC's alleged imprudence under the Petition must depend on what did allegedly change over time, namely, the market prices of the PRB coal and the availability and cost of transportation of PRB coal.

[3] OPC also alleges that PEF purchased coal for CR4 and CR5 through its affiliates who owned or had contracts for bituminous coal and purchased synfuel briquettes for CR4 and CR5. (see OPC Petition, ¶¶16-19, 21-23, 27). Without more, however, these allegations are also irrelevant to OPC's claims of imprudence. OPC's imprudence claims turn on the allegation that PRB coal was less expensive than the delivered price of coal actually used at CR4 and CR5 over the past decade; if the PRB coal was actually more expensive than the coal burned at CR4 and CR5 over this time period there is little doubt that OPC would agree with PEF's coal procurement decisions, if all it involved was the mere purchase of cheaper bituminous coal and synfuel briquettes from PEF's affiliates. Again, OPC accepts the prudence of PEF's coal procurement decisions for CR4 and CR5 in the 80's, when PEF's predecessor was purchasing bituminous coal from an affiliate. (OPC Petition, ¶ 11).

[4] OPC does generally allege as a conclusion that the information OPC relies on to show that burning PRB coal at CR4 and CR5 from 1996 to 2005 was feasible and economically desirable was "known, or was available, to PEF at the time." (OPC Petition, ¶38). Neither courts nor the Commission are bound by a mere conclusion in a pleading, however, when it is contradicted by the express or implicit allegations of fact in the pleading, as is the case here. See W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc., 728 So. 2d 297, 300 (Fla. 1st DCA 1999) (holding that courts "need not accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party" on a motion to dismiss), citing Response Oncology, Inc. v. Metrahealth Insurance Co., 978 F. Supp. 1052, 1058 (S.D.Fla. 1997).

in the mid-1980s and that it has stayed available until 2005. (OPC Petition, ¶ 12.) However, inherent in that allegation is that OPC knows today that the rail line has in fact remained open for transporting coal from the early 1990s until 2005. At the time PEF was considering whether to buy PRB coal, however, it could not have had the benefit of this knowledge. Any number of things might have happened over the last decade in which the challenged decisions were made to disrupt the reliable transportation of coal on that particular rail line. A reasonable and prudent coal purchaser must consider such factors when determining the location of coal to purchase. OPC, by considering only the fact that an additional rail line became available to transport PRB coal and allegedly was available over the entire time period that OPC seeks a refund, has failed to consider the element of the unknown that faced PEF at the time it made its decisions to procure coal for CR4 and CR5. Therefore, OPC seeks to review PEF's actions using improper hindsight review.

Similarly, OPC alleges as fact that PRB coal was more readily available during this time at a lower price than Eastern bituminous coal. (OPC Petition, ¶¶ 12-13). However, these allegations again involve improper hindsight review. OPC has the benefit of the knowledge today that the PRB mines produced PRB coal at an allegedly competitive price from the early 1990's until 2005. But at the time PEF made its decisions regarding coal for CR4 and CR5 over that time period, PEF did not have and could not have had this knowledge. PEF did not know whether the PRB mine providers would have problems with, for example, labor strikes, mine collapses, or finding adequate veins in the mine. PEF necessarily had to factor these risks into its decision regarding the purchase of PRB coal, because any prudent coal purchaser would do so. Because OPC does not address the additional risk analysis that PEF had to conduct when it made its decision, OPC seeks to apply improper hindsight review to PEF's coal procurement decisions.

OPC also calculates the SO_2 allowance cost as part of its claimed excess cost, because allegedly burning sub bituminous PRB coal would have resulted in lower SO_2 emissions. Again, OPC seeks to apply an improper hindsight review standard to the prudence of PEF's decisions. Now, in 2006, OPC has the benefit of knowing exactly what each SO_2 allowance would cost at the particular date for each year. However, when PEF, like any other utility making coal procurement decisions, considers what type of coal to purchase, it must use a market forecast to estimate what it thinks the SO_2 allowance market will be at the time the coal is burned. PEF uses these estimates to compare various coal types and determine how much additional cost will be associated with burning each type of coal. Due to market variations that cannot be precisely forecasted, the estimates may, of course, turn out to be incorrect. But a utility's management cannot be judged by what actually happened in the market; rather, it can only be judged by what it knew at the time the coal procurement decisions were made. OPC's use of actual SO_2 allowance costs does not take into account the market forecasting necessarily a part of such allowances and, thus, necessarily involves improper hindsight review.

Finally, OPC seeks to judge PEF's action based on the "market prices for coals over time." (OPC Petition, ¶ 38.). At the times PEF made the relevant decisions to procure certain coal, it necessarily only had knowledge of the then-current market price and projected market prices. It did not have the benefit, as OPC does now, of what actually occurred in the market regarding coal prices. Indeed, the Commission in the Gulf order recognizes that existing and projected market prices, not actual market prices, must be considered when judging the prudence of coal procurement decisions: "Market prices and projected market prices at the time of a fuel procurement decision are relevant to the determination of prudence of that decision, but actual prices paid after the decision is made do not affect a determination of prudence." Order No.

13452 at *35 (emphasis added). OPC, by relying only on market prices actually paid over time, is improperly subjecting PEF to improper hindsight review. In fact, OPC makes no reference to projected market prices at all, much less to allege some error in PEF's forecasts that must have been known to PEF at the time the forecasts were made and relied on by PEF in its coal procurement decisions for CR4 and CR5. But, as the Commission recognized in Order No. 13452, "projected market prices" are necessarily a part of the consideration of the coal procurement decisions at issue. The failure by OPC to even reference such necessary projections in its petition only highlights the reliance OPC places on market prices known only after the fact. This is improper hindsight review.

Simply put, the Commission is being asked to second-guess the coal procurement decisions made by PEF for CR4 and CR5 over ten years based on facts known only after the complex interaction of coal supply and transportation issues, involving such things as supply and transportation availability and congestion, variations in utility and other demand for supply and transportation resources, and allowances in a changing environment, have played out over the last decade. PEF and the Commission have been down this same path before. In In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor, Order No. 19042, Docket No. 880001-EI, 1988 Fla. PUC LEXIS 1030 (Mar. 25, 1988), Occidental argued that certain utility fuel costs should be disallowed because Florida Power Corporation ("FPC") had acted imprudently when it failed to act as quickly as it should have to secure the necessary contracts to switch from oil to gas at its Suwannee plant. FPC responded that its actions were prudent because, during the time when it was making the decision regarding the choice of fuel, the future market prices of gas and oil were uncertain. FPC further argued that there was no guarantee that gas would be cheaper than oil for any extended period of time and

that there was uncertainty concerning potential retroactive charges in transportation rates for gas as well. The Commission refused to find that FPC's actions were imprudent, stating:

> While the clear vision of hindsight suggests that it is possible that FPC could have acted more expeditiously in concluding the contract and that some benefit might have derived from it, we are unable to find that the delays were so unreasonable, or the potential benefit so clear, that the utility's actions rise to the level of imprudence. In short, we will not here substitute our judgment for that of FPC's management in conducting negotiations with the utility's gas supplier nor in evaluating the risks inherent in choosing the fuel supply for the Suwannee plant.

Order No. 19042, *15. OPC is beating the same path and asking the Commission, again, to substitute its judgment for management. Such a review is clearly improper, and because OPC's allegations of imprudence depend on improper hindsight review, its petition should be dismissed.

III. The Jurisdictional Limits on the Commission's Authority to Award Retroactive Rate Relief Preclude the Commission from Granting the Refund Requested in OPC's Petition.

OPC's Petition calls on the Commission to order a refund of fuel costs submitted by PEF in 14 Fuel Clause proceedings, involving 14 hearings including 14 true-up proceedings, that have been expended and recovered by PEF over the last ten years based on fuel procurement decisions that were first made more than a decade ago. It is a matter of public record in each of these 14 Fuel Clause proceedings and 14 hearings, beginning in 1996 and continuing until November 2005,[5] that PEF has made clear the type, quantity, and cost of the coal procured for and used in the operation of CR4 and CR5. Despite this publicly available information in each of the last ten years, at no time has OPC, the Commission Staff, or any other person ever raised an issue with respect to the prudence of PEF's management decisions regarding the type, quantity, and cost of coal used at CR4 and CR5. Yet, OPC requests the Commission to order a refund of costs

[5] According to OPC's petition, OPC first raised an issue -- but not this issue -- regarding the prudence of the fuel procurement policy for CR4 and CR5 in November 2005. (OPC Petition, ¶48).

incurred and recovered over this entire past period of time, from 1996 to 2005. As a result, OPC requests the Commission to exceed its statutory authority and engage in improper retroactive ratemaking that denies PEF fair and timely notice and a fair opportunity to be heard on the issue of the prudence of its prior coal procurement decisions before it incurred those fuel costs. These circumstances set OPC's petition apart from the precedent OPC relies upon in its Petition.

OPC relies on the Florida Supreme Court's decision in Gulf Power Co. v. Florida Public Service Comm'n, 487 So. 2d 1036 (Fla. 1986), and Commission Order No. 12645 in Docket No. 830001-EU, to support its petition. Both of these decisions addressed the Commission's authority to set rates or charges to recover fuel costs in Fuel Clause proceedings. OPC contends that the "legal principles" established in these decisions by the Court and the Commission "are applicable to the situation described in [OPC's] petition" and provide the Commission the "requisite authority" and "statutory responsibility" to act on OPC's Petition. (OPC Petition, ¶47). To the contrary, however, this authority and other precedent of the Court and Commission show that OPC's Petition requires the Commission to exceed its requisite, statutory authority.

The Commission derives its jurisdictional authority solely from the Florida legislature. City of West Palm Beach v. Florida Public Service Comm'n, 224 So. 2d 322, 325 (Fla. 1969). And, any reasonable doubt as to the existence of a power of the Commission is resolved against the Commission. City of Cape Coral v. G.A.C. Utilities of Florida, 281 So. 2d 493, 496 (Fla. 1973); see also Tampa Electric Co. v. Garcia, 767 So. 2d 428, 434 (Fla. 2000). The Commission's statutory jurisdiction to fix fair, just, and compensatory rates and charges is prospective, following notice to the public and the utility and a hearing. §366.041, Fla. Stats.; §366.06(2), Fla. Stats. ("... the commission shall order and hold a public hearing, giving notice to the public and to the public utility, and shall thereafter determine just and reasonable rates to

be **thereafter** charged for such service ..."); §366.07, Fla. Stats. ("... the commission shall determine and by order fix the fair and reasonable rates, rentals, charges, ... to be imposed ... **in the future**.") (emphasis supplied). Retroactive ratemaking, an attempt to recover either past under or over earnings through changes in past costs or revenues in current rates or charges, is prohibited.

The Florida Supreme Court has long held that the Commission's statutory authority to set rates and charges for electric service is prospective only and that the Commission lacks the authority to engage in retroactive ratemaking. City of Miami v. Florida Public Service Comm'n, 208 So. 2d 249, 259 (Fla. 1968) ("An examination of pertinent statutes leads us to conclude that the Commission would have no authority to make retroactive ratemaking orders.") (emphasis supplied). The Commission likewise has recognized this limitation on its jurisdictional authority. In re Petition for Clarification on Appropriate Market Based Pricing Methodology by Tampa Electric Company, Order No. PSC-92-1048-FOF-EI, Docket No. 920041-EI, 1992 Fla. PUC LEXIS 1509, *21-22 (Sept. 23, 1992) ("... we are required to review and modify our rate decisions, on a prospective basis, by virtue of our continuing duty to regulate the rates and service of electric utilities. ... This continuing obligation applies to rates for fuel cost recovery as well as other forms of rates ...") (emphasis added).

Fuel Clause proceedings involve setting rates and charges under the Commission's statutory jurisdiction. The Commission recognized this in Order No. PSC-92-1048-FOF-EI, explaining that its continuing obligation to regulate rates on a prospective basis applied "to rates for fuel cost recovery as well as other forms of rates ... ." Order No. PSC-92-1048-FOF-EI,

*21-22.[6] OPC concedes this point in its petition, pointing out that the fuel cost recovery charge is a "rate" or "charge" within the meaning of the jurisdictional provisions over rates and charges in Chapter 366. (OPC Petition, ¶42); see, e.g., §§ 366.041, 366.06, Fla. Stats. Therefore, rates under the Fuel Clause are subject to the same jurisdictional limits on retroactive ratemaking that apply to other rates and charges under the Commission's statutory authority.

The manner of setting rates to recover utility fuel costs, however, has evolved from recovery through base rate proceedings to a continuous rate proceeding under the Fuel Clause.[7] The justification for the recovery of fuel costs through the Fuel Clause is the elimination of regulatory lag that occurs as a result of the "difference between the actual cost of fuel for an electric utility and the amount allocated for fuel in the utility's current general rate structure." Citizens of the State of Florida v. Florida Public Service Comm'n, 403 So 2d 1332, 1333 (Fla. 1981) (Overton, dissenting). By adjusting rates in the Fuel Clause to recover fuel costs closer in time to when they are incurred, thereby eliminating the lag between incurrence of the costs and recovery of them in base rates, "customers are protected from sharp decreases in fuel or commodity costs, and the utility [is protected] in cases of sharp increases." Pinellas County v. Mayo, 218 So 2d 749, 750 (Fla. 1969). Both utilities and customers, therefore, benefit from the elimination of this effect of regulatory lag in Fuel Clause proceedings.

There is another regulatory lag effect, however, under the Fuel Clause. That is, there is sometimes a delay between the recovery of fuel costs by the utility and the determination of the prudence of those costs. As the Commission explained in the Gulf order, the "time needed by

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[6] The Commission has in fact recognized that "utilities are entitled to recover the actual cost of fuel purchased to generate electricity." In re Fuel and purchased power cost recovery clause and generating performance incentive factor, Order No. PSC-97-0608-FOF-EI, Docket No. 970001-EI, 1997 Fla. PUC LEXIS 623, *3-4 (May 28, 1997).

[7] Other cost recovery clauses are based on express statutory authority. The environmental cost recovery clause is established by §366.8255, Fla. Stats.

the Commission to collect and analyze relevant information causes regulatory lag." In re Investigation of Fuel Cost Recovery Clauses of Electric Utilities (Gulf Power Company-Maxine Mine), Order No. 13452, Docket No. 820001-EU-A, 1984 Fla. PUC LEXIS 461, *47 (June 22, 1984). In the event of this prudence review, however, for the Commission to avoid the jurisdictional prohibition on retroactive ratemaking, there must be notice of a genuine issue with respect to a particular fuel transaction or cost, before that transaction has occurred or that cost has been incurred, and an adequate opportunity to be heard on the issue. Such notice and hearing are also essential to fundamental fairness and due process under the state and federal constitutions.

In the order on appeal in Gulf Power, the Commission found that Gulf had imprudently entered into a ten-year extension of a contract for coal from a particular mine in 1974 without adequate safeguards for early termination that, by 1980, was among comparable coals the highest cost coal in the country. Order No. 13452, *18, *24. The Commission determined that the prices of coal for 1980, 1981, and 1982 were excessive and unreasonable and ordered a refund for costs recovered under that mine contract in those years. Id. at *3. Tellingly, this period coincided with the time period that Gulf was on notice that the prudence of the Maxine Mine coal costs was an issue and the Commission was investigating the prudence of the costs. As the Commission explained,

> This case is a prime example of the reality of regulatory lag. In early 1981, when the resources of the Commission were focused on Maxine Mine, the staff became concerned about the cost of the coal to Gulf. An analysis was conducted and the staff issued a report in early 1982 stating its preliminary findings. The issue of the prudence of Gulf's expenditures for Maxine Coal was then spun off from the June, 1982 true-up hearing and staff made its initial filing of testimony on Maxine Mine in September, 1982. ... As it is now, it has taken three years to bring this case from initial inquiry to final decision. During this entire time Gulf was able to recover its fuel expense, even though the Commission had yet to decide the prudence of the expenditures.

Id. at *48-49.

In affirming the Commission order, the Florida Supreme Court did not overrule its prior precedent prohibiting retroactive ratemaking (nor could the Court overrule that precedent since it was premised on the limits of the Commission's statutory authority). Rather, the Court held that the order did not constitute a "prohibited retroactive ratemaking fuel adjustment." Gulf Power, 487 So. 2d at 1037 (emphasis supplied). The Court emphasized that the Commission's refund order was "predicated on adjustments for 1980, 1981, and 1982," specifically finding "them to be permissible" under the principle of regulatory lag, and not a "prohibited retroactive ratemaking fuel adjustment." Id. (emphasis added). The Court acknowledged, then, that there might be, under other circumstances, "prohibited" retroactive ratemaking fuel adjustments.

Unlike the circumstances in Gulf, OPC has not raised an issue of prudence with respect to the coal procured for CR4 and CR5 and sought to subject to refund only the costs recovered for coal burned at CR4 and CR5 during the investigation of the prudence of those costs. Rather, OPC raises for the first time in its petition an issue with respect to the coal burned at CR4 and CR5 and requests that the Commission order a refund for the past 10 years. OPC's Petition requires the Commission to engage in "prohibited" retroactive ratemaking under the principles of the Gulf Power decision.

The Florida Supreme Court's decision in Gulf Power provides the jurisdictional parameters on the Commission's authority to order the refund requested by OPC in its Petition. The Commission's broader statements in Order No. 13452, and in Order No. 12645 relied upon by OPC, regarding the Commission's continuing ability to determine the prudence of fuel costs recovered by utilities in Fuel Clause proceedings, must be read in light of the limits necessarily imposed on the Commission by the Florida Supreme Court in the Gulf Power case. These

Orders cannot legally mean, as OPC suggests, that the Commission has the unlimited authority to order the refund of fuel costs recovered under prior Fuel Clause proceedings no matter how long ago those costs were incurred and recovered.

The Commission Staff and OPC understood this in Order No. 12645. There, the Commission addressed a change in the operation of the Fuel Clause proposed by Staff to give the Commission additional time to address the prudence of fuel costs incurred beyond the current true-up hearing following each six-month period. Staff proposed – and OPC supported – a three year period following approval of fuel costs at the true-up hearing in which an issue might be raised for further prudence review. In re Investigation of Fuel Adjustment Clauses of Electric Utilities, Order No. 12645, Docket No. 830001-EU, 1983 Fla. PUC LEXIS 163, *19-21 (Nov. 3, 1983). Both Staff and OPC recognized the fundamental fairness in providing the utility notice with respect to the prudence of a particular transaction within a reasonable period of time after the amounts relating to that transaction had passed through the Fuel Clause in order to subject such costs to possible refund.

While the Commission declined Staff's proposal of an express deadline on its authority to review the prudence of recovered fuel costs, the Commission nevertheless acknowledged that an "appropriate limitation of our jurisdiction ... [is] based on whatever statute of limitations or other jurisdictional limitations applies to our actions as a matter of law." Order No. 12645, at *23 (emphasis supplied). That jurisdictional limit, as demonstrated by the Gulf order the next year and the Florida Supreme Court's decision three years later, exists when the Commission goes beyond the principle of regulatory lag following notice to the utility of the prudence issue and an opportunity for the Commission to investigate and resolve the issue. That is, the refund period that was not "prohibited" retroactive ratemaking in Gulf Power coincided with the period of time

that Gulf was on notice that there was a prudence issue with respect to the Maxine Mine coal costs and the Commission was investigating the prudence of the costs incurred.

The reasons this jurisdictional limit exists on the Commission's ability to award the refund OPC requests are readily apparent. First, because this issue was not raised prior to OPC's Petition, PEF has necessarily relied on the recovery of such costs in its financial and operational decisions over the last decade. Others have necessarily relied on the recovery of coal costs for CR4 and CR5 that occurred without notice of any issue as to the prudence of these costs as well, including investors and credit rating agencies. Subjecting costs recovered years ago --- here a decade in the past --- to a potential refund when no issue was ever raised as to the prudence of those costs when they were incurred or recovered undermines the legitimacy of the ratemaking process and confidence of the financial markets in that process. In re Fuel and purchased power cost recovery clause with generating performance incentive factor, Order No. PSC-03-1461-FOF-EI, Docket No. 030001-EI, 2003 Fla. PUC Lexis 874, p.11 (Dec. 22, 2003) (declining to apply substitute market price measures for terminated market price proxies to past periods where PEF was not on notice the proxies may cease and they provided "regulatory certainty" to PEF). See also Matunuska Electric Ass'n v. Chugach Electric Ass'n, Inc., 53 P.3d 578, 583 (Alaska 2002) (concluding that retroactive ratemaking is prohibited because utilities, investors, and credit rating agencies must be able to rely on the legitimacy and stability of the ratemaking process).

Additionally, it is simply unfair, as OPC suggests, that the Commission can subject costs recovered by PEF through Fuel Clause hearings over the past ten years to indefinite prudence review -- and possible refund -- when the Commission has the power and obligation to investigate and determine the recoverable costs under the particular transaction at issue. See Wisconsin Power and Light Co. v. Public Service Comm'n of Wisconsin, 511 N.W.2d 291, 399-

400 (Wis. 1994) (reversing refund order for fuel overcharges 15 years after the fact and rejecting arguments that commission review was superficial as irrelevant because the commission had the power to investigate and examine the reasonableness of the utility's fuel costs); Matunuska Electric Ass'n, 53 P.3d at 585 (affirming reversal of refund order in part because ministerial review of costs by commission was irrelevant when commission had full power to review additional fuel cost data).[8]

The Commission's 2003 Order in the Fuel Clause proceeding illustrates the point that prior notice of an issue of prudence with respect to recoverable fuel costs is a matter of fundamental fairness. There, Staff raised an issue regarding the continuation of the market price proxies for all Waterborne Coal Transportation Service (WCTS) provided to PEF. Staff proposed the elimination of the market price proxies in the future, noting that it would be inappropriate to retroactively apply the new cost recovery method because PEF had relied upon "such regulatory treatment" in contracting for services. Order No. PSC-03-1461-FOF-EI, p. 11. The Commission agreed with this principle, holding that "[b]ecause PEF was not previously on notice that the proxies may cease to serve as the basis for cost recovery for either 2002 and 2003, we decline to adjust PEF's recoverable amounts under the proxies for those years as a matter of fundamental fairness." Id.

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[8] The principles of the administrative finality doctrine further demonstrate that at some point, even though grounds may exist to revisit a prior decision, the Commission's ability to re-open previously-decided matters must end. In Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966), four years had passed since the Commission's decision and the Court held that administrative finality barred the Commission from re-visiting the order. In In Re: Application for Amendment of Certificates Nos. 298-W and 248-S in Lake County by JJ's Mobile Homes, Inc., 1995 Fla. PUC Lexis 1634, Docket No. 921237-WS, Order No. PSC-95-1319-FOF-WS, *54-55 (Oct. 30, 1995), the Commission found the passage of 18 and 14 years, respectively, from the Commission's orders at issue to be important factors in concluding that the need for administrative finality overrode the duty to correct prior errors, explaining that "there must be a terminal point where parties and the public may rely on an order as being final and dispositive." (emphasis added).

"Utility ratemaking" is, according to the Florida Supreme Court, "a matter of fairness" and "equity requires that both ratepayers and utilities be treated in a similar manner." GTE Florida Inc. v. Clark, 668 So. 2d 971, 972 (Fla. 1996). The decision in Gulf is consistent with this principle. Gulf Power Co., 487 So. 2d at 1036. There, the Court's approval of the refund order was predicated on the fact that the adjustments were for a limited period of time during which the utility was on notice that there was an issue of prudence with respect to the costs incurred and the Commission was conducting an investigation of those costs.

Of course, the Commission's jurisdictional limit which prohibits retroactive ratemaking is not only a matter of fundamental fairness, it is also essential to the due process rights protected by both the state and federal constitutions. See U.S.C.A. Const. Amends. 5, 14; F.S.A. Const. Art. I, §§ 2, 9. As explained by the Florida Supreme Court:

> A regulated public utility is, of course, entitled to an opportunity to earn a fair rate of return on its invested capital. Failure to allow the utility the opportunity to earn a fair rate of return would violate the rights to due process, to just compensation for taking of property and the right to possess and protect property.

Gulf Power Company v. Bevis, 289 So. 2d 401, 403 (Fla. 1974) (citations omitted). By retroactively looking back for a refund of costs recovered over the past 10 years, in violation of the Commission's statutory authority, OPC asks the Commission to subject PEF to an improper taking in violation of PEF's due process rights under the state and federal constitutions.

As a matter of fundamental fairness and due process, similar notice could have and should have been provided to PEF as early as a decade ago if OPC or anyone else had a prudence challenge. The type, quantity, and cost of the coal procured for and burned at CR4 and CR5 has been a matter of public record in the fuel proceedings before the Commission over the last decade. OPC also asserts in its Petition that the use of sub bituminous coal by other utilities in the Southeastern United States was known in the early 1990's and that Tampa Electric Company

shifted its Gannon coal-fired units to a blend containing PRB sub bituminous coal in 1996. (OPC Petition, ¶¶14, 15). Yet, neither OPC nor anyone else raised an issue with respect to the coal purchased and burned at CR4 and CR5 at that or any other time until OPC's Petition. During this period of time, OPC further concedes the coal procurement decisions at issue involved both a predecessor company and predecessor affiliate company, and necessarily involve locating witnesses, documents, and information from over a decade ago. Waiting over 10 years to first raise an issue with respect to the prudence of decisions that commenced over a decade ago, before any review and investigation even commences, hardly constitutes the "regulatory lag" contemplated by the Court in Gulf Power as justification for a refund that fell outside "prohibited" retroactive ratemaking. Therefore, OPC's Petition requesting a refund of costs recovered during the entire period of 1996 to 2005 asks the Commission to be fundamentally unfair and to engage in prohibited retroactive ratemaking. OPC's Petition should be dismissed.

IV. Conclusion.

For all of the foregoing reasons, PEF requests that the Commission dismiss OPC's Petition.

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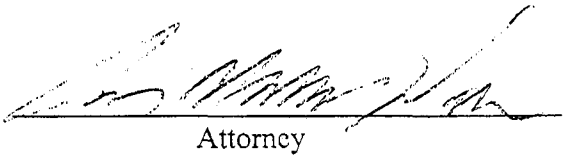
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Progress Energy Florida, Inc.'s Motion to Dismiss Citizen's Petition For Order Requiring Progress Energy Florida, Inc. to Refund to Customers $143 Million, Representing Past Excessively High Fuel Costs Stemming from Failure To Utilize The Most Economical Sources of Coals for Crystal River Units 4 and 5 has been furnished by electronic mail and U.S. Mail on this 31st day of August, 2006 to all counsel as listed on the attached service list.



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