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Docket No. 100001-EI

On behalf of Progress Energy Florida

Consisting of 15 pages.

The attached document for filing is PEF's Post-Hearing Brief in the above referenced docket.

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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.	DOCKET NO. 100001-EI DATED: November 8, 2010

PROGRESS ENERGY FLORIDA, INC.'S
POST-HEARING BRIEF

Progress Energy Florida, Inc. hereby submits its Post-Hearing Brief addressing the recovery of the Crystal River Unit 3 replacement fuel costs through the Fuel and Purchased Power Cost Recovery Clause ("Fuel Clause").[1]

I. INTRODUCTION

As part of the steam generator replacement project at Crystal River Unit 3 ("CR3"), Progress Energy Florida ("PEF") was required to create a temporary opening in the containment wall structure that surrounds the nuclear power core of the unit. During this process, PEF discovered a delamination in Bay 3-4 of the containment wall where some of the outer layers of concrete had separated from the other layers underneath. PEF has been in the process of analyzing and repairing this delamination, and CR3 has been offline while this analysis and repair takes place. While CR3 has been offline, PEF has bought fuel for its other generating units that are being used to provide the power that would otherwise be generated by CR3. At issue in this proceeding is whether or not the costs paid for that fuel, along with all the other fuel that PEF has bought for its units in the normal course of its operations, are reasonable.

The interveners in this proceeding contend that PEF should not be able to recover the

[1] This issue (identified as Issue 1D in the prehearing order) is the only remaining issue for Commission determination. The decision in Issue 1D will impact the ultimate costs to be approved for Issues 8, 9, 10, 12, 13, and 15. For these fall-out issues, PEF supports the amounts that include the full CR3 replacement costs. Those amounts were reflected in Exhibit 71, entered into evidence at the hearing.

costs of fuel that PEF has purchased due to the CR3 outage until after the Commission makes a determination that those costs were prudently incurred.[2] First, the interveners claim that PEF has failed to satisfy a filing requirement that they allege is necessary for recovery to take place on an interim basis, prior to a prudence determination. Next, they argue that even if PEF has satisfied that alleged requirement, the Commission should not allow PEF to recover those costs on an interim basis, subject to refund, because of the state of the national and local economy. Finally, the interveners contend that if PEF is allowed to recover those costs prior to a prudence determination, the Commission should only allow PEF to recover 50% of those costs so that PEF can "split the baby" with customers. Notably, none of the interveners have alleged or contended that the fuel costs at issue are unreasonable. Instead, their challenges are purely based on procedural and policy grounds.[3] As demonstrated below, each of the interveners' arguments are without merit and should be rejected.

II. UNDER LONGSTANDING COMMISSION POLICY, THE COMMISSION LOOKS TO THE REASONABLENESS OF PROJECTED COSTS IN CONSIDERING WHETHER A UTILITY MAY RECOVER INTERIM RATES, NOT "ACTIVITIES AND EVENTS."

The Commission's Fuel Clause is an ongoing docket where the reasonableness of the costs of the fuel that utilities purchase is analyzed on an ongoing basis. Each month, utilities file

[2] The Commission issued Order 10-0632 on October 25, 2010 establishing a separate docket to "evaluate the prudence and reasonableness of PEF's actions concerning the delamination" and to "review the prudence of PEF's resulting fuel and purchase power replacement costs associated with the extended CR3 outage." Notably, the Commission's order did not indicate that the Commission would determine whether PEF's replacement power costs were reasonable in the separate docket, presumably because a reasonableness determination is to be made in this docket.

[3] FIPUG's attorney briefly mentioned issues of "constitutionality," "property rights," and "the cart being before the horse" in his opening arguments but did not attempt to argue those points again in his closing remarks. Accordingly, PEF has not briefed those issues in this filing as it appears that FIPUG will not pursue those arguments. To the extent that FIPUG makes such arguments in its post-hearing brief, however, there is simply no constitutional prohibition to the Commission allowing for interim cost recovery subject to refund, nor does allowing interim recovery violate any property rights. The Commission has allowed for interim cost recovery subject to refund for the past 30 years without challenge and also has standing rules for interim cost recovery subject to refund in its Nuclear Cost Recovery Clause.

"A-Schedules" and "Form 423" reports with the Commission and the parties to the fuel docket to show the type, quantity, and price of fuel purchased. The utilities also file monthly generation performance reports with the Commission and the parties to show how the utilities' generation fleet has operated for the preceding month. Further, PSC staff conducts audits of utility fuel expenses, and PSC staff also conducts noticed informal meetings with the parties on any fuel issues that Staff may have questions on. Additionally, utilities file multiple sets of testimony at different points each year with hundreds of pages of supporting schedules and exhibits to show the reasonableness of all its fuel costs for the relevant periods. During this process, PSC staff and intervening parties take written and oral discovery and are given the opportunity to present evidence at a week-long hearing each November. This is the process that the PSC uses each year to ensure that the billions of dollars of fuel costs that are passed on to ratepayers are reasonable.

Relying on an outdated collateral statement by the Commission in a 13 year-old order, interveners contend that Commission Order 97-0359 requires the Commission to consider the reasonableness of the "actions and events" giving rise to the need for interim rate recovery, not just the reasonableness of the projected fuel costs. Using this argument, the interveners contend that PEF has not satisfied a procedural filing requirement to show the reasonableness of the "actions and events" giving rise to the need for replacement fuel and therefore, PEF should not be allowed to recover interim costs on procedural grounds. As the very next two Commission orders issued after Order 97-0359 make clear, and as Staff recognized in this proceeding (Tr. at 477-78), however, the interveners are wrong.

In Order 97-0359, the Commission approved Florida Power Corporation's ("FPC") request for interim rate recovery for costs caused by an extended unit outage, but it expressed some difficulty in doing so because FPC had not made an initial presentation as to the

reasonableness of its projected costs. *Id.* at 12. The Commission recognized that in the past, it had permitted utilities to recover costs on a preliminary basis, subject to a later prudence review. Thus, the Commission stated, it did not believe it was unreasonable for FPC to expect that it would have the opportunity to meet the "reasonableness" burden of proof during the prudence proceeding. The Commission then stated, as a collateral matter:

> 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 97-0359, at 13.

Interveners' argument is based solely on the Commission's one-time reference in dicta to "actions or events" in Order 97-0359. What the interveners fail to recognize, however, is that the Commission reconsidered Order 97-0359 and no longer referenced "actions or events" as something to be proven for interim rate relief. Indeed, the Commission never again referenced "actions or events" in an interim rate recovery proceeding.

The Office of Public Counsel moved for reconsideration of Order 97-0359, asserting that FPC had not presented competent, substantial evidence to support its replacement fuel costs request. The Commission denied the motion for reconsideration because OPC "misapprehends the point at which proof of prudence is required in fuel adjustment proceedings." Order 97-0608, at 1. The Commission then set forth its policy on interim rate relief, plainly stating: "The evidence to be adduced for prospective fuel cost recovery is the reasonableness ***of the utilities' cost projections.***" Order 97-0608, at 4. The Commission explained that reasonableness is determined by comparing a utility's projected fuel costs to the costs actually expended:

> The evidence to be adduced for prospective fuel cost recovery is the reasonableness of the utilities' cost projections. The standard for approval of projected fuel costs is a showing that the projections are reasonable in amount.

> What is required is a showing that the projected kilowatt-hour sales and projected costs for fuel are reasonable.
>
> * * * *
>
> To require proof of prudently incurred expenses is appropriate in a final decision on cost recovery, ***but is simply inapplicable to a proceeding, such as . . . the fuel adjustment***, in which the Commission allows interim cost recovery subject to refund.

Id.

The Commission reiterated this policy the following year. In Order 98-0049, the Commission recognized that Order 97-0359 had caused some confusion as to the level of detail required to establish the reasonableness of recovering interim rates. The Commission then again set forth its policy, which was consistent with Order 97-0608:

> We have carefully considered the suggestions of FPC and OPC regarding the standard for preliminary proof of projected fuel costs as required by the Order. . . . Therefore, we find that prior to interim recovery, utilities must demonstrate in their prefiled testimony, the reasonableness of ***costs*** that exceed the threshold for increases in fuel adjustment factor findings as set forth herein. . . . The preliminary proof of reasonableness required by this Order is not intended to be a substitute for a full prudence review nor does it abridge parties' rights or obligations in fuel adjustment or prudence proceedings.

Order 98-0049, at 4 (emphasis added).

The Commission again recognized this policy just last year in Order 09-0645, when it described a two-step methodology it uses to assess the reasonableness of fuel costs: 1) a cost effectiveness test that compared actual costs incurred during the year in question with the estimated cost of the fuel, (the Commission compared the actual costs expended to the estimated cost of the fuel the Commission determined the utility should have purchased); and 2) a determination of whether the utility had paid excessive fuel costs.

Finally, the Staff recognized this Policy during this hearing, explaining:

As the Commission found in Order Number PSC-97-0608-FOF-EI, to require

> proof of prudently incurred expenses is appropriate to a final decision on cost recovery, but it is inapplicable to a fuel adjustment proceeding in which the Commission allows cost-recovery on an interim or projected basis subject to a refund.
>
> The Commission stated in that order that the evidence to be adduced for prospective fuel cost-recovery is ***the reasonableness of the utility's cost projections.*** Staff believes that Progress Energy has shown that . . . replacement fuel costs related to the CR3 extended outage are reasonable.

Tr. at 478.

Interveners' argument that something more than the reasonableness of projected costs be considered in this proceeding is contrary to Commission policy. PEF has filed exactly what it has always filed to show the reasonableness of its fuel costs and has fulfilled all procedural and substantive requirements for interim recovery. To suggest otherwise leads to the wholly illogical conclusion that what PEF has filed to show the reasonableness of $1.7 **billion** in fuel costs this year is acceptable but what PEF has filed to show the reasonableness of a comparatively fractional $110 **million** is not.

Even if the Commission had set forth a requirement in 1997 that utilities must make a filing to prove the reasonableness of actions and events that led to the need to purchase fuel, which it did not, the Commission has never defined what is required to be in such a filing, nor is PEF aware of any situation where any utility has ever made such a filing. In other words, had the Commission set forth such a standard, it would have been required to create a rule or issue an order setting forth what must be filed to meet that standard. Notably, the Commission has defined what needs to be filed to show prudence of costs and the Commission has defined what needs to be filed to show the reasonableness of costs, but the Commission has never defined what needs to be filed to show the reasonableness of actions and events giving rise to the need to purchase fuel. Even if the Commission were inclined to enact such a standard today, it would

first need to have workshops or rulemaking proceedings, or issue orders, to determine what utilities must do to meet that standard and the Commission would be legally prohibited from applying that new standard retroactively. Indeed, even the interveners that argued that this alleged standard exists could not tell this Commission in oral argument what is required to meet that standard. They instead just told the Commission that PEF has to file "something." A vague and ambiguous requirement that a utility "file something" to support recovery of costs is contrary to law and arbitrary and capricious. It is a settled principle of law that standards set by administrative agencies must be clearly articulated and understandable to the parties that must comply with the standard. *See* Order Number PSC-98-0049-FOF-EI at 5 (stating that "an ambiguous policy leads to uncertainty by entities who must file under the fuel clause as to what the rules are...[s]uch a policy could be subject to challenge").

III. INTERVENERS' ARGUMENT IS DIRECTLY CONTRARY TO ESTABLISHED COMMISSION POLICY.

In addition to their procedural argument, the interveners assert that the Commission should not allow preliminary rate recovery now, but instead wait until after the prudence review because the federal and state economies are bad. Again, interveners' argument is contrary to Commission policy and the interveners' suggested course of action does not help ratepayers.

The interveners claim that the fuel adjustment costs should remain with PEF's customers now because of the "bad economy." This has never been a consideration expressed by the Commission, nor could it be because a "bad economy" is ambiguous and virtually indefinable. Indeed, the interveners themselves do not suggest what constitutes a bad economy, or how this new consideration could be applied consistently in future cases. Commission policy to the contrary makes eminent sense – customers should be protected from the potentially significant burden of later having to pay recovery costs, plus interest. Under Commission policy, the utility

is the entity that bears the burden of the added interest expense. Interveners, however, seek to subject the customers themselves to that unnecessary added expense. Further, even if the Commission decided that a bad economy should be a consideration, it is not one that can be applied to this case. New agency policy must be promulgated in due course – with proper notice to affected parties – and may not be used in an ex post facto manner. *York v. State*, 10 So. 2d 813 (Fla. 1943); *see also Jordan v. Dep't of Prof'l Reg.*, 522 So. 2d 450 (Fla. 1st DCA 1988) (same). The interveners' arguments here would require the Commission to depart from long-established policy, and the Commission can only prospectively change policies with due notice to the utilities seeking interim rate recovery.

The Commission's clear policy – through decades of application – is that, to prevent regulatory lag, utilities are able to recover their entire fuel cost concurrent with their expense, subject to a subsequent prudence review when the Commission is able to collect and analyze information relevant to the accuracy of the fuel expenditures. *See, e.g.*, Order 13452 (Fla. PSC June 22, 1984); Order 07-0816 (Fla. PSC Oct. 10, 2007). Thus, "clause recovery is immediate. There is a trade-off, however, as a utility remains uncertain as to whether the Commission will ultimately determine its expenditures to be prudent. . . . [The Commission's] ability to review past expenditures by utilities is essentially a quid pro quo that was established in return for the benefit utilities receive." Order 07-0816, 2007 WL 2980912, at **6-7 (Fla. PSC Oct. 10, 2007).

This policy benefits both customers and utilities:

> [Utilities are benefited because] "[t]he current procedure eliminates the difference between the actual cost of fuel for an electric utility and the amount allocated for fuel in the utility's current general rate structure. *Citizens of State of Fla. v. Public Serv. Comm'n*, 403 So. 2d 1332, 1333 (Fla. 1981). Ratepayers also benefit because ***the procedure is designed to produce credits for consumers should fuel costs decrease***. In addition, the practice provides more rate stability and thus less confusion for ratepayers over the fuel adjustment charge. ***Finally, adjustment clauses were developed to protect the consumer in case of sharp decreases in***

> ***fuel or commodity costs and the utility in cases of sharp increases.*** *Pinellas County v. Mayo*, 218 So. 2d 749, 750 (Fla. 1969).
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> * * * *
>
> If we permit recovery now, we can later order a refund of these costs, with interest, if we determine the costs were imprudently incurred. . . . If we delay recovery of these costs until it is determined that all or a significant burden were prudently incurred, . . ., ***we may be putting a significant burden on customers at some future period. That burden will be heightened by interest which will accumulate on the unrecovered costs.***"

Order 97-0608, at 2, 4-5 (internal quotations omitted) (emphases added).

Interveners' argument is exactly opposite to this policy. If the Commission does not permit interim recovery costs now, but waits until after a prudence review, customers will bear a significant burden by having to not only pay in the future the recovery costs but also the interest incurred on those costs. Thus, the burden on the customer would be significantly higher. To the contrary, under interim recovery, the utility is the entity that will be required to pay interest if its recovery costs are deemed imprudent – the customer receives a credit.

Indeed, in Order 06-1057, the Commission rejected the precise argument made by interveners here – that recovery be denied until after prudence could be determined. Instead, the Commission permitted interim cost recovery based on its established policy to protect consumers from a later burden of paying recovery costs with interest.

IV. IF A UTILITY DEMONSTRATES THE REASONABLENESS OF PROJECTED COSTS, THE COMMISSION DOES NOT HAVE THE DISCRETION TO DENY RECOVERY OF INTERIM RATES.

Contrary to the interveners' argument, the Commission does not have the discretion to deny interim rate recovery where the utility satisfies the proof of reasonableness the Commission requires. As discussed above, and as discussed in the seminal fuel clause Order 12645, the allowance of interim recovery of fuel costs subject to refund is the exchange or *quid pro quo* that

the utility makes for remaining uncertain as to whether or not those costs will ultimately be determined to be prudent. As with any situation where a party has exchanged a right for the benefit of another right, a regulatory body cannot deny that party the benefit of its bargain by using "discretion" to take away one part of the exchange. The entire regulatory compact under which regulated electric utilities operate is a mutual exchange of rights and obligations between the utility and the regulator. In exchange for being a regulated entity that has an obligation to serve at the rates set by the regulator, the utility, among other things, is allowed to recover the costs it incurs to do business from its customers so long as those costs are reasonable and prudent. The Commission cannot deny the utility the benefit of that exchange by using "discretion" to disallow the timely recovery of costs. Similarly, the Commission cannot use "discretion" to deny interim recovery of fuel costs when the utility still shoulders the burden of being uncertain as to whether those costs will ultimately be determined to be prudent at some later date.

The Florida Supreme Court made clear in *Florida Cities Water Co. v. Public Service Commission*, 384 So. 2d 1280, 1281 (Fla. 1980), that the Commission should not deviate from its own policies with no record foundation for doing so. *See also* Order PSC-02-0787-FOF-WS (Fla. PSC June 10, 2002) (applying this same policy); Order 7926, Dkt. 760842-TP (Fla. PSC Aug. 10, 1977) (same). Long-standing Commission policy requires the Commission to approve interim rate recovery if the proper showing is made. The Commission has never suggested or applied discretion in making these determinations. Nonetheless, that is exactly what the interveners seek to have the Commission do. Yet, the interveners can point to no logical reason to justify the potential for imposing a significant burden on ratepayers in the future by not permitting interim cost recovery now. Further, the imposition of a new, ambiguous policy also

would be arbitrary and capricious if the Commission attempted to disallow interim recovery. *See* Order PSC-09-0719-PC-EI (Fla. PSC Oct. 29, 2009) ("In all matters before us, we must base our decisions and take actions based on facts, not on suppositions and conclusory impressions that run counter to the facts that exist. Such actions would be arbitrary and capricious and certainly subject to challenge.").

V. THE COMMISSION SHOULD NOT ARBITRARILY APPORTION THE AMOUNT OF COSTS PROGRESS MAY PRELIMINARILY RECOVERY PENDING PRUDENCE REVIEW.

As demonstrated in the orders above, the Commission never has "split the baby" on the issue of interim cost recovery. Consistent with the purpose of the fuel adjustment clause – to allow utilities to immediately recover their projected costs subject to a potential refund – the Commission has always allowed the interim recovery of reasonable costs in their full amounts. Indeed, to apportion the amount of recovery would lead to arbitrary and unreasonable results and cause significant confusion among the Commission, utilities, and customers. *See Fla. Bridge Co. v. Bevis*, 363 So. 2d 799 (Fla. 1978) (finding ration chosen by Commission had no support in logic, precedent, or policy and was therefore arbitrary and capricious).

For example, if the Commission decided to allow PEF to only recover a percentage of its projected costs, the only manner in which to determine that percentage would be to arbitrarily select a number. No other logical grounds exist from which to split the issue. The Commission should decide this issue the way it always has and in line with its established regulatory policy. Allowing interim recovery of costs prevents regulatory lag, provides regulatory certainty, and protects customers from the significant burden of having to pay interest on costs that are deemed prudent.

VI. PEF'S PROJECTED REPLACEMENT COSTS ARE REASONABLE AND RECOVERABLE.

The only question remaining is whether PEF has satisfied the Commission's required showing of the reasonableness of its projected costs. It has. PEF has met this reasonableness standard through the exhibits and testimony of all its witnesses and through all the filings and the process described above that PEF and the parties engage in each year in the fuel docket. Among other things, PEF has explained the types of fuels PEF had to purchase, including the replacement fuels, the costs of these fuels, and that these fuels were necessary and their costs are within the market for such fuels. PEF further explained the significant benefits that the ratepayers have received and continue to receive from PEF's Nuclear Energy Insurance Limited ("NEIL") policy with respect to the Company's replacement fuel costs. Further, and as noted above, no intervener has taken issue with the reasonableness of any of PEF costs.

Simply stated, PEF has met its burden of showing that its replacement fuel costs are reasonable and therefore the Commission should approve those costs, subject to refund with interest pending a prudency review. Commission staff agrees. As staff stated at the hearing, "staff believes that it was reasonable for Progress Energy to purchase replacement power due to the CR3 outage and that delaying recovery of these costs until after a prudence determination in a separate proceeding could put a significant burden on customers at some future period." Tr. at 477.

This is the same proof from which the Commission permitted the preliminary recovery of fuel costs by FPC in Order 97-0608. There, the utility proffered its schedule which established its fuel cost of system net generation for the period of October 1996 through March 1997. Included in that amount were replacement fuel costs due to the outage of CR3 nuclear unit. Based on this evidence, the Commission concluded there was adequate evidence in record to

support a finding of reasonableness.

Indeed, even in this proceeding, after considering the current costs recovered from customers by Gulf Power in litigation, the Commission continued to permit Gulf Power to recover its litigation costs, subject to a refund while the Commission further analyzes the issue. *See also* Order 06-1057 (allowing interim cost recovery subject to refund with interest).

Because PEF has met its standard of proof, it is entitled to recover its interim rates. As the Commission has long noted, it is better to evaluate the reasonableness of Progress's costs at the earliest opportunity and to err on the side of allowing collection of all objectively reasonable costs in order to eliminate the prospect of ordering a later recovery of the costs, with interest, to the detriment of the ratepayers. *See* Order No. PSC-08-0494-PCO, EI (Fla. PSC. Aug. 5, 2008).

WHEREFORE, for all the reasons stated above, the Commission should permit the recovery of all of PEF's 2009 and 2010 CR3 replacement power fuel costs through the Fuel Clause.

RESPECTFULLY SUBMITTED this 8th day of November, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Progress Energy Florida, Inc.'s Prehearing Statement has been furnished via electronic mail this 8th day of November, 2010 to all parties of record as indicated below.

John T. Burnett

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