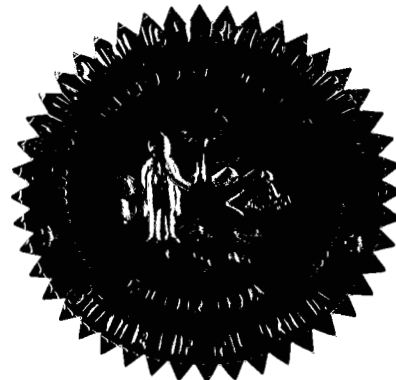


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 060658-EI

In the Matter of:

PETITION ON BEHALF OF CITIZENS OF THE
STATE OF FLORIDA TO REQUIRE PROGRESS
ENERGY FLORIDA, INC. TO REFUND CUSTOMERS
\$143 MILLION.



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PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 12

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

DATE: Tuesday, December 19, 2006

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

REPORTED BY: JANE FAUROT, RPR
 Official Commission Reporter
 (850)413-6732

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FPSC-COMMISSION CLERK

1 PARTICIPATING:

2 ALEXANDER GLENN, ESQUIRE, representing Progress
3 Energy Florida, Inc.

4 CECILIA BRADLEY, ESQUIRE, representing Attorney
5 General Charlie Crist.

6 JOE MCGLOTHLIN, ESQUIRE, Office of Public Counsel,
7 representing the Citizens of the State of Florida.

8 MICHAEL COOKE, General Counsel, LISA BENNETT,
9 Esquire, and Tim Devlin, representing the Florida Public
10 Service Commission Staff.

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P R O C E E D I N G S

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2 CHAIRMAN EDGAR: That will bring us to Number 12.
3 We're ready when you are.

4 MS. BENNETT: Madam Chair, members of the Commission,
5 my name is Lisa Bennett on behalf of the Office of General
6 Counsel for the Public Service Commission.

7 Today before you we have a motion to dismiss --
8 Progress Energy has filed a motion to dismiss the petition by
9 the Office of Public Counsel to refund customers \$143 million.
10 Issue 1 is should PEF's request for oral argument be granted.
11 Staff's recommendation is that, yes, you should grant oral
12 argument on the issues. However, it is within the Commission's
13 discretion to grant that. If you choose to grant the oral
14 argument, it is staff's recommendation that you limit the time
15 to five minutes per party.

16 Issue 2 is should the Commission grant Progress's
17 motion to dismiss? And the staff's recommendation is, no, the
18 motion to dismiss should be denied. The Commission should hear
19 OPC's petition in a full evidentiary proceeding and determine
20 the prudence of PEF's actions based on the evidence and
21 testimony adduced at the hearing. Staff is available for
22 questions.

23 CHAIRMAN EDGAR: Thank you. And I see that we
24 have -- is it three? Mr. Glenn, you are interested in oral
25 argument?

1 MR. GLENN: Yes.

2 CHAIRMAN EDGAR: Mr. McGlothlin and the Attorney
3 General's Office, would you like to participate in oral
4 argument as well?

5 MS. BRADLEY: Actually, I was going to yield our time
6 on behalf of Mr. Shreve and the Attorney General to
7 Mr. McGlothlin. And Mr. Twomey also asked me to tell you that
8 he had to run catch a flight, but supports the position of
9 OPC and staff, as does the Attorney General. So we will
10 yield our time to Mr. McGlothlin.

11 CHAIRMAN EDGAR: Okay. Thank you very much. You've
12 heard the staff recommendation for -- Mr. Cooke, did I mess up?

13 MR. COOKE: No, not at all. I was just going to
14 comment if you add time to one side, it might be appropriate,
15 in this case, to add additional time to the moving party, as
16 well, Progress.

17 CHAIRMAN EDGAR: Thank you. Okay. So we have a
18 recommendation from our staff to hear oral argument for five
19 minutes.

20 Mr. Glenn, does five minutes give you the time? And
21 I will ask Mr. McGlothlin the same question of you. Does five
22 minutes work, or do you need a little more?

23 MR. GLENN: It does not. A little more would help,
24 approximately 15 to 20 minutes, tops. OPC seeks to wipe out
25 half our net income for 2006, so I need to at least speak a

1 little more than five minutes. Thank you.

2 CHAIRMAN EDGAR: Mr. McGlothlin.

3 MR. MCGLOTHLIN: Mr. Glenn, I believe, has a complex.
4 He thinks that our office is picking on him.

5 CHAIRMAN EDGAR: I thought that was me. I thought I
6 was the one being picked on. But, Mr. McGlothlin, about how
7 much time would you, in a perfect world, ask to succinctly
8 cover your arguments?

9 MR. MCGLOTHLIN: My presentation will be ten minutes
10 or less, then whatever time is required in answering your
11 questions.

12 CHAIRMAN EDGAR: Okay. Commissioners, I'm thinking,
13 I don't know, 12-ish maybe, but it is open to -- does that
14 work? Sorry, Mr. --

15 COMMISSIONER CARTER: It is at your discretion.

16 CHAIRMAN EDGAR: Okay. It is an issue that is before
17 us, so Mr. Cooke, I know, always likes it when we actually take
18 up issues that are before us. So I am going to ask, if I can,
19 for a motion and a second to approve Issue 1 with the
20 modification of 12 minutes per side.

21 COMMISSIONER CARTER: So moved.

22 COMMISSIONER DEASON: Second.

23 CHAIRMAN EDGAR: All in favor say aye.

24 (Unanimous affirmative vote.)

25 CHAIRMAN EDGAR: Okay. Mr. Glenn.

1 MR. GLENN: Thank you, Madam Chairman. I would like
2 to reserve just a couple of minutes for rebuttal or to answer
3 any questions that you might have.

4 Commissioners, the question before this Commission on
5 our motion to dismiss is how far back in time can the
6 Commission reach for a refund? Is it really ten years of fuel
7 costs over 14 previous fully litigated fuel clause proceedings
8 as OPC claims, or, should it be the costs in 2004 forward when
9 OPC only arguably first raised this issue about PEF's coal
10 procurement at its Crystal River 4 and 5 plants?

11 Boiled down, OPC's allegations in its petition is
12 that it was obvious to the entire world, presumably to OPC,
13 too, that beginning in 1996 PEF should have switched from
14 burning Central Appalachian bituminous coal to a blend of CAB
15 coal and Powder River Basin coal.

16 Not one, not one of the allegations made by OPC to
17 support this claim is something that was concealed
18 inadvertently or intentionally by the company. To the
19 contrary, everything OPC alleges in its petition as to PEF's
20 alleged imprudence is and has been a matter of public knowledge
21 or public record since at least 1996. This is critically
22 important to the Commission's policy on balancing its right to
23 conduct a prudence review of the costs passed through the fuel
24 clause with the need for closure and regulatory certainty for
25 the benefit of customers and utilities.

1 You're going to hear a lot of quotes I presume today
2 from OPC, but here is what the Commission said in Order Number
3 13452. Quote, if a utility does not come forward and inform
4 the Commission as to the prudence of its actions as a predicate
5 to rate relief, it should expect to have the Commission visit
6 the question of prudence when it, the utility, becomes aware of
7 facts that justify an inquiry. That is the important
8 limitation. The Commission recognized on its review there must
9 be something that was not available to the Commission or known
10 to the Commission before it will or legally can go back in
11 time.

12 And here it's important to understand that in any
13 given fuel docket over the past 14 dockets since 1996, PEF has
14 presented detailed information about what fuel it's procuring
15 and what it costs. This data has been reviewed and audited by
16 staff, reviewed by OPC and other intervenors, and by this
17 Commission. This includes the monthly forms, the 423 forms,
18 that go to both the Commission and OPC on a monthly basis and
19 tell them exactly what coal and other fuels PEF is buying for
20 each unit, how much, from whom, and what it costs.

21 All of this information is and has been available to
22 the Commission and to OPC. And more, too, if they took
23 discovery, which they always do in every proceeding and not
24 just one period, but over three periods, the future projected
25 period, the current year actual and projection corrections, and

1 the true-up for the past year period costs. In 2006 alone in
2 the fuel docket and in this spin-off docket, PEF has received
3 more than 300 interrogatories and document production requests
4 about its costs from all parties. If OPC, staff, or anyone
5 else has a concern about what the utility is doing, they can
6 and should and must take exception to it. If not, all parties
7 should be prepared to move on with the assurance that there has
8 been closure.

9 Now, this is a process that I think many refer to
10 here on the bench, and I think what OPC several agendas ago
11 referred to as regulation by exception in the clauses, and it
12 has been well-established for years in this Commission. Any
13 other practice would literally shut the system down. I mean,
14 if you think about it, in practice, if OPC is right and there
15 is no limitation on how far back you can go for refunds, ten
16 years. Well, why ten years? Why not 20? Why not 1950s when
17 the Commission first adopted the fuel clause? What is a
18 company to do with billions of dollars at stake annually?

19 In PEF's instance alone in 2005, \$1.8 billion in fuel
20 costs that were at stake. And it's not just the fuel clause
21 because, remember, OPC's arguments apply with equal force to
22 the ECRC, the ECCR, and the capacity cost-recovery clause.
23 Utilities are going to be forced to put on scores of witnesses,
24 produce volumes of documents, even more than we do now, to
25 justify the prudence of every action that we take and do not

1 take. Because, remember, OPC is not challenging here the
2 decisions that we made, but the decisions that we did not make.
3 And, remember again, that everything, everything that OPC is
4 alleging in its petition is and was publicly known and was
5 known by the Commission, the staff, and OPC, as well as all the
6 other parties.

7 One example, just one example. OPC emphasizes that
8 PEF acted imprudently because it didn't react like some other
9 utilities did in allegedly burning new, better PRB coal. Well,
10 that was known to everyone then, it was known to everyone now,
11 and no one raised an issue. Certainly, everyone knew that PEF
12 was not burning PRB coal. We filed it in monthly filing
13 reports to the Commission. No one saw that any of these facts
14 justified an investigation of PEF's coal procurement policy at
15 the time.

16 Rather, what has happened now, what has happened now
17 is that through discovery in the fuel docket and in 2005, OPC
18 has learned that more recently we have begun evaluating PRB
19 coal. And based on that knowledge, OPC asked, well, why didn't
20 PEF do it earlier? Well, that is patently unfair and it's
21 unconstitutional and violates our due process rights.

22 Now, this policy of limiting review of previously
23 recovered fuel costs to instances where there has been no
24 opportunity to know what is going on, it is the only workable
25 one. And it is the one that this Commission has followed. It

1 followed it in its 1983 Gulf order, which I know you're going
2 to hear a lot of from OPC.

3 Well, in that Gulf Power case, the Commission found
4 that Gulf had acted imprudently in entering into a ten-year
5 extension of a contract in 1974. But the Commission only
6 determined that the prices for coal in 1980, '81 and '82 were
7 imprudent, notwithstanding the imprudence of executing that
8 1974 extension. These are the years that Gulf was on notice
9 that the prudence of the Maxine Mine coal cost was an issue,
10 and the Commission was investigating the prudence. The
11 Commission didn't go back, nor could it legally, back to '74,
12 even though it explicitly held Gulf to be imprudent.

13 What the Commission said is, quote, this is a prime
14 example of regulatory lag. In early 1981 when the resources of
15 the Commission were focused on Maxine Mine, the staff became
16 concerned about those costs, so they issued a report. As it is
17 now, it has taken three years to bring this case from initial
18 inquiry to final decision, that notice period, the period of
19 regulatory lag. In affirming the Commission's order, the
20 Florida Supreme Court in the Gulf Power decision, which staff
21 cites in its recommendation and OPC cites, as well, didn't
22 overrule prior precedent that it is improper retroactive
23 ratemaking, but it said it was predicated, quote, predicated on
24 adjustments of 1981, '82 and 1980, specifically finding them to
25 be permissible under the theory of regulatory lag.

1 Now, the Commission has reaffirmed this just three
2 years ago in PEF's waterborne coal transportation docket.
3 There the staff raised an issue regarding the continuation of
4 market price proxies for all waterborne coal transportation
5 costs. Staff proposed the elimination of that market priced
6 proxy in the future, stating that it was inappropriate to
7 retroactively apply a new cost-recovery method because PEF had
8 relied on such regulatory treatment. The Commission agreed
9 with this statement, and they held because PEF was not
10 previously on notice that the proxies may cease to serve as the
11 basis for cost-recovery for either '02 or '03, we decline to
12 adjust PEF's recoverable amounts under the proxies for those
13 years as a matter of fundamental fairness.

14 Apart from the law, sound common sense policy reasons
15 support this jurisdictional limit on the Commission's ability
16 to award a refund. Because this issue was not raised prior by
17 OPC, we have necessarily relied on the recovery of such costs,
18 about \$11.4 billion for the last decade in our financial and
19 operational decisions. And others have necessarily relied on
20 it, too, including investors and credit-rating agencies.

21 Subjecting costs recovered years ago here a decade in
22 the past to a potential refund when no issue was ever raised as
23 to the prudence of those costs when they were incurred or
24 recovered undermines the legitimacy of the ratemaking process
25 and the confidence of the financial markets in that process.

1 Now, the Commission can on its face -- the bottom
2 line here is that the Commission -- the bottom line is that the
3 law, this Commission's own precedent, as consistently applied
4 by this Commission, as well as simple fairness, logic, and good
5 regulatory policy, demand that OPC cannot go back indefinitely
6 in time with the benefit of hindsight and challenge the
7 prudence of actions over a decade ago while they sat quietly by
8 watching what allegedly was happening and what was, as they
9 claim, obvious to the entire world, without ever raising their
10 hands once and taking issue against it.

11 Now here the Commission can dismiss their entire
12 petition based purely on hindsight allegations, since all of
13 their allegations in their petition are based on hindsight.
14 But in the alternative, OPC arguably only put PEF on notice in
15 2005 over 2004 alleged imprudent costs, and as such, the
16 Commission should, in the alternative, dismiss OPC's petition,
17 except as to the prudence of PEF's CR-4 and 5 purchases from
18 2004 on.

19 Thank you.

20 CHAIRMAN EDGAR: Thank you, Mr. Glenn.

21 Mr. McGlothlin.

22 MR. MCGLOTHLIN: Joe McGlothlin with the Office of
23 Public Counsel.

24 At the outset, I think it's worth noting the very
25 narrow standard that governs your ruling today. It's set forth

1 in the staff recommendation correctly, but I think it bears
2 repeating. The standard before you today is whether our
3 petition alleges matters which taken to be true and viewed in
4 the light most favorable to the petitioner frame a cause of
5 action which could serve as the basis for relief from this
6 Commission. And you must limit your consideration to matters
7 within the four corners of the petition. What are those
8 allegations? I'm going to give you the abbreviated version
9 just to refresh your recollection of what we have alleged in
10 the petition.

11 We allege that in the early 1990s the cost
12 relationship between western sub-bituminous coal, I'll call it
13 Powder River Basin Coal in the course of the argument, and
14 Appalachian bituminous coal inverted. And because of the
15 inversion, the Powder River Basin coal that previously had been
16 more expensive to deliver to southeast utilities became cheaper
17 than Appalachian bituminous coal. We allege that this same
18 coal market information that led other southeastern utilities
19 to switch rabidly to Powder River Basin coal in order to save
20 money for their ratepayers was known or should have been known
21 to Progress Energy contemporaneously. We allege that instead
22 of procuring Powder River Basin coal, Progress Energy
23 unilaterally gave away its right to burn Powder River Basin
24 coal in its environmental permitting process, and instead,
25 bought more expensive fuels, many times purchasing those fuels

1 from its sister companies.

2 Now, here is something that I think sets the
3 situation apart from the matters that Mr. Glenn has argued.
4 Far from disclosing its action to voluntarily rid its permit of
5 the authority to burn Powder River Basin coal, Progress Energy
6 instead pointed at a later point in time to the lack of
7 authority as the reason why -- as justification for buying more
8 expensive fuels. Now, I'm still at work trying to find words
9 to describe that situation adequately. Misleading certainly
10 comes to mind and disingenuous, but they don't quite get the
11 job done. Maybe by the time of the final brief I'll have put
12 my arms around that situation.

13 In any event, it sets this situation apart from
14 anything that Mr. Glenn has described to you. We allege that
15 during the period of 1996 to 2005 Progress Energy's failure to
16 acquire the most economical fuel resulted in overcharges of
17 \$134.5 million which the Commission should require Progress
18 Energy to refund to customers.

19 Now, in the motion to dismiss, Progress Energy mounts
20 essentially two primary arguments. First, is hindsight and
21 second is retroactive ratemaking. Let's take hindsight first.
22 Are we asking the Commission to apply hindsight? When you read
23 the petition, the answer clearly is no. We asked the
24 Commission to evaluate the decisions and actions of the utility
25 at the time they were made based upon information that they

1 knew or should have known at the time. And there is case law
2 that supports the Commission's ability to do that. That is
3 what they did in the Maxine Mine situation that was approved by
4 the -- affirmed by the Florida Supreme Court. And your staff
5 recommendation correctly observes that we are not asking the
6 Commission to apply a hindsight standard or review.

7 Are we asking the Commission to apply retroactive
8 ratemaking? The answer is, no, we are not. We are asking the
9 Commission to apply the very regime that is set up in the early
10 1980s when it allowed the utilities this extraordinary ability
11 to collect fuel costs at the same time they incur it. Current
12 collection of fuel costs, which guarantees that at the time the
13 Commission approves the collection, it will not have had time
14 to conduct a full prudence analysis.

15 In 1983, the Commission said that the fuel proceeding
16 is now a continuous docket in which prudence review -- the
17 issue is viable until all pertinent facts are presented. The
18 utility gets the advantage of current collection prior to a
19 full blown prudence review, but the trade-off is -- and that is
20 the Commission's word -- the trade-off is that the Commission
21 retains jurisdiction until all the facts are presented to it.
22 That is the quid pro quo necessary to ensure that the
23 ratepayers are protected in the context of this extraordinary
24 departure from other forms of ratemaking. And in the
25 1983 order, the Commission explicitly rejected proposals to

1 place time boundaries around its ability to review past
2 collections, and it insisted on the ability to look at all
3 facts at the time those facts are presented in order to protect
4 ratepayers.

5 Shortly after the 1983 order, the Commission applied
6 that principle to the Maxine Mine situation of Gulf Power
7 Company. The Commission adjusted amounts over a three-year
8 collection period, which is the longest period advocated by any
9 party to that case. I would like to point out that according
10 to the language of the order to which Mr. Glenn referred, the
11 earliest point in time in which the staff expressed any
12 concern, which would be tantamount to the notice that Mr. Glenn
13 claims the utility is entitled to receive, was 1981. Yet the
14 Commission imposed adjustments that related back to 1980, and
15 deliberately made the point that it was reaching back beyond
16 the true-up order that Gulf Power insisted represented the time
17 barrier of its jurisdiction. So the Maxine case supports our
18 view of the situation and not Progress Energy's.

19 When that was presented to the court, the court
20 explicitly approved the concept embedded in the 1983 order that
21 the fuel adjustment proceeding has become a continuous rate
22 proceeding distinguishing it from the traditional base rate
23 proceeding which there are final orders and preserving the
24 Commission's ability to review prudence when all facts are
25 known.

1 Now, in the light of the orders of the Commission,
2 and the decision of the Florida Supreme Court affirming those
3 actions, how does Progress Energy protest our petition? Its
4 solution in its motion to dismiss has been to script a
5 different ending to the Maxine Mine case, one to its liking,
6 but one which is foreign to the court's decision. In its
7 motion, Progress Energy tries to paper over the court's
8 affirmation of the order with a proposition of its own
9 creation.

10 The proposition is that the Commission can't make an
11 adjustment to fuel costs without first putting the utility on
12 notice of the issue prior to a transaction and prior to the
13 costs being incurred. Well, think for just a moment how
14 dangerous a standard that is if you accept it. The utilities
15 come to you with fuel costs that have been the subject of
16 contracts already in place. They incur spot purchases without
17 your knowledge. When would the Commission ever be in a
18 position to review a transaction or a cost in time to protect
19 the ratepayer from imprudent or unreasonable charges if this is
20 the standard? It is completely unrealistic, and, as I said, it
21 is foreign to anything the Supreme Court said.

22 Reading Progress Energy's motion, you would come away
23 with the idea that the Commission lost that case. That is not
24 so. The court endorsed the Commission's concept of a
25 continuing fuel proceeding and affirmed the order, rejecting as

1 it did so, similar utility claims of hindsight and retroactive
2 ratemaking.

3 With respect to the contention that our petition
4 seeks to go back too far, the Commission was very clear as to
5 the reasons why it refused to place any time boundaries on its
6 ability to review past collections. First, it was aware that
7 because of the nature of current recovery, any presentation by
8 the utility would necessarily be superficial at the time of
9 approval. Second, it acknowledged that the burden of proof is
10 always on the utility. It never goes away from the utility.
11 And, third, it recognized that the utility possesses the
12 information necessary to evaluate prudence and reasonableness
13 of costs.

14 Now, I suggest to you that it would be a mistake to
15 change course and establish arbitrary time limits on your
16 ability to go back. Because if you agree with Progress Energy,
17 the message being sent to the utilities is that they should
18 file as scanty a case as possible and then delay as long as
19 possible any attempts to extract the information by intervenors
20 or staff.

21 The Commission recognized at the time it mentioned
22 the trade-off that the uncertainty would be a source of
23 unhappiness to the utilities, but that uncertainty was a
24 necessary component of the quid pro quo formula. You can have
25 current recovery, but you have to accept our continuing

1 jurisdiction. I believe if the utilities wish to have a higher
2 comfort level and want to avoid uncertainty, then they should
3 be motivated to make as complete a case as they can as early as
4 possible and then be as forthcoming as they can when parties
5 attempt to evaluate their actions. And this is achieved by
6 continuing to assert your ability to reach back as far as
7 necessary to protect customers' interest.

8 Thank you. I will answer any questions you have.

9 CHAIRMAN EDGAR: Thank you. Before we do that,
10 Mr. Glenn, I know that you had asked to reserve a few moments,
11 so you are recognized.

12 MR. GLENN: Just a couple of points. First, this
13 issue of about permitting is a complete red herring. What OPC
14 argues is that we should have been burning PRB coal. Everyone
15 knew we were -- what coal we were burning? That's the issue.
16 What facts weren't known to OPC? None. This is like Claude
17 Rains of Captain Renault in Casablanca in Rick's Place in the
18 casino saying, "I'm shocked; there is gambling going on in this
19 establishment." Here's your earnings, sir. This is
20 ridiculous.

21 The 1981 issue, and this is critical to the Gulf
22 Power order. In 1981 the court and the Commission went back to
23 1980. They looked at 1980, '81 and '82. The reason, and staff
24 brought this to the attention -- to the utility and to the
25 Commission in 1981, the reason they were able to go back to

1 1980, and it's not retroactive ratemaking to do that, is
2 because those costs had not been recovered through the fuel
3 clause yet. It was in inventory.

4 Finally, under OPC's interpretation you could go back
5 forever. I mean, why stop in 1952 when the Commission was
6 formed? Why not 1899 and look at what spot ice purchases
7 St. Petersburg Ice Company, the predecessor to Progress Energy
8 Florida made? And there's no answer to that.

9 Finally, his arguments that you have got to keep
10 jurisdiction over the prudence of your determinations, you do.
11 You do maintain that through that regulatory lag period, but
12 once those costs are recovered, that's it.

13 Thank you.

14 MR. MCGLOTHLIN: May I have a moment?

15 CHAIRMAN EDGAR: A moment.

16 MR. MCGLOTHLIN: Commissioners, Mr. Glenn says that
17 the Commission and the parties knew what coal they were buying
18 and what prices they were paying for it. What we didn't know
19 is what prices were offered, but not accepted. And we didn't
20 know that until we got into a deposition with the coal
21 procurement arm of Progress Energy and learned through a review
22 of late-filed exhibits to the deposition that lower bids were
23 offered, but not accepted by the utility. And that is when we
24 first began to inquire further about the ability of the utility
25 to burn Powder River Basin coal and the reasons why it bought

1 more expensive coal when lower bids were placed in front of it.

2 CHAIRMAN EDGAR: Thank you.

3 Commissioners, we have before us Issue 2, and there
4 is the opportunity for questions and discussion either of our
5 staff or any of the parties that are before us.

6 Commissioner Deason.

7 COMMISSIONER DEASON: I have a question for our
8 staff, and it pertains to the Gulf case and specifically the
9 Maxine Mine case, which has been discussed. And I was just
10 wanting staff's perspective on the period of time covered by
11 the Commission's action in that case that was ultimately
12 affirmed by the court. And, specifically, the years '80, '81,
13 and '82, what rationale the Commission gave in requiring those
14 years to be reviewed and why the court upheld that particular
15 time period.

16 MS. BENNETT: It's helpful to, in evaluating the Gulf
17 case that was before the Supreme Court, to go back and look at
18 the In Re: Maxine Mine decision by the Public Service
19 Commission. And, in my opinion, the reason that the Commission
20 went back to 1980 was that that was the first time that the
21 costs were so excessive that it was required for Progress -- I
22 mean, sorry, Gulf to repay. In other words, the Commission did
23 not limit itself because of the notice issue as Progress puts
24 forth today. They actually -- the Commission actually went
25 back to 1974 and decided that the decisions in 1974 and some

1 subsequent decisions were imprudent.

2 The reason they didn't go back to 1974 and require
3 costs, and this is discussed in the Maxine Mine case, is that
4 the costs were not out of line with what other coal
5 companies -- other utility companies were paying for coal at
6 that time.

7 COMMISSIONER DEASON: Follow up. So in the Maxine
8 case, when was Gulf first put on notice that there was an issue
9 concerning the prices paid for coal from Maxine Mine?

10 MS. BENNETT: 1981 was the first that staff began to
11 inquire. There was actually a report given to the Commission
12 in 1982, and there were some subsequent hearings in 1982, and
13 the final decision in 1983 by the Commission, which was the
14 first time the Commission made a prudence finding on the costs.

15 COMMISSIONER DEASON: So in 1981 was when staff
16 initiated an inquiry?

17 MS. BENNETT: In 1981, staff began to focus on Maxine
18 Mine because Maxine Mine was going to be closed. And during
19 that investigation of the costs of closing Maxine Mine, staff
20 became aware of the significance of the cost of coal of Maxine
21 Mine.

22 COMMISSIONER DEASON: Okay. And you say it is your
23 reading of the Commission's order that the 1980 was the first
24 year of a disallowance because that was the first year that
25 there was a significant differential between the actual price

1 paid and what was to be considered a reasonable amount?

2 MS. BENNETT: Yes, it's my opinion. I do acknowledge
3 that Progress correctly stated that in the alternative the
4 Commission did say that there was fuel that could be burned,
5 and that the fuel adjustment doesn't always recognize -- or
6 that coal doesn't always come through in the year that it's
7 purchased.

8 COMMISSIONER DEASON: So there was acknowledgment of
9 the Commission that that might have been a rationale for going
10 back to 1980 because there were questionable fuel purchases
11 that were still in inventory?

12 MS. BENNETT: That was an alternative that the
13 Commission did recognize.

14 MR. GLENN: Chairman Edgar.

15 CHAIRMAN EDGAR: Mr. Glenn.

16 MR. GLENN: May I just clarify one thing to
17 Commissioner Deason's question. In the Commission's order, the
18 Commission did look back before 1980. Quote, Gulf's later
19 decision to extend the full term and its failure to achieve an
20 early termination thereafter, however, exposed Gulf to the
21 enormous cost of Maxine Mine coal in the late 1970s. So,
22 clearly, the Commission knew that these costs were enormous,
23 and they chose only to go back to 1980 because that was the
24 first time, 1981, that the company was on notice, and that they
25 reached back, as you said, to 1980, because those costs, those

1 imprudent costs had not been included in the fuel clause or
2 recovered.

3 MR. MCGLOTHLIN: If I may --

4 CHAIRMAN EDGAR: You may.

5 MR. MCGLOTHLIN: -- speak to the parallel between the
6 Maxine history and our petition. In the Maxine situation, the
7 1974 contract and the costs incurred for several year after
8 that were not the subject of a disallowance because of the view
9 that they were not out of line with the market. Similarly,
10 when Progress Energy and its predecessor designed and built
11 Crystal River Units 4 and 5, they designed and built those
12 units with the ability to blend both sub-bituminous and
13 bituminous coals, but from the outset burned only bituminous
14 coal. And I believe the units went into commercial service in
15 the '83-'84 time frame.

16 We do not challenge any of the costs incurred to burn
17 bituminous coal exclusively during that period, from the period
18 '83 to 1996, because they were not out of line with the market.
19 And so as the Commission focused in Maxine on the period of
20 time during which the costs first became exorbitant, so
21 similarly we have focused on the period of time during which
22 the cost of sub-bituminous coal became more economical than
23 bituminous coal for burning in Crystal River 4 and 5.

24 CHAIRMAN EDGAR: Commissioner Tew.

25 COMMISSIONER TEW: I'll take a stab at it. I'm a

1 little confused on this Maxine Mine case, too, and about what
2 was the real cause for reaching back to 1980, because it seems
3 like I'm hearing a little bit different interpretations of
4 that. Is it correct to say that the only reason that the PSC
5 reached back was because the fuel was still in inventory?

6 MS. BENNETT: No. In my reading of the Maxine Mine
7 case, the reason was in 1980, in July of 1980, which is when
8 the Commission ordered the refund beginning, because that was
9 when a final act could have been done one year prior to get
10 Gulf out of the contract. And then in June of 1980, not only
11 was the coal that was coming out of Maxine Mine the highest
12 that Gulf was paying, it was the highest in the country, at
13 which point the imprudence became excessive, and the Commission
14 decided that Gulf needed to refund that to the customers. It
15 was not because there was still coal in inventory.

16 I believe there was a comment that said there is coal
17 in inventory, and so that is an alternative to support our
18 decision even if the court were to overturn our decision on
19 other grounds. Nor do I believe that the Supreme Court looked
20 at that position. They actually made the decision that, yes,
21 we could go back, the Commission can go back and consider,
22 because prudence review is not done through the fuel clause
23 proceeding.

24 COMMISSIONER TEW: So you're saying that you could
25 reach back to 1980 because there was some decision point where

1 you think the decision should have been different on behalf of
2 the utility, and that was in, I guess, July of 1980?

3 MS. BENNETT: 1980 was the first that there was an
4 adverse impact to the customers. There are other opportunities
5 that the Commission has had to look back in time. In the
6 matter of the St. Lucie outage, the Commission actually went
7 back 16 years, and that was cited by Mr. Glenn. In going back
8 16 years, the Commission acknowledged that it was going to be a
9 difficult task to go back and consider the facts before it, but
10 that they would go ahead and take it. And in that case, the
11 Commission held in favor of the utility, that the utility did
12 act prudently in entering into the contract. So by not
13 dismissing the case, you are not finding against Progress, you
14 are just saying that they need to go ahead and present their
15 case to you.

16 COMMISSIONER TEW: I agree with what you're saying
17 there, that a motion -- a ruling on the motion to dismiss
18 simply takes the case forward, and then we hear more
19 information. I guess I just want to express a little
20 frustration, because I don't -- I'm having trouble
21 understanding what the underlying case law says. I think I
22 alluded to that a little bit this morning. It is definitely
23 not a model of clarity in my opinion, and I'm having trouble
24 deciding whether it meets the standard for a motion to dismiss.
25 And I know that is the question before us, not whether we think

1 going back ten years is fair; it has been done before; if it
2 has been done before, if it's the right thing to do. But I
3 want to definitely understand what has been done, and it seems
4 like both parties are using the same cases to argue their
5 points.

6 CHAIRMAN EDGAR: Mr. Cooke.

7 MR. COOKE: I think, Commissioners, that our reading
8 of Maxine Mine and the Gulf case and reviewed it, did not
9 preclude the Commission from looking back beyond and before the
10 point that notice was given to the company that there might be
11 a question. A reading of the case law and the orders is that
12 in the fuel clause unless there has been an explicit review of
13 the prudence, then it is subject to continuing review.

14 And I think what the Commission needs to focus on is
15 not whether it should go back, whether it's appropriate to go
16 back that far, but under this motion to dismiss, whether there
17 is no -- whether you are precluded from going back. And our
18 reading of the case law and the orders suggests that you are
19 not. A reading of the Gulf case indicates that you are not.

20 That doesn't necessarily mean it's appropriate to do
21 it as we go forward in the evidentiary hearing. There are
22 others issues that can be raised. When you talk about going
23 back to the end of the 1800s, for example, I mean, obviously
24 there are issues about whether evidence is available or not.
25 So there are other limits that come into play as we go forward

1 with this case. The question is whether a motion to dismiss is
2 appropriate in this case because it precludes the Commission
3 from looking back in time beyond the point at which notice was
4 given to the company that there might be an issue, and we
5 believe that you are not precluded from doing that.

6 CHAIRMAN EDGAR: Mr. Glenn.

7 MR. GLENN: In the Maxine Mine case, the Commission
8 made an explicit determination of imprudence in 1974 that
9 enormous costs were being incurred in the '70s. Did the
10 Commission just leave money on the table? Of course not. Of
11 course not. It is a matter of retroactive ratemaking and
12 fundamental fairness. And to say that witnesses might not be
13 available in 1899, that is, of course, the case. Witnesses may
14 not be available in this case, in 1996. Witnesses have passed
15 on. They have left the company. We have not subpoena power to
16 get them. That is a fundamental due process issue. And the
17 way the system works is that we are put on notice of an issue
18 of imprudence, everybody. We are an open book. And if you
19 have got an issue, you raise it. And there is regulatory lag
20 to account for true-up costs of, hey, wait a second. We can go
21 back on that because it hasn't been recovered.

22 That is fundamental fairness in this process, and it
23 turns it on its head. OPC turns it on its head, this
24 regulation by exception. To say that you have got to put
25 forward every imaginable prudence determination. We are going

1 grind to a halt. It is bad policy, and it is unconstitutional.
2 And that's what this Commission said. That is what we said in
3 Maxine Mine. They didn't leave money on the table.

4 CHAIRMAN EDGAR: Mr. McGlothlin.

5 MR. MCGLOTHLIN: Yes. I think it's helpful to look
6 at the wording of the Supreme Court's order in the Maxine Mine
7 case, because I think it settles the basis for the court's view
8 of the Commission's action. Nor do we find that the order
9 constitutes prohibited retroactively ratemaking. Fuel
10 adjustment charges are authorized to compensate for a utility's
11 fluctuating fuel expenses. The fuel adjustment proceeding is a
12 continuous proceeding and operates to a utility's benefit by
13 eliminating regulatory lag.

14 This authorization to collect fuel costs close to the
15 time they are occurred should not be used to divest the
16 Commission of the jurisdiction and power to review the prudence
17 of these costs. So I think that sheds some light on the
18 court's thinking in it's evaluation and the reasons it affirmed
19 the Commission's order in the Maxine Mine case.

20 Then Mr. Glenn keeps saying that Progress Energy is
21 an open book and everything is a matter of record. Do you
22 recall Progress Energy coming into the Commission and saying we
23 have given away our authority to burn Powder River Basin coal.
24 Tell us we were prudent in doing so. Do you remember the
25 utility coming in and saying we chose this bid even though

1 there were lower bids presented in the same RFP. Tell us we
2 were prudent. They have not been as open as he suggests.

3 CHAIRMAN EDGAR: Commissioner Carter.

4 COMMISSIONER CARTER: Thank you, Madam Chair. I was
5 going to be quiet on this one.

6 Mr. Cooke, on the -- it seems that, one, we're saying
7 should the motion to dismiss be granted or not. But then in
8 the context of the issue, the way it is formed, is you have got
9 these years delineated in there. So, then, should the
10 Commission grant the motion to dismiss for the year -- I think
11 Mr. Glenn said 2005 or something like that. Do we just pull --
12 do you see what I'm saying? Is it a motion to dismiss, is that
13 what we are talking about, or are we talking about a motion to
14 dismiss based upon the years that are delineated here? Do you
15 understand the nature of my question here?

16 MR. COOKE: I think I do, and I don't want to speak
17 for Progress. I think they have crafted within their motion to
18 dismiss an alternative suggestion that you might want to
19 consider dismissing only for prior years, prior to which the
20 company was on notice of this issue having been raised. The
21 difficulty I have with that is I don't see within the orders of
22 the cases that I have reviewed, and I believe staff agrees with
23 me, that there is a notice requirement in order for the
24 Commission to look back. And I think, you know, it has been
25 articulated in the response, for example, that some of that

1 information is in the hands of the utility, and it is not
2 necessarily available to us. So if we simply wait until we
3 figure out that there might be an issue, and take for
4 example -- well, in this case there's questions about whether
5 information was transparent or not. So I think that arguing
6 that there is a notice requirement and precluding the
7 Commission from going back before the utility is on notice, I
8 just don't think the orders or cases support that. But that
9 is, I think, an alternative argument that Progress has sort of
10 included within its overall motion. I think you heard that
11 from --

12 COMMISSIONER CARTER: Yes.

13 CHAIRMAN EDGAR: Commissioner Carter.

14 COMMISSIONER CARTER: Just permission to follow up.
15 Thank you, Madam Chair, for your indulgence.

16 The motion to dismiss versus the motion to dismiss
17 based upon a term certain. Do you see what I'm having problems
18 with here from a legal perspective in terms of should we grant
19 the notion dismiss, yes or no? But the motion to dismiss -- as
20 the issue is formulated here, it has this catch-all about this
21 amount as well as the years.

22 MR. COOKE: Commissioner, our view is that under
23 either approach, under either argument, the motion to dismiss
24 should not be granted, whether you're looking at it, the
25 complete dismissal of the petition by OPC or whether you are

1 trying to limit it to prior years, prior to the notice.

2 COMMISSIONER CARTER: Madam Chairman, just one little
3 bitty follow-up.

4 CHAIRMAN EDGAR: Go ahead.

5 COMMISSIONER CARTER: Therefore, then the motion to
6 dismiss should stand on its own?

7 MR. COOKE: I'm not sure if I understand that
8 question. It stands on its own. I mean --

9 COMMISSIONER CARTER: Okay. Madam Chairman, if I
10 may. We seem like we are getting into the merits of the case
11 versus the procedural matter, whether or not --

12 MR. COOKE: In terms of standard of review, what you
13 need to look at is whether the petitioner, in this case OPC,
14 has raised sufficient facts which if taken as true create a
15 cause of action. And I believe that to be the case.

16 COMMISSIONER CARTER: Okay.

17 MR. COOKE: Unless --

18 COMMISSIONER CARTER: Which precludes --

19 MR. COOKE: Which would argue against granting the
20 motion to dismiss.

21 COMMISSIONER CARTER: Right.

22 MR. COOKE: Correct.

23 COMMISSIONER CARTER: So it's not necessary to go
24 further, then, to get into the facts of the case, is it, in
25 terms of the years certain, the amount certain? I mean, you

1 have met the threshold, which is really the only thing --
2 excuse me, Madam Chairman, for sounding argumentative. I'm
3 not. I'm just trying -- I mean, we're trying to say -- we are
4 looking at a legal matter here and sometimes times we sit as a
5 judicial body; sometimes we sit as a regulatory entity. But in
6 this context here we are talking about should we grant Progress
7 Energy's motion to dismiss? Yes or no. Is that not the
8 threshold question, notwithstanding this -- and we look at the
9 facts as presented, whether or not the information and the
10 facts presented by OPC gives us a cause of action.

11 MR. COOKE: Yes, I think I agree with what you said.

12 COMMISSIONER CARTER: Okay. Thank you, Madam
13 Chairman.

14 CHAIRMAN EDGAR: Commissioner Deason.

15 COMMISSIONER DEASON: Let me take that a step
16 further, then, and ask does administrative finality ever attach
17 to a fuel order?

18 MR. COOKE: It does. And if there had been prudence
19 review in these fuel clauses, and prudence had been determined,
20 then I think there would be a real question of administrative
21 finality.

22 COMMISSIONER DEASON: Well, let me ask you this
23 question. You say if there had been a prudence review. If you
24 go through the course of a proceeding and there are fuel costs
25 that are projected, year one. And then in year two we look at

1 actually burns and what was burned, and we look at the cost
2 again, that is year two. And then in the third year, we true
3 everything up, and then by the fourth year if there has never
4 been an issue raised, there is still no finality to that
5 because we didn't put it on the order that we have looked at
6 the prudence of these fuel costs?

7 MR. COOKE: I think there is not finality as to the
8 prudence of the incurrence of those costs. The costs
9 themselves, I think, would be hard to revisit.

10 COMMISSIONER DEASON: Well, let me ask this question.

11 MR. COOKE: And I think staff could maybe speak more
12 directly to whether there is -- what the nature of the fuel
13 clause is, but it's --

14 COMMISSIONER DEASON: Let me tell you what troubles
15 me a little bit, and if staff wants to answer it, fine. One of
16 the reasons that -- it has been said here today, and I agree
17 with this, that, you know, this is not retroactive because the
18 real question is what was known or should have been known at
19 the time. And so I guess the basis of the case is that we will
20 go in and evaluate it on what was known or should have been
21 known at the time. But isn't there some burden on other
22 parties as well as to what they knew or should have known at
23 the time? And if they knew that Powder River Basin coal was
24 not being burned, and if they knew that that was a cheaper
25 alternative, was there some burden at least to ask that

1 interrogatory at that time to say why aren't you burning this,
2 and to look into the contractual situation and at least -- or
3 is there no obligation on the parties' part to raise an issue
4 at a certain point in time?

5 MR. COOKE: The burden is on the utility to prove
6 prudence. I think the question of hindsight, and if this does
7 go forward and what facts should be used, the hindsight review
8 is focused on what the company knew or should have known at the
9 time as opposed to what we now know and trying to apply new
10 information that we could only know now back and judge the
11 utility's decision at that time.

12 In other words, the hindsight review of what the
13 company knew or should have known. It is a factual
14 determination for one thing, and it is a focus on what were the
15 facts at the time surrounding this company's decision. That,
16 however, doesn't necessarily mean that the OPC or the
17 Commission had the burden to raise questions at that time,
18 given the way the fuel clause worked and works. We
19 specifically reserve in our orders language that says the
20 dollar amounts are approved and authorized subject to final
21 true-up and, further, subject to proof of reasonableness and
22 prudence of the expenditures upon which the amounts are based.

23 We have other orders from 1983 that talk about the
24 fact that at one point the Commission staff came in and
25 recommended a jurisdictional limit as to how far back to look

1 on this type of issue. And staff at that time recommended
2 don't go back any more than three years. And the Commission at
3 that time said, no, we're going to reject that. We are not
4 going to limit ourselves as to how far back we can look.

5 Whether it is appropriate for us to have fuel clause
6 proceedings that don't examine prudence is a different issue.
7 But my understanding is our fuel clause proceedings look at the
8 dollar amounts, and the trade-off is to try to get those dollar
9 amounts recovered in a rapid way for the benefit of the
10 utilities so that they are flowed through and don't have to
11 wait for base rates. But the trade-off is we don't necessarily
12 look at prudence unless it is specifically raised as an issue
13 in the proceeding.

14 CHAIRMAN EDGAR: Commissioner Deason.

15 COMMISSIONER DEASON: I have a follow-up. If that is
16 the case, as I understand your recommendation, the Commission
17 is not legally bound to limit the review. We could go back to,
18 I guess, conceivably the period that is the subject of OPC's
19 motion. We are not legally -- we are not legally bound to not
20 go back there. I mean, we have that discretion, is that a fair
21 characterization?

22 MR. COOKE: Let me think about it. I believe that is
23 the case, if I understand what you're saying. I don't think
24 you are legally precluded from looking back, and I think based
25 on that, based on the motion to dismiss as suggesting that

1 there is a preclusion, we are recommending denial of the motion
2 to dismiss. I don't think that that necessarily means that it
3 is fair to go back that far, that there are witness issues,
4 that there are questions of equity such as laches that would
5 preclude the ability to put on a case to defend, for the
6 company to defend itself. Those are in the nature of
7 affirmative defenses that I think can be put into this
8 proceeding as we go forward. So I don't think you are bound.

9 If you do not grant the motion to dismiss, I don't
10 think the evidentiary -- I don't think at that point you are
11 bound in the evidentiary proceeding necessarily to end up
12 looking all the way back for the full ten years. I think that
13 is why there will be an evidentiary proceeding and facts will
14 be developed, and you will have a better understanding of the
15 fairness of looking back that far. I think that answered your
16 question.

17 COMMISSIONER DEASON: Yes, it does.

18 CHAIRMAN EDGAR: Commissioner Tew.

19 COMMISSIONER TEW: That somewhat opened a can of
20 worms for me, some of that discussion. Mr. Cooke and I have
21 talked a lot about this issue and, basically, I was under the
22 wrong impression about how the fuel clause worked, I suppose.
23 And something you said a minute ago about the burden was on the
24 utility to prove the prudence, and I, of course, agree with
25 that. And it sort of raised again this issue of the difference

1 in a prudence determination and a fuel clause determination.
2 And I have to tell you that I keep getting more and more
3 confused, and I will even point you to a sentence in the rec
4 that concerns me a little bit. On Page 6, it's the paragraph
5 just before the conclusion paragraph, and the middle sentence
6 starts with the fuel adjustment hearing. It says, "The fuel
7 adjustment hearing allows for a continuing review of the
8 prudence of actions of a utility."

9 So I just need help getting straight what it is we
10 are doing with a regular fuel clause proceeding. Is it just in
11 how a motion is made? In other words, if someone comes in and
12 asks for a prudence review, perhaps we spin it out and we
13 determine prudence and that brings on a host of additional
14 questions and additional audit work versus the fuel, which, I
15 suppose, under the scenario we're talking about, that you would
16 have the ability to go back for several years, because it
17 wasn't labeled as a prudence determination. Can you help me
18 what that?

19 MS. BENNETT: I think the answer we can find in the
20 Order 12645, which is what General Counsel referred to earlier.
21 And you can be assured of prudence review once the facts and
22 allegations -- not only does the utility have the burden to
23 come in and say this is a prudent expenditure, but they must
24 come in and prove that it is a prudent expenditure. Some of
25 the allegations that Mr. McGlothlin referred to, that, you

1 know, we went out and looked at different types of fuel. And
2 the utility could come in and say this was the lowest cost.
3 Here is our RFP, and here is why we selected this one versus
4 this one.

5 Those type of facts, once you hear those facts and
6 you make a determination that that is a prudent purchase, then
7 that administrative finality attaches. Until then, the
8 mechanism of the fuel adjustment clause is a continuous and
9 rapid review to benefit the utility, so that they can recover
10 costs without regulatory lag. And the staff does look at the
11 costs. And I might let the staff address their specific -- how
12 they address this each year. But there are times when the
13 staff would not be able to know what the RFP process was or
14 things that are not readily discernible unless the utility
15 comes forward and opens its heart to you to make that decision.

16 COMMISSIONER TEW: Let me try it this way. Let's say
17 in the course of the fuel proceeding a company's witness on
18 behalf of a project that they want recovered through fuel makes
19 a claim that it is a prudent project for recovery through the
20 fuel clause. Does that, in a sense, trigger a different kind
21 of review than what we are normally doing through fuel or in
22 fuel are we determining prudence?

23 MS. BENNETT: In the fuel you are not determining
24 prudence unless, number one, they raise the issue and, number
25 two, they present evidence of prudence. And then you make a

1 determination based on evidence presented to you. So just
2 making -- and it's actually said in this Order 12645, just the
3 broad statement by a utility that our expenditures are prudent
4 is not enough, you need to present evidence.

5 COMMISSIONER TEW: I didn't mean to suggest that.
6 I'm just worried. I don't really understand what triggers
7 prudence. I understand if someone comes in and raises a motion
8 or something and asks specifically for a prudence review. And
9 as I understand from talking to Mr. Devlin and Mr. Cooke over
10 the last couple of days there is a distinct difference, at
11 least among staff in what that terminology means. But I think
12 we -- I think in the course of fuel proceedings, those kind
13 of -- that terminology is definitely used.

14 For instance, in this sentence, it's kind of
15 confusing to me when we are talking about a prudence review and
16 when we are talking about fuel. And I don't know what kind of
17 case -- whenever -- these cases that we are relying on, were
18 they prudence reviews or were they just through the normal
19 course of the fuel clause and there was no suggestion that it
20 was a prudence review that was being done?

21 MS. BENNETT: I think I can answer this. In the fuel
22 adjustment clause you can consider prudence. Normally that
23 issue is not before you. But let's look at this most recent
24 fuel adjustment hearing. You are going to consider the Turkey
25 Point sabotage issue, and that is going to be a prudence

1 review, and that's going to be a full evidentiary hearing. But
2 the other costs that we looked at that were presented to you
3 were not your prudence reviews. They were costs that the
4 utilities presented for a pass-through.

5 COMMISSIONER TEW: Okay. I think I'm about to wrap
6 this up, but let me get this straight. So, essentially, when
7 we go through the fuel clause, we are not, unless someone has
8 raised it specifically as an issue, and probably it is spun out
9 into a separate docket with a separate time frame, we normally
10 are not determining prudence through fuel clauses.

11 MS. BENNETT: That's correct.

12 CHAIRMAN EDGAR: Mr. Glenn.

13 MR. GLENN: If I may just briefly. What are the
14 consequences of this? As a practical matter, we're going to be
15 putting on every decision that we made or did not make. That
16 is not what the fuel clause is about. At some point there is
17 regulatory certainty in the process that we have relied on for
18 ten years and \$11.4 billion of fuel costs collected. That
19 cannot be and is not the law.

20 CHAIRMAN EDGAR: Is it regulatory certainty or
21 administrative finality?

22 MR. GLENN: It's improper. It's unconstitutional, a
23 due process violation, that at some point the door closes. The
24 Commission has applied it that way. The Commission knew in
25 Maxine Mine that in '74 on it was imprudent that costs were

1 going through the roof. They didn't leave money on the table.
2 They said it is a notice issue. That is the only fair way to
3 do it and to get around retroactive ratemaking. That's how we
4 have operated for 30 years.

5 CHAIRMAN EDGAR: Mr. McGlothlin.

6 MR. MCGLOTHLIN: Progress Energy says to the
7 trade-off formula that the Commission articulated in 1983, we
8 will take the advantage of current collection, thank you very
9 much, but we don't think much of the quid pro quo, which is the
10 retention of jurisdiction to protect ratepayers. They can't
11 have it both ways.

12 And with respect to the conversation about the
13 true-up and whether that ends things or not, the same order
14 that staff referred to earlier, 12645, 1983, says, among other
15 things, staff is also correct in stating that the nature of the
16 clause and the way costs are passed through it belies any
17 finality to a true-up order. So this regime, this formula has
18 been in place since 1983. It is to the advantage of the
19 utility to be forthcoming with respect to information necessary
20 to evaluate prudence. To the extent it does not, it has to
21 live with the uncertainty associated with the possibility that
22 those facts may come to light at a later point in time.

23 And to the extent that they complain that rating
24 agencies or investors will be disappointed and unhappy, I will
25 remind you of this: It's not the function of the Commission to

1 rescue the utility from its mistakes. The function of the
2 utility is to insulate ratepayers from the impact of those
3 mistakes. And if that takes time because of the time required
4 to delve into the complex transactions that are the subject of
5 fuel procurement, then that's the quid pro quo that the company
6 accepts when it also accepts the advantage of current
7 collection.

8 CHAIRMAN EDGAR: Good discussion. I have, however,
9 the double-fisted drink thing going here, so we're going to
10 take about five minutes. Let's make it seven and a half or so,
11 and by the clock on the wall come back at twenty after and see
12 where we are.

13 (Recess.)

14 CHAIRMAN EDGAR: Thank you all. We will go back on
15 the record.

16 We have had some great discussion, raised a number of
17 questions in my mind. I think we have gone a little bit -- a
18 little bit around, perhaps beyond, back and forth, but perhaps
19 a little bit beyond the issue that is before us today.
20 However, I was hoping that we would, because I think there are
21 some very interesting legal questions that are raised and
22 inquiring minds want to know.

23 So, Commissioner Tew, I think when I wanted to take a
24 break, that you had a question to ask. I do note that
25 reviewing the calendar, we do in preparation just in case, have

1 some dates on hold as potential hold dates for hearing if,
2 indeed, we, as a body, decide that we need to hear more on
3 this. Or, obviously, the way it is with the motion before us
4 it can be disposed of one way today. So, Commissioner Tew, I
5 will start with your question, and then we will see what the
6 will of the body is.

7 COMMISSIONER TEW: This is to staff. Perhaps the
8 best thing to do is to talk about this some going forward. I
9 think my questions and concerns relate more to how the fuel
10 clause should be administered going forward, and just making
11 sure that we are all on the same page about how a request is
12 made to deal with projects being recovered through fuel,
13 whether we're making prudence determinations or fuel
14 determinations, and what kind of different activities the
15 Commission does in each of those cases, and just, frankly, how
16 we should be doing it. Because if it results in these kind of
17 cases going forward, then I just want to be aware of that as we
18 continue down our normal fuel clause hearing path.

19 MR. DEVLIN: Madam Chair.

20 CHAIRMAN EDGAR: Every once in awhile, probably every
21 X number of years -- Commissioner Deason, you can maybe tell us
22 what the cycle is, but every once in awhile there needs to be a
23 test case sometimes.

24 Mr. Devlin.

25 MR. DEVLIN: Thank you, Madam Chair. And, yeah, we

1 had a little chance to caucus back there, and the cases that
2 have been cited by legal counsel are old cases, back in the
3 '80s and early '90s. It is probably time to take a refresh
4 view of the look-back philosophy, if you will, and the level of
5 prudence judgment that should take place in the annual fuel
6 proceedings. We don't have a rule for fuel, but we will make
7 sure that -- if it's okay with the Commission, we will make
8 sure that will be an issue that will be addressed the next
9 go-around.

10 And one thing I would like to point out, one of the
11 major differences between what happened in the '80s, I guess it
12 was, and now is that back then we were doing monthly fuel
13 proceedings, and then we transitioned to semi-annual. So there
14 was less time for scrutiny and prudence review back then. We
15 have a full year now, which is better. But still there is,
16 like we discussed this morning, there is an extra burden and
17 resource involved, staff resource involved in doing a prudence
18 review. But if it is okay with the Commission, I will commit
19 to make that an issue or at least bring that to the
20 Commissioners' attention in the fall and maybe address, you
21 know, what our policy should be with respect to look back and
22 prudence review.

23 CHAIRMAN EDGAR: It is always good to do a careful
24 look.

25 Commissioner Tew, did you have further questions?

1 COMMISSIONER TEW: I think that's it. Again, I
2 probably steered us off course more than we needed to be.

3 CHAIRMAN EDGAR: Good discussion.

4 COMMISSIONER TEW: I know that the subject at hand is
5 the motion to dismiss.

6 CHAIRMAN EDGAR: Commissioner Carter.

7 COMMISSIONER CARTER: Just a comment, Madam Chairman.
8 I'm sure Commissioner Deason probably knows this better than we
9 do. It just seems to defy logic that we look it over and then
10 would say, well, these are just numbers, but they are not
11 prudent. Does that make sense to you? I mean, you know, I'm
12 just -- I guess it's a rhetorical question.

13 CHAIRMAN EDGAR: I was wondering if it was a question
14 or not. And I'm sitting here looking at Commissioner Deason to
15 see how he interpreted it, whether it was a question to him or
16 not.

17 COMMISSIONER CARTER: I mean, it just seems like it
18 defies logic to me to say after all of this time we looked at
19 all of these fuel charges and all like that, and, oh, you know
20 what, we forgot one thing, it wasn't prudent. That doesn't --
21 that just doesn't hold water. It just -- you know, that dog
22 won't hunt. It just doesn't make sense. Thank you.

23 CHAIRMAN EDGAR: Commissioners, further discussion or
24 questions. And I'm not seeing any hands in front of me,
25 either. So -- Commissioner Tew.

1 COMMISSIONER TEW: I have one legal question. If we
2 go forward with staff's recommendation to deny the motion to
3 dismiss, does the company have some sort of recourse before the
4 courts? In other words, would this order be appealable in some
5 way?

6 MS. BENNETT: It is considered a non-final
7 interlocutory order and would not be appealable until after the
8 decision, in my opinion.

9 MR. COOKE: I agree with that. That doesn't mean
10 that they won't, perhaps, take advantage and try to find a way
11 to appeal it as an interlocutory, but I think it probably would
12 not be reviewable.

13 CHAIRMAN EDGAR: Commissioners, further questions?

14 COMMISSIONER DEASON: Madam Chairman, I will make a
15 motion. I was just waiting for someone else, but I don't think
16 anybody else will.

17 CHAIRMAN EDGAR: Well, I was going to do it, but I
18 don't think I'm allowed, so --

19 COMMISSIONER DEASON: This is a difficult matter, but
20 I think what we have to remember is that we are here on a very
21 limited matter, and that's the motion to dismiss. And it is
22 a -- granting a motion to dismiss is not a very common thing,
23 and there are certain requirements that have to be met. I'm
24 not sure that we have met those, that those have been met here.
25 And I believe that the best course of action is to deny the

1 motion to dismiss and to have this matter heard more clearly.
2 Hopefully, more clearly and in more detail. But it does give
3 me some concern.

4 And just because we are not going to dismiss it does
5 not mean that the Commission should necessarily accept the
6 premise of OPC's motion. I think it should be given great
7 scrutiny. I think it is troublesome, to some extent, that we
8 are potentially going to be litigating prudence for such a long
9 period of time. And I think that will raise concerns in the
10 markets, and I think that could potentially have adverse
11 impacts on customers in the long-term. But at the same time,
12 there is a responsibility of the Commission to make sure that
13 only prudently incurred costs are passed through to customers.

14 But I do agree with staff's assessment that maybe now
15 is a good time to reassess the way we utilize fuel adjustment,
16 and that there have been changes over the years, and that
17 there, perhaps, needs to be some type of prudence
18 determination. And I fear that that potentially could impact
19 the streamlined nature of fuel adjustment, but at the same
20 time, I think we could not expect our utilities to be incurring
21 billions of dollars of fuel charges over, you know, five, ten,
22 fifteen years and there be no determination that those costs
23 were prudent. And so we may have to sacrifice some of the
24 streamlined nature of the fuel adjustment proceeding, but I
25 think that it's best for the companies, our customers, and for

1 the process.

2 If at some point there is a determination of -- and
3 if it has to be in terms of prudence, so be it, but there has
4 got to be some finality. And that such large sums of money
5 cannot continually just be hung out there and potentially be
6 disallowed. I think that sends the wrong signals to the
7 markets and our ability of our companies to go in and access
8 those markets on favorable terms. And I think we have to
9 balance all of that. And I don't -- can't tell you what the
10 solution is, but you all will be able to determine that, and I
11 look forward to your discussions on that.

12 So under the very limited question of dismissal, I
13 think that we should not dismiss, and I think that the
14 Commission's discretion should be exercised more when the
15 matter is finally heard, and that there should be some
16 balancing of the various interests and weigh those concerns
17 carefully when it comes to going back too far to assess -- to
18 determine prudence, when one would assume that if funds have
19 been expended, if they have been projected, they have been
20 spent, they have been tried up, and at some period of time
21 either they are assumed to be prudent or -- I don't know what
22 the correct answer is, but there needs to be some certainty in
23 the process. And so that is just a long way of saying that I
24 move staff's recommendation.

25 COMMISSIONER CARTER: And for those reasons, Madam

1 Chairman, I second the motion.

2 CHAIRMAN EDGAR: Thank you.

3 Commissioner Deason, as always, thank you for your
4 thoughtful comments and motion.

5 There is much about this case that makes me
6 uncomfortable. But all the more reason, perhaps, for some
7 additional time, the opportunity for the parties, for our staff
8 and for others to flesh out more some of the legal analysis and
9 discussion, and that would include repercussions, either as
10 part of this docket or in addition to, probably both, further
11 examination of some of our processes, and I always welcome
12 that.

13 I fully note your comments about impact on what we
14 would like to sometimes term a streamlined process, due
15 process, but yet as we all do, want to have processes that make
16 sense and that work smoothly and that work timely to the
17 benefit of good decisions. But yet as more and more we use the
18 different clauses, sometimes for items and issues that come up
19 that maybe were not envisioned at sometime in the past, all the
20 more reason to continue to evaluate our processes.

21 Commissioner Tew, before I call for a vote, do you
22 have any comments?

23 COMMISSIONER TEW: Just one other thing that occurred
24 to me as Commissioner Deason was expressing some of the
25 concerns that I share. I think it would be safe to say, and I

1 don't want to speak on behalf of all of you, but I think that
2 we would have concerns if Progress, for instance, came forward
3 and suggested they left money on the table ten years ago. So I
4 have, you know, concerns that we have to try to look at how to
5 make this process better going forward, and I think Mr. Devlin
6 has addressed that, to give all sides more certainty. I mean,
7 customers also get notice from us about the fuel clause dollars
8 that we approve every year, and I think that we need to try to
9 strive to get some more certainty there. But I definitely
10 support the motion.

11 CHAIRMAN EDGAR: Okay. Commissioners, again, thank
12 you for your discussion and thank you to the parties and our
13 staff, too, for helping us work through our thoughts on some of
14 this. And, again, I note that some of us will be here probably
15 for a hearing in February.

16 All in favor of the motion say aye.

17 (Unanimous affirmative vote.)

18 CHAIRMAN EDGAR: Opposed?

19 Show the motion adopted.

20 Thank you.

21 * * * * *

1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

4

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


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

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

19 DATED THIS 26TH DAY OF DECEMBER, 2006.

20

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