

**Ruth Nettles**

090079-EI

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**Sent:** Monday, November 09, 2009 4:03 PM  
**To:** Filings@psc.state.fl.us  
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**Subject:** PUBLIC COUNSEL'S RESPONSE TO PROGRESS ENERGY FLORIDA, INC.'S MOTION FOR EXPEDITED APPROVAL OF A REGULATORY ASSET OR LIABILITY AS AN ALTERNATIVE TO IMPLEMENTING RATES SUBJECT TO REFUND PURSUANT TO SECTION 366.06(3), FLORIDA STATUTES.  
**Attachments:** OPC REGASSET RESPONSE (FINAL)11-09-09..pdf

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 090079-EI

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

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 7 pages.

e. The document attached for electronic filing is PUBLIC COUNSEL'S RESPONSE TO PROGRESS ENERGY FLORIDA, INC.'S MOTION FOR EXPEDITED APPROVAL OF A REGULATORY ASSET OR LIABILITY AS AN ALTERNATIVE TO IMPLEMENTING RATES SUBJECT TO REFUND PURSUANT TO SECTION 366.06(3), FLORIDA STATUTES. Thank you for your attention and cooperation to this request.

Monica R. Woods  
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DOCUMENT NUMBER-DATE

11205 NOV-9 8

FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for increase in rates  
By Progress Energy Florida, Inc.,  
\_\_\_\_\_ /

Docket No. 090079-EI

Date Filed: November 9, 2009

**PUBLIC COUNSEL'S RESPONSE TO PROGRESS ENERGY FLORIDA, INC.'S  
MOTION FOR EXPEDITED  
APPROVAL OF A REGULATORY ASSET OR LIABILITY AS AN ALTERNATIVE TO  
IMPLEMENTING RATES SUBJECT TO REFUND PURSUANT TO SECTION  
366.06(3), FLORIDA STATUTES**

The Citizens of Florida, through the Office of the Public Counsel ("OPC") file this response to the Motion of Progress Energy Florida, Inc. ("PEF") for approval of the creation of a regulatory asset or liability as an alternative to the implementation of rates subject to refund pursuant to the Company's Petition in this Docket and Section 366.06(3), Florida Statutes.

The Citizens respond as follows:

1. Because of the public policy decision underlying the October 2, 2009, letter from Governor Charlie Crist requesting a delay in the vote in this case in order that the two new appointees can consider and vote on the case, the possibility of subjecting PEF's customers to the potential implementation of PEF's originally proposed rates became an inevitable consequence.
2. The OPC recognizes the merit of finding a way to protect customers from the imminent increase in rates that are unlikely to be of the magnitude of the permanent rates in this case. The OPC further recognizes the value of changing customer rates only once as a result of the Commission's final decision in this case.

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FPSC-COMMISSION CLERK

3. When the concept of creating a deferred debit in the form of a regulatory asset as a way of allowing PEF to avail itself of its right to implement rates while not imposing an undue burden on customers was first raised, the OPC was not persuaded. The Public Counsel's objection transcends the highly specific and unique circumstances of this case. In fact, at the October 27, 2009, Agenda Conference, the OPC expressed a strong objection to utilizing a regulatory asset in order to attempt to persuade PEF to forbear the implementation of Section 366.06(3), Florida Statutes.

4. In light of the motion filed by PEF, and after further consideration, the OPC maintains its objections and concerns. Nevertheless, in recognition of the practicalities of the situation, our objections can be overcome or set aside if certain conditions occur.

5. PEF proposes that the regulatory asset be approved "as an alternative to the immediate collection on January 1, 2009 [sic] of PEF's requested rates subject to refund as authorized by Section 366.06(3)."

6. The OPC is willing to withhold its objection and refrain from appellate action challenging the legality of the concept proposed by PEF. The OPC's willingness to agree to the accommodation is conditioned upon a stipulation of parties and an express and binding recognition by the Commission that the mechanism proposed by PEF is a one-time accommodation to a unique set of circumstances that are contemplated to never re-occur.

7. These specific and unique set of circumstances are:
- a. A stipulation that prohibits PEF from increasing base rates until a time certain beyond the 8 month date;
  - b. A Commission vote scheduled in time to meet the 8 month time frame and the expiration of the stipulation;
  - c. Two of the five Commissioners assigned to the case whose terms expire at the end of the stipulation are not reappointed by the Governor;
  - d. A request by the Governor to delay the Commission vote beyond both the 8 month and stipulation expiration date; and
  - e. The Commission granting the request to delay the vote beyond the two dates noted in subsection (d) above.

8. These circumstances are highly specific to the PEF case and do not apply to the FPL case, nor will they conceivably apply to any other rate case to be filed in the future. The OPC requests that the Commission expressly note these specific factors and any others it deems to make this situation unique in any order approving the PEF request.

9. The OPC has serious concerns about creating an “alternative” to the operation of the file and suspend provisions of Chapter 366, Florida Statutes. Nevertheless, the OPC is willing to withhold its objections and stipulate to implementing a regulatory asset mechanism that will fairly take into account the legitimate interests of the customers and the company, given the highly unusual circumstances facing the parties and Commission as a result of the request of the Governor’s office in the October 2, 2009 letter.

10. The OPC has stated to PEF that it has an objection to making any modifications to the operation or interpretation of Section 366.06(3), Florida Statutes. OPC also observes that, by the

terms of its Motion, PEF has acknowledged that the operation of the 8 month provision of Section 366.06(3) can be waived, and therefore is not mandatory or automatic. Further, OPC disputes the statutory authority of the Commission to grant PEF's motion in the absence of a stipulation of parties to that effect. However, as OPC has stated, OPC does not dispute PEF's right, under the terms of the governing statute and the terms of its settlement agreement, to place its proposed rates into effect subject to refund pending the Commission's final decision in this docket.

11. In light of the unique and unusual circumstances of this proceeding, and on the condition that the resolution of PEF's proposal will never be considered precedential for any departure from the strict and historical application of the requirements Section 366.06(3), Florida Statutes, the OPC is willing to enter a limited stipulation of parties (or the functional equivalent) as to the creation of the regulatory asset or liability in order to avoid the possibility of customers bearing a level of rate increase, even temporarily, that is unlikely to result from the Commission's final determination. The OPC emphasizes that by its stated willingness to enter such a stipulation OPC does not relinquish its litigation position, which is that current base rates are unreasonably high and should be reduced. In that regard, the ultimate stipulation should be worded neutrally to refer to "revenue decrease" as well as "revenue increase."

12. OPC further states that it does not consent to the mechanism described in paragraphs 8 and 9 and Exhibit 1, but is willing to work with PEF, Staff and other parties to arrive at stipulation language that will ensure that the mechanism of the regulatory asset/regulatory liability achieves the intended result with no windfall to the company relative to the revenues that would be collected if the filed rates were to be implemented on January 1, 2010. The OPC has

commenced discussions with the Company and believes that PEF will work in good faith with the intervenors and the staff through the implementation of final rates in March 2010 to fashion an appropriate surcharge mechanism and amount. The OPC does not believe that all of the details of estimation and collection of the asset and surcharge need be finally determined in the disposition of this Motion. Instead, the proposal by PEF can be approved contingent upon the Parties and the Staff agreeing to stipulation language and working out the final details. Once presented by the parties, the Commission can approve them at one of the two agendas set for the case in January 2010.

13. Furthermore, the OPC does not believe the mechanism should be designed in a way that would create a precedent for use in any other situation – especially where the company has the opportunity to raise rates by operation of the statute either by default or by action or inaction of the Commission or another party. Increasing customers' rates should not be "painless" and easy for the company. Deferring the collection of rates to avoid a difficult decision or to put off the inevitable is not a desired outcome of any automatic rate increase decision nor is it what was contemplated by the Legislature. Creative mechanisms that are not authorized by statute, such as a regulatory asset for deferred collection of revenues should not be used in these situations, absent the specific conditions and circumstances – including willingness of parties to enter a stipulation - existing in this one case.

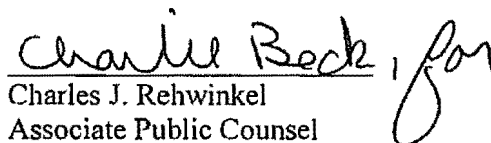
14. The OPC further submits that, in light of the regulatory asset being an accommodation to the company to preserve its ability to collect revenues under the highly specific circumstances of this case, the collection of interest on estimated revenues should not be factored into the

development of the size of the regulatory asset or the level of the surcharge. Rather, the OPC submits that it would be more appropriate for the Company to submit a petition to the Commission after completion of the surcharge for a determination and collection of any interest if it can demonstrate that the failure to collect the commercial paper rate level of interest was a hardship or jeopardized the level of earnings required (e.g., placed the company's earnings below the establish ROE range).

15. For all the reasons provided above, the OPC requests that the Commission take these comments into consideration when making any decisions on PEF's aforementioned Motion.

Respectfully Submitted,

JR Kelly  
Public Counsel

Handwritten signature of Charles J. Rehwinkel in cursive, with the word 'for' written in a smaller script to the right of the signature.

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and foregoing ***PUBLIC COUNSEL'S RESPONSE TO PROGRESS ENERGY FLORIDA, INC.'S MOTION FOR EXPEDITED APPROVAL OF A REGULATORY ASSET OR LIABILITY AS AN ALTERNATIVE TO IMPLEMENTING RATES SUBJECT TO REFUND PURSUANT TO SECTION 366.06(3), FLORIDA STATUTES*** has been furnished by electronic mail and U.S. Mail on this 9<sup>th</sup> day of November, 2009, to the following:

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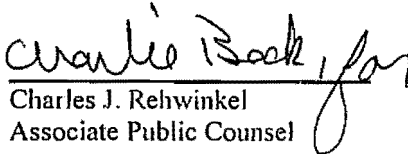
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