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From: Costello, Jeanne [JCostello@CarltonFields.com]
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Attachments: PEF Response to OPC Motion for Reconsideration.pdf

PEF Response
OPC Motion for
Electronic Filing and e-service

A. Person responsible for this electronic filing:

James Michael Walls
Carlton Fields
4221 W. Boy Scout Blvd., Ste. 1000
Tampa, FL 33607
Email: mwalls@carltonfields.com
Direct Dial: (813) 229-4257
Fax: (813) 229-4133

B. Docket No. 060658-EI

Progress Energy Florida Inc.'s Response to Citizen's Motion for Reconsideration and Request for Oral Argument [17 pages]

Thank you for your attention to this request.

Jeanne Costello
Legal Administrative Assistant
James Michael Walls / Dianne M. Triplett Carlton Fields
4221 W. Boy Scout Blvd., Ste. 1000
Tampa, FL 33607
Email: jcostello@carltonfields.com
Direct Dial: (813) 229-4917
Fax: (813) 229-4133
www.carltonfields.com

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 to customers $143 million	)))))	DOCKET NO. 060658-EI Filed: November 1, 2007

PROGRESS ENERGY FLORIDA, INC'S RESPONSE TO CITIZENS' MOTION FOR RECONSIDERATION AND REQUEST FOR ORAL ARGUMENT

Pursuant to Rules 25-22.060(3) and 28-106.204, F.A.C., Progress Energy Florida ("PEF") files this response in opposition to the Motion for Reconsideration and Request for Oral Argument filed by the Office of Public Counsel ("OPC") on October 25, 2007. For the reasons more fully explained below, OPC fails to meet its burden to demonstrate a material and relevant point of fact or law that the Commission overlooked or failed to consider when the Commission rendered its 50-page decision in Order No. PSC-07-0816-FOF-EI (hereinafter the "Order"). As fully explained below, there is absolutely no evidence that the Commission overlooked or failed to consider. Indeed, the Commission's express consideration of evidence supporting a PRB blend **less than 30 percent** is made 27 times in the Order. Order, pp. 17, 27-28, 30-32, 35-36, 37-39. It is amazing that OPC has argued that the Commission overlooked any evidence. OPC simply wants a "do over," which is particularly egregious under the circumstances of this case.

OPC's Motion for Reconsideration

The Commission issued its final, 50-page Order in this docket after a four-day hearing, the submittal of post-hearing briefs and positions by all parties, and the

consideration of a detailed, 104-page staff recommendation. As OPC admits in paragraph 1 of its motion, the issue before the Commission was whether PEF had incurred "unreasonably high costs of fueling its coal-fired Crystal River Units 4 and 5 during the period 1996-2005." Motion, ¶ 1. Based on the evidence presented in pre-filed testimony and over the four-day evidentiary hearing, OPC chose to argue -- as it again admits in its Motion -- that the evidence supported the determination the PEF "should have been burning in Crystal River Units 4 and 5 the 50/50 blend of subbituminous and bituminous coals" that OPC claimed was the design blend for the units. Id. The Commission however, after hearing all the evidence, ordered PEF to refund customers based upon the finding that PEF should have been burning 20 percent Powder River Basin ("PRB") coal and 80 percent bituminous coal at its Crystal River Units 4 and 5 ("CR4" and "CR5"), from 2003 to 2005.[1]

OPC's assertion that this Commission actually overlooked or ignored an argument that the record evidence supported a refund based on a 30 percent PRB blend is a remarkably inaccurate assertion. The Commission did not overlook or ignore the 30 percent PRB blend argument: the Commission expressly considered, debated, and voted against a motion to re-open the proceeding based in part on whether a 30 percent PRB blend should have been used for the refund. For this reason alone, OPC's motion should be summarily denied.

Further, OPC moves for reconsideration to argue a 30 percent PRB blend case based on the same evidence that the Commission considered when it rejected OPC's

[1] PEF defended its coal purchasing decisions during the 1996-2005 time frame at issue in this proceeding and, although PEF still maintains that its decisions were reasonable and prudent, PEF accepts for the purposes of this response that the Commission found as it did in Order No. PSC-07-0816-FOF-EI.

argument that a 50 percent PRB and bituminous coal blend should be used and instead affirmatively decided that a 20 percent blend of PRB coal should have been used at CR4 and CR5 from 2003 to 2005.[2] Under controlling law, the Commission is not permitted to re-weigh the evidence on a motion for reconsideration simply because OPC now believes it should have made a different argument than the one it made. This use of a reconsideration motion is wholly improper and granting OPC's motion would constitute gross appealable error. Accordingly, OPC's motion must be denied.

In any event, OPC's attempts to re-argue the evidence in its motion are easily dispensed with when the entire record is considered. OPC inappropriately "cherry picks" excerpts of evidence from the record and renews old arguments to support its argument for a 30 percent blend on reconsideration. OPC's re-hashed arguments, however, are unsupported by the record evidence. There simply is no evidentiary basis for OPC renewing arguments for a 30 percent PRB blend rather than a 50 percent one.

For all these reasons, as more fully explained below, OPC's motion for reconsideration must be denied.

Standard of Review

OPC fails to meet the strict standard for granting a motion for reconsideration. A motion for reconsideration must identify a point of fact or law that the Commission overlooked or failed to consider in rendering the order. In re: Petition for determination

[2] OPC apparently disagrees with other aspects of the Commission's Order that OPC recognizes are inappropriate for OPC's motion for reconsideration, see, for example, OPC's footnote 1. Motion, ¶ 4, n. 1. Nevertheless, OPC attempts to bolster its arguments in its reconsideration motion with these admittedly improper arguments, i.e. OPC contends that its argument in footnote 1 "underscores the need to identify a blend ratio that does not understate the capability of the units." Id. Because these arguments are not properly before the Commission on OPC's reconsideration motion they should not be considered at all.

of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee, Order No. PSC-06-1028-FOF-EU, 2006 Fla. Puc Lexis 650 (Dec. 11, 2006), citing Stewart Bonded Warehouse. Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 162 (Fla. 1st DCA 1981); and State ex. Rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). This is the "sole and only purpose" of a motion for reconsideration. Green, 105 So. 2d at 818.

An evidentiary matter is not "overlooked" or "misapprehended" by the Commission merely because the movant says it was. "Frequent violations" masquerading as matters "overlooked" or "not considered" include " ... (2) arguing or quarreling with the [commission] over correctness of its conclusions on the points it has considered and decided, (3) advancing new or other points or theories not previously relied on, and (4) rearguing the cause in advance of a permit from the [commission] for such reargument." Sherwood v. State, 11 So. 2d 96, 98-99 (Fla. 3d DCA 1959) (emphasis added). Evidentiary matters, therefore, are not "overlooked" or "misapprehended" when the movant asks the Commission to re-weigh the evidence and re-argues the case. In re: Complaints by Ocean Properties, Ltd., et. al. against Florida Power & Light Co. concerning thermal demand meter error, Order No. PSC-05-1034-FOF-EI, Docket No. 030623-EI (October 21, 2005) ("reweighing the evidence is not a sufficient rationale for granting reconsideration"), citing Green, 105So. 2d at 818. Indeed, if reconsideration is granted based on re-weighing or re-arguing the evidence it is reversible error on appeal. Stewart Bonded Warehouse. Inc., 294 So.2d at 317-318.

The Commission Cannot Overlook a Matter that it Considered and Rejected

The Commission, after reviewing the record evidence and parties' briefs, considered the staff recommendation, engaged in debate, and voted on the staff recommendation at the July 31st agenda conference. During that agenda conference, the issue of using a 30 percent PRB blend for the refund calculation for coal costs for CR4 and CR5 from 2003 to 2005 was raised, among others, and was included in a motion to reopen the proceedings. (Agenda Tr. p. 120). In fact, some of the evidence that OPC relies upon in its Motion for Reconsideration ***was expressly discussed and debated*** during that agenda conference. (Agenda Tr. pp. 7-8, 11-12, 16-17, 37-38, 40-42, 50-53, 103-106, etc.) (discussing the Sargent and Lundy Report and the use of a 70/30 blend). The Commission voted 3 to 2 to disapprove the motion. (Agenda Tr. P. 126). A motion for reconsideration must raise a point of fact or law that the Commission overlooked or failed to consider. See Order No. PSC-06-1028-FOF-EU; Stewart Bonded Warehouse. Inc., 294 So.2d at 317; Diamond Cab Co., 146 So.2d at 891; Pingree, 394 So.2d at 162; and Green, 105 So. 2d at 818. The Commission obviously did not "overlook" or "fail to consider" facts allegedly supporting a 30 percent PRB blend when that issue was debated and included in a motion that was considered and rejected at agenda conference. OPC's motion for reconsideration should be denied simply because it renews an argument that the Commission did not overlook but did in fact consider and reject.

OPC's Motion Re-Argues the Case Based on the Same Evidence and Requires the Commission to Re-Weigh the Evidence

OPC pays lip service to the limited standard of review on a reconsideration motion by using the words "overlooked," "misapprehended," or "not considered" in its motion. But OPC fails to identify any fact (or point of law) that the Commission actually

overlooked or failed to consider in its decision. Rather, OPC is asking this Commission to re-weigh the same evidence the Commission expressly considered in deciding that a 20 percent PRB blend should have been used at CR4 and CR5 from 2003 to 2005, rather than the 50 percent PRB blend OPC argued for and the Commission rejected, and apply a 30 percent PRB blend from 2003 to 2005. Although PEF respectfully disagrees with the Commission's decision, neither PEF's disagreement nor OPC's desire for a "do over" can support an argument that the Commission overlooked or failed to consider evidence.

OPC refers to three record "facts" that OPC contends the Commission "overlooked" or "misapprehended" that, according to OPC, support a 30 percent PRB blend rather than a 20 percent PRB blend: (a) excerpts from the Sargent & Lundy study; (b) parts of Mr. Wayne Tom's testimony; and (c) excerpts from the exhibits containing the PEF 2006 test burn permit application and Florida Department of Environmental Protection (DEP) review of that permit. Motion, pp. 4-7. Before turning to OPC's arguments about this evidence, it bears emphasis at the outset that all of these facts were part of the record and the arguments made about them were in the parties' briefs that this Commission expressly said it "analyzed" at page 17 of its Order. Order, at p. 17.

OPC claims that excerpts from the Sargent & Lundy study support a refund based on a 30 percent PRB blend because the alleged "breakpoint" before "major" performance and cost impacts would occur was a 70 percent PRB blend under the study. Motion, at p.4. OPC then "assumes" a 30 percent PRB blend of coal delivered to CR4 and CR5 would be above the threshold to avoid a derate of the units identified by Mr. Tom's in his testimony. Id. at pp. 5-6. Finally, OPC alleges a 30 percent PRB blend was within the range of blends that PEF proposed to burn in its 2006 DEP permit application and the

DEP evaluation response. Id, at pp. 6-7. In sum, OPC asserts that just these three pieces of the factual record support its argument that the Commission "overlooked" a blend higher than the 20 percent PRB blend --- here, specifically a 30 percent blend --- that the Commission arrived at as the appropriate blend for CR4 and CR5 in its Order. OPC's argument is misleading and wrong.

OPC admits, as it must, that among the Sargent & Lundy study's scenarios was a "less than 30 percent" PRB blend, which the Commission relied upon in part to arrive at its determination that a 20 percent PRB blend was appropriate between 2003 and 2005. Motion, at p. 3. The Commission's Order is replete with references to **all** the evidence the Commission relied upon to conclude that a "**less than 30 percent**" PRB blend was appropriate -- including the Sargent & Lundy study -- for CR4 and CR5. Indeed, the Commission's express consideration of evidence supporting a PRB blend **less than 30 percent** is made 27 times in the Order. Order, pp. 17, 27-18, 30-32, 35-36, 37-39.

The Commission specifically addressed and weighed **all** the evidence regarding the appropriate coal blend, particularly in light of the importance of avoiding a de-rate at CR4 and CR5, before making the final determination that a 20 percent PRB blend was appropriate.

Indeed, the Commission's final order is replete with references to 20 percent and less than 30 percent PRB coal blends, thus, demonstrating that the Commission deliberately evaluated the blend of PRB coal that was appropriate and feasible for burning at CR4 and CR5.[3] It is therefore amazing that OPC has actually argued that the

[3] For example, on page 27 of the Order, the Commission clearly noted that "the continuing reliable operation of CR4 and CR5 is of paramount importance." Order, p.27. The Commission further confirmed on page 29 that CR4 and CR5 performance "must not

Commission somehow overlooked some alleged evidence that a 30 percent PRB blend should have been burned. To the contrary, the Commission provided a detailed analysis as to why a 20 percent PRB blend was chosen. There was absolutely no evidence that was overlooked or misapprehended, and OPC's argument is nothing more than a thinly veiled request for a "do over."

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be compromised" and that the units "will be able to maintain availability and capacity while using a low percentage of PRB coal." Id. at p. 29. On page 28, the Commission considered the Sargent & Lundy study and its findings regarding "***less than*** 30 percent PRB coal" and a "blend ***under 30*** percent." (emphasis added). On that same page, the "short-term test burn of a lower blend of PRB (20 percent) and bituminous coal" was specifically noted in support of the Commission's decision that 20 percent was the appropriate PRB blend. Id. at p. 28. On pages 30 to 31 of the order, the Commission also referred to a report issued by PEF's Strategic Engineering Group, "which indicated that using PRB blended off-site at ***less than 30 percent*** and delivered by barge would offer substantial savings and fuel flexibility." Id. at pp. 30-31. (emphasis added). Continuing on page 31, the Commission references a "***less than 30*** percent" coal blend, "a 20 percent PRB blend," "PRB coal at blends ***under 25*** percent," and "a blend ***under 30*** percent." (emphasis added). The Commission also cites the 2004 test burn on that same page, which was "***15 percent to 22 percent*** PRB coal." (emphasis added). In that same context, the Commission noted the safety concerns concerning the nuclear plant, Crystal River Unit 3 ("CR3"), based on the 2004 test burn of that blend of PRB coal. Order, pp. 31-32. The Commission again, on page 35, expressly considered the capital and operational cost impacts "if the quantities were restricted to blends ***less than 30*** percent of PRB coal," finding that "PRB coal blends ***less than 30*** percent" could have been purchased. Id. at p. 35. (emphasis added). Further, on page 36, the Commission found that CR4 and CR5 could have safely burned "***a 20 percent*** blend of PRB coal." (emphasis added). On that same page, the Commission expressly finds that "the evidence in the record supports a ***long-term 80/20 blend*** of bituminous coal to PRB coal with no derate at CR4 and CR5." (emphasis added). The capital costs are again noted on this page "when PRB coal accounts for ***25 percent or less*** of the blend." Id. at p. 36 (emphasis added). On page 38, in its discussion of the delivery constraints, the Commission notes that "[a]n ***80/20 blend*** of CAPP/foreign to PRB coal with the constraint of 2.4 million tons per year, blended off-site, is consistent with our analysis above." (emphasis added). The Commission on this same page again references "an ***80/20*** blend," "a ***20 percent*** PRB coal blend at CR4 and CR5," "a ***20 percent*** PRB coal blend, blended off-site," "***less than 30 percent*** PRB coal, and "coal blends ***less than 30 percent*** PRB." Id. at p. 38 (emphasis added). Finally, on page 39, the Commission states: "we find that the record reflects that CR4 and CR5 could burn a ***20 percent blend*** of PRB coal without a derate." (emphasis added). The Commission also "lowered the amount of capital improvements needed to recognize ***a 20 percent blend*** of PRB coal." Id. at p. 39 (emphasis added).

Moreover, the exact same arguments that OPC makes in its reconsideration motion in support of a 30 percent PRB blend was made by OPC's witnesses and in OPC's brief in support of a 50 percent PRB blend. (OPC Brief at pp. 7-8, 14, 16-17, 18, 20, 22-24; Tr. P. 729, L. 18 to P. 730, L. 8; Tr. P. 1308, L. 21 to P. 1310, L. 14). The Commission was obviously well aware of what PRB blends are discussed in the Sargent & Lundy study. Considering that study together with all the other evidence, the Commission reached its conclusion that the proper blend was **less than** 30 percent PRB, i.e. 20 percent PRB. Order, pp. 17, 27-28, 30-32, 35-36, 37-39. The argument that the Sargent & Lundy study and the 2006 DEP permit documents supported a higher blend than 20 percent PRB was in fact made to the Commission and rejected. OPC's current reconsideration argument on this point, then, is simply asking the Commission to re-weigh the same evidence and re-arguing the same point. That is flatly improper as a matter of law. See Order No. PSC-06-1028-FOF-EU; Stewart Bonded Warehouse. Inc., 294 So.2d at 317; Diamond Cab Co., 146 So.2d at 891; Pingree, 394 So.2d at 162; and Green, 105 So. 2d at 818.

The Record Evidence as a Whole Does Not Support OPC's Motion

OPC is quite selective in the evidence that it chooses to rely on to support its improper motion. When OPC's "cherry picked" excerpts are considered as a whole, with all other record evidence -- as the Commission has expressly already done -- they do not support OPC's reconsideration motion.

OPC asserts that the Commission "misapprehends" and even "mischaracterizes" the Sargent & Lundy study, based on an excerpt of the Commission's Order at page 28. Motion, at p. 3. OPC then selectively quotes from that study to claim that the study

supports a 70/30 percent PRB blend at CR4 and CR5. Motion, at pp. 3-4. It is OPC however, and not the Commission, that "misapprehends" and "mischaracterizes" the Sargent & Lundy study.

First, the Commission was clearly aware that the Sargent & Lundy study was a "high level" and "first cut" study of PRB blends at CR4 and CR5 -- as the study itself says in parts not quoted by OPC in its reconsideration motion and based on undisputed witness testimony. (Ex. 74, p. 3; Tr. P. 518, L. 20-23; P. 506, L. 5-7.) The Commission, accordingly, did not rely entirely on the Sargent & Lundy study to determine the appropriate PRB blends at CR4 and CR5. Rather, at page 28, where OPC quotes from and elsewhere in the Order, the Commission relied more on the PRB blends that were actually tested in test burns at CR4 and CR5.[4] Order, pp. 28, 30-31. Every expert who testified, including OPC's experts, explained that test burns were necessary to determine how the units would operate using particular qualities and quantities of coal. (Tr. P. 638, L. 2 to P. 639, L. 7; Tr. P. 1342, L. 10-13; Tr. P. 1435, L. 21 to P. 1436, L. 1.) The Commission, therefore, did not "misapprehend" or "mischaracterize" the Sargent & Lundy study. Rather, the Commission gave the study the weight the Commission believed the study deserved in determining the PRB blends that the Commission determined should have been used at CR4 and CR5.

Next, OPC claims the Commission "overlooked" the proper application of Wayne Toms' testimony regarding the Btu level of coal that must be maintained for the units to operate at overpressure. Motion, at p. 5. OPC accepts for the first time Mr. Toms'

[4] Tellingly, the very next sentence of the Commission Order at page 28 after the one OPC quotes on page 3 of its reconsideration motion states: "In 2006, PEF successfully completed a short-test burn of a lower blend of PRB (20 percent) and bituminous coal." Order, p. 28. OPC omits this sentence when it quotes the Commission Order.

testimony that CR4 and CR5 must have coal of at least a level of 11,000 to 11,300 Btus per pound to maintain overpressure and avoid a derate at CR4 and CR5. Id. OPC then claims that this "criterion" is met with a 30 percent PRB blend, "without adjustments of any kind," based on an **assumption** that OPC asks the Commission to make in its reconsideration motion. Id. at pp. 5-6.

There are several reasons why this argument is improper on reconsideration. First, OPC's argument is based on an "assumption" in its motion and an assumption is not evidence. In fact, OPC nowhere in its motion refers to *any evidence in the record* to support this argument.

Second, OPC asserts that this assumption should be taken at face value "without adjustments of any kind," as if the "adjustments" that might be necessary somehow support OPC's assumption. To the contrary, however, any necessary "adjustments," to account for the higher moisture content of PRB coals for example, do not support OPC's assumption. Every expert testified to differences between PRB and bituminous coal, such as the higher PRB moisture content, that required test burns to determine the appropriate impact of particular coals on the boiler. (Tr. P. 1430, L. 24 to P. 1431, L. 2; Tr. P. 1339, L. 2-4; Tr. P. 1430, L. 24 to P. 1431, L. 2; Tr. P. 638, L. 2 to P. 639; L. 7; Tr. P. 1342, L. 10-13; Tr. P. 1435, L. 21 to P. 1436, L. 1.) OPC's "assumption" that the 30 percent blend had no operational impacts at CR4 and CR5 cannot be accepted at face value based on the evidence before the Commission that led it to affirmatively conclude a PRB blend "less than" 30 percent was appropriate.

Third, OPC's argument that the Commission should grant reconsideration based on an "assumed" Btu level for a 30 percent PRB blend overlooks other factors that affect

the output of the units that the Commission in fact expressly relied upon in the Order. At page 30 the Commission explained that "[t]he record indicates that particle size and silo capacity (or throughput) limit the production of the utility." (Order, P. 30; see also Tr. P. 1343, L. 24 to P. 1344, L. 4.) But OPC's assumption about the type of coal that PEF could have burned to get to the 11,300 Btu level does not address the particle size or the silo capacity necessary with that particular coal blend.[5] This example highlights that OPC is "cherry picking" excerpts from the record evidence in its reconsideration motion. The Commission, however, considered the entire record before the Commission when it reached its conclusions in its final order.

Finally, OPC argues that the Commission "overlooked" actual exhibits in evidence that, according to OPC, allegedly contain "representations" to the DEP bearing "on the selection of the ratio of PRB coal to use in calculating the refund." Motion, at p. 6. OPC claims that these "representations" show that PEF could burn up to 50 percent PRB at CR4 and CR5, and, therefore OPC asserts, a 30 percent PRB blend could also be

[5] OPC even ignores this evidence when it argues a point that it claims to "put aside" for the motion but nevertheless included, namely, that simply adjusting the feeder speeds would have compensated for lower PRB Btu content coal and maintain overpressure. Motion, at p. 5. OPC (1) raised this argument in its brief, as it admits in its motion, (2) PEF responded to it by pointing to the undisputed evidence of the actual experience operating the units that silo and pulverizer capacity, not feeder speeds, precluded use of the lower Btu PRB coals in higher blends because of derates (PEF Brief, pp. 33-34), and (3) the Commission rejected it, finding in relevant part that "design calculations" of feeder speeds for example, did not "sufficiently address particle size, or show why limits on silo capacity would not curtail steam production." Order at p. 30. This re-argument of a position so clearly rejected based on the evidence is improper even as an "aside" to OPC's motion.

burned. OPC claims the Commission did not take either exhibit into account in its analysis in the final order. Id. at p. 7.[6]

OPC is wrong on both points. First, the Commission devoted an entire section of its final order to the environmental permitting issues. Order, pp. 17-18. In that section, on page 18, the Commission agreed "that the company could not have listed sub-bituminous coal on the application without conducting a test burn." Order, p. 18. The Commission recognized, then, that DEP would not have allowed PEF to burn a 30 percent PRB blend without a test burn showing the effect that coal blend would have on the unit. This conclusion is supported by the undisputed testimony in the record, including the testimony of OPC's own environmental expert, Stephen Smallwood, that a test burn is necessary before any new coal can be burned at a unit. (Tr. P. 1483, L. 21 to P. 1484, L. 5; Tr. P. 1485, L. 11-16; Tr. P. 786, L. 2-7; Tr. P. 1487, L. 23 to P. 1488, L. 7; Tr. P. 1489, L. 24 to P. 1490, L. 13.) The Commission therefore took into account the entire record evidence, not merely excerpts selected from two exhibits chosen by OPC, in reaching its determination.

OPC also mischaracterizes the very exhibit evidence that OPC argues the Commission overlooked. OPC quotes a limited excerpt from DEP's technical evaluation (Exhibit 224) in its motion. The complete technical evaluation contained in Exhibit 224, however, actually supports the decision the Commission made rather than the decision OPC advocates in its motion. That DEP evaluation acknowledges that PEF conducted a test burn of an 18 percent PRB blend, and accordingly, **the permit authorizes PEF to only burn up to a 20 percent blend.** (Ex. 224, p. 10; Tr. P. 793, L. 1-4.) The DEP

[6] OPC made the exact same argument in its brief at page 14. OPC Brief, p. 14. Thus, this is clearly improper re-argument.

evaluation provides that PEF may burn additional percentages of PRB coal, but only if PEF first tests those higher blend percentages. Id.

This very point was explicitly made during the hearing. OPC specifically questioned PEF's witness Michael Kennedy about these exhibits, Exhibits 223 and 224. (Tr. P. 789-793). Mr. Kennedy testified that the draft permit only allowed for blends up to 20 percent PRB, and that additional testing was necessary for any higher blends of PRB coal. (Tr. P. 794-795). OPC offered no contrary evidence. So, these exhibits actually show that the DEP will not allow a higher than 20 percent PRB blend -- such as a 30 percent PRB blend -- to be burned at CR4 and CR5 without another test burn of that higher percent PRB blend. The exhibits do not prove, as OPC argues with its misleading excerpts, that the units can handle a 30 percent or higher blend of PRB coal without any further test burns.

In sum, OPC relies on partial excerpts of evidence to improperly argue that the Commission made the wrong decision regarding the percentage of PRB coal that can be burned at CR4 and CR5 while maintaining their historic operational output. OPC admits, however, in the conclusion to its motion that there is record evidence supporting the Commission's decision. Motion, at p. 7. The Commission, of course, relies on this record to reach its decision regarding a 20 percent PRB blend rather than some higher PRB blend.[7] OPC's reconsideration motion, then, asks the Commission to re-weigh the record evidence and reach a different conclusion. As a result, OPC's motion for

[7] For example, the Commission states on page 28 that, according to the testimony of PEF witness Mr. Hatt, a PRB coal blend under 25 percent could likely be used. Also, on this same page, the Commission points to an internal PEF report regarding a blend less than 30 percent. Order, p. 28.

reconsideration is improper and should be denied. State ex. rel. Javtex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958).

OPC'S Request for Oral Argument

Given that OPC's Motion for Reconsideration is wholly insufficient on its face as a simple matter of law, oral argument is not appropriate, nor would it be helpful to the Commission. Based on the improper arguments that OPC makes in its Motion for Reconsideration, OPC would likely just use oral argument as an opportunity to inappropriately testify and reargue positions that the Commission has already considered and rejected. Accordingly, OPC's request for oral argument should be denied.

Conclusion

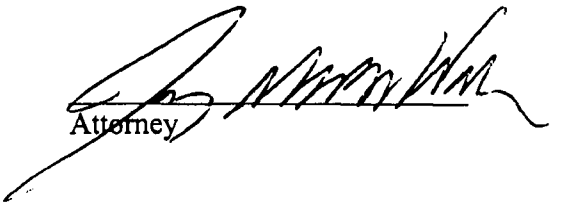
WHEREFORE, for the reasons stated above, PEF respectfully requests that this Commission deny OPC's Motion for Reconsideration and Request for Oral Argument.

R. ALEXANDER GLENN
Deputy General Counsel – Florida
JOHN T. BURNETT
Associate General Counsel – Florida
PROGRESS ENERGY SERVICE COMPANY, LLC
299 1st Avenue, N.
St. Petersburg, FL 33701
Telephone: (727) 820-5184
Facsimile: (727) 820-5519

James Michael Walls
Florida Bar No. 0706242
Dianne M. Triplett
Florida Bar No. 0872431
CARLTON FIELDS, P.A.
4421 Boy Scout Blvd
Suite 1000 (33607)
Post Office Box 3239
Tampa, FL 33601-3239
Telephone: (813) 223-7000
Facsimile: (813) 229-4133

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail this 1st day of November, 2007 to all parties of record as indicated below.



Attorney

COUNSEL OF RECORD AND INTERESTED PARTIES

Joseph A. McGlothin
Associate Public Counsel
Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400

Jack Shreve
Senior General Counsel
Cecilia Bradley
Senior Assistant Attorney General
Office of the Attorney General
The Capitol – PL01
Tallahassee, FL 32399-1050

Michael B. Twomey
P.O. Box 5256
Tallahassee,FL 32314-5256

John McWhirter, Jr.
McWhirter, Reeves Law Firm
400 North Tampa Street, Ste. 2450
Tampa, FL 33602

Bill Walker
Florida Power & Light Co.
215 S. Monroe St., Ste. 810
Tallahassee, FL 32301-1859

R. Wade Litchfield
John T. Butler
Natalie Smith
Florida Power & Light Co.
700 Universe Blvd.
Juno Beach, FL 33408-0420

Robert Scheffel Wright
Young van Assenderp, P.A.
225 S. Adams St., Ste. 200
Tallahassee, FL 32301

Susan D. Ritenour
Richard McMillan
Gulf Power Company
One Energy Place
Pensacola, FL 32520-0780

Lisa Bennett
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Norman H. Horton, Jr.
Fred R. Self
Messer Law Firm
P.O. Box 1876
Tallahassee, FL 32302-1876

Lieutenant Colonel Karen White
Captain Damund Williams
Federal Executive Agencies
139 Barnes Drive, Ste. 1
Tyndall AFB, FL 32403-5319

Paula K. Brown
Regulatory Affairs
Tampa Electric Company
P.O. Box 111
Tampa, FL 33602-0111

Cheryl Martin
Florida Public Utilities Company
P.O. Box 3395
West Palm Beach, FL 33402-3395

Jeffrey A. Stone
Russell Badders
P.O. Box 12950
Pensacola, FL 32591

James W. Brew
Brickfield, Burchette, Ritts & Stone, P.C.
8th Floor, West Tower
1025 Thomas Jefferson Street, NW
Washington, D.C. 20007-5201

James D. Beasley
Lee L. Willis
Ausley & McMullen Law Firm
P.O. Box 391
Tallahassee, FL 32302