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 Submitted for filing April 25, 2007

FLORIDA INDUSTRIAL POWER USERS BRIEF IN SUPPORT OF REFUND TO CUSTOMERS

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STATEMENT OF FACTS AND THE CASE

Progress Energy of Florida is a regulated public utility, its maiden name was Florida Power Corporation (FPC). FPC built a 440 MW coal burning power plant near Crystal River, Florida in 1966. A second coal plant was built in 1969 with a nameplate capacity of 524 MW. It built an 890 MW nuclear plant on the same site that became commercially operative in March 1977. It added a 739 MW coal burning power plant to the site in December of 1982 and a fourth coal burning power plant with a 739MW nameplate capacity in October 1984.

The last two plants were more expensive to build than the first two coal plants because the boilers were bigger and other features were added to enable the plants to burn Powder River Basin (PRB) coal. Today the Crystal River site has power plants with a nameplate capacity of 3332 MW. 73% of the capacity comes from coal burning boilers, 27% comes from nuclear capacity. 60% of the coal burning capacity comes from the generators that are capable of burning PRB coal.

PRB coal has been less expensive and has less adverse environmental impact than coal that comes from the central Appalachian valley (CAPP coal), but it produces less energy (Btus) per pound. Because of the lower Btu value PRB coal requires the larger boiler to develop the same name plate capacity rating. When the nuclear plant and the last two coal burning power plants were certified FPC represented that it was appropriate to add the extra cost to its rate base because the fuel savings would more than off set the additional construction price. Base rates were set that allowed FPC to charge its customers a return on its investment on the more expensive power plants and a depreciation charge that allowed it to recover the investment over the useful life of the plants.

OPC witnesses contend that PRB coal could be burned at Crystal River, was less

expensive, avoided the need to acquire air emission allowances and required no significant capital additions to the existing plant.

OPC assesses damages at $116 million and demands a refund in this amount plus interest. The Attorney General agrees. FIPUG, AARP and White Springs agree with the OPC but say that there should also be a penalty, because interest at the Commission authorized rate will not serve as a disincentive to continue the abusive practices.

PEF, the successor to FPC, says that it is dangerous to burn PRB coal near a nuclear plant; that it would cost $61 million to upgrade the plant and would require extensive environmental permitting. In spite of these drawbacks it says it advertised that it was willing to accept bids for PRB coal but received no meaningful bids.

SUMMARY OF ARGUMENT

- PEF contracted to buy coal from an in house non regulated affiliate, PFC. PFC bought coal from other affiliated mining companies and third parties then resold it to PEF at a profit. PFC processed and transported coal through other affiliated companies at a profit to them. When coal prices fell and less expensive transportation alternatives became available from non affiliated companies PFC continued to purchase more expensive coal and transportation services in house to maintain the profitability of the non regulated affiliates. These actions were imprudent. Excess prices paid for coal during the period should be refunded to customers.*

FIPUG customers agree with the OPC, AARP, White Springs and the Florida Attorney General that the evidence in this case unmistakably demonstrates that the holding company's objective to enhance its profit resulted in excessive and imprudent charges to PEF's customers. It is not the ratepayers' role to fund sweetheart transactions for the benefit of a parent public utility holding company.

FIPUG finds that there are inconsistencies in the PEF presentation that are self defeating. PEF contends there were numerous coal fires outside of boilers over the ten year period. This isn't surprising because coal is purchased to burn and will burn at the wrong place if not properly handled. There was little attempt to explain the circumstances of the coal fires or to relate them to PRB coal. The PEF nuclear manager said he thought it unwise to burn PRB coal near the

nuclear plant he manages. If that is the case why did PEF spend the extra money to build the plants promising that fuel savings would offset the extra cost? If the disputed capital improvements were required it is not a fuel cost recovery clause issue it's a base rate matter. The improvements could have been accomplished handily in the normal course of business from base rate collections. PEF agreed to prospectively reduce its excess base rates by $125 million a year after 2002. It kept the excess base rates before 2002. By the agreement it also refunded additional excess revenues every year thereafter until 2005 as part of the 2002 rate settlement agreement.[1] There was plenty of cash available for the project, but that cash was converted to corporate profit. Profit was chosen over the duty to make the plant work as promised.

PEF says PFC solicited offers for PRB coal during the study period. It is unreasonable to assume that these were serious solicitations if the company believed the coal was too dangerous to burn and assets were not in place to burn it.

The managers of a public utility face two conflicting responsibilities, on the one hand they are requited by an express regulatory requirement to serve their customers at the lowest reasonable price, but on the other hand their salaries and continued employment depend upon their responsibility to enhance corporate profits.

Based on the facts presented at the hearing FIPUG concludes that PEF was more concerned about the need to serve its parent company than it was in protecting its customers. FIPUG argues that there should be a full refund of the overcharges plus a penalty. The Commission has authority to mandate a refund. It is the only agency that can and circumstances warrant reaching back to the beginning of overcharging. A biblical proscription is apt:

No man can serve two masters; for either he will hate the one, and love the other; or else he will hold to one, and despise the other. Ye cannot serve God and mammon.[2]

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[1] Review of Florida Power Corporation's Earnings **Error! Main Document Only.**Docket No.000824-EI Order No.PSC-03-0876-FOF-EI, July 30, 2003
DOCKET NO. 910890-EI; ORDER NO. PSC-92-1197-FOF-EI

[2] Mathew 6:24

The amounts PEF charged customers over and above the competitive market price for fuel during the 1996-2005 period found to be excessive should be refunded to customers with the appropriate interest and penalty.

ARGUMENT

ISSUE 1:

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

No. When a regulated utility operates under the aegis of a public utility holding company and buys coal, coal processing and coal transportation services from affiliated companies under secret non competitive agreements it is imprudent to charge customers more than the competitive market price for the product. Evidence discloses that PEF had the capability to burn less expensive coal. Even though other utilities turned to Powder River Basin coal to lower fuel costs to customers, PEF continued to purchase more expensive bituminous coal and "synfuel" from its affiliates and pass the extra costs on to customers.

Environmental Permitting

PEF specified, designed, procured power plant need certification and constructed two generating plants capable of burning PRB coal. The additional cost for this capability increased the long term cost passed through to customers in base rates. PEF was then surprisingly imprudent in failing to include the possibility that it would burn this low cost clean burning fuel when it became available in its initial Title V Air Quality Application and to perform the requisite test burn. This failure inhibited PEF's ability to give customers the benefit of the lower cost fuel it promised in return for the higher cost plant construction.

Coal Procurement Practices

PEF placed coal procurement exclusively in the hands of a non regulated affiliate that profited from the transactions and kept the dealings secret from the general public. When the scienter independent market studies demonstrates that other utilities paid from 10% to 50% less for coal during the 1996-2005 period an aura of impropriety falls upon the profitable in house transactions at customer expense. PEF's evidence that it merely published broadcast requests for proposals that included lower priced coal mines falls short of the burden it must bear to shed the mantle of misconduct.

CR-3

*CR3 went into commercial operation in March 1977. CR4 and CR5 came on line years later in 1982 and 1984. At that time PEF proved twice that even if it was possibly the only utility in the world to co-locate a nuclear plant on the same site with PRB coal plants the potential fuel savings to customers justified the nuclear risk and charging customers more money for construction to obtain future fuel savings. The contention today that it is imprudent to give customers the promised fuel savings by using the CR3 nuclear disaster shibboleth must be taken

with a grain of salt.*

CR-4 & CR-5 Operational Matters

PEF says PRB coal increases operating costs $ 2 million. It was imprudent not to spend this to get the promised savings. Witness Hatt testified plant improvements for cheaper coal would cost $61.2 million. Witness Basin said it would cost nothing. Improvements to utility plants are continuous. They are irrelevant in a fuel cost proceeding. They are base rate items. Even if the cost were needed, were relevant and the worst case scenario used, the maximum allowed return on a $61.2 million PEF plant upgrade is $6.1 million a year. This authorized return is more than off set by the annual depreciation charge customers already pay to renew and replace the two plants. If CR4&5 cost $900 million to build the depreciation charge customers were initially required to pay was $36 million a year. This is 6 times the sum required to cover the highest allowed return on Hatt's estimated plant improvements.

Megawatt Capacity

Evidence offered by OPC indicates there would be no substantial derating that would off set the anticipated fuel savings that arise from selecting a less expensive coal supply.

Coal Availability and Costs

The evidence presented by OPC and Commission Staff shows unequivocally that PRB and foreign coal was available. The evidence shows that other utilities found and bought less expensive coal. Progress Fuels appears to have done no more than advertise its interest. The existence of the Progress Energy holding company structure belies a real interest in competitively priced fuels. Miners know it and react accordingly. The holding company structure provides a disincentive to seek cheaper coal from non affiliated companies.

Affiliates

The affiliate relationship is the centerpiece of the consumers claim. PEF's fuel affiliate, PFC, did not act as broker for PEF, it bought fuel from other affiliates and third parties and then resold it to PEF at a profit. Not only PFC, but each of the other affiliates profited from the transaction. Under this arrangement great care must be taken by regulators for consumer protection. The need for careful scrutiny is exacerbated because all of the affiliate transactions are trade secrets. Independent review of the competitive market transactions during the study period disclosed the magnitude of the overcharge customers encountered.

Other Factors

The potential for affiliate abuse led to the creation of market proxies for barge transportation, but this proxy fell far short of dealing with the tangled web of affiliated transactions. There is no proxy for purchases from affiliate company owned mines, unloading, mixing and processing services from the affiliate owned shipping terminal, or for western coal purchases that could be delivered by third party rail. When independent studies show prices charged by affiliated companies resulted in higher than competitive market prices for coal customers refunds are in order.

The Commission must begin its analysis of the issues in this case with the recognition

that PEF, a monopoly provider of service to its captive customers, is required to enter into fuel acquisition arrangements which are prudent, cost-effective and in ratepayers' best interests. The Commission may only permit recovery from ratepayers of prudently incurred costs for activities undertaken in the public service. The Commission is the only[3] forum that can direct refunds to customers.

Careful monitoring is seriously impeded because many contracts, even with affiliated companies, are classified as trade secrets. As such they are beyond the purview of all but the Commission staff and the Office of Public Counsel (OPC). The staffs of these two public agencies are burdened with the responsibility each year to monitor a multibillion dollar portfolio of fuel contracts for five investor owned electric utilities and two gas utilities. The study spans two previous years and the forecast for the forthcoming calendar year. The essential data is not filed, only the gross expenditures for fuel. It is filed about 80 days before the Commission considers the matter. The time constraint and lack of detail defies careful study. If the time burden were not enough, the task is compounded by the fact that fuel cost recovery is studied contemporaneously with the cost recovery requests for conservation, environmental, and capacity costs plus GPIF rewards and penalties. Imbedded in each of the cost recovery activities will be innovative new ideas for guaranteed cost recovery outside of the sphere of base rates, such as gas storage, hedging, capital investments for fuel handling, transportation costs, etc, etc.

The standard measure for prudent fuel cost is the competitive market for the commodity. That will be the price paid by other utilities for the same or similar fuels with similar transportation. This information doesn't develop until reports are filed with the Federal Energy Regulatory Commission and is sporadically published in trade publications.

PFC/PEF's requests for bids were not serious attempts to solicit meaningful bids. They were instruments constructed to reach the preordained conclusion that PFC and its affiliated

[3] Richter vs. Florida Power Corporation 366 So.2d 798 (2d DCA 1979)

mines, terminals and transportation facilities would be the presumptive provider of coal acquisition and delivery services to PEF. The Commission will never know if a properly constructed, unbiased RFP would have sparked interest from the marketplace because PEF tainted the process.

As a regulated company PEF has an obligation to purchase, process and transport fuel in a manner that is in the best interest of its retail customers. When PEF pays higher than market prices to keep affiliated non regulated companies profitable the above market price differential should be refunded to retail customers.

The OPC provided sufficient evidence to demonstrate the ready availability of lower cost coal in the competitive market place between 1996 and 2005. [Exhibit 11] Independent evidence developed by the Commission staff confirms OPC's witnesses' findings that Progress paid above market prices for coal during the period from 1996 through 2005. The Commission staff study found PEF paid prices for coal that were 10 to 50% higher than the cost of coal acquired by other utilities located in the southeast. [Exhibit 156] PEF's shotgun approach response that PFC didn't receive bids for the lower cost coal, that it was dangerous to burn and that the generators designed to burn it were inadequate were all successfully rebutted by the OPC witnesses.

PEF is a subsidiary of a public utility holding company, Progress Energy Inc, which owns subsidiary regulated utilities in Florida (PEF) and North Carolina (PEN) along with numerous other affiliated but non regulated operating companies. PEF's contract with its sister company, Progress Fuels Corporation (PFC) and PFC's subsidiary agreements with other affiliated companies have the potential for abuse if not carefully monitored.

In 1935 congress restricted multiple state public utility holding companies[4]. The preamble to the act contains findings that set out the abuses discovered in the operations of public utility holding companies. The full findings are set out in an end note to this brief. [i]

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[4] 15 USC 79b 15 USC 79(b) Protection of investors and interests of consumers.

One of the findings that justified the act was:

"... it is declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected - ...

" (2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;..."

PUCHA was repealed recently, not because the findings were wrong, but because Congress concluded that regulatory constraints now in place can sufficiently protect the public.

In 1972 and 1973 before FPC became PEF and merged with PGN its fuel purchasing practices resulted in overcharges to customers. According to factual findings in U.S vs. Ballard et al, 663 Fd2d (5th CCA 1981) FPC and its customers were subjected to overcharges through an allegedly fraudulent scheme to increase fuel prices. The court set out the circumstances.

"Essentially, each of the appellants worked for enterprises which bought and sold oil. In the transactions here under consideration, the appellants caused these businesses to align themselves in what has been characterized as a "daisy chain." Each sold oil, at its maximum allowable price (and profit) to another which, taking its maximum profit, sold to still another in the chain. The several enterprises each realized its maximum profit before the oil was sold to the ultimate consumer, Florida Power Company."

In response to the discovery of the 1972 daisy chain operation the Florida Public Service Commission employed a special counsel who recommended an $8.5 million refund to customers. Florida Power admitted no wrong doing, but agreed to refund the fuel price overcharges. The Commission ordered a refund 7 years after the fact in 1979. Customers brought a class action, but the court held that the Florida Public Service Commission was vested with exclusive authority to grant refunds. It further held that ordering a refund was not retroactive rate making.[5]

In 1976 FPC created a fuel purchasing subsidiary that later became known as Progress

[5] Richter vs. Florida Power Corporation, , supra

Fuels Corporation (FPC) that operated in house. It also created unregulated but affiliated corporate subsidiaries to own coal mines, transportation equipment and terminal facilities for loading and unloading coal barges as coal was transported from the central Appalachian region to the mouth of the Mississippi River and then reloaded on affiliated company barges to be shipped to Crystal River. Each affiliated, non regulated entity sold fuel to the other and marked up the price until it reached FPC the ultimate consumer. FPC bore no price risk because it passed the final price along to its customers through the Florida Commission's fuel adjustment clause.

The new daisy chain is strikingly similar to the old except all of the profits go to the parent holding company under the tacit oversight of the Commission.

This initial conglomerate operation met the definition of a public utility holding company but was exempt from the Public Utility Holding Company Act because the operation could be "effectively dealt with" by a single state, Florida. The profits of the subsidiaries flowed to an unregulated parent holding company rather than to the regulated utility. The Florida Commission recognized the potential perils of the operation and required that prices between affiliates be competitive. It set up a proxy for competitive pricing, but that proxy dealing with barge traffic on the Mississippi was not applicable to the purchase of western PRB coal.

Prior to 1996 PRB coal was not readily available because of transportation restrictions from the far west. After that date the OPC alleges that transportation became available and could have been utilized by FPC, but was ignored. PRB coal purchases didn't fit into the profitable internecine daisy chain fuel purchase operation between FPC, PFC and the other unregulated subsidiaries in the chain dealing with PFC.

LEGAL PRINCIPLES APPLICABLE TO THE COMMISSION'S DECISION

The Burden of Proof: The burden of proving that PEF purchased fuel at competitive prices rests squarely with PEF. The rule that the burden of proof is on the utility in proceedings

involving rates is so well recognized that this Commission has labeled it "universally established."[6] In an investigation into the shut down of Crystal River Unit No. 3, the utility attempted to argue that intervenors had advocated a "refund of rates" and thus the propriety of the utility's collections were to be presumed. The Commission quickly put that novel idea to rest:

> The rule that, in proceedings involving rates requested by a utility company, the burden of proof is upon the applicant utility, has been universally established. Mississippi Public Service Commission v. Mississippi Power Company, 337 So.2d 936 (Miss. S. Ct., 1976); Pennsylvania v. Laurel Pipeline Company, 19 PUR 4th 454 (Penn. Commonwealth Court, 1977); Re: Hawaiian Electric Company, Inc., 10 PUR 4th 1, 535 P2d 1102 (Hawaii S. Ct., 1975); North Carolina ex rel. Utilities Commission et al. v. Duke Power Company, 206 SE 2d 269, 6 PUR 4th 390 (N.C. St. Ct., 1974). In such proceedings, the burden is upon the utility to demonstrate the reasonableness of the operating expenses for which it should be compensated to enable it to realize a fair rate of return. ... As in ratemaking proceedings generally, the burden of proof lies with the petitioning utilities to demonstrate the reasonableness and propriety of the expenses incurred.[7]

As in any case where a utility imposes charges upon its customers, PEF has the burden to prove that the costs it seeks are fair, just and reasonable. As this Commission has noted, the nature of the fuel adjustment is "continuous."[8] It has further held that:

> The burden of proof rests *solely* with the utility to document the reasonableness of its procurement practices and the resultant expenses from such practices.[9]

In addition, in its order on utility fuel procurement practices, Order No. 12645, discussed below, the Commission emphasized that the utility has the burden of proof:

> Any fuel or fuel related transaction which does not meet the above criteria *shall be denied recovery* through the fuel clause by the Commission, *unless the utility, which has the full burden of proof*, can demonstrate that the transaction is in the

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[6] *In re: Investigation into forced shutdown of Florida Power Corporation's Crystal River No. 3 unit,* Order No. 8994 at 2, Docket No. 780732-EU, August 3, 1979.

[7] *Id.*

[8] *In re: Investigation of Fuel Adjustment Clauses of Electric Utilities,* Order No. 12645 at 11, Docket No. 830002-EU, November 3, 1983.

[9] *Id.* at 12, emphasis added. *See also, In re: Investigation of forced shutdown of Crystal River No. 3,* Order 9775 at 4, Docket No. 780732-EU, January 30, 1981 ("the burden is upon the company to demonstrate that the fuel expenses which it proposes to recover from ratepayers were reasonably and prudently incurred."); *In re: Investigation into extended outage at Florida Power and Light Company's St. Lucie Unit No. 1,* Order No. 15486 at 21, Docket No. 840001-EI-A, December 23, 1985 ("[U]tilities bear the burden of demonstrating that their fuel costs are reasonable and prudent.").

best interest of the ratepayer.[10]

Periodic filings showing gross sums paid are insufficient to meet this burden. When credible evidence is presented showing that fuel prices exceed competitive market prices the utility should have the burden of going forward with proof explaining the differential. PEF did so in this case, but the proof fell short of the mark.

In Order No. 12645, the Commission discussed at length the fuel procurement policies regulated utilities must follow. Order No. 12645 includes Appendix A, entitled "Florida Public Service Commission Fuel Procurement Policy." Many of these articulated policies are directly applicable to the Commission's decision in this case.

For example, Policy IA states:

> The Public Service Commission requires that all expense associated with the procurement of fuel, fuel related handling services and *fuel transportation* which are recovered through the fuel adjustment clause *be prudently incurred*, *result from competitive procurement procedures*, *be reasonably competitive in cost or value* relative to what other buyers are paying under similar terms and conditions for fuel or services for comparable quality or specifications and result from sound administration of fuel supply agreements.[11]

Section II of the Commission's Policy Statement is entitled "Long-Term Agreements for Fuel, Fuel Handling Services, Fuel Transportation, Spot Purchase and Affiliate Transaction. Thus, it is particularly applicable to issues before the Commission. Policy IIB states:

> The Commission recommends that, to the extent practicable, such long-term contracts be negotiated in a *competitive* environment. It is recommended that the primary method employed should be an *open competitive bidding process* or some comparable alternative which produces the same result.[12]

Policy IID provides:

> Vendors should be selected on the basis of a *formal evaluation system* which is *neutral in its application* and capable of producing quantifiable ratings of individual suppliers. Considerations other than delivered price, fuel quality and vendor performance should be *thoroughly documented.*

As to transactions with affiliates, Policy IIP provides:

[10] *Id.* at 14, emphasis added.
[11] Order No. 12645 at 12, emphasis added.
[12] *Id.* at 13, emphasis added.

> All utility transaction[s] with affiliated companies which provide fuel or fuel related services should be based on costs which are *consistent with or lower than* the costs a utility would incur if the utility received the fuel or services form an independent supplier in the *competitive market obtained through competitive bidding.*[13]

PEF's actions in this case flout the requirements of the Commission's policies set forth above.

Finally, in *GTE Florida, Inc. v. Deason,*[14] the Court reversed the Commission's decision to reduce costs arising from a transaction between GTE and its affiliates. The Court articulated the rule applicable to affiliate transactions: "We believe the standard must be whether the transactions exceed the going market rate or are otherwise inherently unfair."[15] The PEF fuel charges to its customers fail both the market rate test and the inherent unfairness test. PEF fuel charges are not "market" rates because, as witness Sansom explained, in a competitive market, these inflated rates would not be paid.

The term "market," both as used in Order No. 20298 and in the *GTE* decision, means a *competitive* market. The *GTE* Court said as much: "the evidence indicates that GTE's costs were no greater than they would have been had GTE purchased supplies and services elsewhere."[16] Order No. 20298 also expressly speaks of *competitive* markets.[17]

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?

Yes. The Commission is the only forum in which customers can seek refunds. The Commission has the authority to grant refunds. When the alleged overcharges deal with trade secrets between affiliates a liberal review of lengthy time periods is in order.

ISSUE 3

Under the circumstances of this case, does the Commission

[13] *Id.* at 14, emphasis added.
[14] 642 So.2d 545 (Fla. 1994).
[15] *Id.* at 547.
[16] 642 So. 2d at 547.
[17] Order No. 20298 at 12.

have the authority to grant the relief requested by OPC?

Yes. Order Nos. 12645, 13452, and PSC 97-0608-FOF-EI, affirm the refund authority plus an extended look-back period. When regulated utilities combine into a Public Utility Holding Company, such as, Progress Energy and deal with a plethora of unregulated affiliates in secret transactions they should understand that the transactions can and will be subject to review for extended periods.

In Order No. PSC-92-1048-FOF-EI,[18] this Commission clearly articulated its ability to ensure just and reasonable rates. In that case, TECo sought to change the benchmark. The Commission denied TECo's request and noted that it had an obligation to change rates when the rates were not fair, just and reasonable:

> That is not to say that we could not modify the manner in which the benchmark is calculated if circumstances warranted such a modification. We are not precluded by any legal doctrine from considering Tampa Electric's petition, from reviewing the correctness and effectiveness of its market-based pricing method, or from modifying that method if we determine that it is in the public interest to do so. To the contrary, we are required to review and modify our rate decisions, on a prospective basis, by virtue of our continuing duty to regulate the rates and service of electric utilities. If we determine that the rates charged by a utility are not fair, just and reasonable, either to the company or to its ratepayers, we have the obligation to fix them. This continuing obligation applies to rates for fuel cost recovery as well as to other forms of rates. . . .
>
> Ratemaking is an ongoing, legislative function intended to be responsive to changing economic conditions. As the First District Court of Appeal recently stated in its order affirming the Commission's authority to correct, on a going forward basis, "an incorrect assumption" in a five-year-old rate order that had operated to the detriment of the utility's ratepayers:
>
> > Peoples Gas Systems, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966), and Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979), recognize an exception to the doctrine of administrative finality where there is a demonstrated public interest. Unlike the issues raised in those cases (authority to approve territorial agreements and the dormancy of transportation certificate), the issue of prospective rate-making is never truly capable of finality.
> > Sunshine Utilities v. Florida Public Service Commission, 577 So.2d 663 (Fla. 1st DCA 1991).
>
> See also Reedy Creek Utilities v. Florida Public Service Commission, 418 So.2d 249 (Fla. 1982), and Richter v. Florida Power Corporation, supra

[18] *In re: Petition for Clarification a [sic] Guidance on Appropriate Market Based Pricing Methodology for Coal Purchased from Gatliff Coal Company by Tampa Electric Company*, Docket No. 920041-EI, Sept. 23, 1992.

> We cannot modify our prior rate orders capriciously, without sufficient demonstration that the public interest requires the modification; but where the demonstration has been adequately made, we not only have the authority to make the appropriate modifications, we have the obligation to make them.[19]

In regard to the importance of its responsibility to ensure appropriate fuel adjustment charges, the Commission has also said:

> Because of the relative importance and impact of fuel costs upon the ratepayers, it is incumbent that electric utilities exercise all reasonable means to purchase the lowest costing fuel possible. Any deviation from this policy results in excessive monthly fuel adjustment charges, the majority of which are passed on to the ratepayers through the application of the fuel cost recovery clause. Where excessive charges for fuel are paid by a utility, *we find it to be our responsibility to correct such overcharges and take whatever measures are necessary in order to rectify that situation.*[20]

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, what amount should be refunded, and how and when should such refund be accomplished?

The Commission should determine savings PEF imprudently overlooked. The refund should be amortized over a twelve month period through a reduced fuel factor beginning at the earliest practicable date.

ISSUE 5

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, and what should be the amount of such penalty?

Yes. If the Commission finds that the potential savings were overlooked in order to enhance non regulated affiliate profits a penalty based upon the nature of the misfeasance should be imposed over and above interest. Interest at the commercial paper rate normally used by the Commission falls short of the mark as it would only penalize discovered overcharges with the cost of cheap debt available to highly rated corporations.

AARP Witness Stewart [TR 1112] correctly pointed out the fact that;

"to simply return to consumers the monies that were taken will provide no incentive to change

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[19] Order No. PSC-92-1048-PCO-EI at 11-12, emphasis in original.

[20] *In re: General investigation and show cause order as to alleged overcharges paid by Florida Power Corporation for spot purchases of fuel oil*, Order No. 8205 at 1-2, Docket No. 770671-CI, March 1, 1978 (emphasis supplied).

behavior in the future. No penalty in this case may actually encourage PEF and other utilities regulated by this Commission to be less aggressive in pursuing lower fuel alternatives. I would recommend that the Commission impose a penalty equal to 10 percent of the overcharges it ultimately finds should be refunded to PEF's customers."

FIPUG agrees.

ISSUE 6

Should this docket be closed?

Yes upon completion of the refund.

CONCLUSION

The dual responsibility of serving two masters placed on PEF's mangers to; 1) serve customers at lowest reasonable cost and 2) increase corporate profits, led to an unhappy result for customers. It is the Commission's duty in the public interest to help the managers out by requiring them to do right.

Building a power plant that could burn less expensive fuel that had less adverse impact on the environment was easy for management to do. It required a bigger investment and bigger profits and held out the promise for lower costs to customers, but when the time came to follow through with lower cost fuel managers reverted to the daisy chain scheme of the early 1970s and enhanced corporate profits for a plethora of unregulated affiliates rather than looking out for their customer's interest.

The Commission should order a refund of the excessive fuel charges, plus interest and add a 10% penalty to the sum.

[i] **Preamble to the Public Utilities Holding Company Act**

15 USC 79(b) Protection of investors and interests of consumers

Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected -

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; **when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary** public-utility companies; **when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;**

(2) **when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management,** construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital. [emphasis added]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Industrial Power Users Group's Post-Hearing Statement of Issues and Positions has been furnished by electronic mail and U.S. Mail the 26th day of April, 2007 to the following:

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