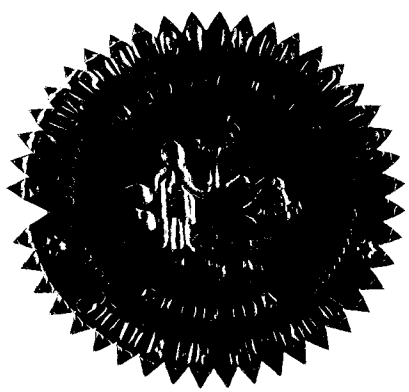


BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 060162-EI

In the Matter of:

PETITION BY PROGRESS ENERGY FLORIDA,  
INC. FOR APPROVAL TO RECOVER MODULAR  
COOLING TOWER COSTS THROUGH FUEL  
COST RECOVERY CLAUSE.



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PROCEEDINGS:           AGENDA CONFERENCE  
                              ITEM NO. 10

BEFORE:                 CHAIRMAN LISA POLAK EDGAR  
                              COMMISSIONER J. TERRY DEASON  
                              COMMISSIONER ISILIO ARRIAGA  
                              COMMISSIONER MATTHEW M. CARTER, II  
                              COMMISSIONER KATRINA J. TEW

DATE:                    Tuesday, August 29, 2006

PLACE:                  Betty Easley Conference Center  
                              Room 148  
                              4075 Esplanade Way  
                              Tallahassee, Florida

REPORTED BY:            JANE FAUROT, RPR  
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DOCUMENT NUMBER-DATE

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5 Florida, Inc.

6 HAROLD McLEAN, ESQUIRE, representing the Citizens of  
7 the State of Florida.

8 SCHEF WRIGHT, ESQUIRE, representing the Florida  
9 Retail Federation.

10 TIM PERRY, ESQUIRE, representing FIPUG.

11 MICHAEL TWOMEY, ESQUIRE, representing AARP.

12 MICHAEL COOKE, MARTHA BROWN, ESQUIRE, and RALPH VON  
13 FOSSEN, representing the Florida Public Service Commission  
14 Staff.

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## P R O C E E D I N G S

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2 CHAIRMAN EDGAR: We will be on Item 10.

3 MR. VON FOSSEN: Item 10 is staff's recommendation  
4 concerning Progress Energy's petition for approval for cost  
5 recovery of its modular cooling tower project through the  
6 environmental cost recovery clause.

7 Staff is recommending that the project is eligible  
8 for recovery through the clause. We are asking for additional  
9 reporting, annual reporting requirements, so that the  
10 Commission can monitor the project on an ongoing basis.  
11 Parties are here to address the Commission, and we are  
12 available to answer any questions you may have.

13 CHAIRMAN EDGAR: Thank you.

14 MS. RAEPPLE: Thank you, Madam Chairman. Carolyn  
15 Raepple on behalf of Progress Energy Florida.

16 The staff recommendation does a very good job of  
17 describing Progress Energy Florida's modular cooling tower  
18 project for the Crystal River plant, as well as the  
19 justification for recovery of the costs for that project under  
20 the environmental cost-recovery clause, so I'm going to try to  
21 limit my comments.

22 It just came to my attention on Friday that there may  
23 be some persons speaking in opposition to Progress Energy's  
24 recovery for this project under the ECRC, although no one has  
25 spoken with me directly. But in light of that possibility, we

1 would like to reserve a little bit of time to respond to any  
2 such comments.

3           The Florida Department of Environmental Protection  
4 has issued an industrial wastewater permit for the Crystal  
5 River plant that includes a thermal limit of 96-1/2 degrees  
6 Fahrenheit on a three-hour rolling average for the cooling  
7 water discharge. This thermal limit must be met no matter what  
8 the temperature of the inlet water is from the Gulf of Mexico.

9           Last summer, in 2005, there was a dramatic increase  
10 in the temperature of the inlet Gulf waters, and this led  
11 Progress Energy to having to implement unprecedented de-rates  
12 of the Crystal River Units 1 and 2. Those de-rates were nearly  
13 three times the amount that was needed for the prior two years  
14 in order to comply with the permit limit.

15           When those de-rates occur on these base-loaded units,  
16 Progress must replace that generation by using more expensive  
17 coal -- I'm sorry, more expensive oil or gas-fired units or by  
18 purchasing higher cost power on the open market.

19           Progress Energy's evaluation indicates that the  
20 modular cooling towers are the most cost-effective option for  
21 minimizing de-rates associated with the thermal permit limit  
22 while giving the company the flexibility to evaluate whether a  
23 permanent solution is needed, and if so, what that permanent  
24 solution may be.

25           Since Progress Energy's evaluation of the de-rate

1 situation was not completed until the last quarter of 2005,  
2 which was after this Commission approved Progress Energy  
3 Florida's current base rates in September, this modular cooling  
4 tower project could not have been anticipated at the time  
5 Progress Energy filed its MFRs, and could not have been  
6 anticipated in the cost levels used to determine the company's  
7 base rates.

8           The project is estimated to cost approximately 2 to  
9 \$3 million per year with a 1-1/2 to \$2 million one-time capital  
10 expenditure in 2006. Progress Energy estimates the net fuel  
11 cost savings over the life of the five-year project to be  
12 approximately \$45 million. And in each of the five years the  
13 annual fuel cost savings are projected to exceed the estimated  
14 cost of the project.

15           This project is proper for recovery under the ECRC  
16 since it complies with the requirements of both the statutory  
17 section, Section 366.8255, Florida Statutes, and the  
18 three-pronged test in the Commission's policy that was set  
19 forth in your Order 94-0044. And those three prongs are that  
20 the cost of the project must be incurred after April 13th,  
21 1993, the need for the project to comply with the DEP permit  
22 limit was triggered after the company's last test year upon  
23 which its rates are based, and the costs of the project are not  
24 recovered through some other cost-recovery mechanism or base  
25 rates.

1           The modular cooling towers have now been in operation  
2 at the Crystal River Plant since June 9th of this year, and we  
3 do not at this point have a full summer season's worth of data.  
4 It is only three days before we have to file our projection  
5 testimony on September 1, and staff has requested as part of  
6 that submittal that we provide data to support the continued  
7 need and prudence of the modular cooling towers, and that we  
8 annually provide that analysis in the projection testimony  
9 under the ECRC clause.

10           Due to the fact that it's June through September that  
11 are the critical months for the operation of these modular  
12 cooling towers, Progress Energy Florida respectfully requests  
13 the Commission's approval for Progress to only include in their  
14 projection filing the available data, which will be only for a  
15 partial summer season, and allow Progress to provide a more  
16 thorough evaluation of the effectiveness of the modular towers,  
17 the actual and avoided de-rates, the annual and cumulative  
18 project costs and fuel savings, and an updated cost/benefit  
19 analysis as part of its true-up filing, which is filed in early  
20 2007 and annually thereafter.

21           Thank you. And, again, we would like to reserve some  
22 time to respond to any comments that may be offered in  
23 opposition.

24           CHAIRMAN EDGAR: Thank you.

25           Mr. McLean.

1 MR. McLEAN: Yes, ma'am. My notes begin by saying  
2 good morning, Commissioners. How are you today?

3 CHAIRMAN EDGAR: We're great.

4 MR. McLEAN: So the notes really don't bear anymore  
5 relevance after that, actually.

6 I want to talk to you just briefly about the posture  
7 that you are in right now. You are considering to propose to  
8 act. Your staff recommendation is that you propose action.  
9 Okay. You're not listening to evidence this afternoon. And  
10 there is no record before you, other than the pleading of the  
11 company and the statements which you are going to hear from all  
12 of us.

13 PAA makes really good sense. It is a cheap way to  
14 go. You don't have to go through a hearing, you don't have to  
15 wait for hours while witnesses go on and on. You have a pretty  
16 good idea of what is going on, and you propose to act, and that  
17 is what is before you now. It's really important to know that  
18 when a party protests a proposed agency action, it is not a  
19 challenge to the agency. It is not a challenge to its  
20 judgment, because you don't have a full record before you. You  
21 have a general direction of where you think the case might go.  
22 You make a pronouncement that this is what we propose to do,  
23 and it is often the case. I would say more often than not the  
24 case that parties are okay with the results. Okay.

25 Why do I bring that up now? Because you don't need a

1 trial right now. You need to be generally advised of the  
2 premise so that you can propose to act in a particular way, and  
3 maybe we can live with the result. But what, of course, I'm  
4 going to tell you, because of the nature of this particular  
5 place -- case, rather, is that we can't live with the result  
6 that your staff has suggested to you.

7           We think that this particular expense is  
8 inappropriate to the ECRC for a number of reasons. The  
9 principal one of which is that it isn't even close to what the  
10 legislature had in mind when they enacted the ECRC some several  
11 years ago. This is not an instance where an environmental  
12 regulation has come down on the company that is going to cost  
13 them money, and if they don't get the money they have to file  
14 for general relief. That's what the ECRC was all about.

15           This is expenses to be incurred and are occurring to  
16 comply with a 1988 regulation. And you heard a lot from  
17 Progress just moments ago about the prudence of this project.  
18 I don't take any issue with that. We don't know if it's  
19 prudent or not, but we don't choose to drive a stake in the  
20 ground on the issue of prudence.

21           The issue is whether it is recoverable through the  
22 ECRC. I believe you heard them say that it isn't in base  
23 rates. I challenge any one of us, the company, intervenors or  
24 the Commission alike to say with confidence and with certainty  
25 that it isn't in base rates. We don't know what's in base



1 rates now. This company agreed with us sometime ago to be  
2 measured by means other than rate base regulation. We are now  
3 in an environment of revenue sharing. So can you say that  
4 these costs are in base rates or are not in base rates now?  
5 Not unless you are willing to assume that every other expense  
6 from the last time MFRs were filed has remained precisely the  
7 same. And you can't say that. We don't know whether that's  
8 true or not.

9           These costs are appropriate for recovery through base  
10 rates, in my opinion, because it does not qualify under the  
11 ECRC. They bargained away their rights to collect this in base  
12 rates in the last case. It is among the things that we --  
13 clauses are fine, no change in base rates. If it's  
14 inappropriate to the clause, you have got to wait until the  
15 next time you can ask for an adjustment in base rates to  
16 recover them. And I think that's the posture we are in.

17           It is quite late. I don't want to belabor the point,  
18 and I don't really want to try the issue of whether these  
19 expenses are eligible for the ECRC, because if you propose, as  
20 the staff recommends that you do, we will carefully evaluate  
21 your order, and if it takes the direction it appears to, we  
22 will protest it. And we will produce evidence in the hearing  
23 which comes along that says, among other things, that the ECRC  
24 has been stretched way out of shape over the years, and that we  
25 believe it should be contracted quite a bit. And when

1 companies bargain away their right to change base rates, they  
2 are obviously incented to bring you more requests by means of  
3 the clauses, both the conservation -- the ECRC and the fuel  
4 clause, for that matter.

5           And one last thought, if there is some doubt about  
6 whether these costs are appropriate to ECRC, look at what they  
7 filed to start with. They filed in fuel believing it wasn't  
8 even -- wasn't eligible for ECRC, and we happen to agree with  
9 that. Your staff recommendation mentions that they didn't  
10 believe it was recoverable, and we don't either. But the big  
11 picture -- and I think we're going to be before you in more  
12 than just this case to suggest to you that the clauses have  
13 become expanded, partially because of the incentive that is  
14 created by the kind of settlements that we have been signing,  
15 namely that you can't change your base rates. That if you want  
16 more money, if you want to raise rates to customers, you've got  
17 to go through the clauses. And I think that's what you're  
18 looking at today.

19           So what are we doing here? To persuade you, if you  
20 must propose to act, to propose to deny it. The company didn't  
21 think it was appropriate, and you probably shouldn't either.  
22 But I think in either case, you are faced with a hearing. And  
23 we have had discussions in the past. When you know for sure  
24 you are not going to make anybody happy, why propose to act at  
25 all? Why don't you just go to hearing? I think there is an

1 answer to that in this case.

2           These are relatively simple issues in this case.  
3 There is a policy issue about whether ECRC is appropriate.  
4 There is a legal issue about whether that's what the  
5 legislature wanted. So I would say to you, propose to act,  
6 propose to deny, if you wish, because the PAA gives the  
7 affected parties something to work from. It tends to sharpen  
8 issues a little bit. So sending it directly for hearing may  
9 not do that. I would urge you to issue a proposed agency  
10 action denying, and then we can go to hearing and sort this  
11 issue out.

12           Thank you.

13           CHAIRMAN EDGAR: Thank you, Mr. McLean.

14           Mr. Wright.

15           MR. WRIGHT: Thank you, Madam Chairman. Very  
16 briefly, Schef Wright on behalf of the Florida Retail  
17 Federation. I'm here to say that we support the position and  
18 the arguments advanced by the Citizens through Public Counsel.

19           Thank you.

20           CHAIRMAN EDGAR: Thank you.

21           Mr. Twomey.

22           MR. TWOMEY: Madam Chair, Commissioners, good  
23 afternoon. Mike Twomey. I'm appearing on behalf of AARP. As  
24 was the case with Mr. Wright, AARP is here for the sole purpose  
25 of supporting the Office of Public Counsel and all of his

1 comments and with the desired outcome, as well.

2 Thank you.

3 CHAIRMAN EDGAR: Thank you.

4 Mr. Perry.

5 MR. PERRY: Good afternoon, Commissioners. Tim Perry  
6 on behalf of FIPUG, and I would also ask that you respectfully  
7 deny Progress's petition. We are not sure that the cooling  
8 tower project necessarily qualifies for the ECRC. And, in any  
9 event, I think that there are some unanswered questions perhaps  
10 raised by Progress' petition and that would maybe need stricter  
11 proof.

12 Thank you.

13 CHAIRMAN EDGAR: Thank you. Before I ask for  
14 questions, Ms. Raepple, would you like to take a few minutes to  
15 respond?

16 MS. RAEPPLE: It is correct that initially Progress  
17 Energy Florida filed its petition under the fuel clause, and  
18 initially our thinking was that it was not proper to file it  
19 under ECRC. We subsequently had discussions with staff, and we  
20 went back to the statute and looked closely at the statute.  
21 And there is nothing in the statute that precludes recovery for  
22 these modular cooling towers under the ECRC.

23 We then looked at the policy established by the  
24 Commission in '94 and it has that three-pronged test that I  
25 went through. The one criteria that was cited by counsel for

1 the Office of Public Counsel was that there was -- he said that  
2 there has been no environmental regulation that has come down.  
3 And there is a prong that says the activity is legally required  
4 to comply with a governmental imposed environmental regulation  
5 enacted, became effective, or whose effect was triggered after  
6 the company's last test year upon which rates are based.

7           And I believe what he is referring to is whether this  
8 regulation was enacted since our last rate case. And, clearly,  
9 the permit that we are complying with has been in effect. It  
10 has been renewed a number of times, but it has been in effect  
11 since 1988. So it has not -- this regulation has not been  
12 enacted or gone into effect, become effective since the last  
13 base rate.

14           What we are looking at is the third part of that  
15 prong, which says the effect was triggered after the company's  
16 last test year. It was not until after the last rate case that  
17 we were able to evaluate the summer season of 2005 and see that  
18 the de-rates were extraordinary. They were, as I said,  
19 approximately threetimes more than the de-rates we had  
20 experienced in the prior two years. We were monitoring the  
21 de-rates, because even in those two years there had been some  
22 increase, but now that the de-rates were so dramatic it was  
23 apparent that we needed to go forward with a temporary solution  
24 to buy us the time to further evaluate and figure out if this  
25 warming trend of the inlet waters is a temporary situation or

1 whether it's something that is going to demand a permanent  
2 resolution.

3           So it is that triggered language that we are looking  
4 to. And we agree with staff that under the policy as set forth  
5 by the Commission and, clearly, under the statute, this project  
6 does qualify for recovery under the ECRC. We also agree it is  
7 recoverable under the fuel clause. But as I said, based on  
8 conversation with staff, they felt it was more appropriate to  
9 go under the ECRC. We just feel it needs to be recovered, and  
10 so we are here under the ECRC.

11           CHAIRMAN EDGAR: Thank you.

12           Commissioners, questions?

13           Commissioner Arriaga.

14           COMMISSIONER ARRIAGA: A comment and a question to  
15 Mr. Cooke, but first to Mr. McLean. I wanted to thank you very  
16 much for your enlightening snapshot at Regulatory Procedure  
17 101. That was quite fine. Being an engineer, that helps.

18           MR. McLEAN: Commissioner, I hope it helped.

19           COMMISSIONER ARRIAGA: Making use of that recently  
20 acquired knowledge, Mr. Cooke, it would seem that whatever we  
21 approve, whether we approve staff's recommendation or deny  
22 staff's recommendation, this thing is going to be protested by  
23 either party, and it's going directly to hearing. So rather  
24 than approving or denying, can't we just send it directly to  
25 hearing anyway?

1 MR. COOKE: You could do that. I think what the  
2 suggestion is here in this case -- there are two types of  
3 hearings that could occur under 120 if it is protested. One  
4 would involve disputed issues of material fact, and that would  
5 be an evidentiary hearing. There is another avenue for  
6 hearings set, for lack of a better term, would be paper  
7 hearings, that wouldn't require evidentiary proceedings. And  
8 it is possible in this case, and I think I'm hearing signals,  
9 that that is a real possibility if this PAA is protested by one  
10 side or the other. I think that is the suggestion I am  
11 hearing, that that's a possibility.

12 In other words, it might be advantageous in this case  
13 to actually make a decision one way or the other on the PAA and  
14 allow one party or the other to protest, and it would not  
15 necessarily result in an evidentiary hearing. Also, I think we  
16 had a somewhat similar case recently involving a TECO  
17 environmental cost-recovery clause that was protested by Office  
18 of Public Counsel. And there might actually be a way to try to  
19 bring those together or at least do them on a similar time  
20 frame. And there may be similar issues, there may not. But I  
21 think there may be some reasons here that this is a good case  
22 to let the PAA process go forward.

23 CHAIRMAN EDGAR: Commissioner Tew.

24 COMMISSIONER TEW: I have a couple of questions for  
25 Public Counsel. Whenever you talked about we don't know what

1 is in base rates, I guess that sort of struck me. And, of  
2 course, you probably know I used to work on this issue, and so  
3 we had to evaluate. And the same thing for fuel, that you have  
4 to satisfy yourself that there is not recovery in base rates.  
5 And I do think that there is some difficulty in trying to  
6 determine what is in base rates. But I guess my concern is, is  
7 that even a project which is uncontested to be consistent with  
8 the purpose of the ECRC per the legislature, how would even in  
9 that case -- how would we be able to satisfy ourselves to that  
10 criterion?

11 MR. McLEAN: I'm not quite sure I understand the  
12 question.

13 COMMISSIONER TEW: Well, in the case of a hearing, we  
14 have to determine, whenever you have any type of project for  
15 ECRC or fuel recovery, that it's not already being recovered in  
16 base rates. And I know it is hard to sometimes determine if  
17 something is being recovered in base rates, but if we just --  
18 if we sort of assume that we don't ever know what is in base  
19 rates, how do we ever make a determination about what should go  
20 into environmental, or fuel, or some of the others that have  
21 that criteria?

22 MR. McLEAN: I think it may boil down to a question  
23 of materiality. And I think that's a good question. If you  
24 accept, as I do, that the reason for the ECRC when it came into  
25 being was that occasionally utilities were victimized, if you



1 will, by a somewhat unforeseen and material environmental  
2 regulation with which they were compelled to comply, they would  
3 before the ECRC, if they wished to recover for it, have to come  
4 down here or over there to apply for a base rate case.

5           And I think the ECRC was an attempt to put an end to  
6 that, to relieve them from that burden. Because notice when  
7 they did apply, they still might lose some, because you can't  
8 set rates retroactively. So I think it's somewhat an issue of  
9 materiality, actually. I think that's probably what it boils  
10 down to.

11           Can you say with certainty that it's in or out of  
12 base rates? I don't think you can. I don't think you ever  
13 can, unless you have a utility which has -- maybe in the TECO  
14 case, and that made one of the differences. Because I believe  
15 their last rate adjustment, if I'm not mistaken, was the result  
16 of a contested rate case. It was not the result of settlement,  
17 I think. But in the case of the settlement we agreed, us and  
18 the utilities, and you folks decided it was in the public  
19 interest, not to measure those utilities in that way to  
20 determine whether things were in base rates or not. So I don't  
21 think that that particular prong helps you at all. I don't  
22 think you can say, well, they're in base rates.

23           Let me give you an example. Suppose -- and this is,  
24 obviously, an example favorable to our side -- that in the next  
25 case you decided that their return on equity was 150 basis

1 points too high. Well, how could you say that if that were the  
2 case that they weren't already recovering for these kind of  
3 expenses?

4           The point is, unless you are willing to do a rate  
5 base analysis rate case on your cuff, on a going-forward basis  
6 you can't say whether those are in or out of rates today. You  
7 can certainly say whether they were in or out of the last MFRs,  
8 but you don't know what's going on today, because we do not  
9 regulate this company on -- you do not regulate this company on  
10 a rate base sort of analysis, except insofar as there is an  
11 escape clause in the settlement and things like that.

12           MR. GLENN: Commissioner Tew, if I might respond.

13           COMMISSIONER TEW: Mr. Glenn.

14           MR. GLENN: Thank you. Just for the record,  
15 notwithstanding the OPC lead pig pile on PEF right now, I'm not  
16 taking back any of the nice things that I said about Mr. McLean  
17 earlier this morning. But do we know -- but do we know what is  
18 in base rates? Yes, we do. And the settlements specifically  
19 address that. It says that when you approve the settlement  
20 agreement you approve the MFRs that were filed. Specifically  
21 it will constitute approval of the MFRs filed in the docket for  
22 regulatory reporting purposes and for establishing PEF's base  
23 line costs in the next base rate proceeding. So it is clear  
24 what is in there and what is not in there. So I disagree with  
25 Mr. McLean on that point.

1           MR. McLEAN: And Mr. Glenn and I continue to disagree  
2 on that point. Those are for very restricted purposes, and you  
3 can't do a rate case in the beat of a heart. And that's what  
4 you are being invited to do when they say that those rates are  
5 already in there. They were. But whether they are now, I  
6 don't think we can say.

7           CHAIRMAN EDGAR: I have a question, and then,  
8 Commissioner Carter, I will look to you.

9           Mr. Cooke, when you responded to a question a few  
10 moments ago and described the two hearing processes, an  
11 evidentiary full hearing or a paper hearing, at what point  
12 would that determination be made if we got to that point?

13          MR. COOKE: Well, I think partly it's going to be up  
14 to the parties as to whether they can agree that there are  
15 issues of material fact. So if they could agree today, it  
16 could be agreed today. I'm not sure that they are going to be  
17 willing to be put on the spot in terms of that issue.

18          CHAIRMAN EDGAR: Okay. So is that something that  
19 then perhaps would go to the prehearing officer?

20          MR. COOKE: I don't know that it would go to the  
21 prehearing officer. There would be -- for example, if there is  
22 an order issued today, or a vote taken today, either up or down  
23 on the recommendation, a party would likely protest that, one  
24 side or the other. And at that point that party would pursue  
25 either -- if, in their opinion, they believe there are issues

1 of material fact, they would pursue an issue that would  
2 involve -- well, the PAA actually would just be basically a  
3 nonevidentiary process. The question is whether that would  
4 resolve all of the issues.

5 CHAIRMAN EDGAR: Commissioner Carter.

6 COMMISSIONER CARTER: Thank you, Madam Chairman.

7 Mr. McLean for a few questions. I was really  
8 intrigued by your statement, and I think we have kind of danced  
9 around this issue for some time. And correct me if I'm wrong,  
10 but it seems to me like you were saying -- and we have had this  
11 discussion before about settlements that were agreed to and  
12 then later on coming back -- the utility will come back and try  
13 to get something that, for whatever purpose, was already  
14 covered in the settlement. And then we get into a posture of  
15 whether we're going to accept this. One party to the  
16 settlement says, well, I don't like this, and I don't like  
17 that, and we get back into -- do you remember that whole  
18 dialogue we've been going through?

19 MR. McLEAN: Yes, sir.

20 COMMISSIONER CARTER: And you intrigued me by that  
21 because it seem to me that you are saying -- I mean, we are  
22 right back in that same posture. Would you agree with that  
23 assessment?

24 MR. McLEAN: No, sir, respectfully.

25 COMMISSIONER CARTER: Okay. Then tell me where are

1 we, then.

2 MR. McLEAN: Sure.

3 COMMISSIONER CARTER: Because it seems to me a  
4 distinction without a difference.

5 MR. McLEAN: Sure. Let me tell you -- let me see if  
6 I can clarify, at least my way of thinking. The company and I  
7 would both agree that if these rates are appropriate -- if this  
8 money is appropriate for recovery through base rates, that it  
9 is precluded in the settlement. That is not where our  
10 disagreement is. We agree on that.

11 What we disagree on is whether this is appropriate to  
12 the ECRC. That's what we are talking about here, really. If  
13 it is appropriate to the ECRC, then it is inappropriate to base  
14 rates, at least for purposes of this proceeding. But if it's  
15 appropriate to base rates, and if the company were taking that  
16 position in their petition -- they couldn't take that position  
17 in their petition. I don't really think we disagree on what  
18 the settlement says. I have to leave that to them.

19 We disagree on whether these particular expenses are  
20 recoverable through the ECRC, and I suspect that we also  
21 disagree about whether the current breadth of the ECRC is  
22 appropriate to what the legislature intended when they enacted  
23 it. And we intend to put evidence before you, if we go to the  
24 evidentiary hearing, to persuade you that, indeed, it is overly  
25 broad at this point in time. That is what the dispute is

1 really about, whether these expenses are appropriate and  
2 whether -- it is a very closely related question -- whether the  
3 current breadth of the ECRC is too wide. So we don't really  
4 agree about what the settlement says, I don't think. I'll have  
5 to leave that to these good folks to comment.

6 COMMISSIONER CARTER: You understand why I asked that  
7 question, right?

8 MR. McLEAN: Yes, sir. And, you know, I thought  
9 about in the earlier item of chiming in, which I probably too  
10 often do. I understand your consternation about the little  
11 disputes we get in about the settlements which we sign. It is  
12 very annoying. When I was over here it was annoying. But the  
13 fact is from a practitioner's standpoint, crafting a settlement  
14 that contemplates every imaginable scenario is simply not  
15 possible. And we do the best we can.

16 I don't think that is the kind of case that Progress  
17 has set before you today. And I don't think we take a great  
18 deal of -- I don't think we disagree about whether the  
19 settlement is really at issue here. The true kernel of  
20 disagreement between Progress and ourselves is whether these  
21 expenses are appropriate to recovery through the ECRC.

22 COMMISSIONER CARTER: Permission to follow up, Madam  
23 Chair.

24 You also heard the discussion by General Counsel  
25 about the posture of whether or not we act or whether we, you

1 know, send it to an evidentiary or not hearing after we move  
2 from here. What is your feeling on that?

3 MR. McLEAN: I would be very uncomfortable with the  
4 Commission relying entirely on the notion that we may not want  
5 to produce evidence. We need to read the order, see what it  
6 says, consider the breadth of the ECRC as it has been  
7 interpreted by this Commission and make a decision at that time  
8 whether we want to put on evidence.

9 We may put on -- we may want to put on the dreaded  
10 policy witness to suggest to you what your policy should be, as  
11 well as what the facts are. But it is part and parcel of  
12 regulation. We may wish to do that. So I would hate for you  
13 guys to take any action relying on the notion of a paper  
14 hearing.

15 We have had preliminary discussions with Progress,  
16 and I think there is some possibility to go there.  
17 Particularly with respect to these specific expenses in the  
18 ECRC, but with respect to the very closely related issue, which  
19 is the breadth of ECRC, I'm afraid we may have to do some  
20 evidence on that point.

21 MR. COOKE: Madam Chairman.

22 CHAIRMAN EDGAR: Mr. Cooke.

23 MR. COOKE: I just want to revise one thing I said,  
24 which is normally we would ask the parties to try to go to a  
25 posture as to whether they agree it is a paper hearing or not.

1 But we could arguably take that to a prehearing officer for a  
2 determination, whether there are issues of disputed fact or  
3 not.

4 CHAIRMAN EDGAR: Thank you.

5 Commissioner Tew.

6 COMMISSIONER TEW: I think this is my last one. This  
7 is also for the Public Counsel. I only bring this up because  
8 of the way the case was originally filed as being a fuel clause  
9 recovery item. And I wonder if you would also view -- if we  
10 had gone forward with the fuel case -- if you would also view  
11 that as, and I know you haven't used this terminology, but I  
12 will do the little quotes and say an end run around a  
13 settlement or a base rate recovery.

14 MR. McLEAN: Let me respond two ways. First of all,  
15 I'm not advancing an argument that this company is attempting  
16 to end run around the settlement. My experience with Progress  
17 is that under their settlements we have a disagreement about  
18 the ECRC, which could be mistaken for an end run. But that  
19 implies some kind of intent on their behalf, which I don't  
20 have. With respect to had it been filed under the fuel clause,  
21 you kind of asked me about the pink stuff in Spam, you know.  
22 That's Spam, too. We don't particularly like the breadth of  
23 the fuel clause just now either. And in the appropriate case,  
24 I may bring that to your attention, or our office may.

25 So, I don't think we would be much happier were it



1 filed in the fuel docket. Again, the fuel clause was crafted  
2 by this Commission to isolate the utilities from volatility of  
3 fuel prices. And it has come down a very long road from that  
4 particular point. And one of the reasons it has come down the  
5 road is companies are incented to bring that case before you  
6 because they cannot bring it before you in base rate cases. So  
7 had it been -- would it give me any comfort if it were filed in  
8 the fuel docket? Not a whole lot. Maybe a little.

9 CHAIRMAN EDGAR: Commissioner Tew.

10 COMMISSIONER TEW: I was just going to -- one, I  
11 shouldn't have characterized the end run that way, and that is  
12 why I put it in quotes. Just lack of articulate words at this  
13 late hour.

14 MR. McLEAN: Well, Commissioner, when you said end  
15 run, I thought you said Enron, so --

16 (Laughter.)

17 COMMISSIONER TEW: Oh, no. I'm done with that word.  
18 But also I just wanted to note I think he has been waiting to  
19 spring that pink stuff in Spam thing on us for awhile.

20 CHAIRMAN EDGAR: Commissioner Arriaga.

21 COMMISSIONER ARRIAGA: Commissioner Carter, let me  
22 see if I can add some kind of clarity to your discussion  
23 regarding is it or not in base rates, is it a violation of the  
24 settlement or not. And it seems like in my mind this  
25 discussion is similar to a wedding celebration to which you are

1 not invited, but you are asked to bless the groom and the  
2 bride. So, I don't know if you understand what I am trying to  
3 say, but basically that is the point.

4 Back to serious business. Mr. Cooke, do we have to  
5 vote up or down?

6 MR. COOKE: No, the Commission could, for example, in  
7 a recent case defer the decision and ask for further  
8 clarification. I think the parties might want to address  
9 whether they would like you to vote up or down, however. You  
10 could also simply set it for an evidentiary hearing. I mean,  
11 that is another possibility.

12 COMMISSIONER ARRIAGA: Okay.

13 CHAIRMAN EDGAR: Commissioners, any further  
14 questions?

15 COMMISSIONER CARTER: Madam Chairman.

16 CHAIRMAN EDGAR: Commissioner Carter.

17 COMMISSIONER CARTER: If that's appropriate, I don't  
18 know, maybe we could ask the parties about the preference. I  
19 mean, I know we can make a decision, but I'm just saying, you  
20 know, let's get it out here.

21 CHAIRMAN EDGAR: I think Mr. McLean has stated a  
22 preference earlier, but he certainly can restate it if he would  
23 like.

24 COMMISSIONER CARTER: He said yes and no, though.

25 MR. McLEAN: No, we would prefer to leave with the

1 marbles, if you don't mind. That would be fine with us. In  
2 other words, we wish that you would propose to deny the staff  
3 recommendation or deny the company's petition.

4 COMMISSIONER CARTER: Thank you.

5 MR. GLENN: This is Alex Glenn for PEF. We would ask  
6 for an up vote today.

7 CHAIRMAN EDGAR: Fair enough.

8 COMMISSIONER DEASON: Madam Chairman, I have a  
9 question.

10 CHAIRMAN EDGAR: Commissioner Deason.

11 COMMISSIONER DEASON: To change the focus for a  
12 moment. I don't know exactly how relevant it is, but I guess  
13 it is a question of curiosity. And this is to PEF. It seems  
14 to me that the dilemma we find ourselves in has been  
15 necessitated by the permit under which you operate and the fact  
16 that there is an absolute 96.5 rolling average limitation, and  
17 that that limitation has been reached which causes de-rating of  
18 the plant and it is primarily due to increase in the water  
19 temperature at the intake. Was there any attempt to approach  
20 DEP to change that certificate of operation or permit as  
21 opposed to an absolute limitation of 96.5 degrees, to put it in  
22 terms of a differential between intake and outflow, so that if  
23 the intake temperature increases there is a likewise increase  
24 in permissible discharge temperature?

25 MR. GLENN: We have and they rejected that.

1 COMMISSIONER DEASON: Thank you.

2 CHAIRMAN EDGAR: Commissioners, it appears that we  
3 have a couple of options before us. As Mr. Cooke pointed out,  
4 we can defer, if indeed there is additional information that  
5 would be helpful. I don't know that I'm hearing that, but that  
6 is always an option that I am willing to consider and discuss.  
7 We can vote in favor of the staff's recommendation. We can  
8 deny the staff recommendation, or we can set it directly for  
9 hearing.

10 You know, Mr. McLean, I'm somewhat intrigued by the  
11 statements you made about being able to, or possibly if we were  
12 to go that route presenting testimony as to the intent of the  
13 legislature for the statutory language for the clause. I  
14 always find evidence about legislative intent to be interesting  
15 and intriguing, but yet before us today is the plain meaning of  
16 the statute and the criteria that it contains, as has been laid  
17 out by our staff and discussed by the parties before us. So,  
18 with that, is there additional discussion or comment?

19 COMMISSIONER CARTER: Madam Chairman, if I may.

20 CHAIRMAN EDGAR: Commissioner Carter.

21 COMMISSIONER CARTER: Mr. McLean, I'm intrigued by  
22 your perspective. And I do think, you know, maybe we should  
23 put this in the posture where we need to look at it now and in  
24 a more evidentiary fashion such that as other situations arrive  
25 like this we will have some basis for it. I'm really intrigued

1 by what you had to say, Mr. McLean.

2 MR. McLEAN: Thank you, sir.

3 COMMISSIONER DEASON: Madam Chairman, is a motion in  
4 order, or are there more questions?

5 CHAIRMAN EDGAR: I am not sensing any additional  
6 questions.

7 COMMISSIONER DEASON: I move that we set the matter  
8 for hearing and we expand the scope of the hearing to not only  
9 look at the appropriateness of recovery through the  
10 environmental cost-recovery clause, but also potential  
11 appropriateness for recovery through the fuel clause as fuel  
12 savings.

13 COMMISSIONER CARTER: Second.

14 CHAIRMAN EDGAR: Commissioners, there is a motion and  
15 a second. Is there a discussion or a question regarding the  
16 language of the motion? Usually when I call for a vote  
17 somebody asks for clarification, so are we all clear?  
18 Realizing that it is late, I think I am clear. Okay. All in  
19 favor of the motion say aye.

20 (Unanimous affirmative vote.)

21 CHAIRMAN EDGAR: Those opposed?

22 Show the motion carried.

23 Thank you all, and I look forward to the hearing.

24 MR. McLEAN: Thank you, Commissioners.

25 CHAIRMAN EDGAR: It has been a good day,

1 Commissioners. Thank you. Thank you to our staff and to all  
2 the parties, and we are adjourned.

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STATE OF FLORIDA )

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CERTIFICATE OF REPORTER

COUNTY OF LEON )

I, JANE FAUROT, RPR, Chief, Hearing Reporter Services Section, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 6th day of September, 2006.



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