BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: PEF's Petition for Determination of Need for Expansion of an Electrical Power Plant, for Exemption from Rule 25-22.082, F.A.C., and for Cost Recovery through the Fuel Clause	)	Docket No.: 060642 Submitted for Filing: December 11, 2006

PROGRESS ENERGY FLORIDA, INC.'S RESPONSE IN OPPOSITION TO JOINT MOTION TO SEVER AND ABATE THE PORTION OF THE PROCEEDING ON PEF'S PETITION FOR DETERMINATION OF NEED FOR EXPANSION OF CRYSTAL RIVER 3 NUCLEAR PLANT RELATING TO THE MANNER OF FUTURE COST RECOVERY

Progress Energy Florida, Inc. ("PEF") files its Response in Opposition to the Joint Motion to Sever and Abate the Portion of the Proceeding on PEF's Petition for Determination of Need for Expansion of Crystal River 3 Nuclear Plant Relating to the Manner of Future Cost Recovery ("Joint Motion"), pursuant to Rule 28-106.204, F.A.C.

SUMMARY OF ARGUMENT

PEF is not opposed to severance of the cost recovery portion of its Petition for later hearing in this docket as set forth in the proposed schedule detailed below. PEF is, however, opposed to severance or abatement on the grounds asserted in the Joint Motion because they are wholly unsupported and they are inconsistent with well established Florida Public Service Commission ("FPSC" or the "Commission") precedent.

Intervenors claim that it is "unfair" or "prejudicial" to them for the Commission to address PEF's request for cost recovery for the Crystal River Unit 3 power uprate project ("CR3 Uprate") under the time frame the Commission applied in this Docket consistent with the resolution of petitions for the determination of need. Joint Motion, pp. 3 and 7. Intervenors fail, however, to provide any facts demonstrating that they are prejudiced by, or that it is somehow

unfair to them for, the Commission to consider PEF's cost recovery request for the CR3 Uprate at this time. There is, therefore, no factual basis to support the severance or abatement of PEF's cost recovery portion of its Petition requested by Intervenors in the Joint Motion.

The Intervenors remaining arguments are matters of policy directed at the merits of the cost recovery request in the Petition that can be addressed on this motion based on PEF's Petition, its response to the Joint Motion, and existing Commission precedent. For the following reasons PEF therefore requests that the Commission deny the Joint Motion and grant PEF's request for cost recovery under its Petition.

First, Intervenors make the policy argument that the Commission's long-standing precedent permitting the cost recovery PEF requests --- which Intervenors acknowledge the Commission allows (Joint Motion at p. 5) --- should be rejected and changed. If Intervenors want to argue for a change in the long-standing Commission policy supporting PEF's request for cost recovery, that should not be done in this proceeding, when PEF has already made decisions and taken steps toward bringing the CR3 Uprate to fruition under existing Commission policy. It is unfair to PEF to change the rules in the middle of the game, rather, any discussion about a change in the existing Commission policy should be initiated prospectively in a separate proceeding that allows all utilities, Intervenors, and other interested parties the opportunity to participate in the consideration of whether the policy should remain the same or be changed and, if changed at all, how it should be changed.

Second, Intervenors argue that existing Commission precedent supporting PEF's request for cost recovery for the CR3 Uprate does not apply based on the mischaracterization of the CR3 Uprate. (Joint Motion at pp. 5-6). The CR3 Uprate is not needed to meet increased customer demand or customer growth, therefore, there will be no additional revenues after the CR3 Uprate

is complete. Rather, the CR3 Uprate will displace existing, higher cost fossil fuel or purchased power generation supported by current revenues with lower cost nuclear fuel generation supported by the same, anticipated current revenue stream. As a result, the CR3 Uprate is not a base rate generation project but it is the type of project the Commission has long encouraged by allowing cost recovery through the fuel clause under existing Commission precedent.

For all these reasons, as more fully addressed below, the Joint Motion should be denied and the Commission should grant that portion of PEF's Petition requesting cost recovery through the fuel clause on the pleadings, this motion and the response, or, alternatively, in accordance with PEF's proposed schedule.

ARGUMENT

I. Intervenors Fail to Demonstrate any Unfairness or Prejudice to Support Severance or Abatement of the Cost Recovery portion of PEF's Petition.

Intervenors claim that it is "prejudicial" and "fundamentally unfair" for the cost recovery portion of PEF's Petition to be decided with the remainder of the Petition and, thus, argue for severance or abatement of the cost recovery portion of PEF's Petition to some unspecified time period. (Joint Motion, pp. 3 and 7). Intervenors, however, fail to actually point to anything that makes the decision of the cost recovery portion of PEF's Petition at this time unfair or prejudicial to them or the customers they represent. Nowhere in the Joint Motion do Intervenors identify any fact that needs to be developed and that cannot be developed at this time. Nowhere in the Joint Motion do Intervenors identify any actual prejudice to them or PEF's customers if the cost recovery portion of PEF's Petition is decided at this time. There is no alleged factual basis for Intervenors claims of "prejudice" or "unfairness" and, therefore, no basis for severance or abatement of PEF's cost recovery portion of its Petition.

Intervenors do assert that PEF's request for cost recovery is "anomalous" under Section 403.519(4)(e), Florida Statutes, because it provides for the determination of cost recovery after a petition for determination of need for a nuclear power plant is granted. First, this statutory amendment applies to nuclear power plants and not necessarily the expansion of an existing nuclear power plant.

Second, even if the statutory amendment applies to PEF's Petition, the decision on PEF's request for cost recovery will necessarily follow the decision on PEF's requests for a determination of need for the CR3 Uprate and a waiver of all bid rule requirements in the Petition. In other words, the Commission will only reach the request for cost recovery if it first determines there are sufficient grounds to grant the requests for determination of need and a waiver of the bid rule requirements. Section 403.519(4)(e), Florida Statutes, nowhere states how long after the petition for determination of need has been approved that a request for cost recovery can be granted.

Finally, PEF's Petition makes clear that its request for cost recovery is limited to a determination of the proper means of cost recovery. The actual recovery of costs incurred for the CR3 Uprate will be subject to a later proceeding to determine if the costs incurred were reasonable and prudent. Intervenors will have the opportunity at that time to test the reasonableness and prudence of the costs incurred.

There is, therefore, no basis for severance or abatement on the grounds asserted in the Joint Motion. Severance is appropriate under Florida Rule of Civil Procedure 1.270(b) to avoid prejudice but no prejudice, or unfairness for that matter, has been identified by the Intervenors in the Joint Motion. Fla. R. Civ. Pro. 1.270(e). Abatement is generally warranted under the law when there is some defect in the application for relief, the relief requested will be resolved

without the need for further proceedings, or the relief requested will be decided in a separate, pending proceeding. See In re the Estate of Peck v. Van Sweden, 336 So. 2d 1230 (Fla. 2d DCA 1976) (motion to abate granted where petitioner failed to join an indispensable party); In Re: Review of Progress Energy Florida, Inc.'s Benchmark for Waterborne Transportation Transactions with Progress Fuels, Docket No. 031057-EI, Order No. PSC-04-0451-PCO-EI, 2004 WL 1073372 (Apr. 30, 2004) (proceeding abated where parties had reached settlement on terms); Bergman v. Kaplan, 922 So. 2d 982 (Fla. 4th DCA 2005) (lawsuit pending in circuit court that involved same issues and parties as a probate proceeding should have been dismissed to avoid conflicting decisions). None of these circumstances exist here. There is no defect in PEF's request for cost recovery under the statutes and Commission precedent and the request will not be decided in another proceeding, or resolved without need for a proceeding. There are, therefore, no grounds for abatement.

Intervenors' real arguments are policy ones based on the alleged "proper and improper ratemaking techniques" that Intevernors claim are raised by the cost recovery portion of PEF's Petition. (Joint Motion, p. 3). Intervenors assert arguments to change existing Commission policy (Joint Motion, pp. 4-6), or to deny the application of existing Commission policy to PEF's request for cost recovery in its Petition (Joint Motion, pp. 6-7). As a result, the Intervenors' arguments can be decided on the Petition, the Joint Motion, and PEF's response. PEF's request for cost recovery can be decided at this time based on the application of existing Commission precedent supporting the requested cost recovery.

II. Intervenors' Argument for a Change in Existing Commission Policy is Appropriately Addressed Prospectively in a Separate Proceeding Involving All Utilities, Intervenors, and Other Interested Parties.

Intervenors acknowledge that PEF's request for cost recovery of the CR3 Uprate project costs through the fuel clause is consistent with existing Commission policy and precedent. They agree that the Commission has "allow[ed] utilities to recover the costs of certain programs and projects through the cost recovery clause upon the showing of a nexus between the expense and fuel savings." Joint Motion, p. 5. The Intervenors nowhere claim in their Joint Motion that PEF has not shown that nexus between the expense of the CR3 Uprate and fuel savings in its Petition and supporting testimony. It follows, then, that PEF's request for cost recovery in its Petition is a legitimate request supported by Commission precedent and, therefore, should be granted.

Intervenors argue instead that the Commission precedent is a departure from the original purpose of the fuel cost recovery clause and, therefore, that it is "time to revisit" the wisdom of this precedent. Intervenors erroneously quote Order No. 14546 --- one of the Commission orders PEF relies upon to support its request for cost recovery --- that "only" prudently incurred fossil fuel-related expenses which are subject to volatile changes should be recovered through an electric utility's fuel adjustment clause. Joint Motion, p. 5, n. 4. Intervenors conclude, therefore, that Commission orders allowing utilities to recover through the fuel clause costs that result in fuel savings that benefit ratepayers are a "departure" from the original purpose of the clause. The Commission, however, never said that volatile expenses were the "only" recoverable costs under the fuel clause. In fact, in Order No. 14546 the Commission expressly recognized that costs recoverable through the fuel clause include:

> Fossil fuel-related costs normally recovered through base rates but which were not recognized or anticipated in the cost levels used to determine current base rates and which, if expended, will result in fuel savings to

> customers. Recovery of such costs should be made on a case by case basis after Commission approval.

Order No. 14546 is consistent with prior and subsequent Commission orders.[1] As a result the policy of allowing cost recovery through the fuel clause for costs not otherwise recoverable through base rates that result in fuel savings is a well established purpose of the fuel clause.

In any event, if, as Intervenors argue, they want to revisit the wisdom of this well-established purpose of the fuel clause, then that discussion should occur prospectively in a separate proceeding in which the Intervenors, all utilities, and other interested parties can participate. See York v. State ex.rel. Schwaid, 10 So. 2d 813, 815 (Fla. 1943) (administrative regulations may not be used in an ex post facto manner); Jordan v. Dept. of Professional Regulation, 522 So. 2d 450, 453 (Fla. 1st DCA 1988) (administrative rules are presumed to operate prospectively because the administrative agency acts in a quasi-legislative role when promulgating rules); Environmental Trust v. State, Dept. of Environmental Protection, 714 So. 2d 493, 500 (Fla. 1st DCA 1998) (administrative rules generally have prospective application unless new rule is a clarification and does not establish new requirements).[2] In the current

---

[1] See, e.g., Order No. 9957, Docket No. 810001-EU, 1981 Fla. PUC LEXIS 531, at *7 (April 20, 1981) (in which the Commission noted that "... [w]e wish to indicate that the underlying principle governing our decision --- that utilities must be encouraged to take innovative actions designed to benefit customers and to lower overall costs --- has application elsewhere.") (emphasis added). See also Order No. 9224, Dockets Nos. 790898-EU and 74680-CI, 1980 Fla. PUC LEXIS 519 (Jan. 30, 1980); Order No. PSC-98-0412-FOF-EI, Docket No. 980001-EI, 1998 WL 173332 (March 20, 1998); Order No. PSC-97-0359-FOF-EI, Docket No. 970001-EI, 1997 WL 199376 (March 31, 1997); Order No. PSC-95-0450-FOF-EI, Docket No. 950001-EI, 1995 WL 220901 (April 6, 1995); and Order No. PSC-94-1106-FOF-EI, Docket No. 940391-EI, 1994 Fla. PUC LEXIS 1126 (Sept. 7, 1994).

[2] The cost recovery principle set forth in Order No. 14546, and in the other orders cited in footnote 1 above under which PEF seeks cost recovery through the fuel clause for the CR3 Uprate costs, functions like an administrative rule. §120.52(15), Fla. Stat. (defining "rule" to mean any "agency statement of general applicability that implements, interprets, or prescribes law or policy ... ."). It is a policy of general applicability to all public utilities even though it has been adopted by Commission order. This manner of adopting policies of general applicability to

proceeding, however, the task at hand is to apply the existing policy under Commission precedent to PEF's current request.

Certainty and consistency in regulation are recognized, fundamental principles of utility regulation. Utilities must be able to rely on the certain and consistent application of regulatory policy to make timely, cost-effective decisions. Similarly, investors and utility rating agencies favor regulatory consistency and certainty in their investment and rating decisions. Uncertainty and inconsistency in the application of regulatory policy, then, only delays utility decisions and adds to the utility's and, thus, customer's costs.

PEF has deliberately considered and proceeded with the CR3 Uprate with the understanding that the existing precedent controls PEF's request for cost recovery. After investing the time and effort in the CR3 Uprate under the existing policy it is simply unfair and detrimental to PEF (and ultimately other regulated utilities) to suggest as the Intervenors do that the existing policy should be changed rather than applied to the utility's pending request. Undertaking a review of existing policy now in this proceeding creates uncertainty and inconsistency in the application of regulatory policy to the detriment of the utility and the customer. The Commission should reject the Intervenors' argument that it should revisit its established policy in this proceeding and apply that well established policy to PEF's request for cost recovery.

---

utilities with respect to cost recovery clauses has been approved by the Florida legislature. Under Section 120.80(13)(a), the Commission's policy statements concerning the cost recovery clauses are exempt from the formal rule-making requirements of Chapter 120. §120.82(13)(a), Fla. Stats. If, as Intevenors suggest in the Joint Motion, the requirements for cost recovery established by the Commission in Order No. 9957 and Order No. 14546 and its progeny, should be changed --- and PEF does not agree that they should be --- any such different or new requirements should be applied prospectively and not to PEF's request in this Docket.

III. PEF's Request for Cost Recovery is Consistent with Existing Commission Policy and Should be Granted.

The CR3 Uprate, as set forth more fully in PEF's Petition and the testimony of Javier Portuondo, was not anticipated in PEF's last base rate proceeding and will generate substantial fuel savings for the benefit of PEF's customers. As a result, the CR3 Uprate qualifies for cost recovery through the fuel clause pursuant to well-established Commission precedent in Order No. 9957, and Order No. 14546 and its progeny.

Importantly, in Order No. 961172, the Commission granted Florida Power & Light Company's ("FPL") request for the recovery of FPL's costs for a thermal power uprate to its Turkey Point nuclear facility through the fuel clause because FPL's nuclear uprate project was expected to generate fuel savings in excess of the project costs and the costs were not otherwise recoverable through base rates. There is no rational distinction between the application of Commission policy to FPL's prior request and PEF's current request for cost recovery through the fuel clause for nuclear uprate project costs. The only differences between the two uprate projects are that the CR3 Uprate costs more and generates substantially more fuel savings for customers. The certain and consistent application of regulatory policy requires the similar treatment of the two requests for cost recovery. PEF's request for cost recovery for the CR3 Uprate through the fuel clause, accordingly, should be granted.

The Commission has long recognized the need to allow utilities to recover costs that were necessary to reduce customer costs and increase customer benefits. As early as 1981 the Commission permitted the recovery of costs through the fuel clause for innovative projects to encourage utilities to find and implement ways to lower fuel costs for their customers. Order No. 9957, Docket No. 810001-EU, 1981 Fla. PUC LEXIS 531 (April 20, 1981). This Commission policy has been reiterated time and again in various proceedings before the Commission. See

footnote 1, supra. The CR3 Uprate satisfies this policy in Order No. 9957 as reiterated in Order No. 14546 and its progeny.

Intervenors fundamentally misunderstand the CR3 Uprate. Phase I of the project does not include the steam generator replacement for the CR3 license extension, as Intervenors allege on page 2 of the Joint Motion. The steam generator replacement project was planned far in advance of the CR3 Uprate and can be completed with or without the CR3 Uprate. All costs associated with the CR3 Uprate are incremental to the steam generator replacement project and all changes that are part of the CR3 Uprate go beyond the steam generator replacement. The CR3 Uprate, therefore, is not dependent on the steam generator replacement project. Rather, the CR3 Uprate is a separate, independent project from the steam generator replacement.

Intervenors further argue, erroneously, that the CR3 Uprate costs should be included in a base rate proceeding, so that the "full dynamics and potentially offsetting effects of revenue stemming from customer growth, growth in demand, cost savings resulting from efficiencies, the retirement of plant, etc. can be taken into account when reviewing a claim of an individual increased expense or new investment." (Joint Motion, p. 4). The CR3 Uprate is not needed to meet customer or demand growth on PEF's system. Rather, the impetus for the CR3 Uprate was increasing fossil fuel costs and forecasted fuel costs that made the CR3 Uprate a viable project to achieve the Company's objective of reducing fuel costs to the Company's customers. The CR3 Uprate will achieve substantial fuel savings for the benefit of customers by displacing other higher-cost fuel generation resources with the lowest cost fuel (nuclear fuel) available to the Company on its generation system.

The CR3 Uprate, accordingly, *will not generate additional revenue and will not be supported by any new revenue*. It will displace existing generation supported by current

revenues but at a lower cost to the customer. The need for the CR3 Uprate is an economic, not a capacity need. There will be, therefore, no "offsetting effects" from revenues due to additional customer growth and increased demand for the CR3 Uprate. The CR3 Uprate costs were not contemplated in the Company's last base rate proceeding. Base rate recovery, therefore, does not exist and is inappropriate; instead, for projects like the CR3 Uprate the Commission has recognized the recovery of the project expenditures to create fuel savings through the fuel clause.

Intervenors also claim that the settlement of the Company's last base rate proceeding somehow precluded in some undefined way a complete analysis of PEF's investments and depreciation expenses. Nothing could be farther from the truth. PEF's last rate case settled on the eve of trial after PEF had filed a detailed petition with supporting testimony and exhibits, gone through eight months of voluminous discovery, including the production of thousands of pages of documents, scores of interrogatory responses, and numerous depositions, and only after PEF filed complete Minimum Filing Requirements ("MFRs"), which were fully scrutinized during the discovery process. In addition, PEF filed a current depreciation study, in which the extended life of CR3 was assumed, and it was the subject of extensive discovery in the rate case. In fact, the very settlement, to which all Intervenors were parties, incorporated that depreciation study along with the extended life assumption for CR3. The Company's investments and depreciation expense at issue in the Company's MFRs and base rate proceeding were subject to full and complete analysis and review by the Commission Staff and Intervenors leading up to the settlement.

Intervenors further argue erroneously and without any factual support that utilities have a "huge" incentive to put costs through the fuel clause and that this incentive is "adverse to customers' interests" with respect to PEF's cost recovery request in this proceeding. Intervenors

wholly ignore the substantial fuel savings the CR3 Uprate will generate. These fuel savings are the genesis for the project and PEF's cost recovery request and they certainly are not "adverse to the customers' interests." Allowing cost recovery for projects like the CR3 Uprate encourages utilities to be innovative and creative in finding ways to save customers money. This fuel cost recovery policy provides an incentive to utilities to make capital improvements to achieve fuel savings where that incentive would not otherwise exist. This benefits customers and therefore is in the customers' best interests. It is not adverse to their interests.

In sum, PEF's cost recovery request is consistent with Commission policy that advances the interests of customers in seeing that innovative projects that reduce fuel costs to the benefit of customers are developed and brought to fruition. The Commission should grant PEF's request for cost recovery to advance this beneficial policy.

IV. PEF's Proposed Schedule for Resolving the Cost Recovery Portion of its Petition.

PEF is opposed to the requested severance and abatement on the grounds asserted in the Joint Motion but PEF is willing to agree to a severance of the cost recovery portion in order to allow for a limited extension of time to resolve that issue. PEF proposes that the hearing on the cost recovery portion take place on May 30-31, 2007, with the understanding that the need and bid rule portions of the Petition will remain on the current schedule for hearing in January 18, 2007. PEF believes, however, that the cost recovery portion of its Petition involves a limited question of the proper application of existing Commission policy that can be decided on the pleadings, the Joint Motion, and PEF's response. Accordingly, PEF requests that the Commission deny the Joint Motion and grant PEF's cost recovery request on this basis.

Without waiving that position and to accommodate the request of Staff for an extension of the time to hear the cost recovery portion of PEF's Petition, however, PEF proposes the following schedule to be followed for the cost recovery portion of the proceeding:

February 14, 2007: testimony – Intervenors
February 28, 2007: testimony - Staff
March 14, 2007: testimony – rebuttal
April 24, 2007: prehearing statements
May 2, 2007: prehearing
May 7, 2007: prehearing transcript due
May14, 2007: prehearing order
May 30-31, 2007: hearing

CONCLUSION

PEF respectfully requests that the Commission (1) deny the Joint Motion with respect to the grounds asserted for severance and abatement of the cost recovery portion of PEF's Petition, (2) grant PEF's request for cost recovery based on the pleadings, the Joint Motion, and PEF's response to the Joint Motion, or, alternatively, (3) approve PEF's proposed schedule for severance and extension of the time to decide after either a later hearing on the Joint Motion or a formal hearing the cost recovery portion of its Petition, and, thereafter, allow PEF to recover the costs of its CR3 Uprate Project through the fuel clause.

Respectfully submitted this 11th day of December, 2006.

R. Alexander Glenn
Deputy General Counsel
PROGRESS ENERGY SERVICE
COMPANY, LLC
Post Office Box 14042
St. Petersburg, FL 33733-4042

James Michael Walls
Florida Bar No. 0706242
Dianne M. Triplett
Florida Bar No. 0872431
CARLTON FIELDS, P.A.
Post Office Box 3239

Telephone: (727) 820-5587
Facsimile: (727) 820-5519

Tampa, FL 33601-3239
Telephone: (813) 223-7000
Facsimile: (813) 229-4133

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record and interested parties as listed below via electronic mail where indicated by * and U.S. Mail this 11th day of December, 2006.

Attorney

Lisa Bennett, Esq.* William Keating, Esq. Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 Telephone: (850) 413-6230 Fax: (850) 413-6184 E-mail: lbennett@psc.state.fl.us	Harold McLean, Esq.* Office of the Public Counsel c/o The Florida Legislature 111 W. Madison Street, Room 812 Tallahassee, FL 32399-1400 Phone: (850) 488-9330 Fax: (850) 488-4491 E-mail: mclean.harold@leg.state.fl.us
Valerie Hubbard, Director Division of Community Planning 2555 Shumard Oak Blvd. Tallahassee, FL 32399-2100 Phone: (850) 488-2356 Fax: (850) 488-3309	Buck Oven Michael P. Halpin Department of Environmental Regulation Siting Coordination Office 2600 Blairstone Road, MS 48 Tallahassee, FL 32301 Phone: (850) 245-8002 Fax: (850) 245-8003
John W. McWhirter, Jr. * McWhirter, Reeves & Davidson, P.A. 400 North Tampa Street, Ste. 2450 Tampa, FL 33602 Phone: (813) 224-0866 Fax: (813) 221-1854 Email: jmcwhirter@mac-law.com Counsel for Florida Industrial Power Users Group	Robert Scheffel Wright* John T. LaVia * Young van Assenderp, P.A. 225 South Adams Street, Ste. 200 Tallahassee, FL 32301 Phone: (850) 222-7206 Fax: (850) 561-6834 Email: swright@yvlaw.net Counsel for The Florida Retail Federation
Michael B. Twomey* P.O. Box 5256 Tallahassee, FL 32314-5256 Phone: (850) 421-9530 Fax: (850) 421-9530 Email: miketwomey@talstar.com	