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ORIGINAL

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ɔ. Docket No. 060658-EI

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

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

d. There are a total of 44 pages.

e. The document attached for electronic filing is Office of Public Counsel's Post Hearing Brief .

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Thank you for your attention and cooperation to this request.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In Re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund to customers $143 million	)))))	Docket No. 060658-EI Filed: April 30, 2007

OFFICE OF PUBLIC COUNSEL'S POST HEARING BRIEF

I. INTRODUCTION, BACKGROUND, AND STATEMENT OF THE CASE

The genesis of this case was Citizens' effort to evaluate the reasonableness of prices that Progress Energy Florida, Inc. ("PEF") was paying its affiliates for bituminous coal to be delivered to its Crystal River Units 4 and 5 ("CR4" and "CR5") during 2005 and 2006. Certain deliveries of coal stemmed from contracts awarded to PEF's affiliates as a result of a Request For Proposals ("RFP") that PEF and its affiliate and coal procurement arm, Progress Fuels Corporation, conducted in 2004. During a desposition of Progress Fuels Corporation officer Al Pitcher conducted during the discovery phase of Docket No. 050001-EI, Citizens requested copies of the documents reflecting the evaluation of all bids received during the RFP. Those documents, provided as late-filed exhibits to Mr. Pitcher's deposition, revealed that producers of Powder River Basin subbituminous coal ("PRB") submitted the lowest bids, but PEF did not select any of them. Citizens attached a Motion to Defer Issues related to this discovery and supported it with an Affidavit of their consultant and expert witness, Robert Sansom. In what was clearly an effort to head off further inquiries, PEF responded by declaring the lower, unchosen bids were for a type of coal that PEF was not authorized to burn under the terms of its environmental permit. The Commission granted Citizens' motion, and in

Docket No. 060001-EI Citizens conducted further discovery. Citizens' independent review of the files of the Florida Department of Environmental Protection established that CR4 and CR5 were designed to burn a 50/50 blend of PRB subbituminous and Appalachian bituminous coals, and that PEF had requested and received authority to burn the design blend under state law in 1978. However, the same file review disclosed that in 1996 PEF was required to apply for a new federal permit, and that PEF omitted PRB subbituminous coal from the scope of this application, as well as the application for renewal it submitted in 2004. In the interim, in 1999 PEF amended its initial application to request authority to burn "synfuel" that itintended to purchase from its sister companies. Based on this permitting history, Citizens engaged Mr. Sansom to analyze, among other things, the impact of PEF's decision to effectively eliminate PRB coal as a source of fuel for CR4 and CR5 on customers' bills. His analysis led to the filing of Citizens' Petition, which was assigned Docket No. 060658-EI. PEF filed a Motion to Dismiss the Petition on August, 30, 2006; Citizens responded on September 13, 2006. Following oral argument, the Commission denied PEF's motion in Order No. PSC-07-0059-PCO-EI, issued on January 22, 2007. The case proceeded to an evidentiary hearing on April 2-4, 2007.

STATEMENT OF FACTS

More than most cases that the Commission processes, Citizens believe that a separate, unified Statement of Facts is needed to help frame the issues that the Commission must resolve in this docket.

Two primary choices by a utility drive the design, size, and configuration of a power generating plant and all supporting systems: the fuel to be burned, and the steam flow to be provided. (TR 1262-1263)

When it decided to construct Crystal River Units 4 and 5, PEF[1] specified a fuel consisting 50% of western subbituminous coal and 50% of Appalachian bituminous coal. With respect to steam flow, PEF specified units having the capability to operate at "Maximum Continuous Rating," the maximum safe boiler operating condition—also called 5% overpressure -- 24 hours a day without limitation. (TR 1265, 1268)

In 1978 PEF presented its proposed plant design to the Governor and Cabinet, sitting as the Florida Electrical Power Plant Siting Board ("Siting Board"). During the proceeding on PEF's application for certification of the units under state law, PEF touted the flexibility inherent in the ability to burn both western subbituminous and Appalachian bituminous coals at Crystal River Units 4 and 5. PEF proposed specific emissions limitations for the units. In the Conditions of Certification attached to the Certification Order, the Siting Board issued exactly the emissions standards that PEF requested. (TR 1471) The Siting Board's Conditions did not dictate a particular coal to be burned; rather, they placed a ceiling on the pollutants that PEF could emit with the fuel that it supplied to the units, including the 50/50 blend of western subbituminous and Appalachian bituminous coals that the utility specified as the "design basis" of the units.

Black & Veatch, PEF's architect engineer, and Babcock & Wilcox, the contractor selected to provide the boilers for the units, designed and constructed CR Units 4 and 5 around the design basis fuel specified by PEF and the requirement for boilers that could operate at the level of 5% overpressure without limitation. Partly because of this second,

[1] For simplicity, "PEF' also refers to its predeecessor, Florida Power Corporation.

unusual design specification, and partly because PEF indicated it wanted units that were also capable of burning Illinois Basin coal, Babcock & Wilcox incorporated its most conservative design criteria into the units—criteria that would render Crystal River capable of burning coal having slagging and fouling characteristics more severe than those of the 50/50 design basis fuel. In addition, the boiler design incorporated "lessons learned" from a decade of burning Powder River Basin subbituminous coal in existing boilers and research conducted in laboratories. (TR 1270)

Crystal River Unit 4 and Crystal River Unit 5 were completed in the early 1980s. PEF spent an additional $44 million on each unit to incorporate the ability to burn the "design basis" blend of PRB and bituminous coals. (TR 1429) PEF performed operational tests on the units before "accepting" them from the contractors. PEF burned only bituminous coal during the acceptance tests. (TR 48)

By the time the units became operational, Progress Energy had developed a network of affiliated companies engaged in the business of mining bituminous coal, transporting it on barges, and transloading it at terminals on the rivers in the Appalachian mining region. When the units entered commercial service, PEF procured only bituminous coal for them.

Bituminous coal remained the more economical fuel for CR4 and CR5 on a delivered basis during the 1980s. However, during the late 1980s and early 1990s two developments effectively reversed the delivered price relationship between Powder River Basin subbituminous coal and the Appalachian bituminous coal that PEF had been burning exclusively in CR4 and CR5. First, to the south of the original mining activity in the Powder River Basin deposits of coal containing higher Btus per pound were opened

for mining production. The increase in Btu content meant that fewer tons would have to be purchased and transported to provide the needed Btus. Also, a second railroad company began competing for the opportunity to transport the coal. The competition led to lower transportation costs. Powder River Basin coal, or PRB, became more economical than Appalachian bituminous coal for many geographical locations, including the Southeast. Information regarding the market prices of coals was disseminated throughout the industry through trade periodicals. (TR 50-51) Moreover, the PRB producers marketed their product aggressively. Within Southern Company, when those responsible for fuel procurement presented upper management with calculations of the potential savings that could be garnered with PRB coal, the initial reaction was disbelief that savings of such magnitude could be possible. (TR 1436): The coal procurement team was directed to perform the analysis again. When the recalculation established that the magnitude of the savings was real, Southern proceeded to convert 10 units at 4 different sites to PRB coal. (TR 1436, 1395-1404)

Georgia Power Company, Alabama Power Company, Mississippi Power Company, the Tennessee Valley Authority, and Tampa Electric Company moved to exploit the opportunity to lower customers' fuel costs that PRB coal provided. Utilities converted units from bituminous to PRB subbituminous coal that had not originally been designed to burn PRB coal. To maximize savings, some utilities moved to 100% PRB coal. (TR 1398, 1403) PEF continued to burn bituminous coal exclusively in CR4 and CR5.

Amendments to the Clean Air Act required utilities to apply for and obtain a new federal air operating permit called the Title V air permit. Unlike the conditions of

certification issued under the state Power Plant Siting Act, the federal Title V permit limits fuels to those specifically included within the permit. (Tr 1475) In 1996 PEF submitted its application for its first Title V permit. PEF listed only bituminous coal as the fuel it wished authority to burn in CR4 and CR5. While the application was pending, PEF amended it to include a request to burn "synfuel" (petroleum-treated, bituminous-derived briquettes) purchased from affiliates. The Title V permit did not become effective until January 2000. Until it became effective, PEF continued to possess authority to burn Powder River Basin coal under the Conditions of Certification issued under state law. (TR 1475) PEF purchased and burned no PRB coal prior to the time its limiting permit became effective.

During 2003, PEF issued a Request For Proposals to various potential providers. PEF received a proposal from a PRB producer. When evaluating the cost of PRB coal, PEF assumed it would be able to pay its affiliates a "waterborne proxy" rate for barge transportation that was higher than market rates and that had never been approved by the Commission. Also, in the evaluation PEF attributed to the PRB coal a negative impact on boiler operations. When quantifying the negative impact, the computer program was directed to assume that PEF would burn—not a 50/50 blend of PRB and bituminous coals—but 100% PRB coal. When actual prevailing market transportation rates are substituted for the assumed but unauthorized proxy, and when the 100% PRB assumption is removed from the boiler impact calculation, PRB coal was the most economical bid that PEF received during the 2003 RFP.

During 2004, PEF conducted another RFP. Again, PEF applied an unauthorized "regulator" or "waterborne proxy" instead of prevailing market rates for transportation of

PRB coal. Again, PEF directed its computer evaluation program to assume it would burn 100% PRB coal instead of a 50/50 blend and to penalize the PRB bid for negative boiler impacts in accordance with the assumption. With these penalties, the PRB bids were the most economical proposals that PEF received during the solicitation. PEF did not award a contract to any of the low-cost PRB bidders as a result of the solicitation.

Also during 2004, but separate and apart from the RFP, PEF purchased a small quantity of PRB coal to blend with bituminous coal for a test burn at CR4. The blend consisted of 18-22% PRB coal. Neither Progress Fuels Corporation, which purchased the PRB coal for the purpose, nor plant operating personnel were aware that the terms of the Title V permit prohibited PEF from burning PRB coal in CR4. After a small quantity of blended coal was burned, PEF's environmental permitting section told the plant to halt the test burn. PEF then notified the Florida Department of Environmental Permitting of the incident.

In 2005 Progress Energy's upper management directed its internal Strategic Engineering department to analyze the potential for burning Powder River Basin coal in Crystal River 4 and 5. Progress Energy engaged the consulting engineering firm of Sargent and Lundy to assess the ability of CR4 and CR5 to burn Powder River Basin coal. In its report, Sargent and Lundy concluded the boilers could successfully burn a blend containing as much as 70% Powder River Basin coal without incurring major capital costs. Contemporaneously, the Strategic Engineering Department estimated that PEF could save tens of millions of dollars between 2007-2010 by burning a blend containing only 20% Powder River Basin coal at CR4 and CR5.

With respect to the authority to burn Powder River Basin coal, PEF told the Florida Department of Environmental Protection that the Conditions of Certification allowed for a 50% blend, and asserted that it should not be required to obtain a permit for the blend. (TR 1472) The FDEP required PEF to apply for and obtain a construction permit to conduct a test burn of the blend. PEF applied for the construction permit in March of 2006. In May of 2006, PEF conducted a test burn of a blend containing 18% PRB coal in CR5. The test burn was successful. PEF cited the results of the May 2006 test burn when it applied for a permit to burn a blend containing up to 50% Powder River Basin coal in 2006. (Exhibit 224)

In 2005 Citizens conducted discovery on the subject of prices that PEF was paying its affiliates for coal to be delivered to Crystal River 4 and 5 in 2005-2006. Close to the hearing date set for Docket No. 050001, Citizens obtained copies of the individual evaluation results performed on the bids to the 2004 RFP. Citizens learned that PRB bids were lower than any selected for purchase. Citizens included this fact in an affidavit of Robert Sansom that accompanied Citizens' request to defer the issue so that additional discovery could be conducted on this larger issue. In its response to the request, PEF justified the situation by stating that its permit did not authorize it to burn PRB coal at CR4 and CR5.

SUMMARY OF ARGUMENT

At the core of Citizens' claim for a refund of past overcharges in this case is the fact that PEF first spent $88 million to build into CR4 and CR5 the flexibility to burn a blend containing 50% PRB subbituminous coal, then - because it was focused on dealing with affiliated companies that mined and transported Appalachian bituminous coal –

imprudently squandered the ability to employ that flexibility to lower customers' fuel costs when PRB became the most economical source of fuel for these units. With its shotgun-like efforts to resist a refund, in this proceeding PEF also squandered its credibility. PEF advanced arguments that PEF itself clearly does not believe.

Safety:

At the same time Counsel for PEF melodramatically showed footage of a coal burn, ostensibly to send the message that PEF should stay away from subbituminous coal, PEF witness Sasha Weintraub was waiting to testify that PEF is actively considering the option of burning 100% PRB coal in CR4 and CR5.

Environmental Permitting

In response to the criticism of its failure to include PRB coal in its 1996 application for a federal Title V permit, PEF resorted to the unusual defense of arguing that the original emission standard it requested and received under state law was insufficient as well – therefore appearing to defend an imprudent omission by claiming earlier ineptness. However, the claim was fashioned for litigation: PEF had earlier represented to the FDEP that the Condition of Certification allowed PEF to burn the 50/50 blend.

Derating:

At the same time PEF dispatched witnesses Hatt and Toms to assert that 124 megawatts would be lost because a 50/50 blend conrtains fewer Btus than prior bituminous coal, PEF had filed and was actively pursuing an application before the Florida Department of Environmental Protection for authority to burn in CR4 and CR5 a 50/50 blend of PRB subbituminous and Illinois Basin bituminous coals that contains

fewer Btus than even the original 1978 "design basis" fuel that PEF specified for CR4 and CR5.

Test Burns:

When defending against a refund, PEF sponsored testimony that long term test burns of 6 months are necessary. However, PEF began burning a different foreign coal after a test burn that lasted 4 days.

Using actual data for the amounts PEF charged ratepayers for fuel burned in CR4 and CR5, actual transactions depicting the cost of PRB coal in the same timeframe, and a sound methodology for reflecting the transporation costs to Crystal River, Citizens' witness demonstrated that PEF overcharged customers by $134.5 million during 1996-2005. While Citizens' Petition asks for refund that relate to the period 1996-2005, by far the largest impact of PEF's imprudence was felt by customers in the most recent years. Even PEF witness Fetter acknowledged the Commission's ability to adjust overcharges for the prior three years. He also said the Commission can relate back further in time in a case involving a material concealment. In Order No. 12645, the Commission reserved the ability to receive and consider at any time relevant facts pointing to imprudence that the utility had failed to present. The difference between the standard offered by Mr. Felter and that articulated by the Commission basically is one of semantics. Among other things, Citizens have shown that PEF set out to eliminate PRB as an alternative fuel for CR4 and CR5, then pointed to the lack of authority it had authorized as a defense to criticism of its failure to purchase the lowest costing fuel. Such misleading and disingenuous submissions constitute grounds for an exercise of the Commission's jurisdiction.

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

Citizens: No. To achieve flexibility, PEF designed and built Crystal River 4 and 5 to be able to burn a 50/50 blend of subbituminous and bituminous coals. In the early 1990s the discovery of higher Btu subbituminous Powder River Basin coal and competition between railroads caused PRB coal to become significantly cheaper (delivered) than the eastern bituminous coal PEF was burning in CR4-5. As other utilities turned to Powder River Basin coal to lower fuel costs borne by customers, PEF continued to purchase more expensive bituminous coal and "synfuel" from its affiliates and pass the extra costs on to customers. PEF knew, or should have known, of the opportunity presented by PRB, and should have acted timely to lower its fuel costs during 1996-2005. There was no impediment between a management acting prudently in its customers' interests and significantly lower fuel costs.

ARGUMENT

With respect to both its failure to conduct a test burn of the fuel blend that it specified as the "design basis" for Crystal River Units 4 and 5 and its failure to maintain the legal authority to burn the blend, in this case PEF has attempted to defend the indefensible. Its conduct amounts to imprudence per se.

In 2005, Citizens obtained the bid documents and evaluations associated with PEF's 2004 Request For Proposals. Citizens' consultant determined that PRB producers had submitted the lowest bids to the RFP, but PEF selected none of those bids for contracts. PEF attempted to defuse the discovery by stating that PEF's environmental permit did not authorize it to burn Powder River Basin subbituminous coal in the CR4 and CR5 boilers. Clearly PEF hoped this response would end any scrutiny of its past procurement activities. PEF neglected to say that the reason why PEF did not have authority to burn PRB coal was that, after first obtaining authority to burn the 50/50 blend

under the state Siting Act in 1978, PEF had failed to request that such authority be included in its federal Title V air permit at any point between 1996, the date of PEF's initial application for its first Title V permit, and 2005. PEF also neglected to say that, despite its imprudence on that point, because the first application was the subject of litigation PEF could have purchased and burned PRB coal (subject only to a satisfactory stack test) at any point until the deliberately confining Title V permit became effective in January 2000.

The omission of Powder River Basin coal from its Title V application was deliberate. Asked in an interrogatory to explain why it did not designate subbituminous coal as a fuel for CR4-5 in its Title V application, PEF said tersely that it did not contemplate burning subbituminous coal at the time. (Exhibit 31; TR 58) Citizens regarded this answer then as astonishing, and it is even more astonishing in light of the record of the hearing. While it seems obvious that a utility that had spent $88 million of its ratepayers' money to construct the capability of burning PRB coal would realize the need to have in place the legal authority to burn the coal, the timing of the first application is significant. By 1996 the wave of conversions of southeastern generating units to Powder River Basin coal to save fuel costs had become a phenomenon of the industry. Market prices of PRB coal were disseminated in trade periodicals. For PEF to say that in the face of these developments PEF did not "contemplate" the possibility of burning subbituminous coal inCR4 and CR5 reveals either the extent to which PEF was imprudently oblivious to market changes or the extent to which PEF was subordinating the interests of customers to the interests of shareholders who held a stake in the affiliates' businesses of mining and transporting bituminous coal. Indeed, the record

shows that in 1999 PEF demonstrated it knew how to amend the Title V application to add another fuel—but the fuel it added was the synfuel it planned to acquire from affiliated companies.

In response, PEF claims, among other things, that the Siting Board didn't really give PEF authority to burn PRB coal in the Conditions of Certification. (A remarkable and ironic theme to PEF's "defenses" is the extent to which it seeks to avoid accountability for procurement activities by arguing that its own earlier construction oversight and permitting activities were inadequate!) PEF points to the requirement that it perform a stack test and inform the agency of its source of coal. However, these requirements were applicable to *any* coal that PEF chose to burn in CR4 and CR5. It is disingenuous for PEF to suggest that, after having specified and accepted units capable of burning a blend of PRB coal, after representing to the Governor and Cabinet that it could and would (legally) burn a 50/50 blend of subbituminous and bituminous coals, and after receiving from the Governor and Cabinet 100% of the emissions criteria that PEF itself proposed, it would have been unable to adhere to the ministerial aspects of the conditions of certification. The environmental permitting issue presents one of several instances in which PEF attempts to bootstrap an early imprudence—here, the failure to conduct a stack test using the very fuel blend around which the units had been designed and built—into a "defense" against later imprudences.

PEF also takes the position that its failure to designate subbituminous coal as a fuel for CR4 and CR5 was "no harm, no foul." (TR 760) PEF is badly wrong. Citizens' witness Stephen Smallwood, P.E., testified that PEF missed an opportunity to add subbituminous coal to its Title V permit in what would have been a straightforward

application process. (TR 1474-1477) Further, recent events disprove the "no harm, no foul" claim. In 2004, PEF sought to perform a test burn of a blend of PRB and eastern Appalachian coals. (Neither Progress Fuels Corporation, who purchased the PRB coal for the test, nor the plant operations staff, who burned it, were aware of the limitation in PEF's Title V permit—something that PEF should have considered before arguing that Staff and parties should have to stay abreast of environmental permitting proceedings independent of any burden of PEF to bring relevant facts to the Commission in the fuel cost recovery docket.) The test was aborted, and PEF began steps to cure the defect in its authority. The FDEP issued a permit formally authorizing PEF to burn a blend of PRB and bituminous coals in CR4 and CR5 in the spring of 2007. Because PEF missed its original opportunity, once finally begun the process of adding PRB coal to the permit required three years—three years during which even PEF believed it would have saved fuel costs by burning Powder River Basin coal.

However, Citizens regard the best rebuttal to PEF's claim that PEF never had authority to burn PRB coal under the Siting Act's conditions of certification to be PEF's own representation to the FDEP on the subject. In the introduction to its application for a construction permit authorizing a test burn following the aborted and unauthorized episode, PEF represented to the FDEP that the conditions of certification allowed the 50/50 blend. (See Exhibit 206). Citizens concur with PEF's statement to the FDEP.

Coal procurement practices

OPC: During 1996-2005 PEF's coal procurement practices favored affiliates over more economical alternatives. PEF's claim that PRB producers were disinterested marketers contradicts market information and simply is not credible. PEF failed to exploit its flexible transportation modes so as to

accommodate the cheapest fule. Other flaws in PEF's practices include the failure to position itself to shift to the 50% PRB blend timely by maintaining environmental authority and conducting any needed stack tests.

In its inadequate 2004 "supplemental solicitation, PEF's affiliate was the only producer of Appalachian bituminous coal that PEF contacted.

Citizens will incorporate their argument on this topic with the combined argument on Issues 2 and 3.

CR3

Citizens: CR3 was nuclear in 1978, when PEF designed and sought state certification of CR4-5 to burn PRB, and still nuclear in 2006, when PEF applied to modify its federal permits to authorize burning PRB in CR4-5. Only the period 1996-2005 covered by OPC's Petition is the subject of PEF's "CR3 concern." If applicable, prudence would have required PEF to attend to any NRC information requirements at the outset, so that it would be positioned to burn PRB when economical to do so. CR1-2 boilers are far closer to CR3 than are CR4-5 and pose greater risks.

ARGUMENT

Citizens will not devote much time and space to this argument, because PEF's own actions belie the claim that it ever regarded the presence of CR3 as an impediment to the burning of PRB coal in Crystal River Units 4 and 5. It is sufficient to point out that, at the same time PEF was preparing the testimony of witnesses who worried aloud about the implications of Powder River Basin coal for NRC reporting requirements, PEF was actively pursuing its (then pending) application before the Florida Department of Environmental Protection for authority to burn a 50/50 blend of subbituminous and bituminous coals in Crystal River Units 4 and 5. And, as though that was not enough to discredit the "CR3 argument:" At the same time it was preparing the testimony of witnesses on CR3 implications, PEF was also submitting the testimony of its witness Sasha Weintraub, who testified under oath that PEF is actively considering the possibility

of moving to 100% Powder River Basin coal at Crystal River 4 and 5. (TR 503) Obviously, PEF does not believe its own made-for-litigation argument. If there is any credence to the assertion that the NRC will require an analysis of the situation, the point to be taken from PEF's testimony is-given the investment PEF made in fuel flexibility and the need to position itself to take advantage of that flexibility—any consideration of CR3 issues should have been undertaken and accomplished long before now. By pursuing its "CR3 theory," PEF has succeeded only in introducing another layer of past imprudence.

CR-4 and CR-5 Operational Matters

In the 1980s, PEF specified units capable of burning a 50/50 blend of PRB and bituminous coals, and capable also of operating, while burning this 50/50 blend, at the 5% overpressure condition that would generate 750-770 megawatts 24 hours a day, 7 days a week, without limitation. PEF *accepted* the units from such premier contractors as Black & Veatch and Babcock & Wilcox as conforming to its requirements and their obligations. In 2005, PE's consulting engineers, Sargent & Lundy, effectively praised those who designed and built CR4 and CR5 and concluded the units could, as built, successfully accommodate a blend of coals containing 70% PRB coal before PEF would encounter the need to commit to significant capital outlays. In 2005, PE's own internal Strategic Engineering Department endorsed Sargent & Lundy's report and calculated that the units, as built, could save tens of millions of dollars in fuel costs annually when burning only 20% PRB in the blend.

Then, the Citizens filed the Petition that initiated this proceeding. Suddenly, the same approach to permitting that had "allowed" the burning of the 50/50 blend did not obtain needed authority after all. Suddenly, the same units that were capable of burning 70% PRB as built needed an "inherently necessary" seventh pulverizer. Suddenly, the same PRB coal that was the subject of an ongoing application for environmental authority became too scary to handle. And, suddenly, the boilers and all of the supporting systems—the ones that had been accepted earlier—became, under PEF's theory of the case, woefully inadequate: not a single component was capable of doing the job it was designed to perform.

But they were inadequate only for PEF's litigation purposes. At the same time it was sponsoring the testimony of Mr. Hatt and Mr. Toms, PEF was busily pursuing its application to the Florida Department of Environmental Protection for authority to burn a 50/50 blend of PRB and bituminous coals in CR4 and CR5.

Slagging and fouling—Mr. Hatt, who is not an engineer and has never designed a boiler, claimed that not enough was known when Babcock & Wilcox designed the boilers of Crystal River Units 4 and 5 to equip them to manage the slagging and fouling properties of PRB coal. Mr. Hatt was wrong—and the *extent* to which he was wrong undermines his credibility on the subject. Citizens' witness Joseph Barsin provided details of the extensive research that had been performed on Powder River Basin coal in existing boilers and in laboratories in the 1970s, the lessons from which were applied to the design of CR4 and CR5. Mr. Barsin personally performed a substantial amount of the research. (Exhibits JB-7, 8) In addition, he personally supervised those who designed the CR4 and CR5 boilers. Mr. Barsin personally ensured the boilers were designed to

meet Babcock & Wilcox's most conservative design parameters. According to him, the design basis fuel containing 50% Powder River Basin coal did not even present the most challenging aspect of the project. While PEF specified the "design basis" fuel to be the 50/50 blend of PRB subbituminous and Appalachian bituminous coal, it also wanted units capable of burning "Illinois Basin" bituminous coal. The propensity of Illinois Basin coal to cause slagging and fouling is worse than that of the 50/50 PRB/Appalachian bituminous blend. Illinois Basin coal requires a more conservative, slag-defeating design than does the 50/50 blend. Babcock & Wilcox designed into CR4 and CR5 the features that enable them to handle this worse Illinois Basin coal. Nowhere in Mr. Hatt's testimony does he indicate he was even aware of this important design consideration.

Perhaps as important to the design execution as the extreme measures calculated to accommodate coal worse than the 50/50 blend was the fact that PEF specified units capable of Maximum Continuous Rating *without limitation*. Mr. Barsin explained that this unlimited capability went beyond the normal design standard. Because B&W was committing to units capable of operating at 5% overpressure without limitation (as well as because he knew of PEF's tendency to litigate when contractors did not meet expectations), Mr. Barsin ensured that the boilers of CR4 and CR5 were perhaps the most conservatively designed boilers ever to come across his desk. (TR 1275)

Mr. Hatt's other "operationally related" comments were equally conjectural. With respect to each, Mr. Hatt disregarded available engineering data documenting the capabilities of the components, preferring instead to substitute unsubstantiated supposition. For instance, referring vaguely to a precipitator of a different unit owned by a different utility in a different part of the country—with absolutely no information

offered to support the notion that the situation was comparable—Mr. Hatt predicted that the precipitator of CR4 and CR5 would not be able to perform with the 50/50 blend until it had been upgraded. His prediction is PEF-serving conjecture. It is enabled solely by PEF's failure to have performed a stack test using the "design basis" blend of coals for the first 20+ years of their lives.

Like the rest of his testimony, Mr. Hatt approached this subject as one who is accustomed to dealing with generators and supporting systems that were designed for fuels other than PRB coal and are under consideration for conversion. In rebuttal testimony, Citizens' witness Joseph Barsin testified in detail that the precipitator for CR4 and CR5 were designed and sized specifically to operate with the 50/50 "design basis" blend of PRB and Appalachian bituminous coals. Specifically, the precipitators employ a design and technology tailored to the higher resistivity of the ash of PRB coal. (TR 1330) Mr. Hatt had access to such information, but did not even acknowledge it in his testimony.

Similarly, Mr. Hatt questioned the capabilities of the blending system provided with CR4 and CR5. He focused solely on the stacker/reclaimer piece of equipment. However, as Mr. Putman and Mr.Barsin pointed out, the blending system consists of far more. In addition to the two stacker/reclaimers, the blending system incorporates belt scales and variable speed drives in an elaborate, redundant, comprehensively designed system. The system was specifically designed to enable PEF to blend coal from an existing storage pile (pure PRB or pure bituminous) with a different coal arriving either by barge or by rail. (TR 1377) Alternatively, using this system PEF can feed the units from a storage pile of blended coal lying between the inventories of bituminous and PRB

coals. All the while, the components of the belt scales and variable speed drives on the conveyors can be employed in conjunction with the stacker/reclaimers to ensure the boilers receive the blended Btus at the rate and in the quantities they require. (TR 1413) Mr. Barsin refuted the notion that the existing system would need to be replaced, and in his testimony Citizens' witness David Putman spoke of his personal knowledge that similar systems are used successfully to blend coals in other locations. (TR. 1413) Mr. Putman's testimony on this point was unchallenged.

Mr. Hatt also questioned the ability of the conveyors to provide sufficient quantities of blended coal to the boilers. Simple math disproves his concern. There are *two* conveyors capable of operating at 800 tons per hour. Mr. Putman demonstrated that the requirements of the boilers can be met even if only one belt is in operation. (TR 1414) Similarly, Mr. Barsin demonstrated that, like all other systems appurtenant to the boilers and turbines, Black & Veatch provided ample surplus capacity beyond the needs of the boilers. (TR 1332-1333)

Mr. Hatt's tally of allegedly needed capital costs[2] suffers from the same misinformed mindset. Because the CR4 and CR5 units were specifically designed around the assumption that they would be burning the 50/50 blend of PRB and Appalachian bituminous coal, the money to provide that capability *has already been spent.* The only capital investments necessary are those related to safety and housekeeping—and those are necessitated, in part, by the manner in which PEF has allowed the dust suppression systems and related safety itemsprovided by Black & Veatch to deteriorate. However, while the damage to or removal of such equipment was

[2] Mr. Hatt's numbers clearly are expressed in current dollars. He does not attempt to relate them to the 1996 time frame nor does PEF demonstrate that it regarded capital expenditures as necessary during the period 1996-2005. "Backfilling" should be as off limits as "hindsight."

conspicuous to Citizens' representatives during a site visit, Mr. Hatt—the expert on the need for housekeeping—generously gave PEF a pass on its shortcomings, just as he forgave his client for the large accumulations of coal dust that Mr. Putman found "shocking." (TR 1428) In his rebuttal testimony, Mr. Barsin refuted Mr. Hatt's laundry list of capital needs in detail, item by item. It is worth noting that Mr. Barsin's appraisal is consistent with the findings of PE's consulting engineers, Sargent & Lundy, whose report held sway with PEF and PE's internal Strategic Engineering Department until Citizen's Petition subjected PEF to the possibility of a refund. The only legitimate point that Mr. Hatt made relates to the need for enhanced safety measures, and Mr. Barsin's calculations provide fully for those needs. When one subtracts the amount necessary to prevent ratepayers from paying twice for the dust suppression systems that PEF allowed to deteriorate, the amounts are less then $2 million in capital costs and a modest amount of ongoing annual maintenance costs. (TR 1323)

Megawatt capacity

Citizens: The limiting factor on CR4-5 megawatt production is "5% overpressure," the maximum safe boiler operating pressure. At 5% overpressure the turbine produces the same megawatts, regardless of the fuel being burned. CR4-5 were explicitly designed and built to supply, without limitation, 5% overpressure steam to the turbine when burning the 50/50 blend. As specified and built, all systems, including the six pulverizers and the coal supply system, have ample capacity to sustain 5% overpressure. *Before* OPC filed its petition, PEF's consulting engineers assessed the units and predicted no derating below ***70%*** PRB blend.

ARGUMENT

Mr. Hatt and Mr. Toms would have the Commission believe that the size of the boilers built to enable CR4 and CR5 to yield the nameplate rating of 665 MW when burning the 50/50 blend of PRB and eastern Appalachian coals enables the boilers to

generate 750-770 when burning pure bituminous coal. Their testimony on the subject is misleading. Available to both witnesses, and ignored by both, are the engineering and contract documents proving that from the outset PEF insisted on units capable of sustaining MCR (5% overpressure, yielding 750-770 MW) on an *unlimited* basis *when burning the 50/50 blend of PRB and Appalachian bituminous coals.* Because by definition the "maximum continuous rating" is the limiting factor in terms of megawatt output, when operating at MCR the units will produce the 750-770 megawatts, regardless of which fuel is being burned to supply the 5% overpressure steam condition. The history of CR4 and CR5 demonstrates the units are capable of operating at MCR on a sustained basis.

Mr. Hatt conjectured that the units would be capable of producing no more than the 665 nameplate rating when burning the 50/50 blend. He based his claim—not on engineering data—but on a conversation with Mr. Toms, "inconclusive" test burns, and the fact that the vendors left room for an additional pulverizer. None of the matters on which Mr. Hatt relied supports his position. The conversation with Mr. Toms relates to the observation that the amount of power produced by the units diminished when the Btu content of the coal being burned dipped below a certain level. However, during cross-examination Mr. Toms acknowledged that when the decline in output occurred the rate at which the feeders supplied coal to the boilers had been frozen. Naturally, because the MW output is a function of Btus supplied to the boilers, when the Btus per pound fell and no attempt to increase the quantities of coal to compensate, the MW output also fell. Mr. Toms said that once the feeders were allowed to be adjusted, the output levels increased to full MCR. (TR 729)

Finally, Mr. Hatt saw the space left for an additional pulverizer and mill, and concluded they are "inherently necessary" to the ability to maintain MCR. conjecture is disproven with the contract information sheets prepared by Babcock & Wilcox that are attached to the testimony of Joseph Barsin. The contract information sheets state the equipment that Babcock & Wilcox provided under the contractual arrangement, as well as the performance parameters the supplied equipment are to achieve. The "to be supplied" section clearly states that only six pulverizers were to be installed under the contract. The accompanying performance criteria as clearly delineate that the six pulverizers are capable of sustaining maximum continuous rating; in fact, the unit is designed to operate at MCR when one of the six pulverizers is out of service. The expansion space left for a seventh pulverizer serves only the scenario in which PEF chooses to burn 100% PRB coal. (TR 1331) Counsel for PEF challenged Mr. Barsin's assertion that Babcock & Wilcox guaranteed the ability of CR4 and CR5 to operate at 5% overpressure without limitation by referring to a disclaimer that appeared at the bottom of one contract summary sheet. Mr. Barsin immediately pointed out that no such disclaimer appears on the sheet containing the operative performance parameters which include MCR values. Mr. Barsin also pointed to entries marked "guar" in the the Illinois Basin scenario. The entries disprove PEF's assertion that only such "guar" entries reflect contractual commitments, because Babcock & Wilcox's contractual guarantees did not apply to Illinois Basin coal. (TR 1369, 1372)

All of the above points are than sufficient to demonstrate that the prediction of lost megawatts is a speciousclaim,fashioned for litigation. However, the strongest, most incontrovertible proof that PEF does not believe its own made-for-litigation story is its

own behavior. At the same time PEF was fashioning the "lost megawatts" theory to resist Citizens' demand for a refund of overcharges, before the Florida Department of Environmental Protection it was pursuing its request for authority to burn a mixture containing 50% PRB subbituminous coal and 50% Illinois Basin bituminous coal. Moreover, at the same time PEF pretended to worry about the impact that fuel having a Btu content lower than that of 100% bituminous coal, before the FDEP PEF was proposing to operate CR4 and CR5 with a blend of coals that (because Illinois Basin coal would be used instead of Btu-rich Appalachian bituminous coal in the mixture) would contain 200 Btus less per pound than the original "design basis" 50/50 blend of PRB and Appalachian bituminous coals—and about 500 Btus per pound less than the blend now available using the 8800 Btu/pound PRB coal and Appalachian bituminous coal.[3] (TR 1465) And, as though these proposals were not enough to torpedo the "derating" defense, in the same application to the Florida Department of Environmental Protection PEF represented that CR4 and CR5 are capable of receiving more Btus than existing authority allows PEF to place in the boilers. (TR 792)

[3]The blend of PRB and Illinois Basin coals that PEF nominated to the FDEP at the same time it created the specter of expensive deratings in this case contains 200 Btus per pound less than the original "design basis" blend identified by PEF in 1978. The "design basis" blend contained 10285 Btus per pound because the PRB coal available at the time contained only 8125 Btus per pound. The PRB coal now available contains 8800 Btus per pound. Bearing in mind that the richer-in-Btus PRB coal would constitute 50% of the blend that PEF should have been burning since 1996 at the latest. the difference between the Illinois Basin/PRB blend that PEF proposes to fire in CR4 and CR5, on the one hand, and the blend of now-available PRB coal and the Appalachian coal that was part of the original design basis blend, on the other, is therefore more than 500 Btus per pound. PEF's proposal to switch to this blend is implicitly and effectively an admission that PEF doesn't believe its own "defense." PEF's proposal to burn a 50/50 blend of PRB coal and bituminous coal, made a decade late and containing even fewer Btus than the 1978 assumption, quashes the made-for-litigation concern over the impact of a blend containing PRB coal on MW production.

Coal Availability and Costs

Citizens: PRB coal was available to PER in large quantities and at costs significantly lower than alternatives during 1996-2005. Pertinent market information was disseminated widely in the utility industry at the time. Actual purchases of PRB to TECO, adjusted for delivery to Crystal River, provide an accurate picture of the opportunity that was available to PEF (but not acted on) during the period, as do bids submitted to PEF by PRB producers in 2003 and 2004. The notion that the same PRB producers who were marketing aggressively elsewhere elected to bypass CR4-5 simply is not credible.

ARGUMENT

During the period that is the subject of Citizens' Petition, the producers of Powder River Basin coal were in an overcapacity situation. (TR 1229). To expand their markets, the PRB producers invited potential buyers to travel in special coach trains and tour the facilities. (TR 1425). They also marketed their product aggressively. (TR 1423) When David Putman, at the time responsible for Southern Company coal procurement, first informed his management of the magnitude of the savings that could be achieved with PRB coal, the savings were so dramatic that management's reaction was one of disbelief. (TR 1436) A recalculation confirmed that the savings were as huge as Mr. Putman first represented, and the Southern Company proceeded to convert ten generating units to PRB coal. (TR 1422). Southern Company realized a spread between the delivered cost of PRB coal and the delivered cost of alternative bituminous coal during the period of about $1 per million Btus. (TR 1462). To maximize the savings to ratepayers this spread could produce, Southern Company converted its units to 100% PRB coal. It also took measures to leverage transportation options and to negotiate different terms on existing contracts so that it could move as rapidly to lower fuel costs by burning cheaper PRB coal as possible.

By sharp contrast: In the face of an industry phenomenon, PEF contends that PRB coal was neither available nor economical during the period. Its claim relies on a distortion of the real economics of the situation. PEF acknowledges that when evaluating the cost of PRB coal, it assumed a transportation cost that reflected—not the actual cost of transporting PRB coal—but an artificially higher cost derived from a "waterborne" proxy rate that the Commission had authorized PEF to apply to different coals, located in different geographical locations and traveling routes different than those that the PRB coal would travel. While PEF witness Mr. Heller termed this assumed higher cost of transportation a "regulator," he acknowledged that the Commission had not approved its use over actual costs—in fact, Mr. Heller's "regulator" had never been submitted to the Commission. In his rebuttal testimony, Citizens' witness Robert Sansom explained that, had PEF submitted such a request for approval, PEF would have alerted the Commission to multi million dollar savings available with an alternative route. (TR 1192) The incorporation of the so-called "regulator" in the evaluation was therefore an unauthorized, inappropriate, infeasible, and distorting assumption that biased the evaluation in favor of affiliated alternatives.

Mr. Heller also acknowledged that, when evaluating bids of PRB coal, PEF programmed its computerized evaluation program to impose a "penalty" in the form of a quantification of deleterious impacts the PRB coal would have on boiler performance. The size of the penalty the "black box" added to the cost of PRB coal mysteriously increased over time. (TR 987). The effect of the penalty was to make PRB coal more expensive relative to alternatives, including the bituminous coal and synfuel marketed by PEF's sister companies. The penalty that PEF added to PRB costs for boiler performance

was artificial and inappropriate. The effect of it was to overstate the cost of the PRB option relative to alternatives. Mr. Heller acknowledged that the computer was instructed to assume that only 100% PRB coal would be in the boiler, when in fact the design basis fuel consists of 50% PRB and 50% bituminous coal. The "evaluation" methodology was therefore not a true apples to apples comparison. Further, because the boilers of CR4 and CR5 were specifically designed to burn the 50/50 mixture, there is no occasion to apply a "penalty" of any magnitude when evaluating the design basis fuel relative to alternatives.

Mr Sansom demonstrated that, once market-based costs of available transportation modes are incorporated in the comparison and improper "boiler penalties" are removed from the calculations, PRB coal was PEF's most economical source of fuel for CR4 and CR5 for each year during the period that is the subject of Citizens' Petition. For the cost of PRB coal, Mr. Sansom used the price that Tampa Electric Company paid for coal delivered to its Gannon site during the years 1996-1003. For 2004 and 2005, he used actual bids for the supply of PRB coal that PEF received during the Requests For Proposals that PEF conducted during 2003 and 2004. To the commodity costs and TECO's transportation costs he added the differential in transportation costs to Crystal River. Mr. Sansom then compared the costs of PRB coal delivered to Crystal River to the actual amounts that PEF paid for bituminous coal and/or synfuel that PEF paid during each year. Not taking interest into account, the total overcharges amount to $134.5 million. Included in the calculation, and having the effect of understating the total overcharges, is a factor designed to impute blending costs that Mr. Sansom incorporated before learning that PEF already has on site an elaborate and redundant blending mechanism that renders the factor unnecessary. The calculation of overcharges is also

conservative because Mr. Sansom used TECO's reported cost of transportation without reducing it to remove the effect of a waterborne proxy that was approved for TECO but that would have been inapplicable to PRB coal delivered to PEF at Crystal River. Finally, the calculation is conservative because Mr. Sansom had insufficient data with which to price the cheaper route from Mobile to Crystal River, and so used the data for the more expensive New Orleans route to Crystal River.

PEF's attempted to "recalculate" Mr. Sansom's quantification of overcharges. Its "adjustments" are baseless. PEF criticized Mr. Sansom for incorporating spot prices rather than contract prices in his analysis, but failed to mention that spot and contract prices were close to each other during the period. PEF pointed to a transloading fee that TECO does not include in the Form 423 that Mr. Sansom used as a source of data, but the effect of the fee is more than offset by the unnecessary blending expense that Mr. Sansom built into the calculation of overcharges before learning that PEF would incur no additional costs to blend the PRB and bituminous coals. PEF in fact attempted to double the blending costs that Mr. Sansom had originally assumed, but Mr. Barsin's description of the elaborate blending system already in place refutes the need to add any costs of blending. Mr. Heller sponsored exhibits in which he performed complex calculations purporting to incorporate in the cost of PRB the estimates of capital costs that Mr. Hatt included in his testimony. Mr. Barsin demonstrated that Mr. Hatt's laundry list of capital costs (with the exception of minor amounts designed to enhance safety, which Mr. Barsin also included in testimony) was baseless, and designed more for a scenario in which boilers not designed to burn a blend of PRB coal and bituminous coal were being

converted for the purpose. In sum, at the end of the day Mr. Sansom's methodology and his conclusions were unscathed.

(Because the issues are so related, Citizens will present a single section of argument addressing Issues 2 and 3)

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?**

Citizens: Yes. Under the current system, utilities may collect fuel costs as they are incurred and before providing information sufficient to establish the costs are prudent. The PSC must balance this benefit to utilities with measures adequate to protect customers' interests. Prudence review entails-not only amounts spent-but decisions made regarding alternatives. If a utility elects not to provide all relevant facts, placing time limits on parties' ability to obtain such information from utilities would send the message that a utility which submits comprehensive information is subject to prudence review, but one which holds back may avoid it.

ISSUE 3: **Under the circumstances of this case, does the Commission have the authority to grant the relief requested by OPC?**

Citizens: Yes. Citizens do not ask the Commission to employ hindsight. In Order Nos. 12645, 13452, and PSC 97-0608-FOF-EI, the Commission recognized it was allowing utilities to collect fuel costs based on partial information, and rejected attempts to limit the time in which it could revisit past amounts upon receiving facts relevant to prudence. The Florida Supreme Court affirmed the ability of the Commission to make adjustments in the continuous fuel proceeding without engaging in "retroactive ratemaking." Citizens have presented facts relevant to prudence of PEF's fuel purchases for CR4-5 (see positions 1,4) that PEF never submitted to the Commission.

ARGUMENT ON ISSUES 2 AND 3

Under the proceedings on the fuel cost recovery mechanisms that have been in place for decades, PEF (and other regulated electric utilities) may collect the costs of purchasing and transporting fuel through a cost recovery mechanism separate and apart from base rates. This cost recovery mechanism, intended to enable the utilities to adjust their rates without going through a revenue requirements determination each time volatile fuel costs change, is a departure from traditional ratemaking and is a utility-favoring policy. Since the early 1980s, the cost recovery mechanism has been designed and implemented to enable the utilities to recover their fuel costs on a current basis—that is, the utilities collect the costs of fuel from customers during the same time frame in which the utilities incur the costs. The move to a current recovery feature was a utility-favoring development in the evolution of the fuel cost recovery clause. The Commission allowed the utilities to begin collecting their fuel costs from customers on a current basis, using projections of future costs, despite the fact that the utilities would not have proven the prudence and reasonableness of those costs either at the time of initial approval of a request to collect, or at the time of true-up, when projections of costs are simply compared to actual expenditures. The ability to collect costs prior to proving they were prudently and reasonably incurred is a utility-favoring development in the evolution of the fuel cost recovery clause.

What about the customers' interests? In the course of providing these advantages to utilities, how did the Commission protect customers? The one protective measure the Commission took care to erect and maintain is this: The burden of proof remains with the requesting utility; the Commission requires proof of prudence to the same extent and

in the same manner such proof is required in base rate situations; the utility may choose not to present comprehensive proof, but to the extent the utility elects not to present proof sufficient to demonstrate the fuel costs are prudent, the Commission retains jurisdiction to consider relevant facts bearing on the prudence issue at a later date. The Commission set forth these tenets in Order Nos. 12645, 13452 and PSC-97-0608-FOF-EI. The Florida Supreme Court affirmed the jurisdiction that the Commission staked out in Order Nos. 12645 and 13452 in the case of *Gulf Power Company v. Florida Public Service Commission,* 487 So. 2d 1036 (Florida 1986). If the Commission had not incorporated this feature into the fuel cost recovery mechanism, and later successfully defended it in the co-called "Maxine Mine case," it would have effectively abdicated its role of protecting customers' interests, for the admonition that a failure to prove prudence or face uncertainty and the possibility of a future disallowance is the *only* feature intended to protect customers left following the evolution to provide additional advantages to utilities. It was on the basis of the jurisdiction that the Commission preserved in these orders and that the Florida Supreme Court affirmed in Gulf Power that the Commission denied PEF's motion to dismiss Citizens' Petition in the early phases of this proceeding. The jurisdiction of the Commission to disallow past overcharges when factors warrant, then, has been established; the only question that remains to consider is whether Citizens have brought relevant facts to the Commission in this case that warrant the exercise of that jurisidiction to protect customers from imprudent and unreasonable charges. On the basis of the record of the hearing, and for the reasons stated in response to this and prior issues, Citizens submit the Commission must answer this question in the affirmative.

PEF availed itself of the advantage of current recovery. PEF chose not to present evidence sufficient to prove its costs of fueling CR4 and CR5 were prudent and reasonable (nor could it). PEF assumed the risk that relevant facts that it had chosen not to present might be discovered and presented in support for a demand by customers that unreasonable fuel charges be refunded. Now PEF, having enjoyed the benefits of current recovery, having failed to prove the prudence of its costs, and having assumed the risk that the Commission might do what it said it would do when laying out the customer protection quid pro quo of the current recovery mechanism, presents itself as a victim when called to account for decisions that subordinated customers' interests to corporate profits. The Commission should reject this latest effort by a utility to persuade it to abdicate its role of protecting customers' interests.

Among other arguments, PEF asserts that to impose a disallowance would lead capital markets to react negatively. Citizens' witness, Dan Lawton, put the assertion into perspective when he testified that capital markets do not expect regulators to acquiesce to imprudent and unreasonable costs: otherwise, a utility could dump ratepayers' money into a lake without fearing adverse consequences. (TR-). PEF's own witness, Mr. Fetter, mistakenly asserted that the Commission had made findings of prudence at the time of true-up orders. His testimony, obviously made without the benefit of an understanding of the processes or pronouncements of the Commission on the subject, was effectively rebutted by Citizens' witness, Todd Bohrmann. (TR 1501-1502) Notwithstanding his prefiled testimony, Mr. Fetter agreed that the Commission must have the ability to adjust collections to disallow overcharges for a reasonable period of time,

which he defined at one point to be three years. (TR 204). He opined that the Commission should reach farther only in the instance of a material concealment.

Citizens question whether there is any real or substantive difference between Mr. Fetter's stance and Citizens' position in this case. What is the difference, if any, between a utility that elects not to present all facts bearing on prudence, including those that would disclose imprudence, and a utility that engages in a material concealment? The difference would appear to Citizens to be one of semantics. In this case, for instance, Citizens have shown that in 2005 PEF sought to deflect criticism for not having purchased PRB coal, the cheapest fuel bid into its 2004 RFP, by responding that its environmental permit did not authorize it to burn PRB coal at the time. Citizens have also shown that PEF failed to mention in its response that (1) PEF purposely omitted any reference to PRB coal in its 1996 application for its first Title V federal air permit; (2) PEF subsequently amended its application to add synfuel to be purchased from affiliates, but did not add PRB subbituminous coal to its application; (3) PEF's own fuel procurement and plant operating personnel were not aware of the limitation in the federal permit when they conducted the 2004 RFP or when they purchased PRB coal for a test burn in 2004; (4) PEF failed to conduct a stack test of the 50/50 blend of PRB and bituminous coals that were the "design basis fuel" for CR4 and CR5 at any point from the time the units entered commercial service until the unauthorized and aborted effort in 2004; (5) when evaluating PRB coal PEF clung to the assumption that it would have the same ability to arbitrage the difference between a "proxy" transportation rate and market transportation costs, when no such proxy had been approved by the Commission. Had PEF been forthcoming about these and other pertinent facts in a timely manner, the

parties and the Commission would have been in a position to winnow overcharges from amounts to be collected much sooner. Despite the fact that it had the burden of proof, and despite having been placed on notice that the Commission would retain jurisdiction to consider the prudence issue, PEF chose not to present all relevant facts timely. Citizens submit that the situation meets—not only the parameters of the Commission's orders reserving jurisdiction to protect customers—but the parameters of PEF's own witness, who spoke of "material concealment."

As to predictions that Wall Street may react negatively: The role of the Commission is to protect customers from the consequences of PEF imprudence, *not* to rescue PEF management from its mistakes and imprudence. If the Commission finds PEF's conduct to have been imprudent, the capital markets cannot fault the Commission for taking steps to insulate customers from higher costs emanating from that misconduct. And, if capital markets react by increasing PEF"s costs of borrowing, then the Commission must filter those incrementally higher costs from the costs that customers bear as well. Management – not the utility's customers – must be made to bear the risk of imprudence. The Commission's charge is to ensure that the rates customers pay are fair and reasonable, *not* to hold management harmless becauselenders and stockholders dislike disallowances of imprudent expenses. In their position statements Citizens have stated that they expect the Commission to structure the timing of the refund in a manner consistent with the dual objectives of returning overcharges, with interest, to ratepayers while maintaining PEF's ability to provide quality service and access capital markets on reasonable terms. In light of the Commission's role in protecting customers from bearing

the imprudent and unreasonable costs, that is all that either PEF or capital markets could ask or expect.

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?**

Citizens: The amount of overcharges by year are:

Year	Excess Coal Costs $	Excess SO_2 Allowance Cost $	Total Excess Fuel Charges $
1996	1,056,000	N/A	1,056,000
1997	5,617,376	N/A	5,617,376
1998	7,703,136	N/A	7,703,136
1999	8,412,664	N/A	8,412,664
2000	4,884,739	1,497,278	6,382,017
2001	14,923,313	1,897,541	16,820,854
2002	20,712,248	1,410,049	22,122,297
2003	14,108,871	1,413,510	15,522,381
2004	17,603,768	4,196,799	21,800,567
2005	21,572,511	7,513,540	29,086,051
Total w/o Interest	116,594,626	17,928,717	134,523,343

The total refund is based on the beginning year selected. By 1996 the opportunity to save costs had been fully established; in that year PEF excluded subbituminous coal from its federal permit application.

ARGUMENT

The amount of overcharges that should be refunded is a function of the period of time the Commission selects as the appropriate basis for refunding overcharges. Perhaps the best way to assess the question of the appropriate time frame is to begin with the most recent periods and proceed in the direction of earlier years.

2005: The amounts that PEF paid for fuel for CR4 and CR5 during 2005 are a function of the results of an RFP that PEF conducted in 2004. Even PEF's witnesses acknowledge that the bids to the 2004 RFP demonstrate that PRB coal were the most economical sources of fuel for CR4 and CR5 that were offered. Yet, having spent an additional $44 million *each*of ratepayers' money on CR4 and CR5 to provide the ability and flexibility to burn a blend containing 50% PRB subbituminous coal, in 2004-2005 PEF was not positioned to take advantage of the opportunity to lower customers' fuel costs by purchasing and burning the 50/50 blend in CR4 and CR5. It was not positioned to do so because of imprudence. It was imprudent for PEF not to have taken those measures necessary to maintain the flexibility for which customers were paying over time. It was imprudent not to have performed a stack test with the blend at the time the units were being performance tested. It was imprudent not to identify PRB subbituminous coal as a fuel for which PEF requested authority in 1996, when it first applied for its federal Title V permit, or at any point between 1996 and the time when the authority could have been in place prior to the results of the 2004 RFP. As a result of these imprudences, and the resulting unreasonable fuel charges, for 2005 the Commission should require PEF to refund $29,086,051.

2004: The amount that PEF paid for fuel to burn in CR4 and CR5 is a function of the results of its 2003 RFP. In its evaluation of PRB bids, PEF overstated the costs of the PRB option. Properly adjusted, the PRB offers were the most economical sources of fuel for CR4 and CR5. Yet, PEF was not positioned to take advantage of the opportunity to lower costs borne by customers in 2004. PEF was not positioned to do so because it had been imprudent in its management of fuel procurement for CR4 and CR5. Having spent

$44 million of ratepayers' money *each* on CR4 and CR5 6to add the capability and flexibility to burn the 50/50 mixture of PRB and bituminous coals that PEF itself had designated as the "design basis fuel," PEF imprudently failed to perform a stack test with the blend when the units became operational (or, for that matter, at any time during the first 20+ years of their operation!). PEF purposely omitted any mention of subbituminous coal as a potential fuel for CR4 and CR5 in its application for its first federal Title V air permit. This constituted imprudence *per se.* As a result of these imprudences, PEF could not have met its obligation to customers to purchase the most economical fuel available, even if it had not "placed its thumb on the scale" during its evaluation of bids to the 2003 RFP. The year 2004 is only one year prior to the point in time at which Citizens raised the issue of Powder River Basin coal in Docket No. 050001. There can be no credible claim that the Commission does not have jurisdiction and authority to adjust the amounts that PEF spent on fuel for CR4 and CR5 during that year. The Commission should add to the refund the amount of $21,800,567. For the two years 2005 and 2004 the amount to be refunded, excluding interest, is $50,886,618.

2003: While Citizens assert that the Commission has jurisdiction and authority to order a refund for the 10 year period that is the subject of its Petition and Mr. Sansom's analysis, Citizens have included the year 2003 in the individual breakout because it represents the third year of the period in which the Commission would be fashioning an adjustment to past periods. Three years is the time frame that the Commission applied in the Maxine Mine case. It is the period that the Florida Supreme Court affirmed in the appeal of that order. It also happens to be the longest period that any party to the Maxine Mine case advocated, and for that reason Citizens submit the case does not limit the

Commission's ability to reach back farther in time where relevant facts not presented earlier warrant such action. However, even in the face of opposing arguments, in light of the Court's decision there can be no credible claim that the Commission is without jurisdiction and authority to require a refund of overcharges imposed on customers in 2003. Based on actual transactions involving the purchase and sale of PRB coal in 2003, and a sound and reasonable methodology for adjusting the delivered price to reflect the different Crystal River destination, Mr. Sansom demonstrated that in 2003 PEF collected $15,522,381 more from customers to fuel CR4 and CR5 than it would have collected had it taken advantage of the opportunity to use the flexibility in the design of CR4 and CR5 to burn a 50/50 blend of PRB and bituminous coals. PEF was not positioned to do so in 2003 because of prior imprudent behavior. Having spent $44 million of ratepayers' money on each of CR4 and CR5 to provide such flexibility, PEF imprudently failed to perform a stack test with the very fuel the units were designed to burn upon completion of construction or at any point during the first 20+ years of their operation. PEF purposely omitted PRB subbituminous coal as a fuel it wished authority to burn in CR4 and CR5. Citizens assert that this constituted imprudence *per se,* and that in attempting to deny imprudence in this case PEF is attempting to defend the indefensible. In 2003, then, PEF was imprudent, first for failing to identify PRB as the most economical choice, and also for failing to have taken those measures that would have enabled to act on the opportunity to lower customers' costs even if it had properly assessed that opportunity. Based on actual transactions involving the price of PRB coal during 2003, and reasonable, sound adjustments designed to take into account the different Crystal River destination, Mr. Sansom demonstrated that customers paid $15,522,381 more than they

would have paid had PEF purchased and burned the 50/50 blend of PRB and bituminous coals that PEF itself had designated as the "design basis fuel" for the units. Added to the amounts for 2005 and 2004, the refund for the three year period (exclusive of interest) is $66,408,999.

2000-2002: The first Title V permit limiting PEF to burning bituminous coal and synfuel became effective in January 2000. That date marks the beginning point at which PEF was legally unable to burn in CR4 and CR5 the very blend of coals that the units were designed to burn—this despite the investment of $88 million of ratepayers' money to acquire that ability. PEF was in that position—not because of any external condition that was imposed upon it—but because it failed, first to conduct a basic stack test of the fuel the units were designed to burn, and more importantly because PEF purposely and knowingly omitted PRB subbituminous coal from the list of fuels it requested authority to burn when it applied for a Title V permit. These imprudences resulted in a permit that prohibited PEF from burning the fuel that PEF itself had chosen as the "design basis" for the units. Ironically, 200 is also the year by which PEF's own fuel procurement official predicted that PEF would be purchasing PRB coal. Further, PEF took no action in 2000, 2001, or 2002 to rectify the situation. In the meantime, during the years 2000, 2001, and 2002, customers paid $40,023,725 more than they would have paid had PEF positioned itself to utilize the flexibility for which customers were paying. This amount was calculated conservatively by Mr. Sansom using data from actual purchases of PRB coal during the period, and incorporating a sound and reasonable methodology for taking into account the different Crystal River destination. Added to the amounts for the years 2005, 2004, and 2003, the total for the period 2000-2005 (excluding interest) is $106,432,724.

1996-1999: As Mr. Sansom's exhibit displaying annual overcharges shows, the largest amounts of overcharges occurred in the most recent annual periods. The year 1996 is significant because it marked the last reasonable point at which PEF should have joined the wave of PRB purchasers that caused sales of PRB coal to increase dramatically by that date. Yet, while other utilities were taking measures such as converting units that had not been designed to burn PRB coal so that they could exploit the opportunity to lower customers' fuel costs, PEF , the owner of two units that had been expensively designed to burn a 50/50 blend of PRB coal and bituminous coals, deliberately excluded PRB subbituminous coal from the scope of its first federal Title V permit in 1996. PEF received what it requested: a permit that limited it to bituminous coal and synfuel. In 2005, PEF justified the fact that it had not purchased PRB coal pursuant to the 2004 RFP on the grounds that its permit prohibited it from doing so, without disclosing that PEF had itself engineered that result. This disingenuous and misleading episode belies the claim by PEF that its procurement practices have been "an open book" and that it provided all information requested by parties. It is the reason why, even though the larger dollar amounts of overcharges occurred in subsequent years, the Commission should include 1996-1999 in the calculation of overcharges. The corresponding amount is $22,789,176, which results in a total for the entire period of $134.5 million plus interest.

ISSUE 6: **Should this docket be closed?**

Citizens: If the Commission closes this docket it should state clearly that parties may prusue related issues for years following 2005 in true-up proceedings or other appropriate proceedings.

CONCLUSION

At page 509, after first asserting that recent changes in market conditions mean there is no economic benefit to be gained from PRB coal, PEF witness Sasha Weintraub stated: "We plan, however, to continue to pursue a revision to the environmental permit to add sub-bituminous colas and we will continue to monitor the market to be prepared for subsequent changes in the prices of PRB coals relative to bituminous coals." Probably Mr. Weintraub did not realize that with this pledge of future prudent behavior he was indicting PEF's performance during 1996-2005. In that period PEF failed to conduct a test burn with the 50/50 blend the units were designed to burn, failed to maintain or acquire requisite authority, failed to properly gauge the economics of PRB coal, and imprudently missed a major window of opportunity to lower costs borne by customers.

For the reasons developed above the Commission should order PEF to refund to retailcustomers overcharges totaling $134.5 million, plus interest.

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