

Diamond Williams

From: Kim Hancock [khancock@kagmlaw.com]
Sent: Friday, August 05, 2011 1:35 PM
To: Filings@psc.state.fl.us
Cc: Lisa Bennett; Keino Young; Anna Norris; john.burnett@pgnmail.com; jwb@bbrslaw.com; george@cavros-law.com; kelly.jr@leg.state.fl.us; Charles Rehwinkel; saylor.erik@leg.state.fl.us; Jon Moyle; Vicki Gordon Kaufman
Subject: Docket No. 100437-EI
Attachments: FIPUG Response in Opp to PEF's 2nd Motion to Establish Case Schedule 8.5.11.pdf

a. The name, address, telephone number and email for the person responsible for the filing is:

Jon C. Moyle, Jr.
Keefe Anchors Gordon & Moyle
118 North Gadsden Street
Tallahassee, FL 32301
(850) 681-3828
jmoyle@kagmlaw.com

b. This filing is made in Docket No. 100437-EI.

c. The document is filed on behalf of Florida Industrial Power Users Group.

d. The total pages in the document are 4 pages.

e. The attached document is THE FLORIDA INDUSTRIAL POWER USERS GROUP'S RESPONSE IN OPPOSITION TO PROGRESS ENERGY, INC.'S SECOND MOTION TO ESTABLISH CASE SCHEDULE AND REQUEST FOR ORAL ARGUMENT

Kim Hancock
khancock@kagmlaw.com



Keefe, Anchors, Gordon and Moyle, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, Florida 32301
(850) 681-3828 (Voice)
(850) 681-8788 (Fax)
www.kagmlaw.com

The information contained in this e-mail is confidential and may be subject to the attorney client privilege or may constitute privileged work product. The information is intended only for the use of the individual or entity to whom it is addressed. If you are not the intended recipient, or the agent or employee responsible to deliver it to the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you receive this e-mail in error, please notify us by telephone or return e-mail immediately. Thank you.

DOCUMENT NUMBER-DATE

05540 AUG-5 =

8/5/2011

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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: August 5, 2011

**THE FLORIDA INDUSTRIAL POWER USERS GROUP'S RESPONSE
IN OPPOSITION TO PROGRESS ENERGY, INC.'S SECOND MOTION TO
ESTABLISH CASE SCHEDULE AND REQUEST FOR ORAL ARGUMENT**

Pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C.), the Florida Industrial Power Users Group (FIPUG), through its undersigned counsel, files this response in opposition to Progress Energy Florida, Inc.'s (PEF) Second Motion to Establish Case Schedule. As grounds therefore, FIPUG states the following:

1. While the caption of PEF's motion seems innocuous enough, "Second Motion to Establish Case Schedule," it would be more accurate and descriptive for PEF to have titled its pleading as a "Motion to Trifurcate," as that is the relief the motion seeks.

2. PEF relies on Rule 28-106.211, F.A.C. as the authority to support its motion. This rule states: "The presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, **and inexpensive determination** of all aspects of the case, including bifurcating the proceeding." (emphasis added).

3. PEF's motion apparently ignores the plain, conjunctive language of Rule 28-106.211 that permits an order of bifurcation only when it will promote the just, speedy and inexpensive determination of all aspects of the case. Breaking the case into thirds will undoubtedly be more expensive for FIPUG and other consumer interests for the following reasons: three trials, three prehearings, three sets of prefiled direct testimony, three sets of

DOCUMENT NUMBER - DATE

05540 AUG-5 =

FPSC-COMMISSION CLERK

intervener testimony, three sets of rebuttal testimony, three rounds of depositions related to the prefiled testimony, three prehearing statements, three sets of motion practice, three post hearing briefs, etc. The litigation costs will escalate significantly if PEF's motion is granted.

4. FIPUG, a group of industrial customers, does not have unlimited resources with which to litigate with PEF. Additionally, PEF, a regulated monopoly that funds its business operations largely by charging ratepayers, recovers its litigation costs from ratepayers, including FIPUG members. Thus, FIPUG and other consumers will, in effect, pay twice for the increased litigation expense of "trifurcating" or bifurcating this proceeding.

5. It is also helpful to review Rule 28-106.108 entitled "Consolidation." This rule states in its entirety as follows: "If there are separate matters which involve similar issues of law or fact, or identical parties, the matters may be consolidated if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party." Here, the parties are identical and the issues in dispute involve similar issues of fact or law. Consolidation is warranted and should not be disturbed. As pointed out above, keeping the case together will be significantly less expensive than Balkanizing the matter into three parts.

6. The comments to Florida Rule of Civil Procedure 1.270, the rule which addresses consolidation and bifurcation in Florida civil trials, are instructive. The following comment succinctly summarizes a key reason why FIPUG opposes bifurcation, and as PEF now suggests, "trifurcation." **"Generally, justice requires that an action should not be handled piecemeal when it reasonably can be avoided, and it should be administered with the least expense and vexation to the parties."** (emphasis added). The issues related to Crystal River 3, while complicated, can be tried together. Complex, multi-faceted civil litigation cases are often tried

over a period of weeks or even months as attempting to segregate, split or parse issues oftentimes overly complicates the administration of justice.

7. In BDO Seidman, LLP v. Banco Espirito Santo Intern, 38 So.3d 874 (Fla. 3rd DCA 2010), the appellate court disapproved and reversed a trial court decision to “trifurcate” a liability determination from intertwined issues such as causation, reliance and comparative fault. Similarly, the Crystal River 3 saga, with all of its intertwined and related moving parts, should not be decided on a piecemeal basis.

For the reasons set forth above, FIPUG opposes PEF’s Motion to Establish Case Schedule. Additionally, pursuant to Rule 25-22.022, F.A.C., FIPUG seeks oral argument on this matter. Oral argument of up to ten minutes per party will help clarify and explain the expense and vexation that will impact consumers should PEF’s motion be granted. Such argument will also reveal the entanglement and inter-relation of the Crystal River 3 issues that should be tried together, not apart.

s/ Jon C. Moyle, Jr.

Jon C. Moyle, Jr.

Vicki Gordon Kaufman

Keefe Anchors Gordon & Moyle, PA

118 North Gadsden Street

Tallahassee, Florida 32301

Telephone: (850)681-3828

Facsimile: (850)681-8788

jmoyle@kagmlaw.com

vkaufman@kagmlaw.com

Attorneys for the Florida Industrial Power Users
Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response in Opposition to Progress Energy, Inc.'s Motion to Establish Case Schedule and Request for Oral Argument was served by Electronic Mail and United States Mail this 5th day of August, 2011, to the following:

Keino Young
Lisa Bennett
Anna Norris
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

John Burnett
Progress Energy Florida, Inc.
P. O. Box 14042
St. Petersburg, FL 33733-4042

James W. Brew
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N.W.
Eighth Floor West Tower
Washington, D.C. 20007

George Cavros, Esq.
120 E. Oakland Park Blvd, Ste. 105
Fort Lauderdale, FL 33334

J. R. Kelly
Charles Rehwinkel
Erik L. Saylor
Office of Public Counsel
111 W. Madison Street, Room 812
Tallahassee, Florida 32399-1400

s/ Jon C. Moyle, Jr.
Jon C. Moyle, Jr.