

Diamond Williams100001-EI

From: Al Taylor [Al.Taylor@bbrslaw.com]
Sent: Monday, November 08, 2010 3:54 PM
To: Filings@psc.state.fl.us
Cc: 'ken.rubin@fpl.com'; 'jbeasley@ausley.com'; 'jmcwhirter@mac-law.com';
 'wade_litchfield@fpl.com'; 'sdriteno@southernco.com'; 'vkaufman@kagmlaw.com'; Charles
 Rehwinkel; 'paul.lewisjr@pgnmail.com'; 'john.burnett@pgnmail.com';
 'Regdept@tecoenergy.com'; 'rab@beggslane.com'; 'jas@beggslane.com';
 'John_butler@fpl.com'; Beth Keating; 'RMiller@pcosphosphate.com'; Jay Brew;
 'shayla.mcneill@tyndall.af.mil'; 'george_bachman@chpk.com'; 'swright@yvlaw.net';
 'cecilia.bradley@myfloridalegal.com'; 'dmoore@esgconsult.com'; 'wigglaw@gmail.com';
 'christensen.patty@leg.state.fl.us'; 'J.R. Kelly'; 'Russell A. Badders'; Erik Saylor; Lisa Bennett
Subject: FPSC Docket No 100001 - PCS Phosphate's Post-Hearing Brief
Attachments: PCS Fuel Brief 2010.pdf

a. Person responsible for filing

James W. Brew
 Brickfield, Burchette, Ritts & Stone, P.C.
 1025 Thomas Jefferson Street, N.W.
 Eighth Floor West Tower
 Washington, D.C. 20007
 Tel: (202) 342-0800
 Fax: (202) 342-0807
jwb@bbrslaw.com

b. Docket No. 100001 -EI, In Re: Fuel and purchased power cost recovery clause with generating performance incentive factor

c. Filed on behalf of White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate - White Springs

d. Total Pages = 8

e. PCS Phosphate's Post-Hearing Brief

F. Alvin Taylor
 BRICKFIELD BURCHETTE RITTS & STONE, PC
 1025 Thomas Jefferson St, N.W.
 Eighth Floor, West Tower
 Washington, DC 20007
 202-342-0800
 Fax: 202-342-0807
ataylor@bbrslaw.com

DOCUMENT NUMBER-DATE
 09222 NOV-8 2
 FPSC-COMMISSION CLERK

11/8/2010

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Fuel and Purchased Power)
Cost Recovery Clause with Generating)
Performance Incentive Factor)

**Docket No. 100001-EI
Filed: November 8, 2010**

**POST-HEARING BRIEF AND STATEMENT OF ISSUE AND POSITION
OF WHITE SPRINGS AGRICULTURAL CHEMICALS, INC.
D/B/A PCS PHOSPHATE – WHITE SPRINGS**

Pursuant to the Florida Public Service Commission’s March 18, 2010 *Order Establishing Procedure*, Order No. PSC-10-0154-PCO-EI, and as ordered at the November 2, 2010 Commission Hearing in this proceeding, White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs (“PCS Phosphate”) files this Post-Hearing Brief and Statement of Issue and Position with respect to Progress Energy Florida (“Progress”). All issues in this proceeding have been resolved except for Issue 1D, which concerns the appropriateness of interim recovery of replacement fuel costs caused by the extended outage of the Crystal River 3 (“CR3”) nuclear generating unit pending a Commission decision on the prudence of such costs that will be examined in a separate proceeding. As explained below, PCS Phosphate urges the Commission to deny such interim recovery.

STATEMENT OF POSITION AND DISCUSSION

ISSUE 1D: Should Progress Energy Florida, Inc. be permitted to collect through the fuel clause, amounts related to replacement power due to the extended outage at Crystal River Unit 3 prior to the Commission’s determination of the prudence of such costs in a separate docket?

POSITION: **No. Interim cost recovery in the fuel factor is not warranted at this time. Progress is not entitled to interim recovery and the prevailing state of the Florida economy militates against such recovery prior to the Commission’s CR3 prudence determination.**

DOCUMENT NUMBER-DATE
09222 NOV-8 09
FPSC-COMMISSION CLERK

Progress originally planned for the CR3 unit to return to service before the end of 2009. It now appears that the nuclear unit will remain out of service for all of calendar year 2010. The Commission has determined that a separate docket should be established to examine the causes of the extended outage, Progress' management of the issues that caused the outage and the outage itself, and the prudence of the cost consequences.¹

In its September filing in this docket, Progress proposed to increase its fuel factor charge to consumers notwithstanding steadily declining fuel costs. The sole cause for the increase cited by Progress was the cost of energy to replace expected CR3 output in 2010 that is not otherwise covered by insurance.² Progress subsequently has revised its estimated fuel forecasts for 2011 as well as the expected excess replacement power costs for CR3. This update is reflected in Exhibit 71 and now shows net reductions in proposed levelized fuel factor charges from 2010 to 2011, with additional revisions to be provided by Progress on November 10, 2010.³

With these revisions and changing estimates, the excess replacement power costs associated with the CR3 outage have declined substantially from PEF's September filing, but remain substantial. Exhibit 71 shows fuel factor costs and proposed factors "with" and "without" the CR3 excess replacement power costs. The alternative calculations shown on that exhibit reveal that, even as revised, the CR3-related costs have a material impact on fuel factor charges to Progress ratepayers.

¹ *In re: Fuel and purchase power cost recovery clause with generating performance incentive factor*, Order No. PSC-10-0632-PCO-EI, Docket No. 100001-EI (Oct. 25, 2010).

² Tr. 53-54 (September 1, 2010 Direct Testimony of Marcia Olivier at 3-4).

³ Tr. 406-07.

The question of whether to permit or deny interim cost recovery pending the outcome of the CR3 prudence proceeding has been described as a legal issue when in fact it is a Commission policy choice. Legally, it is firmly settled that the Commission has full authority to determine whether to permit or deny recovery of some or all of the CR3 outage costs based on its responsibility to ensure that rates charged to consumers are fair, just and reasonable.⁴ Further, any time a utility seeks to recover costs from consumers in rates, it bears the burden of proving the reasonableness of those costs.⁵

Also, prudence is not a distinct concept from reasonableness. In utility regulatory lexicon, "prudence" refers to whether costs in question were the result of decisions and actions that reasonable utility management would have taken under the circumstances prevailing at the time.⁶ In short, whether costs are reasonable is inextricably bound to whether they were prudently incurred.

Where, as in this instance, the circumstances are such that the Commission has determined that a separate proceeding is required to assess the prudence question, the ancillary question of interim cost recovery is presented. The parties seem to agree that Florida statutes and the Commission's rules neither compel nor prohibit such interim recovery. Indeed, it is clear that such questions fall to the discretion and sound judgment of the Commission.

⁴ See, generally, Chap. 366, F.S.

⁵ See, e.g., *Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982).

⁶ See, e.g., In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers \$143 million, Order No. PSC-07-0816-FOF-EI, Docket No. 060658-EI, at 3 (Oct. 10, 2007), (citing *City of Cincinnati v. Public Utils. Comm'n*, 620 N.E. 2d 826 (Ohio 1993)).

Also, as the parties discussed at the hearing on November 1, the Commission has addressed this question on a number of prior occasions. The most directly applicable of these involved a previous extended CR3 outage in 1997 in which the Commission voted to allow interim recovery with considerable reluctance. In addressing its apparent frustration with the record basis for that requested action, the Commission signaled that it would not accept being placed in such a dilemma again:

In the future, when a utility seeks to recover costs which have a significant impact on the utility's fuel adjustment factor, the utility must affirmatively demonstrate that the actions or events that gave rise to the need for the recovery and the underlying costs are reasonable.⁷

In a subsequent decision establishing what constitutes a "significant impact," the Commission required a utility to demonstrate the reasonableness of such costs in prefiled testimony prior to interim cost recovery.⁸

The mandate for a showing, in advance, to support interim recovery plainly applies in this case. Progress, however, offered no testimony of any kind that aimed to "demonstrate that the actions or events that gave rise to the need for recovery . . . are reasonable." In short, Progress did not attempt the showing for interim recovery that the Commission requires.

Progress attempts to finesse meeting this requirement with a naked assertion that its Schedule E reflects reasonable CR3 replacement decisions (i.e., alternative dispatch or power

⁷ *In re: Fuel and purchase power cost recovery clause and generating performance incentive factor*, Order No. PSC-97-0359-POF-EI, Docket No. 970001-EI at 13 (March 31, 1997), cited with approval in *In re: Establishment of additional filing requirements in the fuel and purchased power cost recovery clause when certain threshold levels are met*, Order No. PSC-98-0049-FOF-EI, Docket No. 971513-EI (January 7, 1998) ("Order No. 98-0049").

⁸ Order No. 98-0049 at 6-7.

purchasing).⁹ This assertion is as insufficient as it is circular in its logic. The E schedules show only what Progress expended or expects to spend on fuel. They do not in any manner address the “actions or events” that gave rise to the need to replace CR3 with energy and capacity from other sources, although such a showing on these matters is precisely what the Commission demanded.

In this case, Progress should have filed testimony that outlined the actions and events associated with the CR3 outage. This does not require advance disclosure of the company's entire prudence case, but certainly requires a sufficient discussion of the outage events to support a request for interim recovery. Progress' failure to attempt such a demonstration is fatal to its request for interim recovery.

Also, in deciding whether to grant or deny interim recovery, the Commission should consider the circumstances facing Florida ratepayers today. It is understood that interim recovery would be subject to refund, with interest, based on the outcome of the prudence case, and the same would apply if interim recovery is denied (i.e., costs subsequently determined to be prudent would be recovered from ratepayers with carrying charges). While the burden imposed on ratepayers ultimately should be comparable under either approach, the timing of cost recovery is important. Forcing Progress' ratepayers to pay the CR3 outage costs in advance of a prudence finding places that burden on consumers at a time when virtually every sector of the Florida economy continues to struggle. This is a condition that should weigh heavily in the consideration of the appropriateness of permitting interim recovery. In the view of PCS Phosphate, this consideration along with Progress' failure to offer a *prima facie*

⁹ Tr. 426-27.

demonstration to support interim recovery argue strongly against authorizing interim CR3 replacement cost recovery in the 2011 fuel factor.

CONCLUSION

For the reasons stated above, PCS Phosphate urges the Commission to deny interim recovery of CR3 outage related fuel costs in the Progress 2011 fuel adjustment factor.

Respectfully submitted the 8th day of November, 2010.

BRICKFIELD, BURCHETTE, RITTS & STONE, P.C.

s/ James W. Brew

James W. Brew
F. Alvin Taylor
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson St., NW
Eighth Floor, West Tower
Washington, DC 20007
Tel: (202) 342-0800
Fax: (202) 342-0800
E-mail: jbrew@bbrslaw.com

*Attorneys for
White Springs Agricultural Chemicals, Inc.
d/b/a/ PCS Phosphate – White Springs*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of PCS Phosphate's Post-Hearing Brief and Statement on Issue and Position has been served by electronic and/or U. S. mail on this 8th day of November, 2010:

Florida Power & Light Company
John T. Butler/Ken Hoffman
700 Universe Boulevard
Juno Beach, FL 33408-0420

Beth Keating
Akerman Law Firm
106 East College Avenue, Suite 1200
Tallahassee, FL 32301

Florida Industrial Power Users Group
c/o John McWhirter, Jr.
McWhirter Law Firm
P.O. Box 3350
Tampa, FL 33601-3350

R. Scheffel Wright/John LaVia
c/o Florida Retail Federation
Young Law Firm
225 South Adams Street, Suite 200
Tallahassee, FL 32301

Jeffrey A. Stone/Russell A. Badders
Beggs & Lane
P.O. Box 12950
Pensacola, FL 32591-2950

Gulf Power Company
Susan D. Ritenour
One Energy Place
Pensacola, FL 32520-0780

Tampa Electric Company
Paula K. Brown
P. O. Box 111
Tampa, FL 33601-0111

Florida Public Utilities Company
G. Bachman/C. Martin
P. O. Box 3395
West Palm Beach, FL 33402-3395

Progress Energy Service Company, LLC
John T. Burnett/R. Alexander Glenn
P. O. Box 14042
100 Central Avenue
St. Petersburg, FL 33733-4042

Office of Public Counsel
J.R. Kelly/Patricia Christensen
c/o The Florida Legislature
111 West Madison Street, #812
Tallahassee, FL 32399-1400

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

Capt. Shayla L. McNeill/
Federal Executive Agencies
c/o AFCESA/JACL-ULT
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319

Ausley Law Firm (10)
James D. Beasley/J. Jeffrey Wahlen
Post Office Box 391
Tallahassee, FL 32302

Vicki Gordon Kaufman/Jon C. Moyle, Jr.
Keefe Anchors Gordon & Moyle, PA
118 N Gadsden St
Tallahassee, Florida 32301-1508

CERTIFICATE OF SERVICE
DOCKET NO. 100001-EI
PAGE 2

Association For Fairness In Rate Making
Dan Moore
316 Maxwell Road, Suite 400
Alpharetta, GA 30009

Office of Attorney General
Cecilia Bradley
The Capitol – PL01
Tallahassee, FL 32399-1050

Bondurant and Fuqua, P.A.
Frank E. Bondurant, City Attorney
4450 Lafayette Street
P.O. Box 1508
Marianna, FL 32447

Patrick K. Wiggins
Post Office Drawer 1657
Tallahassee, FL 32302

White Springs Agricultural Chemicals, Inc.
Randy B. Miller
Post Office Box 300
White Springs, FL 32096

/s/ Al Taylor

F. Alvin Taylor