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Subject: Filing Docket 080009

Attachments: PEF Response to FIPUG Motion to Reconsider.pdf

PEF Response FIPUG Motion t

<<PEF Response to FIPUG Motion to Reconsider.pdf>> Docket 080009 In re: Nuclear Power Plant Cost Recovery Clause

Attached for filing is Progress Energy Florida, Inc.'s Response in Opposition to the Florida Industrial Power Users Group's Motion to Reconsider Prehearing Officer's Exclusion of FIPUG Issue 1E (6 pages)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Power Plant Cost Recovery Clause	Docket No. 080009-EI Submitted for Filing: September 9, 2008

PROGRESS ENERGY FLORIDA, INC.'S RESPONSE IN OPPOSITION TO THE FLORIDA INDUSTRIAL POWER USERS GROUP'S MOTION TO RECONSIDER PREHEARING OFFICER'S EXCLUSION OF FIPUG ISSUE 1E

Pursuant to Rule 28-106.204, Progress Energy Florida, Inc. ("PEF" or the "Company") hereby submits its Response in Opposition to the Florida Industrial Power Users Group's Motion to Reconsider Prehearing Officer's Exclusion of FIPUG Issue 1 E ("Motion") and states:

1. As a threshold matter, FIPUG 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 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. This standard is equally applicable to reconsideration of a Prehearing Officer's Order. See In re: Petition for arbitration of certain unresolved issues associated with negotiations for interconnection, collocation, and resale agreement with Florida Digital Network, Inc. d/b/a FDN Communications, by Sprint-Florida, Inc., Order No. PSC-05-0855-FOF-TP, 2005 Fla. PUC Lexis 729 (PSC Aug. 22, 2005) (citing Order No. PSC-96-0133-FOF-EI, issued January 29, 1996, in Docket No. 950110-EI).

2. The Prehearing Officer's order excluding Issue 1E was made well within her powers pursuant to Rule 28-106.211, F.A.C. FIPUG has not identified or even attempted to allege a single point of fact or law that the Prehearing Officer overlooked or failed to consider when ruling on this issue. FIPUG simply does not like the outcome of the ruling in question and is trying to re-argue the issue, which is inappropriate under the strict legal standard discussed above. Additionally, to the extent that FIPUG contends that it is raising new arguments, not previously raised before the Prehearing Officer, in support of its issue, the law is clear that "advancing new or other points or theories not previously relied on" does not constitute overlooked or misapprehended evidence. Sherwood v. State, 11 So. 2d 96, 98-99 (Fla. 3d DCA 1959). FIPUG's motion thus does not meet the requisite standard for motions for reconsideration and should be denied on this ground alone.

3. Even if this Commission were to decide that FIPUG's motion for reconsideration satisfies the applicable legal standard, which it does not, the motion must fail for several other reasons. First, FIPUG's arguments amount to an improper collateral attack on both a prior Commission order and a statute passed by the Florida Legislature. Second, the motion improperly asks the Commission to exercise business management control over PEF and other utilities, a request which is both ill-advised and beyond the Commission's jurisdiction. Third, there is no precedent authority for FIPUG's request, because the single TECO order FIPUG obliquely relies upon can be readily distinguished and offers the Commission no jurisdiction or authority to grant FIPUG's request. Finally, for all the reasons stated by the Prehearing Officer in denying FIPUG's issue, FIPUG's request to have the Commission rule on hypothetical events that have not taken place yet is speculative, premature, and is not ripe for jurisdictional purposes.

4. First, FIPUG's arguments in its Motion amount to a collateral attack on a prior Commission order and on Section 366.93, Florida Statutes. FIPUG challenges whether Levy Units 1 and 2 are needed by pointing to PEF's reserve margin when the units come online. This Commission affirmatively granted PEF's need determination by Order Number PSC-08-0518-FOF-EI, dated August 12, 2008. In that proceeding, this Commission considered PEF's reserve margins and granted the need for both Levy Units 1 and 2. FIPUG's attempt to challenge the reserve margins is thus an improper collateral attack on Order 08-0518.

5. Again completely ignoring the legal standard for a proper motion for reconsideration, FIPUG also collaterally attacks the wisdom of the Florida Legislature in enacting Section 366.93, the nuclear cost recovery statute. FIPUG improperly argues that the Commission should take additional measures, not contained in Section 366.93, to effectively lower customer rates. The Commission, however, is bound by the authority granted to it by the Florida Legislature. FIPUG's motion simply asks the Commission to step outside its legal authority and contravene the clear intent and language of the Legislature and Section 366.93.

6. The second reason FIPUG's motion must fail is that it asks the Commission to improperly engage in PEF's business management decisions by requiring that PEF enter into specific business arrangements with municipal utilities.[1] As a utility, PEF must make many business decisions regarding generation, load management, joint ownership, and other issues. While the Commission's Section 366 powers are broad, the Commission is not entitled to make business decisions for a utility, and this Commission has always taken care not to make such decisions in its orders. FIPUG's motion apparently also asks the Commission to interfere with

[1] FIPUG also argues that some federal law, for which it does not provide a citation, requires utilities to sell portions of nuclear units to municipal utilities. PEF is not aware of any such requirement under the law, federal or otherwise.

the business management decisions of JEA and other municipalities, which is clearly outside the Commission's jurisdiction.

7. Third, Order 15451, the sole authority upon which FIPUG relies, is not applicable to this situation. In that order, TECO requested a base rate increase associated with placing its Big Bend Unit 4 ("BB4") into commercial service. The order notes that, prior to obtaining the need determination for BB4, TECO knew that it would generate excess capacity and thus entered into a wholesale contract with FPL to sell a certain percentage of the megawatt output once the unit came online. The contract with FPL lasted three years, and when the Commission approved TECO's rate increase, it adjusted rates to account for these expected sales. In this case, PEF has not entered into any such contractual arrangements. In the TECO order, the Commission had a basis upon which to credit the off-system sales. There is no such basis to do so in this case, and any attempt to impute hypothetical joint ownership arrangements would be based on pure speculation. In addition, the TECO case involved crediting rates for excess capacity that actually existed when its generating unit went online. Here, there is no such excess capacity that exists at this time, and it would be speculative and improper for the Commission to assume, as FIPUG requests, what the future may hold. As the Commission held in Order 08-0518, PEF demonstrated a need for all the capacity from the Levy units. Thus, the TECO order is readily distinguishable from the instant proceeding on several grounds, and FIPUG cannot rely upon it as precedent.

8. Finally, as the Prehearing Officer aptly noted in her ruling, it is "better to wait until we actually have some kind of proposal before us and see how it is proposed." (Prehearing at p. 37). Because the parties have stipulated in Issue 1D that the utilities will notify the Commission if a contract is entered into to sell a portion of the nuclear units, the Prehearing

Officer indicated that upon that notification the parties could then discuss the appropriate treatment of the sale. (Id.) This discussion could perhaps take place in a staff workshop to address how the dollars should be flowed to the ratepayers. (Id. at 38) Rather than disputing the substance of the Prehearing Officer's well-reasoned ruling, FIPUG has instead made collateral attacks on the Commission, the Legislature, and has advanced legally unsupported arguments. For these reasons and all the reasons stated in this response, FIPUG's motion for reconsideration should be denied.

WHEREFORE, for the reasons provided above, PEF respectfully requests that this Commission deny FIPUG's motion for reconsideration and uphold the Prehearing Officer's ruling to exclude FIPUG's proposed issue from consideration in this proceeding.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to counsel and parties of record as indicated below via electronic and U.S. Mail this 9th day of September, 2008.

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