

**Ruth Nettles**

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**Sent:** Tuesday, May 26, 2009 11:39 AM  
**To:** Filings@psc.state.fl.us  
**Cc:** John Burnett; Cecilia Bradely; Alex Glenn, Esq. ; Walls, J. Michael; Triplett, Dianne; Lisa Bennett; Keino Young; Paul Lewis; Joe McGlothlin; J R Kelly ; Kaufman, Vicki  
**Subject:** Dkt 070703-EI FIPUG Post hearing Brief with brief attached this time  
**Attachments:** FIPUG post hearing statment and brief.doc

1. John W. McWhirter, Jr., 400 N. Tampa St. Tampa, Fl 33602, [jmcwhirter@mac-law.com](mailto:jmcwhirter@mac-law.com) is the person responsible for this electronic filing;
2. The filing is to be made in Docket 070703-EI, In re: Review of Coal Costs PEF
3. The filing is made on behalf of the Florida Industrial Power Users Group;
4. The total number of pages is 6 and
5. The attached document is The Florida Industrial Power User Group's Post Hearing Statement

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DOCUMENT NUMBER-DATE

05175 MAY 26 08

FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Review of coal costs for Progress )  
Energy Florida's Crystal River Units 4 )  
and 5 for 2006 and 2007 )  
\_\_\_\_\_ )

Docket No. 070703-EI

Filed May 26, 2009

**FLORIDA INDUSTRIAL POWER USERS (FIPUG's) POST HEARING STATEMENT OF ISSUES  
AND POSITIONS, CONCLUSIONS OF LAW AND BRIEF**

The Florida Industrial Power Users Group (FIPUG) hereby files its Post hearing Statement and brief in compliance with Order PSC-09-0210-PHO-EI rendered April 7, 2009, and Rule 28-106.215, F.A.C.

**STATEMENT OF THE CASE**

FIPUG accepts the statement of the case contained in pre hearing order PSC-09-0210-PHO-EI.

**STATEMENT OF RELEVANT FACTS**

This case is the 2006 and 2007 continuation of an investigation to determine credits due customers for fuel cost overcharges during these years. It was determined in a previous related case, docket 060658-EI that in 1982 and 1984 PEF (then known as Florida Power) had designed and built the CR 4 & 5 power plants at considerably more cost than comparably sized coal plants. The greater cost was justified on the proposition that customers and the environment would benefit in the long run. In 1982 and 1984 PEF proffered in sworn testimony that future fuel cost savings would far out weigh the additional money customers would pay PEF for its authorized after tax profit and interest on borrowed funds. The fuel cost savings and environmental improvement would come because with the more expensive plant design PEF would be able to burn less expensive and less environmentally antagonistic Powder River Basin and other sub bituminous coal. For the last twenty six years customers have been charged a return and a depreciation expense for the more expensive portion of the PEF rate base that has never been put to beneficial use for customers because PEF failed to put itself in position to use coal it had said it would.

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FPSC-COMMISSION CLERK

In Docket 060658-EI the OPC alleged that between 1996 and 2006 the failure to buy less expensive coal coupled with the need to buy emission allowances for the more expensive and dirtier coal that it burned resulted in \$143 million in overcharges to customers. OPC and other consumer advocates demanded a refund. By order PSC-070816-FOF-EI the Commission gave PEF the benefit of doubt for eight years, but ordered a refund for two. It found:

**“IV. Prudence of PEF’s Actions in Purchasing Coal**

Having concluded that as a matter of law and of policy, we should consider the matter of PEF’s coal procurement decisions, we turn to whether PEF was indeed imprudent in its coal purchases for CR4 and CR5 for the years 1996 to 2005. We have analyzed the record and the parties’ briefs in this case. We conclude that for the period from 1996 to 2001, PEF did act prudently in procuring coal for CR4 and CR5. We find that in 2001 and 2002 **PEF acted imprudently by failing to put itself in the position to use coal that was known to be less expensive.** Because of PEF’s imprudent decisions in 2001 and 2002, PEF was not prudent in purchasing coal for CR4 and CR5 during the period 2003 through 2005. As a result, customers should be refunded the amount of \$12,425,492 in excess coal and SO2 emissions costs for the years 2003 through 2005.” (at page 34 emphasis supplied)

PEF belatedly sought and received a permit for a test burn of sub bituminous coal in March 2006 (Exhibit 26), after solicitations for 2006 and 2007 had been received.

OPC witness David J Putnam performed his 2006-2007 refund calculations after examining the confidential coal bids PEF received for the period. The information came from PEF business records supplied in response to Commission discovery procedures. The evidence shows PEF rejected offers to supply less expensive sub bituminous coal during the 2006-2007 periods in favor of more expensive Central Appalachian coal and synfuel purchased from PEF affiliates.

Following the Commission’s previous finding of imprudence with respect to post 2002 coal purchases Mr. Putnam calculated that customers overpaid \$35,575,577 for fuel and emission allowances in 2006 and 2007.

If this conclusion is accepted and the refund is credited on customers’ bills for the remainder of the year beginning with the first billing in August it should reduce PEF’s average fuel

charge \$2.11 per 1000 kWh.<sup>1</sup> This refund credit would happen contemporaneously with the \$3.50 per 1,000 kwh combined base rate increase the Commission authorized PEF to collect “to make it whole” and to cover the anticipated carrying costs and expenses attributable to the reconditioned Bartow plant<sup>2</sup> that is expected to come on line in June. Both base rate increases come before any evidence is examined in a public hearing. The relatively modest fuel over charge refund has been studied for two years.

## **ARGUMENT**

The essential issue in this case is whether investor owned utilities should be made to live up to their promises. It is not uncommon for utilities to raise current rates based upon the promise of future savings. For example in a 1977 Docket, 770316-EU, Florida Power enstlyed its petition for a \$62 million base rate increase:

“Petition of Florida Power Corporation to modify its rate schedules to reflect the true net savings resulting from the generation of electricity from its Crystal River Nuclear Unit”

In that case the Commission granted the increase then reconsidered.

If such a promise is made it should not be forgotten. In this case the Commission has found that PEF had the ability to make good on its promise, but demurred when the time came to follow through. Why did it demur? The answer is simple and provides insight into utility operations worthy of serious consideration.

An examination of the surveillance reports during that period will show ample utility profits. In this circumstance the cost to upgrade and permit the fuel cost savings improvements would affect profits at a time when a corporate merger was in progress. Fuel cost savings don't affect profits only customers benefit. When cheaper fuel became available there was no chance to

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<sup>1</sup> This is based upon the PEF revised forecast filed May 18, 2009 in Docket 090001-EI in compliance with Commission order PSC-09-0208-PAA-EI. The revised forecast projects sales of 16,832,380 mWh from August 1 to year's end.

<sup>2</sup> Dockets 090144-EI and 090145-EI per Commission vote on May 19, 2009.

pass the cost of the permitting and capital improvements needed to burn the cheaper fuel on to customers. It is axiomatic that a utility's fiduciary duty is to the company, its managers and the sole utility company stock holder- not captive customers. The utility decided to do nothing to reduce its excessive earnings when only customers would see the benefit.

An examination of the record will validate the foregoing theory. On July 7, 2000 the Commission Opened Docket 000824-EI on its own motion "to review the earnings of Florida Power Corporation." The Commission ordered the utility to hold \$98 million of current earnings subject to refund. The final order in that docket reduced base rates by \$125 million.<sup>3</sup> and froze PEF's base rates at that level for 4 years.

In summary because the additional cost to provide the promised fuel savings could not be passed on to customers. Customers' benefits were sacrificed to the call of mammon.

Sound regulatory policy mandates that customers should receive recompense when utilities shirk their promises. The order in this case can reinforce that policy.

## **ISSUES AND POSITIONS**

### **STATEMENT OF BASIC POSITION:**

*\*FIPUG agrees with the Office of Public Counsel that PEF failed to follow through on its promise of future savings. Customers are entitled to refund credits for 2006 & 2007. The Commission should mandate alternate relief for the future to avoid a multiplicity of actions\**

### **STATEMENT OF ISSUES AND POSITIONS**

**Issue 1** Did the imprudence in PEF's fuel procurement activities determined in Order PSC-07-0816-FOF-EI result in the costs of coal actually delivered to Crystal River Units 4 and 5 during 2006 and 2007 being unreasonably high?

**FIPUG:** \*Yes\*

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<sup>3</sup> Order PSC-02-0655-AS-EI

- a. How should the reasonableness of the costs of coal delivered to Crystal River Units 4 and 5 during 2006 and 2007 be measured?

**FIPUG:** \*Use the evaluation guidelines established by PSC Order No. 07-0816-FOF-EI. To compare PEF's delivered coal costs to the costs it would have incurred if it had purchased the lowest cost coal available during the period.\*

- b. What candidates for alternative coal purchases should the Commission consider in evaluating whether more economical coal was available for delivery to Crystal River Units 4 and 5 during 2006?

**FIPUG:** \*Agree with OPC\*

- c. By what amount, if any, were the costs of coal actually delivered to Crystal River Units 4 and 5 unreasonably high in 2006?

**FIPUG:** \*\$15,436,386 in coal charges \$1,154,160 in emission charges\*

- d. What candidates for alternative coal purchases should the Commission consider in evaluating whether more economical coal was available for delivery to Crystal River Units 4 and 5 during 2007?

**FIPUG:** \*Agree with OPC foreign sub bituminous coal should be considered along with Powder River Coal.\*

- e. By what amount, if any, were the costs of coal actually delivered to Crystal River Units 4 and 5 unreasonably high in 2007?

**FIPUG:** \*\$13,647,445 in coal charges, \$5,337,520 in environmental charges\*

**Issue 2** If the Commission determines that the costs of coal delivered to Crystal River Units 4 and 5 during 2006 and 2007 were unreasonably high, should it require PEF to issue a refund to its customers? If so, in what amount?

**FIPUG:** \*Yes it should order a \$35,575,517 one time summer credit on customer bills plus additional accrued interest\*

**Issue 3** Based on the evidence of PEF's fuel procurement approach and activities as they relate to Crystal River 4 and 5, what additional action, if any, should the Commission take in this docket?

**FIPUG:** \*Customers have suffered four ways from PEF's imprudence. These are: higher fuel costs; higher emission costs; higher returns and annual depreciation charges on the over built portion of two power plants. To avoid a multiplicity of annual actions to calculate and litigate fuel cost refund credits every year until PEF gets the proper

permits FIPUG recommends that PEF be required to continue to operate CR 1, 2, 4 & 5 without further capital carrying costs until the proposed Levy County Nuclear plant becomes operational.\*

Respectfully submitted  
/s/ John W. McWhirter, Jr.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing The Florida Industrial Power Users' Post Hearing Statement and Brief has been furnished by electronic mail effective the 26th day of May 2009 to the following:

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