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Subject: OPC'S RESPONSE AND OBJECTION TO PEF's STATUS REPORT AND MOTION TO BIFURCATE

Attachments: OPC's Response to PEF's Status Report and Motion to Bifurcate.pdf

Electronic Filing

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b. Docket No. 100437-EI

In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.

c. Documents being filed on behalf of the Office of Public Counsel

d. There are a total of 10 pages.

e. The document attached for electronic filing is OFFICE OF PUBLIC COUNSEL'S RESPONSE AND OBJECTION TO PROGRESS ENERGY FLORIDA'S STATUS REPORT AND MOTION TO BIFURCATE

Thank you for your attention and cooperation to this request.

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.

DOCKET NO.: 100437-EI

FILED: April 11, 2011

**OFFICE OF PUBLIC COUNSEL'S RESPONSE AND OBJECTION
TO PROGRESS ENERGY FLORIDA'S STATUS REPORT AND MOTION TO
BIFURCATE**

Pursuant to Order No. PSC-11-0108-PCO-EI, the Office of Public Counsel (OPC) files this response and objection to Progress Energy Florida's (PEF) Status Report (Report) and Motion to Bifurcate (Motion) as follows:

1. The OPC believes that PEF's Motion is, at best, premature and should not be granted based on the limited information contained in the Report attached to the Motion. The gist of the Report – a single paragraph – describes a discovery of failure in the repair of the original delamination that resulted in a 78-day planned outage to be extended by approximately 18 months (and counting) in unplanned outage time. As a consequence, PEF reports that it cannot meet the previously projected April 20, 2011, restart and that the unit's return to service cannot be "definitively provide[d]." PEF then, citing that single paragraph, offers a suggestion that the Commission "bifurcate" the prudence determination into two phases due to what it characterizes as a "second delamination event." The OPC believes that PEF's scheduling request is submitted in good faith and appears based on the best information that PEF has at this time. Based on

the limited information made available to the Commission and the Intervenors, PEF's request for bifurcation is not well supported or warranted.

2. At this point, the suggested March 15, 2011, demarcation between two "Phases" appears to be premature, and perhaps arbitrary. OPC's response and objections are grounded in our fundamental belief that the complexity of issues as well as the sheer magnitude of the known and potential customer impact issues in this case far exceeds that which the Commission has ever encountered to date – both in dollar impact and engineering complexity. OPC is concerned that there are not enough facts known at this time to support a definitive decision to fundamentally alter the nature of this docket.

3. Essentially, if the Commission were to accede to what PEF wants, the current proceeding would be artificially limited to an isolated adjudication of only issues relating to relevant – though incomplete and still unfolding – events occurring prior to March 15, 2011. Presumably, the Commission would then later hold a separate, expensive evidentiary hearing to adjudicate the facts and events allegedly occurring after that point in time and relating to the damage recently discovered at the CR3 containment building. PEF contends without offering definitive, evidentiary proof that a separate "event" occurred on or about March 14, 2011.

4. There is no factual proof or legal basis to establish March 15, 2011, as demarcation between theoretical "phases" of the case. It would be a mistake and unfairly prejudicial to the customers. The overall determination of all related facts and issues must be made in a single hearing, absent a compelling and lawful reason to do otherwise.

5. As the Commission stated when the spin-off docket was created (at PEF's request):

[T]he purpose of the docket will be to enable the Commission and all interested parties to review facts and information related to the Crystal River Unit 3 (CR3) steam generator replacement project and the subsequent delamination that was discovered during CR3's Refueling Outage 16. PEF asserts that in this new docket the Commission will be able to evaluate the prudence and reasonableness of PEF's actions concerning the delamination. The new docket will also provide the Commission with the ability to review the prudence of PEF's resulting fuel and purchase power replacement costs associated with the extended CR3 outage.

Order No. PSC-10-0632-PCO-EI, issued October 25, 2010, in Docket No. 100001-EI, In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.

6. Notably, this docket was created to review the prudence of the actions related to both the steam generator replacement project and the subsequent delamination (and associated replacement power costs). This is the presumption with which this docket began and with which the OPC concurred. *Id.* There must be a compelling reason to alter that basis that does not adversely impact the customers whom PEF most certainly will seek to have bear the costs of the outage and other damages proximately caused by the decision to cut the containment building. The minimal facts contained in the Report and the arguments set forth in PEF's Motion do not rise to that level.

7. PEF carries the burden to establish that bifurcation would actually lead to a "just, speedy, and inexpensive determination of all aspects of this case." Motion at 5. PEF has not stated why there is a need to hurry up and have a preliminary determination

related solely to events occurring prior to March 15th. There is a citation to a resolution of all issues raised previously by the parties and a perceived “fear” by the prehearing officer about an open ended schedule. Motion at 4. However, the OPC did not assert that as an issue or a concern. Instead, the OPC urged caution in proceeding too quickly while acknowledging that an open-ended schedule was not desirable. The OPC adamantly urged that form should not prevail over substance. January 24, 2011, Status Conference, T. 35-36. At this point in the docket, less than four weeks after the March 14th delamination discovery, there is no evidence that the schedule is truly “open-ended.”

8. The OPC submits that such bifurcation and separation into two “phases” would be arbitrary and is not supported by the extremely limited known facts regarding the current condition of the containment building and prognosis for successful repair. Granting PEF’s request based on nothing more would be harmful to the interests of the customers who may well be asked to foot the entire cost of the uninsured loss amounting to hundreds of millions of dollars. The OPC contends that the core issue in this case will essentially be:

Whether the decisions and activities of PEF and its agents and contractors which led to the delamination that was discovered on October 2, 2009, were prudent and, if not, what are the damages proximately caused by those decisions and activities?

9. The customers have an absolute right to be heard on the full range of all matters bearing on this core issue and to be afforded full procedural and substantive due process. Premature bifurcation or bifurcation at all may well be a denial of due process and constitute an artificial constraint in the OPC’s case. Premature and unsubstantiated

presumptions regarding facts relating to the relatedness of the delamination discoveries could unfairly relieve PEF of its full burden of proof.

10. Without more information about the substantive reasons for moving toward a quick resolution and rushing to an early determination any decision to bifurcate would be elevating form over substance. PEF has cited the potential for evidentiary staleness as a reason to rush. However, the OPC submits that key witnesses are unavailable for discovery because they are actively involved in the ongoing repair analysis and activities. In fact, at the January 24, 2011, status conference, the OPC informed the Prehearing Officer that after having discussed the matter with PEF, the OPC was not pursuing discovery from the witnesses involved in the repair. T. 32-33. The OPC continues to believe it to be the proper approach to give the repair the highest priority. Thus, until more information is revealed about the true nature of the March delamination discovery, the additional repair needs, and the future status of the containment building (as well as key witness availability), early bifurcation could well be harmful to the OPC's discovery and its case.

11. Bifurcation also creates a host of additional potential problems. The unassailable fact in this matter is that the customers had zero role in PEF's decision to cut the building or select the contractors or methodologies for the cut or subsequent repair efforts. The customers of PEF are not responsible for the fact that PEF's repair process has resulted in a failure that has revealed further delamination that is reportedly on the same scale as the delamination discovered on October 2, 2009. Yet now the customers

are being asked to make accommodation to PEF and rush to judgment on the prudence determination and damages.

12. At this point, the disclosures to the intervening parties of the ongoing, real-time development of facts surrounding the nature and extent of damage to the CR3 containment building are (perhaps understandably) incomplete. The reasons may range from a lack of information to securities laws restrictions to PEF's own ongoing strategic planning relating to other matters including other dockets. The OPC can only speculate at this time; however, there must be a reason beyond what is cited in the PEF motion for wanting bifurcation and acceleration of the Commission's prudence review of PEF's decisionmaking. The reasons supplied in the Motion do not support the Commission hurrying the scheduling, thereby limiting the OPC's case.

13. Substantively, bifurcation would impose an unfair limitation on the OPC's case. There is no evidence that the so-called "second delamination event" is not actually part of an ongoing progressive failure of the containment building that was initiated or exacerbated by the detensioning and subsequent construction activities that began in September 2009. Without knowing more, OPC also believes that the establishment of two separate phases may artificially segregate ongoing direct damages proximately caused by the decision-making that was, and continues to be, associated with the delamination in the form of repair activities. Bifurcation would impose on OPC and the intervenors a needlessly harmful separation of connected facts (i.e. unfolding and continuous damages) based only on scant, incomplete supposition. Examples of damages caused by the

containment cut activities are replacement power costs, capitalized costs of repair, costs for which rate relief has been granted but for which benefits have been lost, uneconomic dispatch of PEF system generation assets, lost opportunity costs of uprate benefits, among others. Pre-March 15, 2011, costs or damages of this type are indistinguishable from costs or damages incurred after March 15. As a result it would be legally incorrect for the Commission to prematurely “bifurcate” the hearing and separate relevant facts and ongoing direct damages on an arbitrary basis.

14. The information proved to the parties and the Commission is too minimal and preliminary to enable an informed decision about limiting the scope of the docket. The OPC believes that a tentative schedule can be established with the flexibility to accommodate relevant ongoing developments. This is addressed below. The Commission should proceed cautiously and not artificially limit the issues that parties can raise nor should an artificial delineation of issues be created that gives the impression that there are two discrete calculations of damages or that ongoing repair and power replacement costs and potential additional direct impacts are factually or legally separate from costs incurred prior to March 15, 2011.

15. Having stated its objections, the OPC is willing to seek scheduling and administrative efficiency solutions that fairly consider the rights and interests of all involved. In this vein, the OPC urges that the Commission require the parties to have further discussion regarding the status of the containment building, repair activities, and witness availability before a decision is made. After such discussion, additional

opportunity for argument to the Commission should be allowed. The OPC suggests scheduling at least an additional status conference after May 2, 2011, because the filing of testimony in the NCRC case on May 2, 2011, may have some bearing on the overall global impact of the CR3 delamination.

16. The OPC believes that in the coming weeks that PEF will know more about the magnitude of delamination, prognosis for a successful repair, minimum repair times, fiscal impacts on other dockets such as Fuel, NCRC, and the filing of rate case for rates effective in 2013.¹ All of these factors impact the scheduling of the case and resources available to Intervenors.

17. Bifurcation would likely impose an increase in financial cost of expert witnesses and needless duplication (in the form of two sets of testimony, depositions and hearing appearances, including travel costs) that would unfairly impact intervenors. Bifurcation of the proceeding at this time could lead to an unjust and very expensive determination of this case, contrary to the claims in the Motion. More needs to be known before rushing to establish a new schedule or bifurcating this proceeding. The OPC and the other intervenors need more information before we can meaningfully respond to any scheduling concerns that the Commission may have.

¹ See Form S-4 Registration Statement as filed with the United States Securities and Exchange Commission March 17, 2011; p. 149-150.

In conclusion, at this point, the OPC sees no compelling reason to create two phases. PEF has supplied no compelling reason to bifurcate at this time. The potential damages that customers could be asked to pay when the entire single, ongoing delamination event is concluded could reach into the hundreds of millions of dollars. Artificial segregation of the damages based on a failure point in the ongoing repair may be contrary to the public interest. The OPC is willing to engage in further dialogue with PEF, the other parties, and Staff in order to seek any needed resolution of scheduling matters. Due to the complex nature of the case and the evolving nature of fact development, the OPC requests an opportunity to make oral argument prior to any further scheduling decisions resulting from PEF's Motion.

Dated this 11th day of April, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **OFFICE OF PUBLIC COUNSEL'S RESPONSETO PROGRESS ENERGY FLORIDA'S STATUS REPORT AND MOTION TO BIFURCATE** has been furnished by electronic mail and U.S. Mail on this 11th day of April 2011 to the following:

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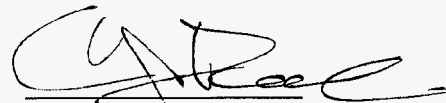
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