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Subject: Progress Energy Florida, Inc. Filing
Attachments: Petition for Emergency Variance or Waiver of the 60 Day Notice Requirement.pdf

090079-EI

Attached for filing is a Petition for Emergency Variance or Waiver of the 60-Day Notice Requirement in Rule 25-6.140, F.A.C. (11 pages) made on behalf of Progress Energy Florida, Inc.

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by
Progress Energy Florida, Inc.

Docket No. 090079-EI
Submitted for Filing: February 12, 2009

**PETITION FOR EMERGENCY VARIANCE OR WAIVER OF THE 60-DAY
NOTICE REQUIREMENT IN RULE 25-6.140, F.A.C.**

Progress Energy Florida ("PEF" or the "Company") respectfully petitions the Florida Public Service Commission ("PSC" or the "Commission") for an emergency variance or waiver of the 60-day notice requirement under Rule 25-6.140, F.A.C. pursuant to Rules 28-104.004 and 28-104.002, F.A.C. and Section 120.542, Florida Statutes.

SUMMARY OF PETITION

PEF provided its written Test Year Notification to the Commission yesterday, selecting its test year, providing for a filing date of its base rate proceeding on March 20, 2009, and otherwise complying with the requirements of Rule 25-6.140, F.A.C. PEF respectfully requests an emergency variance or waiver of only one requirement of the rule, that PEF provide its test year notification at least 60 days prior to filing its petition for a general rate increase. PEF substantially complied with this requirement by informally notifying the Commission of its pending base rate proceeding, providing the PSC and its Staff time to coordinate schedules and staffing requirements, and set pre-hearing, service hearing, and technical hearing dates for PEF's base rate proceeding consistent with the purpose of its rule and Section 366.06(1), the underlying statute implemented by the rule. The result is that strict compliance with the 60-day notice requirement before PEF can file its base rate proceeding now provides the Commission

no additional benefit. Rather, rigid compliance with this 60-day filing requirement when notice has previously been provided informally imposes the substantial hardship on PEF of complying only with a legal formality without any real meaning. Requiring strict compliance with this timing requirement under these circumstances could also discourage PEF and other utilities in the future of engaging in attempts to settle their base rate proceedings before they have to initiate general base rate proceedings that place substantial demands on the Commission's time and resources. PEF further requests that this petition for waiver or variance be treated as an emergency request. Unless the petition is handled on an emergency basis, the notice and other procedural time frames that govern a non-emergency petition under Section 120.542 and Chapter 28-104, F.A.C. would prevent PEF from obtaining a ruling by the Commission in advance of the requested March 20, 2009 Minimum Filing Requirements (MFR) filing date.

I. Preliminary Information.

1. The Petitioner's name and address are:

Progress Energy Florida, Inc.
299 1st Avenue North
St. Petersburg, Florida 33701

2. Any pleading, motion, notice, order, or other document required to be served upon PEF of filed by any party to this proceeding should be served upon the following individuals:

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II. Waiver or Variance of the 60-day notice requirement in Rule 25-6.140, F.A.C. is warranted under Section 120.542, Commission Rules, and Commission Precedent.

3. Rule 25-6.140, F.A.C. is the Test Year Notification and Proposed Agency Action Notification Commission rule. The rule's purpose is procedural; it requires notification of the proposed test year, an explanation of the major factors necessitating a rate increase, a statement of the actions and measures implemented by the company to avoid a rate increase, and whether the utility company is requesting the Commission to process the petition using the proposed agency action process. Rule 25-6.140, F.A.C. The notification goes to the Commission and it allows the Commission to plan and prepare for the base rate proceeding. The Test Year Notification itself is not used by the Commission to determine the fair, just, and reasonable rates the utility company should

charge for its service. That determination is made based on the petition, Minimum Filing Requirements (MFRs), testimony, and exhibits, introduced in the hearing on the utility's petition.

4. Rule 25-6.140, F.A.C. implements Section 366.06, in particular subsection (1), Florida Statutes. Section 366.06 is entitled "Rates; procedure for fixing and changing," and provides that a public utility cannot charge any rate not on file with the Commission, that any change in rates must be submitted in writing to the Commission, and that the Commission shall have the authority to investigate and determine the express matters the Commission must consider in fixing fair, just, and reasonable rates. The Legislature does not mandate how the Commission must handle an application by a public utility for a change in rates. Instead, the Florida Legislature leaves the procedure for handling base rate petitions to the Commission's discretion, directing that all applications for changes in rates shall be made in writing "under rules and regulations prescribed" by the Commission.

5. Rule 25-6.140 F.A.C. is one of the "rules and regulations prescribed" by the Commission for handling base rate change applications. The requirements of Rule 25-6.140 F.A.C. nowhere appear in Section 366.06. In particular, there is no requirement in Section 366.06 that a public utility provide test year notification 60 days prior to filing a petition for a general rate increase. The 60-day requirement was established solely by the Commission, exercising its discretion to prescribe rules and regulations to handle applications for changes in utility rates.

6. PEF requests the Commission to waive or grant a variance of the 60-day notice requirement in Rule 25-6.140 and allow PEF to file its base rate petition, MFRs, testimony and supporting exhibits on March 20, 2009. The Commission can grant PEF's

request under Section 120.542 when (1) the purpose of the rule will otherwise be satisfied even though the rule is waived and (2) substantial hardship of a technological, economic, legal, or other type of hardship will result from compliance with the rule. §120.542(2), Fla. Stat. Both requirements are met here and, therefore, PEF's petition should be granted.

7. The 60-day notice requirement is a discretionary requirement established by the Commission to allow it to timely plan for a base rate proceeding. It is not a legislative requirement under Section 366.06. Rather, the manner of handling applications for rate changes was left to the Commission. The purpose of the 60-day notice requirement was met when PEF informally notified the Commission that PEF planned to file a petition to initiate a base rate proceeding in 2009 and the Commission proceeded to schedule pre-hearing and hearing dates and otherwise plan for the allocation of its resources to handle PEF's petition for a base rate increase. Strict compliance with the 60-day notification period now provides no real, additional benefits to the Commission that it does not already have and has used from PEF's informal notification to plan the efficient use of its resources and schedule. See generally, In re: Review of 2007 Electric Infrastructure Storm Hardening Plan filed pursuant to Rule 25-6.0342, F.A.C. submitted by Florida Public Utility Company, 2007 Fla. PUC LEXIS 342, Order No. PSC-07-0557-FOF-EI, Docket No. 070300-EI, (July 2, 2007) (finding that underlying purpose of the statute would be met even with the granting of a waiver to provide an additional 60 days to file a storm hardening plan because Florida Public Utility Company (FPUC) did not seek to be excused altogether and the extension would not deny staff or intervenors the opportunity to review and evaluate the plan). As a

result, the purpose of the 60-day notice requirement has already been met and, therefore, PEF's petition for waiver or variance of this requirement should be granted.

8. Section 120.542 further provides that a rule requirement can be waived when strict compliance creates a hardship that is economic, technological, legal, or some other type of substantial hardship. Because all agency rules necessarily implement a legislative purpose, Section 120.542 establishes this minimum standard to avoid the arbitrary avoidance or subversion of legislative intent while protecting individuals from unfair or unreasonable outcomes if the rule requirements are always strictly enforced. See generally, Florida Dep't. of Business and Professional Regulation, Div. of Paralegal Mutuel Wagering v. Investment Corp. of Palm Beach, 747 So. 2d 374, 383 n.7 (Fla. 1999) (“[Section 120.542] is intended to give agencies much-needed flexibility to address unique or unusual situations that are not contemplated by agency rules that, by necessity, are written to address general circumstances.”) (quoting Blanton & Rhodes, Flexibility, Flexibility, Flexibility, The New Variance & Waiver Provision, Fla. Bar Journal, Mar. 1997 at 35, 38-39). The determination of what is a hardship and what makes it substantial is made by the agency that enacted the rule consistent with the legislative policy the rule implements. The legislative policy implemented by the procedural requirements of Rule 25-6.140, F.A.C. is the legislative deference to the Commission to prescribe rules and regulations for handling applications for changes in rates. §366.06(1), Fla. Stat. The Commission, therefore, has the discretion to determine what warrants a waiver of its 60-day notification requirement even under the substantial hardship test of Section 120.542 because the Florida Legislature deferred to the Commission to prescribe the procedural rules for handling rate change applications.

9. The Commission can find that there is a substantial hardship if PEF is required to strictly comply with the 60-day notification requirement in Rule 25-6.140, F.A.C., because strict compliance provides the Commission no real, additional notification that the Commission does not already have and that the Commission has not already acted upon to plan for and schedule the handling of PEF's petition for a base rate increase. See generally, Order No. PSC-07-0557-FOF-EI (July 2, 2007) (rule waiver granted when FPUC intended to comply with filing requirement and staff and others had the opportunity to review and evaluate the plan when filed); In re: Petition for waiver of Rule 25-17.250(1) and (2)(a), F.A.C., Order No. PSC-08-0706-TRF-EI, Docket No. 080501-EI, 2008 Fla. PUC LEXIS 523 (Oct. 23, 2008) (waiving rule requiring filing of standard offer contract when it was factually inapplicable to PEF's situation). Strict compliance with the 60-day notice requirement, therefore, imposes on PEF a formalistic, legal requirement that serves no real purpose at this time. See generally, In Re: Request for waiver of carrier selection requirements of Rule 25-4.118, F.A.C., Order No. PSC-07-0999-PAA-TX, Docket No. 070611-TX, 2007 Fla. PUC LEXIS 647 (Dec. 12, 2007) (waiving individual customer authorization of carrier change rule requirement when strict compliance served no useful purpose because adequate public notice to customers was provided and individual authorization could cause confusion and claims to detriment of utility and customers).

10. No other person or entity can claim any prejudice if strict compliance with the 60-day notice requirement by PEF is not required. Rule 25-6.140 makes clear this notification requirement is for the benefit of the Commission. The rule provides that, 60 days prior to filing a petition for a general rate increase, a company shall "notify the Commission." Rule 25-6.140(1), F.A.C. The rule does not require the company to serve

its test year notification on any other entity, so customers and potential intervenors, among others, cannot be prejudiced or harmed by a company's failure to strictly comply with the timing of a notification that they do not receive. Customers and potential intervenors will have ample notice of and an opportunity to participate in the base rate proceeding when it is filed. In fact, customers and potential intervenors will benefit from the waiver, because the earlier filing of MFRs and testimony will provide them with over three additional weeks to review these materials and prepare for hearings on the dates currently reserved on the Commission's calendar.

11. The Commission should further find that there is a substantial hardship to PEF if strict compliance with the 60-day notice requirement is required because PEF has been engaged in settlement discussions in an effort to avoid initiation of a base rate proceeding at this time. These settlement efforts delayed PEF's filing of the Test Year Notification while settlement discussions appeared fruitful. The Commission has a long-standing policy of favoring settlements. E.g., In re: Petition for rate increase by Progress Energy Florida, Inc., Order No. PSC-05-0945-S-EI, Docket No. 050078-EI, p. 7, 2005 Fla. PUC LEXIS 136, (Sept. 28, 2005) ("Nonetheless, this Commission has a long history of encouraging settlements, giving great weight and deference to settlements, and enforcing them in the spirit in which they were reached by the parties."). Even in Rule 25-6.140, the company must describe the "actions or measures" that have the purpose of avoiding a rate increase. Rule 25-6.140(c), F.A.C. Settlement discussions, therefore, should be encouraged, even if they fail to yield settlements. Settlements on terms favorable to all interested parties and the Commission avoid the time and cost of protracted base rate proceedings to all parties and conserve the limited Commission resources for other matters. See generally, In re: Petition for a Determination of Need

for an Electrical Power Plant in Martin County by Florida Power & Light Co., 2002 Fla. PUC LEXIS 378, Order No. PSC-02-0703-PCO-EI, Docket No. 020262-EI, (May 23, 2002) (granting request for waiver of 90-day requirement to hold a need determination hearing so that a second request for proposals (RFP) could be issued, potentially avoiding the substantial hardship of expensive, complicated litigation over issues the second RFP might resolve). Requiring PEF to comply with the 60-day notice requirement will achieve formalistic compliance with a rule requirement but it will also discourage existing and future settlement efforts, potentially requiring PEF, the Commission, and others to face the substantial hardship of the expense and time of litigating all issues in a base rate proceeding. For this reason, PEF requests the Commission grant its petition for waiver or variance of the 60-day notice requirement in Rule 25-6.140.

12. The variance or waiver of the 60-day notice requirement is temporary because the waiver or variance is required only for the filing of PEF's general rate increase in 2009. In subsequent years, following PEF's 2009 base rate proceeding, the 60-day notice requirement remains in effect, unless the circumstances at that future time warrant a waiver or variance. If that is the case, PEF will, of course, request a variance or waiver of the requirement based on the then-pending circumstances. PEF, therefore, requests a temporary waiver or variance of the 60-day notice requirement for the filing of its general rate increase in 2009.

III. Request for Emergency Variance or Waiver of the 60-day notification requirement in Rule 25-6.140, F.A.C.

13. PEF's request for a variance or waiver of the 60-day notice requirement in Rule 25-6.140, F.A.C. is necessarily an emergency under this Rule and Section 120.542, Florida Statutes. Under Section 120.542(8), the Commission must grant or deny the

petition for waiver or variance within 90 days after it receives the original petition or last timely requested additional material to make its decision. §120.542(8), Fla. Stat. Given the time frames for processing a non-emergency waiver or variance under Section 120.542 and Chapter 28-104, F.A.C., the Company will not be able to obtain a Commission ruling on its petition prior to the requested March 20, 2009 filing date unless the request is handled on an emergency basis. Such circumstances warrant the Commission's consideration of PEF's request for a variance or waiver of the 60-day notice requirement in Rule 25-6140 on an emergency basis. See Order No. PSC-02-0703-PCO-EI (May 23, 2002) (granting request for waiver of 90-day requirement to hold a need determination hearing on an emergency basis because a decision on the rule waiver petition on a non-emergency basis yielded a decision more than a month past the current need determination schedule).

14. PEF specifically incorporates by reference and restates its grounds for waiver or variance of the 60-day notification requirement of Rule 25-6.140 stated above as if fully restated here -- which fully support PEF's request for a variance or waiver of this rule requirement -- to demonstrate why PEF will suffer an immediate adverse impact if the variance or waiver is not issued more expeditiously than the time frames provided in Section 120.542(8). These facts fully justify PEF's requested rule or waiver variance, and without a decision on them on an emergency basis PEF will be denied full and fair consideration of its request simply due to the operation of the time limits in Section 120.542(8).

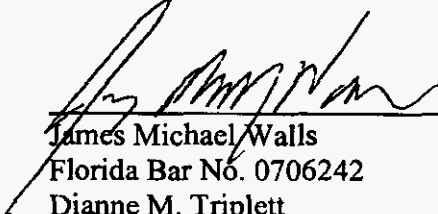
IV. Conclusion.

15. In sum, the 60-day notice requirement of Rule 25-6.140 should be waived or a variance granted, on an emergency basis, because PEF has satisfied the notification

purpose of the rule and PEF faces substantial hardship if it must now legalistically comply with a notice requirement that has been substantially met and that would discourage efforts to avoid the substantial time and cost of base rate proceedings through potential settlement prior to the initiation of a base rate proceeding.

Respectfully submitted this 12th day of February, 2009.

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