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From: Rhonda Dulgar [rdulgar@yvlaw.net]
Sent: Wednesday, February 18, 2009 5:01 PM
To: James Brew; Charles Rehwinkel; Jon Moyle; Vicki Kaufman; J.R. Kelly; John T. Burnett; Paul Lewis, Jr.; Erik Saylor; Filings@psc.state.fl.us; Jean Hartman; Lisa Bennett; Martha Brown; Schef Wright
Subject: Electronic Filing - Docket 090079-EI
Attachments: FRF.ResponseToPEFsEmergencyPetition.2-18-09.doc

a. Person responsible for this electronic filing:

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b. 090079-EI

In Re: Petition for Increase in Rates by Progress Energy Florida, Inc.

c. Document being filed on behalf of the Florida Retail Federation.

d. There are a total of 7 pages.

e. The document attached for electronic filing The Florida Retail Federation's Response in Opposition to Progress Energy Florida's Petition for an Emergency Rule Waiver.

(see attached file: FRF.ResponsetoPEFsEmergencyPetition.2-18-09.doc)

Thank you for your attention and assistance in this matter.

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2/18/2009

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Rhonda Dulgier	Electronic Filing - Docket 090079-EI	58 KB	Wed 2/18/2009 4:58 PM

Attachments:  FRF.ResponseToPEFsEmergencyPetition.2-18-09.doc (51 KB)

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b. 090079-EI

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Increase in Rates)
by Progress Energy Florida, Inc.) DOCKET NO. 090079-EI
_____) FILED: FEBRUARY 18, 2009

THE FLORIDA RETAIL FEDERATION'S RESPONSE IN OPPOSITION TO
PROGRESS ENERGY FLORIDA'S PETITION FOR AN EMERGENCY RULE WAIVER

The Florida Retail Federation ("FRF"), pursuant to Rule 28-104, Florida Administrative Code (F.A.C.), and the Commission's Notice issued in this docket on Friday, February 13, 2009, and subject to its pending Petition to Intervene in this docket, hereby submits this response in opposition to Progress Energy Florida's ("PEF") petition for an emergency waiver of Commission Rule 25-6.140, F.A.C. (the "Test Year Letter Rule" or "Rule").

PEF seeks the Commission's waiver of the specific requirement that it file its Test Year Letter "at least 60 days prior to filing a petition for a general rate increase." PEF claims that there is some emergency and attempts to justify its request on the grounds that the Test Year Letter Rule exists only for the Commission's convenience, that no party or potential party will be prejudiced by granting the requested waiver, and that the purpose of the Test Year Letter Rule will otherwise be satisfied by granting the waiver.

PEF also attempts to explain that, in PEF's view, "the Commission can find that there is a substantial hardship if PEF

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is required to strictly comply" with the Test Year Letter Rule. However, PEF fails altogether to explain what its alleged "substantial hardship" might be. On its face, then, PEF's petition fails to satisfy the requirements of both Rule 28-104, F.A.C., and Section 120.542(2), Florida Statutes, both of which require a petitioner to demonstrate a substantial economic, technological, legal or other type of hardship in order to justify emergency rule waivers.

Rule 28-104.004(2), F.A.C., provides:

(2) In addition to the other requirements of Section 120.542(5), F.S., and this chapter, the petition shall specify:

(a) The specific facts that make the situation an emergency; and

(b) The specific facts to show that the petitioner will suffer an immediate adverse effect unless the variance or waiver is issued more expeditiously than the time frames provided in Section 120.542, F.S.

Clearly, Rule 28-104.004(2), F.A.C., provides for specific and heightened pleading requirements to demonstrate entitlement to an emergency variance or waiver. PEF has failed to satisfy the minimum pleading requirements, and on that basis alone, the Commission should reject PEF's efforts to have its petition treated on an emergency basis. PEF has also failed to satisfy the statutory requirements of Section 120.542(2), Florida Statutes, which require a "demonstrated economic, technological,

legal or other type of hardship" in order to be eligible for any waiver, whether emergency or non-emergency. Apparently, the most that PEF has to claim in terms of hardship is that if it has to comply with the Rule, it will have to "strictly" comply with the "formalistic" requirements of the Rule. Compliance with the Rule is simply not a hardship.

In another case involving a petition for an emergency rule waiver, the Commission rejected the petitioner's plea for emergency relief because the subject petition "does not state specific facts that make the situation an emergency nor does it show an immediate adverse effect unless the waiver is issued more expeditiously." In Re: BellSouth Telecommunications, Inc., Docket No. 990777-TL, Order No. PSC-99-1791-PAA-TL, 1999 WL 796463 (Fla. P.S.C., September 14, 1999). PEF has not alleged any specific facts that would demonstrate any economic hardship, any technological hardship, or any substantive legal hardship, and accordingly, the Commission must deny its petition.

The FRF rejects PEF's suggestion that the Test Year Letter Rule is intended only for the Commission's convenience in planning and scheduling events in rate cases. This suggestion is unquestionably overridden by the Commission's fundamental mandate pursuant to Section 366.01, Florida Statutes, to regulate utilities "in the public interest," not for the convenience of utilities subject to its jurisdiction and not

solely for the Commission's convenience. The FRF also rejects PEF's claim that the underlying purpose of the Rule will otherwise be met by virtue of PEF's having given the Commission "informal" notice of its plans. The principal foundations of all law, and Florida administrative law in particular, include public notice and due process. Informal notice is not public notice, and due process includes the rights of the FRF and other Consumer parties to have ample time to prepare their cases under fair schedules.

PEF asserts that the earlier filing will help intervenors because it will enable them to see PEF's case 3 weeks earlier relative to hearing dates that have been reserved on the Commission's calendar. This is obviously the first that the FRF, and almost certainly the other Consumer parties, have heard of any such reservation of dates, and are not aware of what those dates are. Like any rational party, the FRF is in favor of more time rather than less to evaluate an adverse party's case, and the FRF is in favor of fair procedures that provide due process to all parties, including PEF. Such fair procedures include ample time for the FRF to prepare its testimony and evidence in this docket, which the FRF expects will challenge and refute many of PEF's claims for rate increases. Shortening the time available for the FRF to prepare its case would be prejudicial.

Further regarding the scheduling of this docket, the FRF will simply observe at this point that as of today, the FRF and the other Consumer entities believe that, per the existing 2005 Stipulation and Settlement, Progress is entitled to seek new rates to become effective on January 1, 2010. This would require that the Commission vote on those rates no later than December 2, 2009. There is obviously ample time for PEF to file its MFRs and testimony in compliance with the Test Year Letter Rule, i.e., on or after April 13, 2009, and still have the Commission vote by December 2, with orderly hearing procedures and fair dates established in that time frame.

The FRF disputes the existence of any legitimate emergency sufficient to warrant the requested waiver of the Test Year Letter Rule. If the alleged "emergency" is that PEF will not get more money as soon as it wants, then PEF has itself created that emergency and is not entitled to bootstrap its failure to act in its own best interests into emergency relief that may shorten the time that the FRF and other Consumer entities would have to prepare their evidence in this case.

If PEF is attempting to suggest that PEF did not file its Test Year Letter earlier because of any suggestion or representation made by the FRF or by any other Consumer entity, the FRF flatly rejects any such suggestion. To the extent that PEF did not file its Test Year Letter 60 days before March 20,

or 60 days before any other date targeted internally by PEF, that decision was solely PEF's and solely PEF's responsibility. PEF chose to sit on its hands, and cannot now claim that its inaction has created any emergency or hardship sufficient to justify waiver of the Rule.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Commission should deny PEF's petition for emergency waiver.

Respectfully submitted this 18th day of February, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Florida Retail Federation's Response in Opposition to Progress Energy Florida's Petition for an Emergency Rule Waiver has been furnished by electronic Mail this 18th day of February, 2009, to the following:

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