

# ORIGINAL

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b. Docket No. 060658-EI

In re: Petition on behalf of Citizens of the State of Florida to required Progress Energy Florida, Inc. to refund customers \$143 million

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 32 pages.

e. The document attached for electronic filing is Citizens' Memorandum on Issues for the Prehearing Order.

Thank you for your attention and cooperation to this request.

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**ORIGINAL**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition on behalf of Citizens of )  
the State of Florida to require )  
Progress Energy Florida, Inc. to )  
refund customers \$143 million )  
\_\_\_\_\_ )

DOCKET NO. 060658-EI

Filed: March 12, 2007

**CITIZENS' MEMORANDUM ON ISSUES FOR THE PREHEARING ORDER**

The Citizens of the State of Florida ("Citizens") by and through their undersigned attorney, Pursuant to Order No. PSC-07-0191-PCO-EI, issued in this docket on March 2, 2007, Citizens hereby submit their Memorandum addressing the issues to be included in the Prehearing Order.

I. The Citizens present for resolution the following issues that are not included in the list of tentative issues attached to the Original Order On Procedure.

Preliminary general comments:

Citizens wish to point out that the original list was described as "tentative" for good reason. As the Third Order On Procedure recites, the original Order stated only that, "A list of the issues identified thus far in this proceeding is attached hereto as Attachment A. The scope of this proceeding will be based upon these issues as well as other issues raised by the parties up to and during the Prehearing Conference, unless modified by the Commission."

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As the Commission noted at the time, the list was prepared at an early point: without input from Citizens, who prepared and filed the Petition and who are asserting the claim for relief. Significantly, the original Order was published on the same day that PEF filed the testimony of thirteen witnesses, the function of whose testimony was to assert defenses to the Petition that were not anticipated, much less developed, in the Petition and which, by virtue of timing, necessarily were not considered in the formulation of the “tentative issues.” On March 6, Citizens filed rebuttal testimony in which they dispute and take issue with the defenses raised by PEF in its January 16, 2007 testimony. The rebuttal testimony having collided with the defenses, the parties effectively put at issue more factual disputes than were known, much less considered, in the formulation of the tentative issues. Citizens have worked to identify those additional issues at each step of the Issue Identification process. Citizens have offered to work on the wording of issues, as long as the issues are raised and presented fairly for resolution. Staff, for whatever reason, opposes any attempt to modify or add to the preliminary issues which were, prepared without input from the Petitioners who initiated the proceeding and without consideration of new subjects raised after the tentative issues were prepared. PEF, having decided its interests are favored by broad, general issues that obscure and hide the nature of the factual dispute, has sided with Staff.

The framing of the issues affects the procedural due process afforded to the Petitioner. The “tentative” list should be regarded as ONLY that—a starting point, without any presumption of completeness or finality attached to it, so that when the issues subsequently are joined fully through the conflicting testimony, and the party whose claim is being evaluated has had an opportunity to frame the issues raised by the

Petition and PEF's response, the issues can be addressed without the impact of "inertia" emanating from the tentative list.

It bears repeating that this proceeding was initiated by Citizens; therefore, Citizens' articulation of the issues raised by the Petition should be given due weight in the framing, unless it is shown that Citizens are abusing the process, which they emphatically are not.

However, it is as much for the Commission's own needs that the Prehearing Officer should rule in favor of Citizens' proposed issues. Citizens ask the Prehearing Officer to keep foremost in her mind the proper functions of a Prehearing Order, as a consideration of those functions will determine the matters being placed before her.

The first function of the Prehearing Order is to inform and educate the panel of Commissioners assigned to the docket as to the nature of the disputes raised by the pleadings—a road map to the evidentiary hearing. Any prehearing order that fails to inform and educate the Commissioners is a disservice to the Commissioners and to the party asking the Commissioners to digest, consider, and rule upon the matters the party has brought to them. As the Prehearing Officer will appreciate immediately upon reviewing the four "tentative issues," they are virtually meaningless with respect to informing the Commissioners of the variety of factual issues being disputed by the parties.

A properly drafted prehearing order should give a detailed guide to the case at hand. A Commissioner should be able to read a well-drafted prehearing statement and understand all the issues that will be brought to the hearing.

The foregoing concept of a well-drafted prehearing statement is one the Commission has always embraced when presented with a complex array of factual disputes. Consider any rate case. If the goal is brevity, the entire substance should be encapsulated in the single issue: “Is the utility’s rate request reasonable?” Nevertheless, the prehearing order for a rate case often consists of more than two hundred separate issues. The current case likewise is factually too complex to be presented in just a few generic-type issues. The Commissioners will be better served by delineating the separate issues sought by Citizens.

In addition, the public is better served by a more detailed rendition of the issues. All parties to this process are here to serve the public. The PSC and the OPC are employed by the public and have the affirmative duty to act in the public interest. A prehearing order is a public document, meaning that it is the property of the public. It should be drafted so that it has value to the public. Limiting the Prehearing Order to a few generic-type issues serves only to obscure the issues that are part of the hearing. Our responsibility to the public should be considered.

The second function of the Prehearing Order is to identify and organize the arguments the parties will submit—a road map to the post-hearing memoranda and briefs. Any prehearing order that fails to articulate the substance of the case for organized post-hearing comment provides a disservice to the Commissioners and the parties. Citizens ask the Prehearing Officer to consider, for example, the practice of requiring parties to summarize positions on issues in (typically) 50 words or (when relief from the standard 50 is requested) 80 to 100 words. Citizens then request the Prehearing Officer to consider that (as will be developed below) the subjects encompassed within the direct and

rebuttal testimonies include whether the utility's procurement practices were well designed for customers, or whether they were skewed to be favorable to affiliates; whether Crystal River Units 4 and 5 were built to operate at the same limiting steam condition (5% overpressure) of which the units were capable when burning the blend of subbituminous and bituminous coals the units were designed to burn as when they burned bituminous only, or whether the units would generate less with the design basis blend; whether safety issues with Powder River Basin coal constitute a defense for not having bought and burned it in the past, or whether those safety issues can be handled with housekeeping protocols at low cost; whether the coal handling equipment is capable of supplying the increased quantity of blended coals necessary for full operation, or whether there would have been a shortfall and a resulting loss of generation; whether the blend would have necessitated large capital investments, or whether the capability of burning the blend was designed into the units and paid for by ratepayers at the outset. Citizens have enumerated some, but not all, of the subjects which the disputing parties have effectively placed at issue through conflicting testimony. Citizens ask the Prehearing Officer to gauge whether a party's position on all of these can be summarized in a single "position statement" of 80 to 100 words. The obvious answer that such a summary is impossible is one—but only one—clear indication that the four "tentative issues" are far too broad and general to serve any function, including the function of providing due process to Petitioners.

The third function that a prehearing order serves is to ensure that the matters the parties deem important are explicitly addressed and analyzed in the recommendation that the Staff submits to the Commissioners. The parties who have invested time and energy

to the presentation of matters important to them should not have to leave it to chance as to whether those matters are identified and analyzed in the decision making process.

The fourth function that a prehearing order serves is to prescribe the manner in which the matters will be teed up for the Commissioners' deliberations and vote. Unless the prehearing order ensures that the matters presented on the vote sheet for decision reflect the issues that the parties brought for disposition, the possibility of a vote that overlooks a matter deemed important to the party litigant is enhanced. Such an omission does a disservice to the Commissioners and to the parties.

Clearly, the objective of drafters of the four "tentative" issues was to arrive at the broadest, most general issues possible, and the fewest possible in number. But is that objective a desirable one, given the functions of a prehearing order? Is there any virtue in having the broadest, most general issues, if the impact is not to educate and inform the Commissioners prior to the hearing, but instead to obscure from view the nature of the disputes the parties have brought to the Commission? Is there any advantage to having the broadest, most general issues possible, if the impact is not to ensure a uniform presentation of arguments in post-hearing briefs, but instead to ensure they will be inconsistently organized? Is it an accomplishment to arrive at the broadest, most general, fewest issues, if the result is to virtually guarantee that the Petitioners will not know which of their arguments were accepted and which were rejected?

Citizens understand that the matters brought to the Commission must be procedurally manageable. However, the issues identified by Citizens are not in the least unwieldy. In a proceeding that covers a decade of time, a myriad of defenses, twenty witnesses and a demand for a refund of more than \$100 million, Citizens have proposed

fewer than twenty issues. Citizens ask the Prehearing Officer to review Prehearing Order No. PSC-06-0301-PHO-EI, which set the stage for the hearing on terms and conditions of financing orders involving storm damage reserve, for an example of the level of detail (86 separate issues) the Staff and the Commission deem appropriate when they, are actively involved in framing the issues. A comparison of that order and the four “tentative issues” attached to the original Order On Procedure will demonstrate vividly that to allow only the four general “tentative” issues would shortchange Citizens procedurally in this case. Citizens are confident that, once the Prehearing Officer compares these four broad, general, uninformative issues with those put forward by Citizens, it will be clear that the effect of denying Citizens’ requested issues would be to deny them due process.

Each of Citizens’ issues developed below is needed to serve the functions of a prehearing order. None are included in the tentative issues.

The first “tentative issue,” which Staff has refused to modify, reads 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?

Citizens: This issue, as framed, is unacceptable to Citizens. In their Petition and in their testimony, Citizens assert that PEF constructed Crystal River 4 and 5 to have the capability of burning a blend of Eastern bituminous and Western subbituminous coals; that subbituminous coal from the western Powder River Basin became the more economical choice in the early 1990’s; and that PEF elected to burn bituminous coal and bituminous-derived synfuel instead, much of it from its affiliates. Even PEF says, in the

very first sentence of its General Statement of Position, “This proceeding is about OPC’s allegation that PEF should have purchased and burned an equal blend of sub-bituminous coal from the Powder River Basin (PRB) with bituminous coal at PEF’s Crystal River compliance coal units 4 and 5 . . .from 1996 to 2005.” Yet not even this most fundamental aspect of the proceeding on Citizens’ Petition would be communicated to the Commissioners if the “tentative issues” are not modified. Nor could the Citizens frame a response that would adequately inform the Commissioners without devoting pages to the subject instead of a paragraph. The issue is simply too general and too broad to serve a purpose other than to serve as the ultimate, conclusory determination after the more specific factual disputes are identified and resolved. Needed is Citizens’ first issue, which asks:

ISSUE 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?

This issue is appropriate and needed because it informs the Commissioners of the primary factual contention of the Petition. The “tentative issues” do not.

On the same date that the tentative issues were attached to the First Order On Procedure, PEF filed testimony in which it asserted matters which, in a civil trial proceeding, would be deemed “affirmative defenses.” In a civil proceeding there necessarily would be a formal ruling on each such “affirmative defense.” The rules of the Commission are such that PEF did not have to declare its defenses as formally; however, PEF hopes to avoid the impact of a finding for Citizens on the merits of the Petition by persuading the Commission that, even if true, there are reasons that the Commission should not require PEF to refund overcharges to customers. By supporting the “tentative issues,” PEF apparently believes its own interests are served by a set of issues that are so vague that the ability of the Commissioners to understand the matters at hand is impeded, its defenses will become amorphous, and the Commission’s vote indistinct. That is unacceptable to Petitioners. Petitioners want to be able to determine whether PEF’s individual defenses are accepted or rejected. The clear path to granting this reasonable request is to identify an issue for each such defense. The Commissioners will be informed of the utility’s arguments in defense; the post-hearing briefs can address each in an orderly fashion; Staff can analyze each in orderly sequence; and the Commission will vote in an intelligible fashion—all of which are necessary to provide procedural due process.

One such PEF “defense”—submitted simultaneously with the original Order On Procedure and thus not contemplated by the “tentative issues,” is the proposition that, had PEF burned the blend of bituminous and subbituminous coals in CR4 and CR5, the units would have generated less electricity and the replacement costs would have outweighed any fuel savings. In rebuttal, Petitioners’ expert asserts the units were specified by PEF,

designed by its architect and engineer, and designed and built to ensure the units would operate at the same maximum steam pressure with the blend as with the straight bituminous coal. This subject is critical to an understanding of the case. Yet, the four “tentative issues” would reveal nothing about the factual dispute to the Commissioners, would not frame the matter for post-hearing memoranda, and would not present the subject as a distinct item for analysis by staff and disposition by the Commissioners. Needed is Citizens’ Issue 2, which reads:

ISSUE 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?

This wording frames the critical issue of whether CR4 and CR5 were capable of matching the output when burning the blend of coals that PEF experienced with the bituminous coal. Moreover, it needs subparts.

PEF specified, and its designer and builders built and delivered, units having six pulverizers each. Space was left for a seventh pulverizer. In testimony delivered on the same day that the original Order On Procedure was issued, and therefore not known or contemplated by the “tentative issues,” PEF’s witness contends that, had the units burned the blend of coals, the seventh pulverizer would have been “inherently” necessary to enable the units to match the output with bituminous coal. Citizens’ expert rebuts the

contention by pointing to the design capabilities and contract documents, which lead him to conclude the units were designed and built to deliver the maximum allowable steam pressure (and hence maximum MW) with only five of the pulverizers in operation. The “tentative issues” would do nothing to inform the Commissioners of this critical dispute. Needed is Citizens Issue 2a:

Were the units capable of generating the same output with the blend of PRB and bituminous coals that PEF experienced with bituminous coal and bituminous/synfuel while operating with the six pulverizers (per unit) supplied by Babcock & Wilcox under the contract?

In testimony delivered on the same day the original Order On Procedure was issued, and therefore that the “tentative issues” attached to that order did not contemplate, PEF’s witness “defends” against the allegations of the Petition by asserting the units were not designed to handle the ash deposition characteristics of PRB coal without deratings. In rebuttal, Citizens’ expert asserts the properties of the PRB ash were understood, and the designers of the units provided the means with which to avoid the ash deposition problems and maintain output. This joining of the issue is central to the case. The “tentative issues” would shed absolutely no light on the subject. Needed is Citizens’ Issue 2(b), which asks:

As specified by PEF's predecessor, were the boilers, precipitators, and other components of CR5 and CR6 capable of accommodating or mitigating the combustion properties of the PRB/bituminous blend successfully during operations?

In testimony delivered on the same date the original Order On Procedure was issued, and therefore was neither known nor contemplated when the four broad "tentative issues" were prepared, PEF's witness asserts the coal handling equipment in the CR coal yard would not have delivered the increased quantities of the PRB/bituminous blend necessary to maintain maximum output equivalent to the all-bituminous scenario. In rebuttal, Citizens' witnesses point to the design capacity ratings of the equipment to show there would have been ample capacity. The "tentative issues" would shed absolutely no light on this critical factual dispute. Needed is Citizens' Issue 2 (c), which states:

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?

As a defense to the allegations of the Petition, in testimony submitted on the same date the original Order On Procedure was issued, and therefore neither known nor contemplated by the four "tentative issues," PEF's witness maintains that the equipment on site that was intended to blend the western and eastern coals into the 50/50 mixture

would have been inadequate for the purpose, and the replacement cost of the equipment would have been many millions of dollars. In rebuttal, Citizens' witnesses point to the design of the existing system, PEF's acceptance of the system from the vendors, and point to the fact that to replace perfectly adequate equipment with new would be wasteful treatment of ratepayers' money. The tentative issues would not identify this issue, worth tens of millions of dollars, to the level of consciousness. Needed is Citizens' Issue 2(d), which states:

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

Citizens contend the very procurement activities of PEF and its affiliate were flawed, and were inadequate to secure the most economical source of coal for the customers. PEF denies this is the case. The allegation and the denial of the allegation precipitate a factual issue that is fundamental to the case. The tentative issues would do nothing to inform the Commissioners of this dispute. Needed is Citizens' Issue 3, which states:

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?

As a defense to the allegations of the Petition, PEF asserts that it could not have burned the blend during the time frame identified by Citizens because it had never burned

the blend before and would have required lengthy test burns prior to initiating the burning of the blend. In rebuttal, Citizens maintain that PEF put itself in a position in which it was unable to react and save money for ratepayers because it failed to perform a stack test with the blend as soon as the units were completed. The tentative issues would not capture any part of this factual issue. Needed is Citizens' Issue 4, which states:

Did PEF take those prudent measures necessary to position itself to acquire and burn the most economical coal for the benefit of its customers?

As a defense to the allegations of the Petition, which defense was raised in testimony submitted on the same day the original Order On Procedure containing "tentative issues" was published, PEF's witness argues that PEF did not have "absolute authority" to burn the blend of coals even under the Conditions of Certification issued by the Governor and Cabinet. In rebuttal, Citizens' witness points to PEF's own application to the DEP for authority to perform a test burn, in which PEF states the Conditions encompass the blend, and testifies that PEF had the same authority to burn the blend as it had to burn the bituminous coal. The tentative issues do not address this issue at all. Needed is Citizens' Issue 5, which states:

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?

As a defense against the allegations of the Petition, which defense was submitted in testimony on the same day that the order containing the tentative issues was published, and thus were not considered in the formulation of the tentative issues, PEF's witness asserted that Powder River Basin coal is hazardous and has the potential to cause fires and explosions. In rebuttal, Citizens' witness asserts that the means of keeping PRB coal safe—dust suppression, compaction of coal piles, frequent washdowns—are well known, are within the capabilities of competent utility management, and are inexpensive in relation to the scale of fuel savings that PRB has afforded utilities the opportunity to achieve for their customers over time. The tentative issues do not provide the Commissioners the first hint that this factual dispute is part of the case. Needed is Citizens' Issue 6, which states:

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?

As a defense against the allegations of the complaint, which defense was filed in testimony on the same date the first Order On Procedure was published, and so was not known or considered when the tentative issues were formulated, PEF's witness asserted that PEF would need to expend more than \$60 million in capital costs to prepare the unit

to accommodate the blend of PRB and bituminous coals—making it appear that a cost-effectiveness test would support the decision not to purchase and burn the western subbituminous coal. In rebuttal, Citizens’ witness testifies that the estimates belong more to units that were not designed to burn PRB coal in the first place; that the estimates conflict with the findings of a consulting engineering firm that looked at the question before Citizens filed their petition; and that, because the units were well designed, the investment needed to enable the units to burn the blend would be limited to inexpensive enhancements of safety systems—some of which were constructed at the time the units were being built, but which PEF had either removed or allowed to deteriorate. The tentative issues do not disclose that this factual issue is part of the case. Needed is Citizens’ Issue 7, which reads:

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?

Although the Commission denied PEF’s Motion to Dismiss, in which PEF challenged the jurisdiction of the Commission to afford the relief requested in Citizens’ Petition, as a defense to the Petition—which defense was asserted on the same day that the first Order On Procedure was published, and thus was not considered in the formulation of the tentative issues—PEF asserted in testimony that the Commission has already found its expenditures to be prudent and that Citizens’ prayer for relief should be

denied in light of the need for finality and the skittishness of capital markets. In rebuttal, one of Citizens' witnesses, an expert in cost of capital, testifies that the Commission established by order the tradeoff between a utility that wants the ability to collect fuel costs from customers near in time to the point the costs are incurred, on the one hand, and the degree of uncertainty a utility that chooses not to prove up prudence with all relevant facts and the intent of the Commission to consider all relevant facts without time limitation, on the other. Another witness for Citizens, who as a former PSC staff member held responsibility for processing utilities' fuel collection requests, testified that the fuel clause proceeding worked in practice just as the Commission laid it out in orders, and that when making recommendations he never considered that he was recommending, or that the Commission was adjudicating, final findings of prudence. This important issue is not hinted at in the tentative issues. Needed is Citizens' Issue 8, which states:

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

Only after identifying, framing, and resolving Citizens' Issues 1-8 do the "tentative issues" now labeled 1-3 in Staff's Prehearing Statement serve a useful purpose as the conclusory "fallout" issues.

II. Response to PEF's "Legal and Policy" issues:

1. PEF's Issue 1L states: "Is the Commission barred, by the prohibition against retroactive ratemaking, from requiring PEF to refund coal purchased to run Crystal River Units 4 and 5 during the time period of 1996-2005?"

Citizens object to this issue on the grounds the ability to adjust past fuel cost recovery collections without engaging in retroactive ratemaking is settled law. In Order No. 12645, the Commission ruled that it will not be limited by an arbitrary time frame if the utility fails to present all relevant facts bearing prudence and evidence of imprudence subsequently is presented by other parties. In Gulf Power vs. Florida Public Service Commission, 487 So.2d 1036 (Fla. 1986), the Florida Supreme Court upheld the Commission's authority to act accordingly. Nevertheless, Citizens understand that the period subject to adjustment is dependent on the facts and circumstances of each case, and would accept an issue that asks:

Alternative Issue 1L: Under the facts and circumstances of this proceeding, does the Commission have the legal authority to grant the relief requested by Citizens?

2. PEF's Issue 2L reads: "Is the Commission barred, by the principle of impermissible hindsight review, from requiring PEF to refund coal purchased to run Crystal River Units 4 and 5 during the time period of 1996-2005?"

Citizens do not object to this issue. Prior to the Prehearing Conference, Citizens will formulate a position in which Citizens will assert that at no point do Citizens ask the Commission to apply a “hindsight standard” in this case.

3. PEF’s Issue 3L asks: “Is the Commission barred, by the principle of administrative finality, from requiring PEF to refund coal purchased to run Crystal River Units 4 and 5 during the time period of 1996-2005?”

Citizens object to this issue on the grounds that it is a matter of settled law that the principle that the fuel cost recovery proceeding is a continuing matter, and that administrative finality is inapplicable where not all relevant facts bearing on prudence have been presented by the utility. Citizens understand that the extent of the Commission’s ability to grant the relief requested in their Petition is dependent on the facts and circumstances of this case. This issue would be captured by the wording suggested in response to PEF’s 1L, above.

4. PEF’s Issue 1P states: “Should the Commission limit the amount of time it can look back, to an issue regarding a utility’s fuel costs, to when the utility is first put on notice of that issue?”

Citizens object to this issue on the grounds that it seeks to alter settled law; that is, by Commission Order No. 12645 the legal authority of the Commission to consider, in a

case in which the utility has not presented all relevant facts bearing on prudence, evidence of imprudence when presented by other parties was established.

### III. Additional matters:

In an earlier compilation of issues, PEF indicated it would pursue a longer list in the event Citizens prevail on their request to expand beyond the “tentative issues.” In Citizens’ Prehearing Statement, Citizens objected to the manner in which many of PEF’s additional issues were formulated. PEF did not include those issues in its Prehearing Statement. In the event PEF reintroduces those additional issues, Citizens reserve the right to renew its objections to them. As a general response, OPC objects to the wording of many of PEF’s proposed issues on the grounds that they ask whether a particular matter was “reasonable” or whether PEF “reasonably” considered a subject. As worded, there is no mention of the prudence standard. The issue appears to imply that if a matter was considered, the consideration of it was “reasonable”—without broaching the different standard of whether the decision made was prudent under the circumstances. Because the problem occurs in so many of PEF’s issues, OPC makes this general objection applicable to all such issues.

As a “place holder,” Citizens incorporate and provide here the comments on PEF’s more detailed list that is contained in Citizens’ Prehearing statement.<sup>1</sup>

ISSUE 1: During the period of 1996 through 2005, were there available to PEF sources of sub bituminous coal from the Power River Basin suitable for use at Crystal River Unit 4 (CR4) and Crystal River Unit 5 (CR5) that

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<sup>1</sup> Citizens reserve the right to present additional arguments or to offer alternative language in the event PEF renews its request for these issues.

were more economical than that purchased for CR4 and CR5 and that PEF knew or should have known about?

OPC: This is duplicative of OPC's list, item \_\_\_.

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?

OPC: Yes. Foreign and Colorado coal was available and cheaper than eastern bituminous coal and/or synfuel. To that extent, OPC witness agrees with Staff witness Windham. However, during the period 1996-2005 Powder River Basin coal generally was cheaper than foreign and Colorado bituminous coal. (Sansom)

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?

OPC objects to the issue as currently stated, because the term phrase "factors other than just the actual commodity price for coal" is vague and ambiguous.

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 1996 through 2005?

OPC: If the issue and PEF's position on the issue are designed to assert that the supply of Powder River Basin coal was inadequate or unreliable, then OPC states that there is no evidence that any such consideration played any part of PEF's failure to purchase PRB coal at the time; further, the supply was adequate and reliable, and any view to the

contrary would have been contradicted by known facts and imprudent on the part of management. (Sansom)

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 quality of coal that PEF needed to procure for CR4 and CR5 during the period of 1996 through 2005?

OPC: There is no evidence indicating that such considerations played any part in PEF's failure to purchase PRB coal at the time. Further, PEF's own documents demonstrate that the coal under contract could have economically been moved from water delivery to rail delivery. Finally, even if the contracts presented an obstacle, which OPC disputes, prudent management would have moved to renegotiate the contract so that it could secure the dramatic fuel savings that could be accomplished by burning the blend of coals the units were designed to burn. (Sansom)

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 1996 through 2005?

OPC: No. To the extent that PEF considered the matter, it was mistaken in assuming and applying a "waterborne proxy" to PRB coal. PEF never requested, and the Commission never approved, a proxy to be applicable to either PRB coal or the route it would travel. (Sansom)

ISSUE 7: Was PEF reasonable in using an evaluated cost or busbar cost in PEF's evaluation of RFP responses during the period 1996 through 2005?

OPC: There is no evidence supporting the contention that PEF used an evaluated cost or busbar cost as the basis for its decisions regarding RFP responses at the time during

1996-2005. Even if it had, a properly performed evaluation would have demonstrated that PRB coal was the most economical choice for CR4 and CR5. (Sansom)

ISSUE 8: Was PEF evaluated cost or busbar cost methodology reasonable during the period 1996 through 2005?

OPC: There is no evidence supporting the contention that PEF used an evaluated or busbar cost analysis as the basis for its decisions in awarding contracts following RFPs in 1996-2005. In any event, a reasonable methodology would have demonstrated that PRB coal was the most economical choice during the period. (Sansom)

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?

OPC: There is no evidence supporting the contention that PEF considered delivery constraints and delays at the time it made coal procurement decisions during 1996-2005. In any event, a decision based on anticipated constraints would have been imprudent under the circumstances at the time. (Sansom)

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?

OPC: Office of Public Counsel objects to the issue as currently phrased. “. . .that deviated from PEF's coal specifications” is vague, unclear, and ambiguous. PEF's predecessor prescribed to the designers and builders of CR4 and CR5 the 50/50 blend of PRB/bituminous coals they were to assume as the basis for designing the units. PEF included in RFPs specifications for PRB coal that respondents met when they submitted bids. Subject to the objection, and without waiving it, OPC states that this is an example in which a practice may be “reasonable” but its implementation “imprudent.” The units

were designed to burn the 50/50 blend of PRB and bituminous coals. The purpose was to provide flexibility to PEF. Yet, PEF did not perform a stack test with the blend at the time the units were completed; nor did it perform a stack test at the time it applied for its first Title V air permit. Both omissions were imprudent, for reasons stated more fully in OPC's response to PEF's Issue 11. (Sansom)

ISSUE 11: Did PEF reasonably conduct test burns during the period of 1996 through 2005?

OPC: PEF's practice, as implemented, was imprudent in the extreme. PEF elected not to perform a test burn or stack test of the 50/50 blend at the time the units were completed. In addition to proving the design capabilities of the units, such a test burn would have facilitated and streamlined its ability to maintain the authority to burn the PRB/bituminous blend. PEF also elected to forgo including subbituminous coal in its first application for the then new federal Title V air permit. A limited stack test of the blend, coupled with the inclusion of subbituminous coal among the fuels for which PEF sought authority to burn under the Title V permit, would have continued the authority to burn PRB coal that lapsed when the Title V permit became effective in January 2000. (Sansom)

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?

OPC: There is no evidence supporting the contention that PEF considered this at the time it was making its procurement decisions. Assuming for the sake of argument that it did so, then to have forgone the opportunity to save customers many millions of dollars in fuel costs on the basis of possible minute changes in coal quality in transit would have been imprudent. (Sansom)

ISSUE 13: In evaluating coal purchasing options, did PEF reasonably consider the safety of PEF equipment and personnel on handling coals at Crystal River during the period of 1996 through 2005?

OPC: There is no evidence supporting the contention that safety was a consideration in failing to purchase PRB coal at the time procurement decisions were made in 1996-2005. Even assuming, for the sake of argument, that management considered safety, it would have been imprudent to forgo the opportunity to save customers many millions of dollars in fuel costs. PRB coal can be handled and stored safely with dust suppression, compaction of coal piles, and frequent washdowns. In fact, Black and Veatch designed and constructed many of the safety systems necessary for the safe handling of PRB coal. (Sansom)

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?

OPC: There is no evidence supporting the contention that the cost of blending coals entered the decision making process during procurement activities in 1996-2005. There is ample evidence that PEF's predecessor, Florida Power Corporation, specified to the designers and builders of CR4 and CR5 that the units be equipped with blending facilities on site. Even if one accepts, for the purpose of argument, that PEF considered blending costs at the time, to have forgone the opportunity to save customers many millions of dollars in fuel costs because of the minuscule incremental costs of blending would have been imprudent. (Sansom)

ISSUE 15: In evaluating coal purchasing options, did PEF reasonably consider impacts on internal plant components of burning coals at CR4 and CR5 during the period of 1996 through 2005?

OPC: There is no evidence to support the contention that “impacts on internal plant components” was a consideration at the time procurement decisions were being made during 1996-2005. Accepting for the sake of argument that “impacts” were a consideration, it would have been imprudent in the extreme for PEF to have forgone the opportunity to lower costs with a blend of PRB and bituminous coals, because PEF paid for enhanced units that specifically were designed to accommodate the blend successfully. PEF accepted those units as meeting its specifications. Therefore, even if it would have been “reasonable” for the subject to occur to PEF, to have based a decision on the possibility of such impacts, in light of the elaborate and extreme measures its designers and contractors had gone to prevent such impacts, would have been imprudent. To spend the extra money on units having that capability, only to abandon the capability based on impacts the utility paid its vendors to avoid, would have been imprudent in the extreme.

ISSUE 16: In evaluating coal purchasing options, did PEF reasonably consider potential derates from historical gross capacity and energy production at CR4 and CR5 during the period of 1996 through 2005?

OPC: There is no evidence supporting the contention that possible derates played any part of the decision making during procurement activities of 1996-2005. Assuming, for the sake of argument, that the subject arose. Even if addressing the possibility would have been reasonable, it would have been imprudent for PEF to have based a decision to forgo millions of dollars in lower fuel costs on that basis, because PEF (its predecessor) specified, and the designers and vendors built, units capable of maintaining maximum continuous capability (the 5% overpressure condition) without limitation—meaning the

units were as capable of maximum output when burning the 50/50 blend as they were when burning only bituminous coal.

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.

OPC: No Position at this time.

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?

OPC: There is no evidence that proximity to CR3 played any part of the decision making on procurement activities during 1995-2006. CR3 was built prior to the design and construction of CR4 and CR5. Had CR3 been a legitimate issue, prudent management would have undertaken to resolve that issue before spending customers' money on the more expensive, PRB-capable units. Further, PEF has applied for a permit to burn PRB coal at CR4 and CR5, so PEF must believe any issues associated with CR3 can be navigated. If, for the sake of argument, there may have been questions posed as a result of proximity to CR3, prudent management would have initiated the process to resolve them as early as possible, so that it would have been positioned to take advantage of opportunities made possible by the flexibility to burn PRB coal in addition to bituminous coal.

ISSUE 19: Did PEF act prudently in purchasing coal for CR4 and CR5 beginning in 1996 and continuing through 2005?

OPC: No. Prudent management would have taken advantage of the opportunity afforded by the flexibility it had purposely designed into CR4 and CR5. Prudent management would have acted on the same information that led other utilities at the time

to shift to PRB coal to save customers money—the same information that was available to PEF at the time. (Sansom)

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 and excess SO2 allowance costs?

OPC: Yes.

ISSUE 21: If the Commission determines that PEF should be required to refund customers for excess costs and excess SO2 costs incurred to operate CR4 and CR5 from 1996 to 2005, what amounts should be refunded?

OPC: \$134.5 million, plus interest. (Sansom)

ISSUE 22: What is the appropriate methodology for calculating the interest, if any, associated with any refund required in this docket?

OPC: This is duplicative of a staff item. OPC is willing to stipulate to the adjustment to OPC's original methodology proposed by PEF's witness.

ISSUE 23: What amount of interest associated with excess coal costs and excess SO2 costs, if any, should be refunded to customers?

OPC: To be provided

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

OPC: The refund should begin as quickly as practicable. The time frame should be structured so as to balance the objective of returning the money to customers quickly with the need to avoid impacts on earnings so severe as to constrain PEF's ability to provide quality service or obtain needed financing. OPC is open to further discussions of this subject consistent with these principles.

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?

OPC: No position at this time.

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?

OPC: No position at this time.

CONCLUSION

For the above reasons, the Commission should approve Citizens' proposed issues.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of foregoing Citizens' Memorandum on Issues for Prehearing Order has been furnished by electronic mail and U.S. Mail on this 12<sup>th</sup> day of March, 2007, to the following:

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