

Office of Commission Clerk Official Filing

Ruth Nettles

From: Costello, Jeanne [jcostello@carltonfields.com]
 Sent: Monday, August 03, 2009 11:09 AM
 To: Filings@psc.state.fl.us
 Cc: larry.r.allen@navy.mil; cecilia.bradley@myfloridalegal.com; jbrew@bbrslaw.com; john.burnett@pgnmail.com; Khojasteh.Davoodi@navy.mil; Katherine Fleming; alex.glenn@pgnmail.com; vkaufman@kagmlaw.com; Caroline Klancke; John T. Lavia, III; paul.lewisjr@pgnmail.com; rick@rmelsonlaw.com; jmoyle@kagmlaw.com; Charles Rehwinkel; Erik Saylor; jtselecky@consultbai.com; Stright, Lisa; ataylor@bbrslaw.com; audrey.VanDyke@navy.mil; Mike Walls; Schef Wright; Keino Young; Triplett, Dianne; Bernier, Matthew R.
 Subject: Filing: Docket 090145

Attachments: Docket 090145 PEF Motion for Procedural Order.pdf



Docket 090145
EF Motion for P.

<<Docket 090145 PEF Motion for Procedural Order.pdf>> Docket 090145 In re: Petition for expedited approval of the deferral of pension expenses, authorization to charge storm hardening expenses to the storm damage reserve, and variance from or waiver of Rule 25-6.0143(1)(c), (d) and (f), F.A.C. by Progress Energy Florida, Inc.

1. This filing is made by

Jeanne Costello on behalf of Mike Walls Carlton Fields, P.A.
4221 W. Boy Scout Boulevard, Suite 1000
Tampa, Florida 33607-5780
Direct: 813.229.4917
Fax: 813.229.4133
jcostello@carltonfields.com

2. This filing is Progress Energy Florida, Inc.'s Motion for Procedural Order Setting Matter for Informal Hearing Under Section 120.57(2), F.S. or, in the Alternative, Motion to Consolidate

3. This filing consists of 5 pages.

4. This filing is made on behalf of Progress Energy Florida, Inc.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited approval of the deferral of pension expenses, authorization to charge storm hardening expenses to the storm damage reserve, and variance from or waiver of Rule 25-6.0143(1)(c), (d), and (f), F.A.C. by Progress Energy Florida, Inc.

Docket No. 090145-EI

Submitted for filing: August 3, 2009

MOTION FOR PRODEDURAL ORDER SETTING MATTER FOR INFORMAL HEARING UNDER SECTION 120.57(2), F.S. OR, IN THE ALTERNATIVE, MOTION TO CONSOLIDATE

Progress Energy Florida, Inc. ("PEF") hereby moves pursuant to Section 120.57, F.S. and Rule 28-106.301, F.A.C. for a procedural order setting the protest of Order No. PSC-09-0484-PAA-EI ("PAA Order") filed by the Intervenors¹ on July 29, 2009 ("Protest"), for an informal hearing pursuant to Section 120.57(2), F.S. PEF further requests that the informal hearing be held on a schedule that will enable a final Commission order to be issued no later than December 31, 2009. In the alternative, if the Commission determines that the Protest does identify a disputed issue of material fact, PEF moves that this matter be consolidated for purposes of hearing with Docket No. 090079-EI. In support thereof, PEF states:

1. Paragraph 13 of the Protest asserts that there are three "fact, policy and legal issues" which are subject to dispute. The "wherefore" clause of the Protest requests a formal hearing under Section 120.57(1), F.S.

¹ The Intervenors identified in the protest are: the Citizens of the State of Florida through the Office of Public Counsel, the Florida Industrial Power Users Group, the Attorney General, the Florida Retail Federation, and PCS Phosphate.

2. A hearing under Section 120.57(1) is appropriate only if there are disputed issues of material fact. *Cambas v. Dept. of Business and Prof. Regulation*, 6 So. 3d 668, 670 (Fla. 5th DCA 2009) (even when a party specifically requests a formal hearing, an agency may conclude that no dispute of material fact has been demonstrated and proceed informally); *Weiss v. Dept. of Business and Prof. Regulation*, 677 So. 2d 98, 99 (when no material facts are in dispute an agency is not required to hold a formal hearing even though requested by the party). See *Nicolitz v. Board of Opticianry*, 609 So. 2d 92, 93 (when a party seeks a formal hearing, an agency may conclude that no dispute of material fact has been demonstrated and proceed informally).

3. The Intervenors have not identified any disputed issues of material fact. Each of the three issues identified in the Protest is an issue of law relating to the legal interpretation of the Stipulation approved in Order No. PSC-05-0945-S-EI or the legal consequences which flow from that interpretation or from the actions proposed in the PAA Order. Under Section 120.80(13)(b), Fla. Stat., and Rule 25-22.029(3), F.A.C., all issues in the PAA Order that were not identified in the Protest are deemed stipulated.

4. In the absence of a disputed issue of material fact, the legal issues raised by the Protest should be resolved pursuant to Section 120.57(2), F.S. and Rules 28-106.301, *et seq.* F.A.C. on the basis of briefs and oral arguments. See *In re: Notice of adoption of existing interconnection agreement*, Docket No. 070368-TP, Order No. PSC-08-0415-FOF-TP issued June 23, 2008 (matter set for an informal proceeding on issues of policy and law, to be identified and briefed by the parties).

5. PEF's petition for deferral of pension expenses ("Petition") relates to expenses incurred during calendar 2009. In order to establish the appropriate accounting treatment for

such expenses, it is important for PEF to obtain a final Commission order on the Petition on or before December 31, 2009.

6. PEF therefore requests that the Commission establish a schedule for briefing and oral argument in this docket that will permit the issuance of a final order by December 31, 2009.

7. In the alternative, in the event the Commission determines that the Protest does identify a disputed issue of material fact, PEF requests that this matter be consolidated for purposes of hearing with its current rate case, Docket No. 090079-EI. Although the issues raised by the Petition relate to a different time period than the rate case (2009 vs. 2010 and beyond), the parties are the same. If an evidentiary hearing is required, consolidation with the rate case may be the only practicable way for PEF to obtain a ruling on its Petition by December 31, 2009.

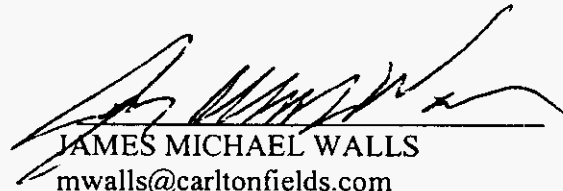
8. PEF has consulted with counsel for the Office of Public Counsel and is authorized to represent that Intervenors will oppose handling the Protest pursuant to Section 120.57(2). However, the Intervenors do not oppose consolidating this matter with Docket No. 090079-EI.

WHEREFORE, PEF requests that the Commission set the Protest for an informal hearing on a schedule to permit entry of a final order by December 31, 2009. In the alternative, if the Commission finds that Intervenors have identified a disputed issue of material fact, PEF requests that this docket be consolidated with Docket No. 090079-EI.

RESPECTFULLY SUBMITTED this 3rd day of August, 2009.

R. ALEXANDER GLENN
alex.glenn@pgnmail.com
JOHN T. BURNETT
john.burnett@pgnmail.com
Progress Energy Service Company, LLC
299 First Avenue North
P.O. Box 14042 (33733)
St. Petersburg, Florida 33701
(727) 820-5184
(727) 820-5249(fax)

PAUL LEWIS, JR.
Paul.lewisjr@pgnmail.com
Progress Energy Service Company, LLC
106 East College Avenue, Suite 800
Tallahassee, Florida 32301
(850) 222-8738 / (850) 222-9768 (fax)

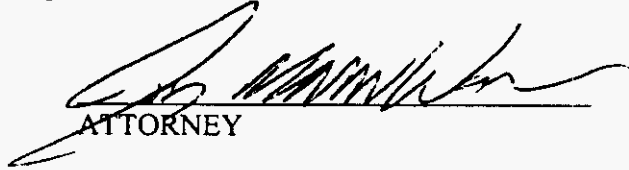


JAMES MICHAEL WALLS
mwalls@carltonfields.com
Florida Bar No. 0706242
DIANNE M. TRIPLETT
dtriplett@carltonfields.com
Florida Bar No. 0872431
MATTHEW BERNIER
mbernier@carltonfields.com
Florida Bar No. 0059886
Carlton Fields
4221 W. Boy Scout Boulevard
P.O. Box 3239
Tampa, Florida 33607-5736
(813) 223-7000 / (813) 229-4133 (fax)

RICHARD MELSON
rick@rmelsonlaw.com
Florida Bar No. 0201243
705 Piedmont Drive
Tallahassee, FL 32312
(850) 894-1351

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic and U.S. Mail to the following counsel of record as indicated below on this 3rd day of August, 2009.



ATTORNEY

KATHERINE FLEMING
Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd
Tallahassee, FL 32399

J.R. KELLY/CHARLES REHWINKLE
Office of the Public Counsel
c/o The Florida Legislature
111 W. Madison Street – Room 812
Tallahassee, FL 32399-1400

BILL MCCOLLUM/CECILIA BRADLEY
Office of the Attorney General
The Capitol – PL01
Tallahassee, FL 32399-1050

VICKI G. KAUFMAN/JON C. MOYLE, JR.
Keefe Law Firm, The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301

JAMES W. BREW/ALVIN TAYLOR
Brickfield Law Firm
1025 Thomas Jefferson Street, NW, 8th Fl
Washington, D.C. 20007

R. SCHEFFEL WRIGHT / JOHN T. LAVIA
Young Law Firm
225 South Adams Street, Ste. 200
Tallahassee, FL 32301

KAY DAVOODI
Director, Utility Rates and Studies Office
Naval Facilities Engineering Command
1322 Patterson Avenue SE
Washington Navy Yard, DC 20374-5065

AUDREY VAN DYKE
Litigation Headquarters
Naval Facilities Engineering Command
720 Kennon Street, S.E. Bldg 36, Room 136
Washington Navy Yard, DC 20374-5065