

Marguerite McLean

090079-EI

From: WOODS.MONICA [WOODS.MONICA@leg.state.fl.us]
Sent: Monday, March 29, 2010 4:56 PM
To: Filings@psc.state.fl.us
Cc: Alex Glenn; Alexander, Stephanie; Audrey VanDyke; Bill Schultz; C. Bradley; Caroline Klancke; Dan Lawton; Dan Moore; Dianne Triplett; Erik Saylor; F. Alvin Taylor; J. Burnett; J. McWhirter; J. Pous; J. Woolridge; James Brew; John C. Moyle, Jr.; John T. LaVia; Joseph L. Adams; K. Dismukes; Katherine Fleming; Keino Young; Karin S. Torain; Khojasteh Davoodi; M. Walls; Paul Lewis; Charles Rehwinkel; Richard Melson; S. Wright; BOYD.SCOTT; V. Kaufman; Vicki Kaufaman
Subject: CITIZENS'CROSS-MOTION FOR RECONSIDERATION AND RESPONSE TO PROGRESS ENERGY'S MOTION FOR RECONSIDERATION
Attachments: CITIZENS CROSS-MOTION FOR RECONSIDERATION AND RESPONSE TO PROGRESS ENERGYS MOTION FOR RECONSIDERATION (FINAL).pdf

Electronic Filing

a. Person responsible for this electronic filing:

Charles J. Rehwinkel, Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
rehwinkel.charles@leg.state.fl.us

b. Docket No. 090079-EI

In re: Petition for increase in rates by Progress Energy Florida, Inc.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 12 pages.

e. The document attached for electronic filing is CITIZENS' CROSS-MOTION FOR RECONSIDERATION AND RESPONSE TO PROGRESS ENERGY'S MOTION FOR RECONSIDERATION. Thank you for your attention and cooperation to this request.

Monica R. Woods
Administrative Assistant to Charles J. Rehwinkel, Associate Public Counsel.
Office of Public Counsel
Telephone: (850) 488-9330
Fax: (850) 487-6419

DOCUMENT NUMBER-DATE

02246 MAR 29 09

FPSC-COMMISSION CLERK

3/30/2010

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for increase in rates by
Progress Energy Florida, Inc.

Docket No.090079-EI

Filed: March 29, 2010

**CITIZENS' CROSS-MOTION FOR RECONSIDERATION AND RESPONSE TO
PROGRESS ENERGY'S MOTION FOR RECONSIDERATION**

Pursuant to Rule 25-22.060, Florida Administrative Code, the Citizens of the State of Florida, through the Office of Public Counsel (Citizens), request the Commission reconsider a single aspect of the decision memorialized in Order No. PSC-10-0131-FOF-EI, issued on March 5, 2010 (Order). Any increase in revenue requirement flowing from any errors proven to exist as a result of the Motion for Reconsideration filed by Progress Energy Florida (PEF) (Motion) should be offset by amortizing the undisputed depreciation reserve surplus of the at least \$667 million remaining. Customers' rates should remain unchanged.

Standard of Review

The standard of review for a motion for reconsideration requires that the motion identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. 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 161 (Fla. 1st DCA 1981). While a motion for reconsideration should not reargue matters that have already been considered, Sherwood v. State, 111 So. 2d 96(Fla. 3d DCA 1959) (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla 1st DCA 1958)), it is appropriate for the Commission to consider points of fact and law that could not be raised.

Summary of the Arguments

The Citizens' proposition is simple. The Commission erred, as matter of law, in determining that the \$132 million increase in base rate revenues associated with the Bartow Repowering Project (Bartow) was approved prior to and outside of the final determination on January 11, 2020, on PEF's Petition for rate increase filed in this docket. As a result of that error, the Commission appears to have declined to amortize any more than \$23 million of the depreciation reserve surplus to offset the increased revenue requirement resulting from Bartow or any other undifferentiated component of the company's overall jurisdictional revenue requirement. While the Citizens do not seek retroactive application of any corrections of the error, prospective correction is required.

The roots of the error are found in the Commission's vote in the related Docket No. 090144-EI. Therein, the Commission voted to approve, through a Proposed Agency Action (PAA) Order, PEF's Petition for a Limited Proceeding. PEF sought to synchronize the collection of revenues associated with the in-service date of Bartow. The Bartow-related revenue requirement of \$132 million included in the rate case resulted from a stipulation that came out of a protest of Order No. PSC-09-0415-PAA-EI, issued June 12, 2009, in Docket No. 090144-EI (Bartow Interim PAA Order). The stipulation did not provide for a "separate and apart" establishment of customer rates for Bartow. It merely reflected the agreement of the parties to include the revenue requirement impact of Bartow in consideration in the overall rate case revenue requirements and in the final determination of rates. To the extent that the Commission concluded otherwise based on the error and declined to amortize the depreciation surplus to offset a part of the overall revenue requirement, the Citizens ask that the error be corrected prospectively in order to protect (protect?) customers through an offset to any revenue

requirement increases resulting from errors that may be proven to exist as a result of PEF's Motion.

Citizens' response to PEF's Motion is likewise brief. PEF's Motion has identified several "errors" that it contends the Commission made when calculating depreciation expense. In the time allotted to respond to the PEF motion, the Citizens have not been able to verify PEF's claims. Under these circumstances, the Commission Staff has the Citizens' confidence that they possess the information and expertise to advise the Commission correctly as to the merits of the PEF Motion. Any associated revenue requirement resulting from the Commission's determination should be offset by an annual debit to the depreciation reserve and a credit to depreciation expense. No customer rates should change.

Cross-Motion

By way of response in part to PEF's Motion, the OPC respectfully cross-moves that the Commission reconsiders its decision to refrain from using the depreciation reserve surplus to offset any more than \$5,840,613 of the annual revenue requirement of \$138 million ultimately established in the order.¹

The OPC contends that the Commission erred when it determined that the revenue requirement associated with the Bartow interim rates constituted a new "floor" for purposes of determining a revenue requirement increase and/or for purposes of making a determination about what, if any, revenue requirement should be offset by debiting the depreciation reserve and crediting depreciation expense.

¹ \$138 million is derived from adding the \$5,840,613 (identified on page 52 of the Order) to the \$132,100,000 associated with the Bartow Repowering Project (shown on Line 88 of Page 173 of the Order)

In the Bartow Interim PAA Order the Commission authorized, over the objection of Citizens, the interim collection of \$126,212,000 in an across the board base rate increase. This order reflected that the increase was held subject to the refund:

[P]ending a review and final determination of the appropriate calculation of the Bartow Repowering Project Revenue Requirements in PEF's Base Rate proceeding in Docket No. 090079-EI.

Bartow Interim PAA Order at 8.

The Commission further stated, in initially authorizing customer rate increases, that:

PEF's Tariff Sheets reflecting the Project increase are hereby approved, with the amounts collected held subject to refund pending a final hearing in PEF's base rate proceeding.

Bartow Interim PAA Order at 9.

Based on these and other determinations, the Commission concluded as follows:

Ordered that the \$126,212,000 annual base rate increase shall be held subject to refund pending a review and final determination of the appropriate calculation of the Bartow Repowering Project revenue requirements in PEF's base rate proceeding in Docket No. 090079-EI.

Ordered that the tariff shall remain in effect with any revenues held subject to refund, pending review in the base rate proceeding in Docket no 090079-EI.

Bartow Interim PAA Order at 10, 11.

The rates authorized in the Bartow Interim PAA Order went into effect in July 2009, on an interim² basis. The case was also consolidated with the rate case, Docket No 090079-EI. On

² The Bartow Order doesn't describe the July rate increase as "interim," but the Florida Supreme Court makes it clear that rates that go into effect by operation of law pursuant to the file and suspend statute -- as here -- are interim. Citizens vs. Wilson, 568 So2d 904, (Fla. 1990).

or before July 3, 2009, Citizens and other Interveners protested the Bartow Interim PAA Order. This effectively dissolved that order. Under the file and suspend statute, the interim rates continued in effect pending the overall determination of revenue requirements in the rate case.

At hearing the Commission approved a stipulation among the parties as follows:

Issue 25: Should any adjustments be made to rate base related to the Bartow Repowering Project? (Category 1 Stipulation)

Approved Stipulation: No. This stipulation does not prejudice the rights of any intervenor to contest the legality of including the Bartow project in rates during 2009. The new rates resulting from Docket No. 090079-EI, which will reflect the rate base and revenue requirement impact of the Bartow project, will supercede [sic] the rate change resulting from Order No. PSC-09-0415-PAA-EI as of the effective date of the new rates. (AFFIRM, and NAVY did not affirmatively stipulate to this issue, and took no position.)

Order at 167.

As is clear, the stipulation indicates that agreement was reached solely as to the “rate base and revenue requirement” impact of Bartow. The plain language of the stipulation is unequivocal: it is devoid of any intent to set stand-alone, permanent rates for Bartow alone. The language is clear and unambiguous, and thus not subject to interpretation or the need to resort to extraneous documents.

The parties’ agreement clearly shows that the rates were never intended to have been established on a standalone basis. Nor was the stipulation an agreement on anything but that the Bartow revenue requirement was to be included in the Commission’s overall determination of revenue requirements and final rates. The phrase “will supercede the rate change” is unambiguous in denoting that the temporary nature of the Bartow interim rates would be subsumed into the final rates established. More importantly, the \$800+ million rate base impact and \$132 million revenue requirement were stipulated merely as cost components (just like any

other cost component) of the overall rate case determination and not as a separate, stand alone determination.

Nevertheless, the Commission treated the Bartow interim rates as if they were established separately and finally in the Bartow Interim PAA Order. When deciding if, and to what degree to amortize the depreciation reserve surplus, the Commission erroneously concluded that the Bartow interim increase was already decided separate and apart from the ratemaking vote that occurred on January 11, 2010. In at least three places, the Commission effectively deemed the Bartow Interim Rates to have been final prior to the Commission's vote on final revenue requirements and rates. See Order at 52, 134 and 175.

For example on Schedule 5, the note indicates that the Commission believed that the Bartow Interim Rate was "authorized" in the Bartow PAA Order. Based on this error, the Commission concludes that the decision in this case yielded a \$0 rate increase. Statements on pages 52 and 134 repeat this error.

The Florida Supreme Court has left no doubt that the interim increase in a tariff filing goes into effect subject to refund pending a final hearing. Citizens vs. Wilson, 568 So2d 904, (Fla 1990). In that case, the court made it clear that the file and suspend law creates the interim nature of the rates pursuant to a tariff filing. Any statement by the Commission that purports to approve an interim tariff rate increase is "surplusage," in that the statute authorizes the rates to be initially effective pending a hearing opportunity. Wilson at 907. Additionally, the court also admonished the Commission that it was a misconception to consider any order initially approving the tariff filing as final. Id. at 908.

Here, the Commission affirmatively acted to allow the Bartow related rates to go into effect on an interim basis. Bartow Interim PAA Order at 8. Additionally, the Commission had

specifically found that the file-and-suspend statute applied and that the tariff filing accompanying it “triggered” the application of the “file and suspend” provisions of Section 366.06, Florida Statutes. Based on this and the Wilson case, it was error for the Commission to have treated the \$132 million Bartow Interim Rate increase as having been authorized outside of the determination in Docket 090079-EI and the specific vote on January 11, 2010.

Having concluded that the Bartow revenue requirement was already effectively decided and final for purposes of their rate determination, the Commission made a series of errors that could hamper its ability to fulfill its apparent desire to avoid rate impacts on PEF’s customers when considering PEF’s Motion. For example, this discussion is contained in the Order:

The question remains what additional action should be taken with respect to the remaining calculated reserve surplus of \$690 million. Balancing the need to correct the reserve surplus with concerns regarding reduced cash flow and financial integrity, we find that \$23 million of the reserve surplus shall be amortized over four years in the annual amount of \$5,840,613, thereby bringing the increase in annual revenue requirement to zero. The remaining \$667 million reserve surplus shall be recovered through the remaining life rate design.

Order at 52.

Later, the Commission states as follows:

B. Annual Operating Revenue Increase

Based on our decision herein, the appropriate annual operating revenue increase for the 2010 projected test year is \$0, as reflected on Schedule 5 attached hereto.

We hereby find that revenues at current rates for the projected test year shall be increased from \$1,448,466,000 to \$1,580,567,000, or by \$132,101,000, to account for the Bartow Repowering Project base rate increase approved by us in Order No. PSC-09-0415-PAA-EI, issued June 12, 2009, in Docket No. 090144-EI.

Order at 134.

Finally, in showing the calculation of revenue requirements that indicated a \$0 increase,

Schedule 5 included the following statement of explanation:

Notes: *PEF's requested operating revenue increase of \$499,997,000 includes the operating revenue requirements associated with the Bartow Repowering Project. PEF's current base rates include the \$126,212,000 base rate increase for the Bartow repowering project that was authorized in Order No. PSC-09-0415-PAA-EI, issued June 12, 2009, Docket No. 090144-EI, In Re: Petition for limited proceeding to include Bartow repowering project in base rates, by Progress Energy Florida, Inc. The effective date for implementing the base rate increase was the first billing cycle in July 2009.

Order at 175.

Likewise, the discussion of the Commissioners during the consideration and voting makes it fairly obvious that the Commissioners were operating under the incorrect assumption that the Bartow increase was already decided and that the determination of whether any overall revenue increase was being granted turned on the assumption that the rates associated with Bartow had already been granted by the Bartow PAA Interim Order, and perhaps the stipulation on Issue 25. See Special Agenda Transcript at 114-119; 134; 137-138;-140-141; 150-151; 218-226; 229-233. The discussion shows that this legal error led to the Commission utilizing the artificial "zero" revenue requirement level (\$132 million level) as a barrier to amortizing the depreciation reserve surplus.

The Citizens believe that the error in law about the true nature of the Bartow Interim rates caused a clear misapprehension about the nature of the rates that customers were paying from July 2009 through the time of the commission vote on January 11, 2010. As a matter of law, instead of being a discrete separately authorized, stand-alone rate, the Bartow increase was only an interim mechanism implemented for PEF to collect the revenue requirement associated with the placement into service of the Bartow project. This interim rate mechanism was only in place until overall final revenue requirements and rates were determined. This is what the Wilson case

requires. The Bartow interim rate was only effective pending a final hearing. That hearing was embodied in the protest filed in July 2009 which preserved the final determination in the rate case.

That final hearing concluded in two parts. The first was the stipulation at page 167 of the Order which shows clearly that only the Bartow revenue requirement alone was agreed upon. Final rates were to be established utilizing, among other things, the Bartow revenue requirement as merely a component. For this reason, the Bartow revenue requirement should have been treated as just another component of the overall revenue requirement and no consideration should have been given as to the interim rates then in place being the starting point for determining revenue requirements. Nor should the Bartow interim rates have been given any consideration for prospective treatment of the depreciation reserve surplus. The Commission misapprehended this and for this reason should reconsider its decision prior to considering how to dispose of any revenue requirement occasioned by PEFs Motion.

Response to PEF's Motion for Reconsideration

Succinctly put, the Citizens do not object to PEF bringing forward on reconsideration material errors that affect the correct determination of PEF's overall revenue requirements. In this response, Citizens have not attempted to verify the company's claims. Time has not allowed this to be done. The Commission Staff possesses the requisite expertise and information to test the company's claims. By this response, Citizens do not waive our right to participate in any proceedings to ultimately decide the nature and extent of PEF's claims.

Citizens note that in its Motion, the company essentially limited its' pleading to describing and documenting its assertion of error. PEF identified a "revenue requirement" of

\$36,179,000 associated with the errors, but did not ask for customers' rates to be increased. See Motion at 2, 4 and 22.

The consideration of any additional revenue requirements ultimately borne out by the Company's Motion and the Staff's assessment should be evaluated as if the Commissioners knew of it on January 11, 2010, and without the burden of the misapprehension of the impact of the Bartow rates and revenue requirement as discussed in Citizens' Cross Motion for Reconsideration. In that light, the Commission should only consider offsetting any net revenue requirement increase by an annual amortization of the accumulated reserve surplus. Specifically, a debit should be made accumulated depreciation in the amount of the additional revenue requirement as well as corresponding and offsetting credit to depreciation expense. Citizens recognize that an adjustment to depreciation rates may result from an adjustment to depreciation reserve. The record supports such an adjustment if the depreciation experts on staff so advise. Customers' rates should not be increased as a result of any revenue requirement increase resulting from the PEF Motion.

Conclusion

Wherefore, the Commission should reconsider its decision that interim rates for Bartow were decided outside of the overall rate case decision and to the extent that it relied on such a

conclusion that it recede from that in order that it might offset any revenue requirement resulting from PEF's post hearing filings.

Dated this 29th day of March, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Rehwinkel", written over a horizontal line.

Charles J. Rehwinkel
Assistant Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399

(850) 488-9330

Attorney for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
Docket No. 090079-EI

I HEREBY CERTIFY that a true and foregoing **CITIZENS' MOTION FOR RECONSIDERATION and CROSS MOTION FOR RECONSIDERATION** has been furnished by electronic mail and U.S. Mail on this 29th day of March, 2010, to the following:

John T. Burnett
Progress Energy Service Company, LLC
P.O. Box 14042
St. Petersburg, FL 33733-4042

Connissa Pease
1550 S. Belcher Road #513
Clearwater, FL 33764

Katherine Fleming/Keino Young
Caroline Klancke, Erik Saylor
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Mr. Paul Lewis, Jr.
Progress Energy Florida, Inc.
106 East College Ave, Suite 800
Tallahassee, FL 32301-7740

Vicki G. Kaufman/Jon C. Moyle, Jr.
Florida Industrial Power Users Group
118 North Gadsden Street
Tallahassee, FL 32301

Richard D. Melson
705 Piedmont Drive
Tallahassee, FL 32312

Bill McCollum/Cecilia Bradley
Office of Attorney General
The Capitol – PL01
Tallahassee, FL 32399-1050

Robert Scheffel Wright/ John T. LaVia
Young van Assenderp
Florida Retail Federation
225 South Adams Street, Suite 200
Tallahassee, FL 32301

Kay Davoodi, Director Utility Rates
c/o Naval Facilities Engineering
Comma
1322 Patterson Avenue SE
Washington Navy Yard, DC 20374

Stephanie Alexander
Tripp Scott, P.A.
200 West College Avenue, Suite 216
Tallahassee, FL 32301

Joseph L. Adams
IBEW System Council U-8
4314 N. Suncoast Blvd.
Crystal River, FL 34428

Audrey Van Dyke
c/o Naval Facilities Engineering
Comma
720 Kennon Street, SE Building 36 R
Washington Navy Yard, DC 20374

J. Michael Walls/ Blaise N. Huhta
Carlton Fields Law Firm
P.O. Box 3239
Tampa, FL 33601-3239

James W. Brew/F. Alvin Taylor
PCS Phosphate – White Springs
1025 Thomas Jefferson St. NW, 8th Flo
Washington, DC 20007

Marco Iannella
701 Milwaukee Ave.
Dunedin, FL 34698

Dan Moore/Stephanie Alexander
Association for Fairness in Rate Making
316 Maxwell Road, Suite 400
Alpharetta, GA 30009

Dianne M. Tripplett
229 1st Avenue N PEF-152
St. Petersburg, FL 33701

Bill Newton, Executive Director
3006 W. Kennedy Blvd, Ste B
Tampa, FL 33609

Honorable William M. Queen
190 173rd Avenue
Saint Petersburg, FL 33708



Charles J. Rehwinkel
Associate Public Counsel