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Subject: Filing Docket 060658

Attachments: PEF Memorandum on Case Issues.pdf



PEF Memorandum
on Case Issues....

<<PEF Memorandum on Case Issues.pdf>> Attached for filing in Docket 060658 is Progress Energy Florida, Inc.'s Memorandum on Case Issues (with Exhibit A for a total of 17 pages).

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FPSC-COMMISSION CLERK

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition on behalf of Citizens of)
the State of Florida to require) DOCKET NO. 060658-EI
Progress Energy Florida, Inc. to)
refund to customers \$143 million) Filed: March 12, 2007
_____)

PROGRESS ENERGY FLORIDA, INC.'S MEMORANDUM ON CASE ISSUES

Progress Energy Florida, Inc. ("PEF" or the "Company"), pursuant to Order No. PSC-07-0191-PCO-EI, hereby submits its Memorandum on Case Issues in this matter, and states as follows:

On March 2, 2007, the Commission issued Order No. PSC-07-0191-PCO-EI instructing the parties in this matter to file memoranda on case issues no later than March 12, 2007.

Specifically the Commission instructed the parties to address:

1. Any issues the parties wish to have the Commission resolve that are not included in the list of tentative issues attached to the original Order Establishing Procedure;
2. The rationale for such proposed additional issues; and
3. The rationale against any other proposed issues that have been identified thus far by the parties.

PEF Supports the List of Tentative Issues in the Original Order Establishing Procedure as Adopted by Staff in its Proposed List of Preliminary Issues¹

On February 26, 2007, Staff filed its list of preliminary issues in this matter. Those issues are as follows:

ISSUE 1: Did PEF act prudently in purchasing coal for Crystal River Units 4 and 5 beginning in 1996 and continuing to 2005?

¹ PEF notes that by responding to these issues, PEF does not waive any argument it has raised, and continues to assert, that any review of PEF's coal procurement practices prior to 2004 is illegal, unconstitutional, and constitutes prohibited retroactive ratemaking.

ISSUE 2: If the Commission determines that PEF acted imprudently in its coal purchases, should PEF be required to refund customers for coal purchased to run Crystal River Units 4 and 5 during the time period of 1996 - 2005?

ISSUE 3: If the Commission determines that PEF should be required to refund customers for coal purchased to run Crystal River Units 4 and 5, what amount should be refunded?

ISSUE 4: If the Commission determines that PEF should be required to refund customers for coal purchased to run Crystal River Units 4 and 5, how and when should such refund be accomplished?

PEF supports and adopts the preliminary issues proposed by Staff which are the same as those included in the original Order Governing Procedure -- for the reasons set forth in more detail below. All other issues proposed by the Interveners are unnecessary.

Staff's Proposal Adequately Covers the Issues in This Case

The fundamental issue in this case is whether PEF acted prudently in purchasing coal for Crystal River Units 4 and 5 beginning in 1996 and continuing to 2005. All parties who are actively participating in this matter have filed testimony on this issue and those parties will all present witnesses at the hearing in this matter to address this issue. Through the pre-filed direct, reply, and rebuttal testimony and the evidence presented at the hearing, the Commission will hear and consider evidence on this matter and will ultimately rule on one and only one threshold issue: Did PEF act prudently in purchasing coal for Crystal River Units 4 and 5 beginning in 1996 and continuing to 2005? In considering this question, the Commission will determine whether judgments made by PEF's management from 1996 to 2005, at the time they were made, fell within a range of reasonable business judgments. See In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor, Order No. 19042, Docket No. 880001-EI, 1988 Fla. PUC LEXIS 1030 (Mar. 25, 1988) (Commission refused to substitute its judgment for that of the utility's management, where the utility's actions were not "so

unreasonable” so as to “rise to the level of imprudence.”) In applying this standard, the Commission is not and cannot be bound to some “formulaic equation” or “roped checklist” of what constitutes prudent or imprudent behavior. Rather, the Commission must necessarily weigh all the facts, circumstances, and evidence, using proper review standards, and make a simple determination as to PEF’s prudence.

The original list of issues proposed in the Commission’s original Order Governing Procedure that were adopted and proposed by Commission Staff as its preliminary list of issues does an excellent job of framing the critical issues in this case in a manner that will allow the Commission to properly rule on prudence without falling prey to myriad legal and procedural errors that are inherent with a list of issues that try to formulaically define prudence or that attempt to limit the Commission to a certain set of facts for consideration in determining prudence. Because the only question in this case is whether PEF acted prudently in purchasing coal for Crystal River Units 4 and 5 beginning in 1996 and continuing to 2005, simple logic and common sense dictate that no other issues, besides the fallout issues reflected in Staff’s Issues 2-4, are needed. As discussed in more detail below, any attempt to convolute this straight-forward issue with other issues that selectively attempt to “define” and limit what facts the Commission can consider in determining prudence increases the likelihood of legal and procedural error.

The Interveners’ Additional Cherry-Picked Issues Miss the Heart of the Case

I. OPC’s Proposed Issues

In an attempt to limit the Commission to a “cherry-picked” list of selective issues that OPC would like the Commission to narrowly focus on in evaluating prudence in this matter, OPC has submitted the following list of unnecessary issues that, for the reasons set forth in detail below, will do nothing more than: (1) improperly limit the Commission’s review; (2) confuse

and convolute the straight forward issue in this case; (3) introduce non-neutral issues that are based, in some instances, on facts not proven; and (4) will inevitably lead to legal error if used. For ease of reference, we set forth OPC's proposed issues and PEF's responses to each below:

1. *During the period of 1996 through 2005, were there available to PEF sources of subbituminous coal from the Powder River Basin ("PRB coal") that were more economical on a delivered basis than the 100% bituminous coal and the blend of bituminous coal and bituminous-derived synthetic fuel ("synfuel") that PEF purchased and burned at Crystal River Units 4 and 5 during the period? If so, did PEF know, or should PEF have known, of the availability of this more economical fuel at the time?*

PEF Response:

First, this issue is aptly subsumed by Staff's proposed Issue 1. Second, the use of the term "economical" highlighted above could improperly suggest that price is the only consideration for the Commission to consider in determining prudence, while OPC acknowledged at the first issues conference that price is not the only consideration. Also, the use of the highlighted term "delivered basis" improperly assumes that the delivered basis is the proper way to evaluate economics, which is an issue in dispute in this matter.

2. *Could PEF have burned the blend of 50% PRB coal and 50% bituminous coal that CR4 and CR5 were designed to burn in sufficient quantities so as to have generated the same output of electricity that PEF generated during the period with bituminous coal and a blend of bituminous coal and synfuel?*

PEF Response:

This issue is aptly subsumed by Staff's proposed Issue 1. Also, the use of the highlighted term "designed to burn" above assumes facts that have not been proven and that are in dispute in this matter.

a. As specified by PEF's predecessor, were the units capable of generating the same output that PEF experienced with bituminous coal and bituminous/synfuel while operating with the six pulverizers (per unit) supplied by Babcock & Wilcox under the contract?

PEF Response:

This sub-issue is aptly subsumed by Staff's proposed Issue 1. Additionally, the highlighted term "specified by PEF's predecessor" is vague and assumes facts that have not been proven and that are in dispute in this matter. Further, the highlighted term "generating" could be read to suggest that the number of pulverizers is the only consideration in generation output. Finally, the highlighted term "supplied by Babcock & Wilcox under the contract" is vague and assumes facts that have not been proven and that are in dispute in this matter.

- b. As specified by PEF's predecessor, were the boilers, precipitators, and other components of CR4 and CR5 capable of accommodating or mitigating the combustion properties of the PRB/bituminous blend successfully during operations?*

PEF Response:

This sub-issue is aptly subsumed by Staff's proposed Issue 1. Additionally, the highlighted term "specified by PEF's predecessor" is vague and assumes facts that have not been proven and that are in dispute in this matter. Further, the highlighted term "combustion properties" could be read to suggest that these are the only properties of PRB coal that could impact on successful operations. Finally, the highlighted term "PRB/bituminous blend" is vague and undefined.

- c. As specified by PEF's predecessor, were the coal handling and conveying systems at CR4 and CR5 capable of supplying to the boilers of CR4 and CR5 the 50/50 blend of PRB and bituminous coals in quantities sufficient to generate the same output that PEF experienced with bituminous coal and a blend of bituminous coal and synfuel during the period?*

PEF Response:

This sub-issue is aptly subsumed by Staff's proposed Issue 1. Additionally, the highlighted term "specified by PEF's predecessor" is vague and assumes facts that have not been proven and that are in dispute in this matter. Further, the highlighted term "supplying" could be read to suggest that the only issue is whether the coal handling and

conveying systems could physically supply PRB coal and not whether they could physically, safely, economically and efficiently supply coal.

d. Was PEF capable of blending the PRB and bituminous coals into the 50/50 mixture on site?

PEF Response:

This sub-issue is aptly subsumed by Staff's proposed Issue 1. Additionally, the highlighted term "blending" could be read to suggest that the only issue is whether the coal could physically be blended and not whether it could be physically, safely, economically and efficiently blended.

3. *Did PEF prudently design and implement its fuel procurement activities so as to solicit from the market the most economical fuel for CR4 and CR5?*

PEF Response:

This issue is aptly subsumed by Staff's proposed Issue 1. Additionally, the highlighted term "design and implement its fuel procurement activities so as to solicit" appears to suggest that the actual design and implementation of PEF's fuel procurement plan is at issue rather than whether PEF acted prudently in actually purchasing coal for Crystal River Units 4 and 5. By way of example, if the Commission finds that PEF did in fact prudently design and implement its procurement plan, would OPC stipulate that a "yes" to this issue would mean that PEF wins this case? The answer to this rhetorical question would obviously be "no" because the real issue is whether PEF acted prudently in actually purchasing coal for Crystal River Units 4 and 5, and that is the issue set forth in Staff's Issue 1.

4. *Did PEF prudently test the performance of CR4 and CR5 with the 50/50 blend of PRB and bituminous coals the units were designed to burn timely, so as to position itself to acquire and burn the most economical coal for the benefit of its customers?*

PEF Response:

This issue is aptly subsumed by Staff's proposed Issue 1. Additionally, the highlighted term "were designed to burn" assumes facts that have not been proven and that are in

dispute in this matter. Further, the highlighted terms “position itself” and “most economical coal” create a non-neutral inference when read together that a 50/50 blend of coal would have been the most economical coal, a fact that has not been proven and that is in dispute in this matter.

5. a. *Did the conditions of certification issued by the Governor and Cabinet provide PEF’s predecessor with the authority to burn the 50/50 blend of PRB and bituminous coals in CR4 and CR5?*

PEF Response:

This sub-issue, to the extent it is relevant to the issues in this case, would be subsumed by Staff’s proposed Issue 1. The highlighted terms “conditions of certification” assume that these conditions were the only applicable environmental restrictions. Additionally, the highlighted term “authority” is vague.

b. Did PEF and its predecessor prudently and timely acquire and maintain the necessary authority from environmental agencies to burn the 50/50 blend of PRB and bituminous coals in CR4 and CR5, so as to position themselves to use the most economical fuel for the benefit of customers?

PEF Response:

This sub-issue is aptly subsumed by Staff’s proposed Issue 1. Additionally, the highlighted terms “so as to position themselves” and “most economical fuel” create a non-neutral inference when read together that a 50/50 blend of coal would have been the most economical coal, a fact that has not been proven and that is in dispute in this matter.

6. *Do the properties of PRB coal that cause it to be dustier and more hazardous to store and handle as compared to bituminous coal constitute a basis for concluding that PEF should not have purchased the blend during 1996-2005, or were such safety considerations manageable with appropriate storage and handling protocols such that prudent management would have pursued the fuel savings for its customers that burning the blend would have provided?*

PEF Response:

This issue is aptly subsumed by Staff’s proposed Issue 1. Additionally, the highlighted terms “dustier and more hazardous to store and handle” can be read to suggest that these

are the only hazards with PRB coal, a fact that has not been proven and that is in dispute in this matter. The highlighted term “the blend” is vague and undefined. The highlighted term “safety” can be read to suggest that safety is the only issue to consider with respect to PRB coal use. The highlighted term “manageable” is vague and undefined. The highlighted term “storage and handling” can be read to suggest that these would be the only areas where PRB coal would have an adverse impact, a fact that has not been proven and that is in dispute in this matter. The highlighted term “protocol” is non-neutral and suggests that only protocols and not substantial capital upgrades would be needed to deal with PRB coal. Finally, the highlighted terms “fuel savings” and “would have provided” create a non-neutral inference when read together that a 50/50 blend of coal would have actually provided fuel savings, a fact that has not been proven and that is in dispute in this matter.

7. *Were the opportunities to save fuel costs by burning the 50/50 blend of PRB and bituminous coals outweighed by the capital investments and increased O&M expense that would have been necessitated, or were any such outlays of a magnitude that prudent management would have regarded as justified by the savings to be achieved?*

PEF Response:

This issue is aptly subsumed by Staff’s proposed Issue 1. Additionally, the highlighted terms “opportunities to save fuel costs by burning the 50/50 blend” and “savings to be achieved” directly assume that a 50/50 blend of coal would have actually provided fuel savings, a fact that has not been proven and that is in dispute in this matter. Further, the highlighted terms “outweighed by the capital investments and increased O&M expense” and “outlays of a magnitude” suggests that financial comparisons for capital and O&M expenses are the only proper considerations in evaluating PRB coal, a fact that has not been proven and that is in dispute in this matter.

8. *(combined legal and factual issue) Under the circumstances of this case, does the Commission have the authority to grant the relief requested by Citizens?*

PEF Response:

PEF agrees that the Commission's authority to grant the relief OPC requests in this matter is at issue, and PEF adopts and incorporates its proposed legal and policy issues set forth in its Prehearing Statement in this matter.

9. *Based on the resolution of the above issues, were the fuel costs associated with the operation of CR4 and CR5 during 1996-2005 prudently incurred and reasonable in amount? If not, by what amount did PEF and its predecessor overcharge its customers?*

PEF Response:

This issue is aptly subsumed by Staff's proposed Issue 1 and Issue 3. Further, the highlighted term "based on the resolution of the above issues" improperly limits the Commission's consideration of prudence in this matter to a non-neutral list of self-serving issues that OPC has "cherry picked" from its testimony. Further the highlighted term "overcharged its customers" is non-neutral as it could be read to suggest that PEF intentionally overcharged its customers, a fact that is not proven and that is in dispute in this matter.

10. What is the appropriate method of calculating interest on any overcharges determined by the Commission in this case?

PEF Response:

This issue is subsumed by Staff's proposed Issue 3.

11. Should the Commission direct PEF to refund excess fuel costs and associated interest in this case? If so, in what amount, in what manner, and over what period of time?

PEF Response:

This issue is subsumed by Staff's proposed Issues 2, 3, and 4.

As evidenced by the above, OPC's list of proposed issues is unnecessary, unfair, and unworkable. To the extent, however, that the Commission is inclined to adopt an approach such as the one that OPC suggests, PEF submits, under objection, the list of issues attached hereto as Exhibit A for the Commission's consideration. While PEF does not agree with OPC's approach

for all the reasons stated above, the list of issues submitted herewith as Exhibit A are neutrally drafted and attempt to address all of the parties' issues in this case rather than the select few offered by OPC.

II. FIPUG's Proposed Issues

PEF reiterates all its concerns and objections noted above regarding adding issues beyond those proposed by Staff. To the extent that the Commission is inclined to adopt FIPUG's proposed issues, however, PEF suggests that they be modified as reflected below:

- ISSUE 1:** During the period of 1996 through 2005, were there available to PEF sources of sub bituminous coal from the Powder River Basin suitable for use at Crystal River Unit 4 (CR4) and Crystal River Unit 5 (CR5) that were more economical than that purchased for CR4 and CR5 and that PEF knew or should have known about?
- ISSUE 2:** During the period of 1996 through 2005, were there available to PEF sources of foreign and Colorado bituminous coal suitable for use at Crystal River Unit 4 (CR4) and Crystal River Unit 5 (CR5) that were more economical than that purchased for CR4 and CR5 and that PEF knew or should have known about?
- ISSUE 3:** Is PEF authorized and are the coal handling and other operating facilities at CR4 and CR5 designed and constructed to safely, efficiently, and economically handle and burn 50/50 PRB and bituminous coal blends without uneconomically derating the plants' generating capacity?
- ISSUE 4:** Did PEF act prudently in purchasing coal for CR4 and CR5 beginning in 1996 and continuing through 2005?
- ISSUE 5:** If the Commission determines that PEF acted imprudently in its CR4 and CR5 coal purchases during the time period of 1996 through 2005, should PEF be required to refund customers for any related excess costs, including coal costs and excess SO2 allowance costs?
- ISSUE 6:** If the Commission determines that PEF should be required to refund customers for excess coal costs and excess SO2 costs incurred to operate CR4 and CR5 from 1996 to 2005, what amounts should be refunded?
- ISSUE 7:** What is the appropriate methodology for calculating the interest, if any, associated with any refund required in this docket?
- ISSUE 8:** What amount of interest associated with excess coal costs and excess SO2 costs, if any should be refunded to customers?

ISSUE 9: If the Commission determines that PEF should be required to refund customers for coal purchased to run CR4 and CR5, how and when should such refund be accomplished?

ISSUE 10: If the Commission determines that PEF refused to comply with or willfully violated any lawful rule or order of the Commission or any provision of Chapter 366, Florida Statutes, should the Commission impose a penalty on PEF?

ISSUE 11: If the Commission determines to impose a penalty on PEF, what should be the amount of the penalty and how should it be imposed?

III. AARP's Proposed Issues

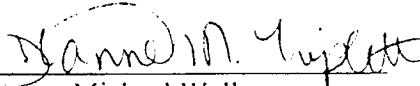
AARP has adopted OPC's proposed list of issues, and PEF incorporates all its objections noted above to that list. As to the specific penalty issue that AARP has raised in this matter, PEF proposes the following issues should the Commission feel that independent issues are needed to address AARP's claim for a penalty:

ISSUE ??: If the Commission determines that PEF refused to comply with or willfully violated any lawful rule or order of the Commission or any provision of Chapter 366, Florida Statutes, should the Commission impose a penalty on PEF?

ISSUE ??: If the Commission determines to impose a penalty on PEF, what should be the amount of the penalty and how should it be imposed?

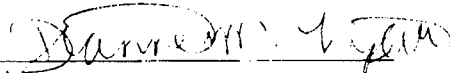
Respectfully submitted this 12th day of March, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail this 12th day of March, 2007 to all parties of record as indicated below.


Attorney

COUNSEL OF RECORD AND INTERESTED PARTIES

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PROGRESS ENERGY FLORIDA, INC.'S
MEMORANDUM ON CASE ISSUES

EXHIBIT A

COMPILATION OF ISSUES

- ISSUE 1:** During the period of 1996 through 2005, were there available to PEF sources of sub bituminous coal from the Powder River Basin suitable for use at Crystal River Unit 4 (CR4) and Crystal River Unit 5 (CR5) that were more economical than that purchased for CR4 and CR5 and that PEF knew or should have known about?
- ISSUE 2:** During the period of 1996 through 2005, were there available to PEF sources of foreign and Colorado bituminous coal suitable for use at Crystal River Unit 4 (CR4) and Crystal River Unit 5 (CR5) that were more economical than that purchased for CR4 and CR5 and that PEF knew or should have known about?
- ISSUE 3:** Did PEF reasonably consider factors other than just the actual commodity price for coal in its coal procurement decisions for CR4 and CR5 during the period of 1996 through 2005?
- ISSUE 4:** Did PEF reasonably consider the adequacy and reliability of supply of coal for CR4 and CR5 in its coal procurement decisions for CR4 and CR5 during the period of 1996 through 2005?
- ISSUE 5:** Did PEF reasonably consider the amount of coal needed for burns, inventory levels, and the amount of coal under contract in determining the quantity of coal that PEF needed to procure for CR4 and CR5 during the period of 1996 through 2005?
- ISSUE 6:** In evaluating coal purchasing options, was PEF reasonable in relying on the waterborne proxy rates established by the Commission for the water transportation costs for coal delivered to CR4 and CR5 by water from 1996 through 2005?
- ISSUE 7:** Was PEF reasonable in using an evaluated cost or busbar cost in PEF's evaluation of RFP responses during the period of 1996 through 2005?
- ISSUE 8:** Was PEF's evaluated cost or busbar cost methodology reasonable during the period of 1996 through 2005?
- ISSUE 9:** Did PEF reasonably consider potential delivery constraints and delays in making coal procurement decisions for CR4 and CR5 during the period of 1996 through 2005?
- ISSUE 10:** Was PEF's practice of conducting test burns for coal that was not previously burned at CR4 and CR5 that deviated from PEF's coal specifications reasonable during the period of 1996 through 2005?
- ISSUE 11:** Did PEF reasonably conduct test burns during the period of 1996 through 2005?

- ISSUE 12:** In evaluating coal purchasing options, did PEF reasonably consider the impact on the quality of coal at CR4 and CR5 resulting from the shipment of that coal from the mine to the plant during the period of 1996 through 2005?
- ISSUE 13:** In evaluating coal purchasing options, did PEF reasonably consider the safety of PEF equipment and personnel in handling coals at Crystal River during the period of 1996 through 2005?
- ISSUE 14:** In evaluating coal purchasing options, did PEF reasonably consider the costs to blend coals on site at Crystal River during the period of 1996 through 2005?
- ISSUE 15:** In evaluating coal purchasing options, did PEF reasonably consider the impacts on internal plant components of burning coals at CR4 and CR5 during the period of 1996 through 2005?
- ISSUE 16:** In evaluating coal purchasing options, did PEF reasonably consider potential de-rates from historical gross capacity and energy production at CR4 and CR5 during the period of 1996 through 2005?
- ISSUE 17:** Would the burning of a 50/50 PRB/bituminous blend of coals in CR4 and CR5 during 1996-2005 have resulted in a loss of MW output as compared to operations using bituminous coal only, as claimed by PEF?
- ISSUE 18:** Could the use of PRB coals at CR4 and CR5 have had an impact on the licensure and operation of Crystal River Unit 3, PEF's nuclear unit during the period of 1996 through 2005?
- ISSUE 19:** Did PEF act prudently in purchasing coal for CR4 and CR5 beginning in 1996 and continuing through 2005?
- ISSUE 20:** If the Commission determines that PEF acted imprudently in its CR4 and CR5 coal purchases during the time period of 1996 through 2005, should PEF be required to refund customers for any related excess costs, including coal costs and excess SO₂ allowance costs?
- ISSUE 21:** If the Commission determines that PEF should be required to refund customers for excess coal costs and excess SO₂ costs incurred to operate CR4 and CR5 from 1996 to 2005, what amounts should be refunded?
- ISSUE 22:** What is the appropriate methodology for calculating the interest, if any, associated with any refund required in this docket?
- ISSUE 23:** What amount of interest associated with excess coal costs and excess SO₂ costs, if any, should be refunded to customers?

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ISSUE 24: If the Commission determines that PEF should be required to refund customers for coal purchased to run CR4 and CR5, how and when should such refund be accomplished?

ISSUE 25: If the Commission determines that PEF willfully violated any lawful rule or order of the Commission or any provision of Chapter 366, Florida Statutes, should the Commission impose a penalty on PEF?

ISSUE 26: If the Commission determines to impose a penalty on PEF, what should be the amount of the penalty and how should it be imposed?