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100001-EI

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e. The attached document is Florida Industrial Power Users Group Post-Hearing Brief of Intervenors.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.	DOCKET NO. 100001-EI Filed: November 8, 2010
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JOINT POST-HEARING BRIEF OF INTERVENORS

This brief is filed jointly by the following Intervenors: The Florida Industrial Power Users Group (FIPUG), the Office of the Attorney General (AG), the Office of Public Counsel (OPC) and the Florida Retail Federation (FRF) (collectively, Intervenors).

INTRODUCTION

At the conclusion of the hearing in this matter on November 2, 2010, parties were provided with the opportunity to present post-hearing briefs on Issue 1D related to Progress Energy Florida, Inc.'s (PEF) ability to recover replacement power costs through the fuel adjustment clause for its Crystal River 3 (CR3) outage, prior to the Commission's determination in a separate docket¹ as to the prudence of PEF's actions. Additionally, the question was raised as to whether the Commission has discretion to permit partial recovery of replacement power costs. Both of these issues will be addressed in this Post-Hearing Brief.

It is the Intervenors' position that the Commission clearly has authority to, and should, deny recovery of replacement fuel costs until there has been a determination of prudence in the separate proceeding. It would be unfair to force ratepayers to bear these significant costs prior to a Commission determination that PEF's actions related to the outage were prudent and appropriate. That determination will not be made until the conclusion of a separate docket dealing specifically with the outage. Additionally, the Commission has previously stated that a

¹ A new docket number has not yet been assigned to the PEF spin-off docket. However, in Order No. PSC-10-0632-PCO-EI, Prehearing Officer Skop granted PEF's request to establish such a docket.

utility seeking replacement power costs must preliminarily and affirmatively demonstrate two things: 1) that the actions or events of the utility that gave rise to the need for the replacement power were reasonable; and 2) that the costs of the replacement power were reasonable. PEF provided insufficient evidence to meet the first prong of this test. *See*, Order No. PSC-97-0359-FOF-EI at 13, as clarified in Order No. PSC-98-0049-FOF-EI.

While it is Intervenors' position that consumers should pay no costs in advance of a prudency determination due to PEF's failure to meet the standard for replacement power costs the Commission has previously articulated, case law and Commission precedent clearly vest this Commission with discretion to order a partial recovery of costs prior to a prudency determination, a "split the baby" approach.

ISSUE AND POSITION

ISSUE 1D: Should Progress Energy Florida, Inc. be permitted to collect through the fuel clause, amounts related to replacement power due to the extended outage at Crystal River Unit 3 prior to the Commission's determination of the prudence of such costs in a separate docket?

INTERVENORS: *No. Ratepayers should not be required to pay for such costs prior to the presentation of evidence and a determination by the Commission in the separate docket regarding PEF's actions related to the CR3 that outage expenditures are reasonable and prudent. Due process requires that the Commission make a determination of the reasonableness and prudency of PEF's actions before ratepayers' property interests, i.e., ratepayer monies, are adversely affected and they are saddled with an additional rate increase. Allowing recovery before the presentation of evidence related to actions associated with the CR3 outage puts the cart before the horse.*

ARGUMENT

The Commission has authority to, and should, deny the entire amount of CR3 replacement fuel costs until a determination of prudence has been made in the separate docket. Further, the Commission has the ability to exercise discretion when considering Issue 1D. Should the Commission decide to exercise its discretion, the Commission should award PEF only a minority portion of its replacement fuel costs now, before the prudence hearing.

- A. PEF Failed to Comply with Previous Commission Orders Addressing Replacement Power Costs for CR3 and thus Recovery of These Costs Should Be Denied.

PEF has failed to meet the requirements set forth in Order No. PSC-97-0359-FOF-EI, as clarified in Order No. PSC-98-0444-FOF-EI to affirmatively demonstrate that the actions or events that gave rise to the need to recover replacement power costs are reasonable. Unfortunately, this is not the first time that PEF has sought Commission approval of replacement power costs due to an extended outage of the CR3 nuclear power plant.

The Commission first considered this very same issue in 1997 in Docket No. PSC-97-0359-FOF-EI. Troubled by allowing advance recovery of costs for replacement fuel related to the CR3 outage, the Commission said:

We have a great deal of difficulty with allowing recovery of these costs. To a limited extent, we agree with the arguments of Public Counsel that given the significance of these costs, FPC should have made some initial presentation as to the reasonableness of these costs. In the past, we have permitted utilities to recover costs on a preliminary basis, subject to audit, "true-up" with interest and an after-the-fact prudence review. Thus, we do not believe it was unreasonable for FPC to expect that it would have the opportunity to meet the burden of proof in a proceeding specifically designed to determine the prudence of these costs. **In the future, however, when a utility seeks to recover costs which have a significant impact on the utility's fuel adjustment factor, the utility must affirmatively demonstrate prior to approval for recovery that the actions or events that gave rise to the need for the recovery and the underlying costs are reasonable.**

Order No. PSC-97-0359-FOF-EI at 13 (emphasis added).²

This prior Commission order addresses the same topic that is before the Commission now -- advance recovery of replacement power costs prior to a prudency determination. The Commission's 1997 order squarely put PEF on notice that before recovery will be allowed, it must *affirmatively* demonstrate that the actions or events that gave rise to the need for replacement power were reasonable. PEF witness, Marcia Olivier, whose testimony summarily addressed the CR3 outage by indicating that the issue would be considered in a "spin off" docket, admitted that there was nothing in her testimony that addressed the reasonableness of either PEF's actions or the events that gave rise to the need for replacement power costs. (Tr. 67-68).

Failing to comply with the Commission's previous directions as set forth above, PEF argued that it only had to show that the price it paid for replacement power was reasonable and that the CR3 nuclear power plant was not operational. PEF points to Order No. 98-0049-FOF-EI as support for its view. PEF's interpretation misreads Order No. 98-0049-FOF-EI and fails to consider that order in *pari materia* with the Commission's previous ruling on the subject of replacement power costs referenced above. Order No. 98-0049-FOF-EI, upon which PEF relies, quotes extensively from Order No. 97-0359-FOF-EI. Order No. 98-0049-FOF-EI includes a significant portion of the extensive quote set forth above which requires a utility to affirmatively demonstrate *the actions or events* giving rise to the need for replacement power were reasonable. Order No. 98-0049-FOF-EI at 2.

The issue addressed in Order No. 98-0049-FOF-EI was what constituted a significant impact upon the utility's fuel adjustment factor. The Commission decided that whenever a 5%

² FPC is the predecessor company to PEF.

increase in the utility's fuel factor results from a change in fuel prices, a fuel supply disruption, or a generating plant outage, that is a significant impact that triggers the threshold requirements of Order No. 97-0359-FOF-EI. Order No. 98-0049-FOF-EI at 4. It is not disputed that the case at hand involves a generating plant outage that impacts more than 5% of PEF's fuel adjustment factor. However, tellingly, the order PEF seeks to rely upon does not recede from the requirement that the requesting utility must affirmatively demonstrate, prior to approval of recovery, that the actions or events giving rise to the need for replacement fuel were reasonable.

In Order No. 98-0049-FOF-EI at 4, the Commission referenced the requirements of its previous order on the subject when it said: "The threshold requirements of Order No. PSC-97-0359-FOF-EI will be triggered whenever fuel costs will result in an increase of 5% or more of the utility's six-month fuel adjustment factor for the projection period." Clearly, the order PEF relies upon for its legally deficient filing expressly references the threshold requirements of the Commission's previous order, which includes the requirement that PEF present evidence showing that the actions or events which caused the need to buy replacement power were reasonable. PEF did not provide any such evidence at hearing in this case as its witness Olivier admitted on the stand.

PEF surely understood that the Commission required a showing of reasonableness of the actions or events that caused the purchase of replacement power. As memorialized in Order No. PSC-98-0049-FOF-EI at 2, PEF proposed the following language to the Commission for consideration to address "significant impact" and even called its proposal a "Guideline for Preliminary Explanation Required by Order No. PSC-97-0359-FOF-EI":

When a utility experiences an extended outage of a major generating unit that increases the utility's fuel adjustment factor for the projection period by more than 5% compared to what the factor would have been absent the outage, the utility must, prior to

approval, disclose the extended outage and provide a preliminary explanation, within the limits of the information then available, of its actions surrounding the outage and the need to incur the underlying fuel costs.

The Commission order rejected PEF's proposed language, in large part because it lacked "definition regarding the character of and manner in which the preliminary showing will be made" and possibly could be made in oral argument without solid evidence to back it up. Order No. PSC-98-0049-FOF-EI at 3.

The prior Commission orders cited above make clear that a utility which seeks recovery of replacement power costs that exceed 5% of the utility's fuel adjustment factor must make a preliminary, affirmative demonstration of two things: 1) that the actions or events that gave rise to the need for the replacement power are reasonable; and 2) that the underlying fuel costs are reasonable. PEF, having admittedly failed to satisfy the first prong of this test, wants the Commission to apply only the second prong. If the Commission were to revise its prior holdings to require that only the second prong must be met before recovery, a utility could engage in, for example, mismanagement (i.e., employ personnel not qualified to run the plant resulting in a shut down) and still recover its replacement fuel costs, by simply presenting a bill showing the costs of its replacement fuel. Such results should not be permitted and that is why the two-prong test is necessary.

The Commission should refuse to vitiate its prior order. To accept PEF's argument, all the utility would need to demonstrate for the purpose of advanced cost recovery in the fuel docket is that the nuclear plant was not available, and, therefore, it had to buy replacement fuel. Surely, as the Commission articulated in Order No. PSC-97-0359-FOF-EI, more is required before the Commission appropriates either all or some portion of fuel replacement costs from

consumers to the benefit of a utility. The Commission should not recede from its two-prong test originally articulated in Order No. 97-0359-FOF-EI and clarified in Order No. 98-0049-FOF-EI.

Because PEF failed to satisfy its burden of affirmatively demonstrating that the actions or events that gave rise to its need for extensive replacement power were reasonable, it should not be allowed to recovery any replacement power costs in advance of the prudency hearing in the spin-off docket.

B. Fundamental Due Process Protects Ratepayers from Advanced Recovery of Replacement Power Costs.

Florida consumers should not be forced to relinquish their property, namely their hard-earned money, to PEF to pay for replacement power costs associated with the extended outage of CR3 unless and until PEF demonstrates that its actions and decisions associated with the outage were reasonable and prudent. The protection of property interests is a basic constitutional right set forth in Section I, Article 2 of the Florida Constitution. Specifically, the Florida Constitution details the basic right “to acquire, possess and **protect** property.” (emphasis added). Section I, Article 9 of the Florida Constitution sets forth the basic right of due process, and provides that **no person shall be deprived of property without due process of law.** (emphasis added).

Tellingly, before detailing the extensive duties and responsibilities of the Commission, the Legislature gave clear direction that the Commission should protect the public welfare and that the Commission should liberally construe its statutes to accomplish the protection of the public welfare. Specifically, in section 366.01, Florida Statutes, the Legislature said:

Legislative declaration. -- The regulation of public utilities as defined herein is declared to be in the public interest and **this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare** and all the provisions hereof shall be liberally construed for the accomplishment of that purpose. (emphasis added).

Courts have recognized that property rights are among the most basic substantive rights that the Florida Constitution expressly protects. *See, Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 964 (Fla. 1991). As detailed above, PEF made no demonstration that the actions or events that resulted in it securing replacement power because its CR3 nuclear power plant was not operational were reasonable. Again, this Commission has previously ruled that such a demonstration must be made, on a preliminary basis, in order to allow a utility to recover money from consumers in advance of a full determination of prudence. *See, Order No. 07-0359-FOF-EI*. “The specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding.” *Keys Citizens for Responsible Government v. Florida Keys Aqueduct Authority*, 795 So. 2d 940, 948 (Fla. 2001).

Given the Commission’s past rulings on this very issue, if this Commission were to allow PEF to collect money from consumers without following this Commission’s dictates that PEF make an affirmative, preliminary showing that the actions or events that lead to the outage of CR3 nuclear power plant were reasonable, consumers would not be afforded due process given the requirements of the proceeding. The Commission should not disregard what it has previously set forth as requirements for this proceeding when a utility seeks advance recovery of replacement power costs that have significant impact on rates. To ignore such requirements and award PEF the right to collect funds from ratepayers would violate due process rights that are afforded to ratepayers by the Florida Constitution. In sum, the Commission should not allow PEF to recover replacement power costs before PEF demonstrates that the actions and events associated with the CR 3 outage were reasonable and prudent, something PEF has yet to do.

C. The Commission has the Discretion to Award a Partial Recovery of Replacement Power Costs.

Intervenors momentarily put aside their arguments set forth above to address the question of whether the Commission has the discretion to allow a partial recovery of replacement power costs. The answer is that the Commission (if PEF made the required preliminary showing of the reasonableness of events or actions leading to the replacement power costs being incurred) clearly has the ability to exercise its discretion to order a partial recovery of replacement power costs pending the Commission's prudence determination related to the CR3 extended outage. Stated differently, the Commission, should it desire, has discretion to fashion relief that adopts neither the position of PEF or the Intervenors, but instead "splits the baby" or adopts a position between those argued by PEF and the Intervenors.

This Commission has previously articulated to the Florida Supreme Court its ability to exercise discretion when setting rates, a position that the Court adopted. Specifically, in *Gulf Power Company v. Bevis*, 296 So. 2d 482, 487 (Fla. 1974) the Florida Supreme Court made the following pronouncement:

As pointed out by the Commission, it has considerable discretion and latitude in the rate-fixing process. In City of Miami v. Public Service Commission (Fla.1968), 208 So.2d 249, upon reviewing the statutes empowering the Commission to fix rates we concluded 'these statutes repose considerable discretion in the Commission in the rate-making process.'

The Commission has also recognized its broad discretion when fixing rates.³ In Order No. PSC-09-0571-FOF-EI, this Commission held:

We have discretion in fixing rates and charges for public utilities. Our discretion in the ratemaking process is well documented in decisions by the Florida Supreme Court. For example, in Gulf Power Co. v. Bevis, 296 So. 2d 482, 487 (Fla. 1974), the Court

³ It is not disputed that the Commission is fixing rates in this proceeding, rates that will be charged for utility fuel purchases.

held that “as pointed out by the Commission, it has considerable discretion and latitude in the rate fixing process;” in Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968), the Court held that “the regulatory powers of the Commission ... are exclusive and, therefore, necessarily broad and comprehensive;” and in City of Miami v. Florida Public Service Commission, 208 So. 2d 249, 253 (Fla. 1968), the Court held that “it is quite apparent that these statutes repose considerable discretion in the Commission in the ratemaking process.”

Without question, had PEF made its required preliminary evidentiary showing, this Commission would have the ability to exercise discretion when deciding Issue 1D. Moreover, this discretion has been used in previous fuel docket proceedings. For example, in Order No. PSC-08-0541-PCO-EI and Order No. PSC-08-049-PCO-EI, the Commission extended the recovery period for recovery of fuel costs.

In this case, PEF’s decision to file a motion to have the prudence of CR3 replacement power costs determined at a later point in time, combined with the dire economic situation facing millions of Floridians, argue persuasively that should the Commission decide to exercise its discretion and permit some recovery of replacement power costs now, the amount recovered now should be a minority sum of the amount in question.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Commission should enter an order denying PEF's request to recover all replacement fuel costs resulting from the outage of the CR3 nuclear power plant until it determines in the spin-off docket whether the events or actions leading to the outage were reasonable and prudent.

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