

**Eric Fryson**

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**From:** Woods, Monica <WOODS.MONICA@leg.state.fl.us>  
**Sent:** Wednesday, May 08, 2013 11:50 AM  
**To:** Filings@psc.state.fl.us  
**Cc:** 'Gamba, Blaise N.'; Rehwinkel, Charles; 'Dianne Triplett'; Sayler, Erik; 'F. Alvin Taylor'; 'James Brew'; 'John Burnett'; 'Jon C. Moyle Jr.'; Keino Young; 'Bernier, Matthew R.'; Kelly, JR; Michael Lawson; 'Walls, J. Michael'; 'Myndi Qualls'; 'Paul Lewis Jr.'; 'Schef Wright'; Lee Eng Tan; 'jcostello@carltonfields.com'; Sayler, Erik; Rehwinkel, Charles; Kelly, JR  
**Subject:** Motion to Accept OPC's Motion for Reconsideration and Request for Oral Argument  
**Attachments:** Motion to Accept OPC's Motion for Reconsideration and Request for Oral Argument.pdf

Electronic Filing

a. Person responsible for this electronic filing:

Charles J. Rehwinkel, Deputy 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](mailto:REHWINKEL.CHARLES@leg.state.fl.us)

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. Document being filed on behalf of Office of Public Counsel

d. There are a total of 17 pages.

e. The document attached for electronic filing is: *Motion to Accept OPC's Motion for Reconsideration and Request for Oral Argument.*

Thank you for your attention and cooperation to this request.

Monica R. Woods  
Administrative Assistant  
Office of Public Counsel  
Telephone: (850) 488-9330  
Fax: (850) 488-4491

DOCUMENT NUMBER-DATE  
02556 MAY-8 2013  
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: May 8, 2013

**MOTION TO ACCEPT PUBLIC COUNSEL'S MOTION FOR RECONSIDERATION  
AND REQUEST FOR ORAL ARGUMENT AS TIMELY FILED, OR  
ALTERNATIVELY TO ENLARGE THE TIME TO FILE**

Public Counsel files this Motion to request that the Commission consider the Public Counsel's Motion for Reconsideration of Commission Order No. PSC-13-0175-PCO-EI and Request for Oral Argument of Office of Public Counsels Motion for Reconsideration of Commission Order No. PSC-13-0175-PCO-EI as being timely filed or, in the alternative, exercise its discretion and grant a one-day extension of time for filing the Motion for reconsideration or take whatever steps are necessary to consider the OPC's Motion and Request in the interest of fairness. In support the OPC state as follows:

**Requested Relief**

The OPC requests that the Commission accept the Motion and Request as filed timely. Alternatively, the OPC requests that the Commission grant an extension of time of one day or take other action in the interest of fairness and to meet the ends of justice and consider the Motion and Request.

DOCUMENT NUMBER-DATE

02556 MAY-8 2013

FPSC-COMMISSION CLERK

### **Background**

On April 26, 2013, the Prehearing Officer issued Order No. PSC-13-0175-PCO-EI (Third OEP) establishing revised controlling dates for the above docket.

On May 6, 2013, the OPC submitted for filing two documents: (1) Public Counsel's Motion for Reconsideration of Commission Order No. PSC-13-0175-PCO-EI, (Motion) and (2) Request for Oral Argument of Office of Public Counsel's Motion for Reconsideration of Commission Order No. PSC-13-0175-PCO-EI (Request).

The documents were both submitted for filing by electronic means pursuant to the Commission's electronic filing rule.

The Motion was submitted at 4:59 PM and the Request was submitted at 5:01 PM by the electronic stamp of the Florida Legislature's email network of which the OPC is a part. See Attachment 1.

The Commission's electronic stamp indicates that both documents were completely received at 5:03 PM. See Attachment 2. Accordingly, the documents were posted as having been received at 8:00 AM on May 7.

Pursuant to Commission Rule 25-22.0376, Florida Administrative Code and the provisions of the Third OEP, a motion for reconsideration of the Third OEP must be filed within 10 days of its issuance. Day 10 was May 6, 2013. Accordingly, and despite the receipt of both documents within 3 minutes of the close of business at 5:00 PM on May 6, 2013, the Motion and Request are technically deemed filed on day 11.

On May 6, 2013 at 4:23 PM, the OPC notified counsel for Duke Energy Florida (Duke) and Commission Staff that a Motion for Reconsideration and Request for Oral argument would be filed close to 5 PM. Attachment 3.

All parties and Staff counsel were served both the Motion and Request via electronic means simultaneously with the submission to the Commission clerk's office. See Attachment 1.

On May 7, 2013 Counsel for OPC asked Counsel for Duke if the company had any objection to the Motion being considered timely filed. The has Company stated that it will not object. See Attachment 4

### Argument

While recognizing that the filings are deemed late in the most technical sense, the OPC's Motion and Request should nevertheless be considered timely filed given the totality of the facts and circumstances and the absence of objection by Duke.

The Commission has granted relief in similar circumstances for cause. See *In Re: Petition for Review of Rates and Charges paid by PATS Providers to LECs*, Docket NO. 860723-TP, Order No. 24425, Issued April 24, 1991. (Motion to enlarge the time to file Motion for Reconsideration granted for a Motion for Reconsideration of a final order filed one day late); *In Re Southern States Utilities*, Docket No. 930880-WS, Order No. PSC-95-0047-FOF-WS (Motion for Reconsideration filed one day out of time given consideration (but ultimately denied) due to amendatory language being added to the dissent); *In Re: Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth Telecommunications, Inc.'s Service Territory*, Docket No. 981834-TP; *In Re: Petition of ACI Corp. d/b/a Accelerated Connections, Inc. for Generic Investigation to Ensure that BellSouth Telecommunications, Inc., Sprint-Florida, Incorporated, and GTE Florida Incorporated Comply with Obligation to Provide Alternative Local Exchange Carriers with Flexible, Timely, and Cost-Efficient Physical Collocation*, Docket No. 990321-TP, Order No. PSC-04-0036-PCO-TP, Issued January 13,

2004. (Motion for leave to file prehearing statement out-of time granted where the filing was made one day late).

Case law and Commission decisional law indicate that the ability to enlarge the time for reconsideration or accept late-filed Motions for Reconsideration only apply to final decisions on the merits and not procedural orders such as the Third OEP. The non-final nature of the Third OEP gives the Commission broad discretion to grant the relief requested. See *In Re: Petition of the Citizens of the State of Florida to Initiate Investigation Into Integrity of Southern Bell Telephone and Telegraph Company's Repair Service Activities and Reports*, Docket No. 910163-TL, Order No. PSC-92-0339-FOF-TL (Southern Bell Repair Case). ("The Commission's designation of and the delegation of authority over procedural matters to the Prehearing Officer are unquestionably within the Commission's discretion. It is equally within the Commission's discretion to establish the standard by which it will review a Prehearing Officer's decisions"). By contrast the leading case on the issue of jurisdictional nature of the deadline for filing Motions for Reconsideration is *City of Hollywood v. Public Employees Relations Commission*, 432 S0. 2d 79 (Fla.4<sup>th</sup> DCA 1983). The court held that the PERC did not have authority to grant an enlargement of time to file a Motion for Reconsideration of a final order. The Court found a lack of express authority to do such and more importantly stated:

By analogizing an agency's inherent power to that of a court of general jurisdiction, we conclude that if a circuit court cannot extend the time for filing a motion for new trial in a criminal case, then it would follow that an agency cannot extend the time for filing a motion for reconsideration in an administration proceeding.

*Id.* at 81. The analogy to the Court's lack of discretion over a jurisdictional matter and the fact of the PERC decision under review being a final decision on the merits, indicate the appellate

decision is confined to agencies' final decisions on the merits.

The contrast to the holding in the *City of Hollywood* case and the Commission's statements in the Southern Bell Repair Case indicate that the Commission has broad authority to grant discretion in non-final procedural matters that are not determinations on the merits disposing of the case. There is nothing indicating that the Courts have extended the *City of Hollywood* holding to motions of reconsideration of merely procedural, scheduling or other non-final matters.

#### Conclusion

Based on the facts and the reasons stated above, the Commission should find that it has the discretion to grant the relief requested by OPC. Following such a determination, the Commission should further find that the OPC has shown good cause for the Commission to accept the Motion that was transmitted<sup>1</sup> prior to the 5 PM deadline and fully submitted no later than 3 minutes past the deadline as substantially in compliance with the requirements for timely filing. All parties and the Commission staff were timely served and given prior notification of the Motion and Request. No party objects to the Commission treating the Motion as timely filed

Alternatively, the OPC requests that the Commission grant an enlargement of time of no more than one day, in the event that the Motion and Request are deemed filed late and to construe the email advising the Commission staff of the filing anticipated being made "close to 5" as a request for extension of time. Essentially, the OPC requests the Commission to exercise its discretion to allow the filing to be considered on the merits. The fundamental basis for this motion is that the ends of justice and fairness will be served by considering a filing made no

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<sup>11</sup> Transmission of the Request was initiated at 5:01pm but this document was referenced in the Motion.

more than 3 minutes late as being timely and that any impact to the electronic filing rule is immaterial. The OPC and the customers should be afforded an opportunity to present argument before the full Commission on the schedule in this docket as set out in the Motion.

Respectfully submitted,



Charles J. Rehwinkel  
Deputy Public Counsel

Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
Tallahassee, FL 32399-1400  
(850) 488-9330

Attorney for the Citizens of the  
State of Florida

**CERTIFICATE OF SERVICE**

**100437-E**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic mail and U.S. Mail on this 8<sup>th</sup> day of May, 2013 to the following:

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

Jon C. Moyle, Jr.  
Moyle Law Firm  
The Perkins House  
118 North Gadsden Street  
Tallahassee, FL 32301

Robert Scheffel Wright. John T.  
LaVia  
c/o Gardner Bist Wiener Law Firm  
1300 Thomaswood Drive  
Tallahassee, FL 32308

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

Michael Lawson  
Theresa Tan/Keino Young  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Karin S. Torain  
PCS Administration (USA), Inc.  
1101 Skokie Boulevard, Suite 400  
Northbrook, IL 60062

Matthew Bernier  
Carlton Fields Law Firm  
215 S. Monroe Street, Ste 500  
Tallahassee, FL 32301

George Cavros, Esq.  
Southern Alliance for Clean Energy  
120 East Oakland Park Blvd, Suite  
105  
Fort Lauderdale, FL 33334

J. Michael Walls/Blaise N. Huhta  
Carlton Fields Law Firm  
P.O. Box 3239  
Tampa, FL 33607-5736

James W. Brew/F. Alvin Taylor  
1025 Thomas Jefferson St. NW, 8<sup>th</sup>  
Flo, West Tower  
Washington, DC 20007



Charles J. Rehwinkel  
Deputy Public Counsel



DOCKET 100437-EI MOTION

**ATTACHMENT 1**

**Woods, Monica**

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**From:** Woods, Monica  
**Sent:** Monday, May 06, 2013 4:59 PM  
**To:** 'Filings@psc.state.fl.us'  
**Cc:** Rehwinkel, Charles; Kelly, JR; Sayler, Erik; Blaise Huhta; Cecilia Bradley; F. Alvin Taylor; George Cavros; J. Burnett; Jay Brew; John Moyle ; K. Torain; K. Young; Lisa Bennett; Matthew Bernier; Paul Lewis; Randy Miller; Vicki Kaufman  
**Subject:** OPC's Motion for Reconsideration of Commission Order No. PSC-13-0175-PCO-EI  
**Attachments:** OPC's Motion for Reconsideration.pdf

**Electronic Filing**

a. Person responsible for this electronic filing:

Charles J. Rehwinkel, Deputy 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](mailto:REHWINKEL.CHARLES@leg.state.fl.us)

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. Document being filed on behalf of Office of Public Counsel

d. There are a total of 18 pages.

e. The document attached for electronic filing is: OFFICE OF PUBLIC COUNSEL'S MOTION FOR RECONSIDERATION OF COMMISSION ORDER NO. PSC-13-0175-PCO-EI.

Thank you for your attention and cooperation to this request.

Monica R. Woods  
Administrative Assistant to Charles J. Rehwinkel  
Office of Public Counsel  
Telephone: (850) 488-9330  
Fax: (850) 488-4491

**Woods, Monica**

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**From:** Woods, Monica  
**Sent:** Monday, May 06, 2013 5:01 PM  
**To:** 'Filings@psc.state.fl.us'  
**Subject:** OPC's Request for Oral Argument on Motion for Reconsideration  
**Attachments:** Request for Oral Argument.pdf

Electronic Filing

a. Person responsible for this electronic filing:

Charles J. Rehwinkel, Deputy Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
Tallahassee, FL 32399-1400  
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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. Document being filed on behalf of Office of Public Counsel

d. There are a total of 18 pages.

e. The document attached for electronic filing is: REQUEST FOR ORAL ARGUMENT FOR OFFICE OF PUBLIC COUNSEL'S MOTION FOR RECONSIDERATION OF COMMISSION ORDER NO. PSC-13-0175-PCO-EI.

Thank you for your attention and cooperation to this request.

Monica R. Woods  
Administrative Assistant to Charles J. Rehwinkel  
Office of Public Counsel  
Telephone: (850) 488-9330  
Fax: (850) 488-4491

DOCKET 100437-EI MOTION

**ATTACHMENT 2**

**Woods, Monica**

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**From:** Filings@psc.state.fl.us  
**Sent:** Monday, May 06, 2013 5:03 PM  
**To:** Woods, Monica  
**Subject:** PSC electronic filing

Your electronic filing has been received by the Florida Public Service Commission, Office of Commission Clerk.

The filing date for an electronically transmitted document is the date that the Office of Commission Clerk receives the complete document. If the document is received on a non-business day, or after 5:00 p.m. (EST) on a business day, it will be considered filed as of 8:00 a.m. on the following business day.

E-filings are accepted in accordance with the Commission's Electronic Filing Requirements, which can be accessed on the Commission's Web Site at <http://www.floridapsc.com/dockets/e-filings/> or by contacting the Office of Commission Clerk at (850) 413-6770 during normal business hours. By electing to file electronically, you agree to abide by and accept the electronic filing requirements posted on the PSC's Web site.

Questions should be directed to the Office of Commission Clerk, [Clerk@psc.state.fl.us](mailto:Clerk@psc.state.fl.us), or call (850) 413-6770.

**Woods, Monica**

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**From:** Filings@psc.state.fl.us  
**Sent:** Monday, May 06, 2013 5:03 PM  
**To:** Woods, Monica  
**Subject:** PSC electronic filing

Your electronic filing has been received by the Florida Public Service Commission, Office of Commission Clerk.

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Questions should be directed to the Office of Commission Clerk, [Clerk@psc.state.fl.us](mailto:Clerk@psc.state.fl.us), or call (850) 413-6770.

DOCKET 100437-EI MOTION

**ATTACHMENT 3**

## Rehwinkel, Charles

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**From:** Rehwinkel, Charles  
**Sent:** Monday, May 06, 2013 4:23 PM  
**To:** Keino Young; John.Burnett@pgnmail.com  
**Cc:** Jay Brew; Jon Moyle (jmoyle@kagmlaw.com); Scheff Wright (schef@gbwlegal.com) (schef@gbwlegal.com); Kelly, JR; Saylor, Erik; Lewis Jr, Paul  
**Subject:** Motion for reconsideratin of Third OEP

Keino and John:

The OPC will be filing a Motion for reconsideration of the Third OEP and separate request for Oral Argument. I expect that this filing will be made close to 5.

Charles



DOCKET 100437-EI MOTION

**ATTACHMENT 4**

## Rehwinkel, Charles

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**From:** Burnett, John <John.Burnett@pgnmail.com>  
**Sent:** Tuesday, May 07, 2013 10:51 AM  
**To:** Rehwinkel, Charles; 'mwall@carltonfields.com'; 'bgamba@carltonfields.com'  
**Cc:** Glenn, Alex; Lewis Jr, Paul  
**Subject:** Re: Motion for reconsideration

Charles, we will not object to the Commission accepting your motion and consider it filed on time.

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**From:** Rehwinkel, Charles [<mailto:REHWINKEL.CHARLES@leg.state.fl.us>]  
**Sent:** Tuesday, May 07, 2013 10:45 AM  
**To:** Burnett, John  
**Subject:** Motion for reconsideration

John:

The motion for reconsideration on the scheduling order that we filed yesterday was emailed at 4:59 but the Clerk's receipt shows 5:03, hence a posting of today and technically filed after the 10<sup>th</sup> day. Will Duke object to a motion for the Commission to consider the pleading to be timely filed or to accept it filed late? (I AM RESEARCHING WHETHER THE COMMISSION HAS DISCRETION TO ACCEPT THIS TYPE OF MOTION FOR RECONSIDERATION OUT OF TIME).

Thank for your consideration

Charles