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Subject: Docket Nos. 110001-EI and 110007-EI

Attachments: Joint Post Hearing Brief of Intervenors 11.8.11.pdf

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

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b. This filing is made in Docket Nos. 110001-EI and 110007-EI.

c. The document is filed on behalf of Consumer Intervenors (Florida Industrial Power Users Group, the Office of Public Counsel, the Florida Retail Federation and the Federal Executive Agencies)

d. The total pages in the document are 18 pages.

e. The attached document is JOINT POST-HEARING BRIEF OF INTERVENORS.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.	DOCKET NO. 110001-EI
In re: Environmental cost recovery clause.	DOCKET NO. 110007-EI DATED: November 8, 2011

JOINT POST-HEARING BRIEF OF INTERVENORS

This Joint Post-Hearing Brief is filed by the following Intervenors: Florida Industrial Power Users Group (FIPUG), the Office of Public Counsel (OPC), the Florida Retail Federation (FRF) and the Federal Executive Agencies (FEA).[1] Collectively, these parties, who represent consumers, are referred to herein as "Consumer Intervenors."

INTRODUCTION

Petitioner, Progress Energy Florida, Inc. (PEF), asks this Commission to allow it to collect approximately $176 million (beginning in January 2012) from ratepayers due to actual and projected replacement fuel costs caused by the extended outage of its Crystal River 3 nuclear power plant (CR3). CR3 was taken off-line in September 2009 for routine refueling and maintenance, and for a replacement of the plant's steam generator. CR3 was originally supposed to be out of service for three months. During the steam generator replacement process, after PEF authorized and oversaw – that is, self-managed – the cutting of a new hole in the building, the concrete containment building cracked or "delaminated." The Commission will decide in a

[1] FRF, a party in Docket No. 110001-EI, but not in Docket No. 110007-EI, joins in the brief as to issues in the fuel cost recovery docket.

separate, open docket whether PEF acted imprudently as to the actions it took which resulted in the containment building delamination.[2]

During last year's fuel adjustment proceeding, Consumer Intervenors objected to ratepayers paying PEF fully for its CR3 replacement fuel costs due to the CR3 outage. After considerable legal argument and analysis, this Commission determined that it has the ability and discretion to allow PEF to recover all, none, or some of its replacement fuel costs.[3]

Many differences exist between CR3's situation during the 2010 fuel adjustment hearing and its status today. Last year, PEF told this Commission that CR3 would return to service in December 2010. Last year, no hearing was scheduled to determine whether PEF acted imprudently when it cut into the containment building and cracked it. Last year, based on the limited, preliminary evidence before it, and believing that the total amount at issue was *only* the replacement fuel costs for calendar year 2010, the Commission tentatively permitted PEF to recover its full replacement fuel cost from consumers.[4]

This year things are radically different. Now, PEF projects (with many, many caveats[5]) that CR3 will be back in service in 2014 at the earliest. Now, a hearing has been scheduled for June 2012 to review the prudence of PEF's actions. Now, PEF failed to present new evidence or solid policy reasons why it should recover fully its replacement fuel costs. Now, PEF erroneously argues that the Commission does not have discretion to deny or limit PEF's replacement fuel recovery costs – an argument the Commission explicitly rejected in the 2010

[2] *See,* Order No. PSC-11-0352-PCO-EI, Docket No. 100437-EI, issued on August 23, 2011, establishing the procedure to be followed and hearing dates of June 11-15, 2012.
[3] *See*, Order No. PSC-10-0734-FOF-EI, Docket No. 100001-EI, issued December 20, 2010.
[4] *Id.*
[5] In its June 2011 Status Report to the Commission (Exh. 89) in which PEF reported on the 2014 return to service date, it said: "... a number of factors could affect the repair plan, the return-to-service date, and costs, including regulatory reviews, ultimate work scope, engineering designs, testing, weather and other developments."

fuel order which initially authorized recovery subject to refund.[6] Now, PEF is not content to wait until June 2012 when this Commission will swear witnesses, listen to the evidence, and ultimately make its decision about the cracked CR3 containment building and whether PEF should recover costs that flow from the cracked building. Now, PEF, with a blatant paternalistic approach (with which all represented consumer groups disagree) tells consumers of all types -- residential consumers, industrial consumers, military bases, and commercial businesses -- that it knows best: that the consumers should pay replacement fuel costs pronto because consumers *might* have to pay more in the future or because rating agencies *might* not like a Commission decision that does not give PEF the right to immediately reach into consumers' pockets. The Commission should follow normal regulatory principles and practice, which provide that utilities are entitled to recovery, even of projected costs, only upon proving that they are entitled to any such recovery. PEF has not proven its entitlement to costs related to the CR3 outage. That matter is in dispute and will be resolved in the hearings scheduled for June 2012.

Further, Consumer Intervenors dispute the reasonableness of PEF's assumption that only one (rather than two) delamination events have occurred at CR3 since September 2009. If two covered events are assumed, a reasonable assumption given PEF's filings with the Commission informing it of a second delamination event, an additional $70 million in insurance proceeds are available for CR3 replacement fuel costs for the 2011-2012 period at issue. (Tr. 524, l. 4-18). This unexplained inaction on PEF's part fails to meet the company's evidentiary burden.

PEF (not consumers) has the burden of establishing by competent, substantial evidence that the assumptions girding its case are reasonable. It wholly failed to meet its evidentiary burden that its assumption of only one covered accident at CR3 is reasonable and has occurred.

[6] Order No. PSC-10-0734-FOF-EI at 14.

Tellingly, PEF failed to present its most knowledgeable employee on the NEIL insurance claim,[7] Mr. Gary Little; failed to present the applicable insurance policy; failed to offer a witness from the insurance company; and failed to introduce into evidence any correspondence between it and the insurance company. Instead, PEF improperly attempted to rely on one or more hearsay statements by an unnamed NEIL insurance representative to seek another $70 million from the ratepayers.

For the reasons detailed below, this Commission should exercise its discretion and, based on the evidence before it *now*, deny in full or in substantial part, PEF's request to immediately recover every dollar of its actual and projected CR3 replacement fuel costs. The Commission should defer any recovery until after the parties present, and the Commission considers, evidence about the prudency or imprudency of PEF's actions in cracking the building and asserting and enforcing its rights under the NEIL replacement power insurance policy. The Commission should not rely on flimsy hearsay evidence to allow PEF to recover an additional $70 million dollars from ratepayers until the insurance company determines whether more than one covered accident has occurred at CR3.

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[7] As Ms. Olivier testified:

> Q. And no one is here today from Progress that can tell us the process that you went through to evaluate one event versus two events; correct?
> A. That's correct. The process to evaluate one versus two events?
> Q. That's right.
> A. We don't have any experts here today with respect to the actual NEIL coverage of this event, so I think you're right there. (Tr. 526, l. 5-13).

ISSUES AND POSITIONS[8]

ISSUE 1C: Should PEF be permitted to recover the costs of replacement power due to the extended outage at Crystal River 3 in this docket? [Docket No. 110001-EI]

No. Ratepayers should not be responsible for replacement power costs, capacity costs, environmental costs, recovery costs or any other charges resulting from the continued extended outage of Crystal River 3. No determination has yet been made regarding the prudency of PEF's actions that led to the CR3 outage. Until such a determination is made, it is unfair and inequitable to require ratepayers to carry the burden of PEF's costs related to the outage.[9]

ISSUE 10G: Should PEF be permitted to recover any environmental costs related to its purchases of replacement power due to the Crystal River 3 outage? [Docket No. 110007-EI]

No. Ratepayers should not be responsible for replacement power costs, capacity costs, environmental costs, recovery costs or any other charges resulting from the continued extended outage of Crystal River 3. No determination has yet been made regarding the prudency of PEF's actions that led to the CR3 outage. Until such a determination is made, it is unfair and inequitable to require ratepayers to carry the burden of PEF's costs related to the outage.[10]

ARGUMENT

A. The Commission Has the Authority to Defer All or A Portion of Recovery for CR3 Until the Prudence Issues are Determined.

It appears to be PEF's position that the Commission decided the issue of the allowance of recovery for CR3 replacement fuel and other costs attributable to the CR3 outage last year and that is the end of the matter.[11] However, even a quick reading of last year's fuel adjustment order demonstrates that PEF is simply wrong.

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[8] Issues 1C and 10G address the same issue – whether PEF should be permitted to recover any money from ratepayers related to the CR3 outage while the determination of the prudency of PEF's actions related to that outage is at issue. Thus, these issues are briefed together. There is one additional environmental issue that Consumer Intervenors address in section E of this brief.

[9] The Commission's decision on this issue will affect other issues related to PEF's fuel recovery. *See*, Issues 8, 9, 10, 11, 18, 20, 22, 27, 28, 29, 30, 31 and 33.

[10] The Commission's decision on this issue will affect other issues related to PEF's capacity recovery. *See*, Issues 1, 2, 3, 4 and 7.

[11] *See,* PEF Prehearing Statement, Issue 1C.

Last year, the Commission made a decision in the context of the facts before it at that time - including the critical fact that PEF told the Commission that CR3 would be back on line in December 2010.[12] As noted above, all parties, including PEF, now know that information is incorrect. PEF admits that CR3, in the best case, will be back on line in 2014. Given the many variables and issues surrounding CR3, neither this Commission nor the Intervenors can be sure CR3 will ever come back on line.[13]

The Commission made it clear in its 2010 Fuel Order[14] that it has the inherent authority to defer all or part of any requested recovery subject to a determination of prudence. In rejecting PEF's assertion that the Commission lacked discretion to defer all or part of the recovery, the Commission said:

> In agreement with the Intervenors and PCS, we have the discretion to defer all or a portion of the requested recovery amount prior to the determination of prudence. . . . it is clear from Order Nos. PSC-08-0494-PCO-EI and PSC-08-0495-PCO-EI that we have the discretion to apportion and defer some or all of the requested under-recovery to a later period prior to the determination of prudence.[15]

Further, the Commission has set a hearing for June 2012 to decide whether PEF's actions as to the first delamination were prudent. If such actions were imprudent, as Consumer Intervenors contend, PEF would not be entitled to any recovery from ratepayers related to the CR3 outage. It is important to bear in mind that the Commission's decision here does not just implicate the *timing* of recovery, as most deferral decisions do, but also whether *any* money at all

[12] Order No. PSC-10-0734-FOF-EI at 4.
[13] If nothing else, given this uncertain and lengthy timeframe for CR3 to return to service, allowing annual replacement power cost shifting to consumers provides PEF with no incentive to make a final decision or complete the repair with deliberate speed.
[14] Order No. PSC-10-0734-FOF-EI.
[15] *Id.* at 14.

is due to PEF. Consumers should not be made to pay money to PEF before it is even determined that such money, or some portion of it, is even owed.

B. Circumstances Have Dramatically Changed Since the 2010 Fuel Adjustment Hearing.

There is no dispute that key facts and circumstances that confronted the Commission during last year's fuel hearing have materially changed. Rather than CR3 returning to service in December 2010, which was the date that PEF told the Commission last year, PEF now expects CR3 to possibly return to service sometime in 2014. (Exh. 89). A hearing to determine whether PEF's actions in severely damaging its own CR3 containment building were prudent or imprudent is scheduled to take place in June 2012.[16] These two key undisputed facts alone should prompt the Commission to exercise its discretion and deny PEF recovery of all or a significant portion of CR3 replacement fuel costs until after the upcoming prudency hearing.

Furthermore, PEF presented scant evidence to justify a Commission award of CR3 replacement fuel dollars. Instead, PEF, ignoring the Commission's legal conclusion from last year that the Commission possesses the sole discretion to award all, some or none of the CR3 replacement fuel dollars, argued that the Commission would be acting capriciously if it *failed* to award PEF its requested CR3 fuel replacement dollars. (Tr. 393-394).

PEF's argument is meritless. The Commission itself has stated that it has the discretion to defer recovery. In this case, such discretion may clearly be exercised on several grounds:

- on the basis of normal regulatory principles that require a utility to prove that it needs higher rates before it can charge them;
- on the basis that any deferral (assuming, in this hypothetical scenario, that PEF were ultimately determined to be entitled to any recovery) would be for only nine months and that PEF would be adequately compensated for the financing costs associated with purchasing replacement fuel in the interim (see below); and

[16] *In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project,* Docket No. 100437-EI; Order No. PSC-I1-0352-PCO-EI, issued August 23, 2011.

- on the basis that PEF, having already recovered some $139 million from consumers ***without*** a prudence determination, fundamental fairness requires that consumers not be required to bear any more costs until the prudence determination is made next summer.

A simple explanation of any or all of these considerations and other relevant factors would easily establish a rock-solid, non-capricious foundation for the Commission's decision to defer further recovery of unproven amounts from consumers.

Instead of putting forth evidence to support the award of the disputed replacement fuel monies, PEF opted instead to rest on its legal laurels. It has assumed that the Commission will not find that a 4-year delay in the expected return of CR3 to service or an upcoming prudency hearing has changed anything. PEF's message at hearing was, in essence, "You got it right last year; you don't have discretion to do anything other than keep having the consumers fund the costly consequences of the cracked CR3 containment building. Order the ratepayers to pay every dollar of our actual and projected CR3 replacement fuel dollars." Consumer Intervenors suggest that PEF has it wrong and that ratepayers should not be required to continue to bear this huge burden.

C. PEF's Argument That the Commission Should Approve Recovery Now to Avoid Future Rate Shock Is Not Credible and Should Be Rejected.

Although PEF's witnesses did not provide any direct testimony regarding possible future "rate shock" that might occur if the Commission deferred recovery now and later approved recovery, PEF's witness Marcia Olivier did assert this argument at the hearing. (Tr. 549). PEF's position is simply not credible. PEF has repeatedly acted to impose rate shock on its customers, even when it sought recovery of costs that it had not incurred and even where the amounts involved were several times greater than the amount involved in this proceeding.

For example, in the summer of 2008, PEF sought to recover from its customers some $213 million of fuel costs that it had incurred, and was projected to incur, over the last half of 2008. (Tr. 511). The Commission, in that instance sensitive to the rate shock of a $12 per 1,000 kWh increase, (Tr. 551), declined to approve the full amount requested and instead approved about half of PEF's request. (Tr. 551). In limiting PEF's requested mid-course correction in that docket, the Commission stated:

> We also considered the comments of PEF, and the customer representatives who spoke at our July 1, 2008, Agenda Conference. Upon review of the projected rate changes and bill impacts under the four different options presented to us, we approve Option C, which is the collection of 50% of the identified under-recovery during August through December of 2008. We defer consideration of the remaining 50% to the 2008 fuel hearing. By permitting PEF to collect 50% of its projected under-recovery in 2008, we will provide ratepayers with the least degree of immediate rate shock. While we are aware that by permitting recovery of only half of the under-recovered amount in 2008 may result in a higher 2009 bill for PEF's customers than if we allowed PEF to collect all of its under-recovery in 2008, we find that the timing of a stepped increase will give customers a better opportunity to adjust their budgets for the eventual expected increases in 2009.[17]

Moreover, in January 2009, PEF implemented a combination of rate increases that totaled $27.28 per 1,000 kWh of residential electric consumption. (Tr. 552-53; Exh. 90). PEF witness Olivier agreed that this was "a large increase, and so that could constitute rate shock." (Tr. 553). Recognizing that the public generally regarded these increases as rate shock, (*Id.*), PEF subsequently reduced both its fuel charges and nuclear cost recovery charges in April 2009. (Tr. 554). Ms. Olivier acknowledged that part of the rate reductions represented a "smoothing out" of the nuclear costs. (*Id.*) Ms. Olivier, however, was unable to explain why PEF did not decide

[17] *In re: Fuel and Purchase Power Cost Recovery Clause*, Docket No. 080001-EI, Order No. PSC-08-0495-FPF-EI at 13.

to smooth out the nuclear cost impacts in January, instead of imposing the full $27.28 per 1,000 kWh increase on its customers. (*Id.*) The Consumer Intervenors believe that the answer is simple: that PEF chose the option that would produce the most cash to PEF, just as it is seeking in this proceeding.

D. If the Commission Defers Recovery of the Disputed Amount Until September, PEF Will be Fairly Compensated for Any Additional Financing Costs Incurred to Purchase Replacement Fuel in the Interim.

PEF Controller, Mr. Garrett, testified that if the Commission defers recovery of the disputed $176.6 million (annualized value) until after the Commission renders its decision in Docket No. 100437-EI (in which the order is expected in September 2012), PEF will "presumably" finance such replacement fuel purchases "with short-term borrowing." Mr. Garrett acknowledged that this means borrowing through the use of commercial paper. (Tr. 491). The current commercial paper rate is somewhere in the range of 0.09% to 1.0%. (*See,* Tr. 534, 589). Regardless of the rate, since PEF will be compensated at its commercial paper rate for any amounts financed, PEF will be fairly compensated for such financing costs.

It is also worth noting that customers who have credit card debt do not have the option of borrowing at PEF's 1% commercial paper rate. Thus, if a consumer has to pay for the cost of replacement fuel, that money will not be available for the consumer to use to pay off debt bearing a higher interest rate. (*See*, Tr. 544-45).

Finally, on a related note, PEF's claim to be concerned about adverse rating agency impacts is not credible.[18] When PEF was required to defer $106 million of recovery in the 2008 fuel docket, Mr. Garrett, PEF's Controller, acknowledged that there were no adverse rating agency impacts. (Tr. 489). Moreover, Mr. Garrett further acknowledged that when PEF

[18] Nor is there any competent substantial evidence in the record to support such a claim.

deferred recovery of approximately $198 million in nuclear costs in April 2009, there was likewise no adverse rating agency impact. (Tr 490). The implication of these admissions is clear: PEF's claim to be concerned about rating agency impacts if the Commission were to defer recovery of the $176.6 million that the Consumer Intervenors believe should be deferred here, has no basis in fact and no basis in any competent substantial evidence in this proceeding. The Commission should reject this argument along with PEF's other conjectural arguments, and defer recovery until after the Commission determines the substantive issues involved in the hearing in Docket No. 100437-EI.

E. Any Recovery Should Be Reduced to Reflect Additional Insurance Coverage Associated With Two Events, Not One.

As discussed above, PEF should not be permitted to recover any money associated with the CR3 outage until this Commission makes a prudency determination in Docket No. 100437-EI. However, if the Commission considers allowing any recovery, it should ensure that two CR3 events, not one, are assumed.

PEF seeks to recover from ratepayers more than $70 million based on its faulty assumption that the CR3 plant suffered only one accident, not two. PEF's assumption is at odds with its own representations to the Commission. (Exh. 89). Specifically, PEF informed this Commission about a "second delamination" event at CR3 in March of 2011 and referred to it as a second event several times in its June 2011 filing. (*Id.*)[19] This second event occurred approximately 18 months after the first cracking event, in another part of the building. If PEF were to assume two events for the purposes of determining how much money to collect from

[19] PEF stated, in part: "The Company has determined that the second delamination occurred following one of the final stages of retensioning the containment building.... The delamination occurred in a different bay than the first delamination.... The second delamination resulted from tensile stresses above the tensile capacity of the concrete." (Exh. 89).

ratepayers, which it should given the facts, it would seek $70 million less of ratepayers dollars because additional insurance coverage would be in place. (Tr. 524, l. 4-10).

PEF offered no credible testimony or witnesses to justify its reliance on the assumption that only one insured, covered event occurred at CR3.[20] PEF Witness Olivier provided numerical calculations that compared insurance coverage of one event versus two events. Amazingly, Ms. Olivier had not even read the applicable insurance policy. (Tr. 605, l. 8-15).

Ms. Olivier indicated that the PEF employee most knowledgeable about the insurance matter was Gary Little. (*Id.*) However, PEF did not offer him as a witness in this proceeding. PEF did not introduce the applicable insurance policy into evidence nor did it have a witness who could discuss the policy. No witness from the insurance company testified. Instead, PEF attempts to rely on a hearsay statement by an unnamed NEIL insurance representative to seek another $70 million from the ratepayers.[21] When PEF witness Garrett was asked directly if PEF had filed for a second event, he suggested that indeed PEF had notified NEIL of a second event:

> Q. Have you made a claim for a second event, do you know?
>
> A. We have notified NEIL, as I understand, that there is -- there has been an additional event that we have requested a determination of coverage.

(Tr. 439, l. 4-8).

Thus, the record is devoid of reliable evidence that could support a finding of fact that PEF's assumption of only one covered accident at CR3 is reasonable. In contrast, ample evidence suggests that two covered events occurred at CR3. The Commission should assume

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[20] Ironically, consumers have paid all NEIL premiums. (Tr. 523 l. 2-6). PEF should interpret the policy in the way most favorable to the beneficiaries.

[21] As was pointed out during the hearing, a hearsay statement alone cannot form the basis for a finding of fact. *See,* section 120.57(1)(c), Florida Statutes: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

two events for the purposes of this proceeding or, alternatively, conclude that PEF did not meet its burden of proof.

When the Commission considers the facts before it, particularly PEF's filing with the Commission describing the "second delamination event," (Exh. 89), it should reduce the monies PEF seeks to recover from ratepayers and reject PEF's one event assumption as unreasonable based on the record evidence. Direct evidence was admitted in which PEF informs the Commission of a second delamination event. Florida law does not allow hearsay alone to support a finding of fact; thus, it follows that it would be error to allow hearsay alone to support a key assumption that costs ratepayers another $70 million. PEF did not carry its burden to establish that its assumption of one covered event was reasonable given its representation to the Commission and others of a second delamination event.

F. The Commission's Approval of Recovery for PEF Prior to a Prudency Finding Would Violate Due Process.

This Commission conducts the fuel proceeding pursuant to section 366, Florida Statutes. The Commission has historically treated cost recovery through its fuel clause as one which examines the costs associated with fuel that is used by the utility to generate electricity. By practice, prudency of projected fuel costs is not routinely examined during the fuel docket, but parties have a right to later challenge the prudency of fuel costs that may have been authorized for recovery upon discovery of facts that support an argument of imprudency.

Here, there is a pending docket in which the prudency or imprudency of PEF's actions in severely damaging its own nuclear containment building will be considered and determined. Prudency is being challenged by the Office of Public Counsel, FIPUG, FRF and other consumer parties. Prudency has been raised as an issue and an evidentiary hearing on the topic is scheduled for June of 2012, with the Commission's order to be issued in September 2012.

Therefore, PEF should not be permitted to recover disputed monies from ratepayers, especially for 2012 projected fuel costs, until after the prudency issues related to the cracked containment building are reviewed and decided based on record evidence. To permit PEF to recover ratepayer money in advance of a hearing violates the Florida Constitution's due process provision found in Article I, Section 10.[22] This section states, in pertinent part: "No person shall be deprived of life, liberty or property without due process of law." However, due process principles would be violated were PEF permitted to recover costs in advance of a prudency determination. This violation is compounded by the fact that PEF has already been allowed to recover some $139 million in replacement fuel costs without having proven that its actions were prudent or that it is entitled to such recovery, and without the Consumer Intervenors having their day in court.

Case law supports the position of Consumer Intervenors. The public policy of this state favors traditional due process rights in rate hearings. *Citizens of Florida v. Mayo*, 333 So.2d 1, 6 (Fla. 1976). When factual matters affecting the fairness of utility rates are considered by a regulatory commission, the rudiments of fair play and due process require that the parties be afforded a fair hearing and an opportunity to explain or rebut those matters. *Florida Gas Company v. Hawkins,* 372 So.2d 1118 (Fla. 1979).

Procedural due process requires that government provide adequate notice, an opportunity to present objections, and an impartial decision maker **prior to** a proposed taking of a citizen's life, liberty, or property, not after the fact. "Due process mandates that in any judicial proceeding, the litigants must be afforded the basic elements of notice and opportunity to be

[22] In addition, the protection of property interests is a basic constitutional right set forth in Section I, Article 2, Florida Constitution. Courts have recognized that property rights are among the most basic substantive rights that the Florida Constitution expressly protects. *See, Department of Law Enforcement v. Real Property*, 588 So.2d 957, 964 (Fla. 1991).

heard." *E.I. DuPont De Nemours & Co. v. Lambert*, 654 So.2d 226, 228 (Fla. 2d DCA 1995) *citing, Cavalier v. Ignas*, 290 So.2d 20, 21 (Fla.1974).

Here, the litigants have notice that they will have an opportunity to be heard in June 2012 regarding the prudency of PEF's actions. Nonetheless, a constitutionally fundamental right -- their property -- is being taken now, in advance of the hearing. Thus, if the Commission forces the ratepayers to now pay money to PEF for disputed CR3 replacement fuel that hinges on the Commission's future determination of PEF's prudency or imprudency actions, the Commission will violate the consumers' procedural and substantive due process protections.

Given the facts at hand, due process would be ensured by not permitting PEF to recover CR3 replacement fuel costs unless and until PEF proves it acted prudently when replacing the steam generator at CR3. Allowing recovery of ratepayer monies, particularly for projected 2012 CR3 replacement fuel costs for which regulatory lag is not an issue, **before** a hearing at which evidence is considered, runs afoul of traditional due process tenets.

Furthermore, PEF witness Marcia Olivier recognized that refunding monies at the commercial paper rate of approximately 1% allows PEF to leverage ratepayers' funds. (Tr. 535, l. 13-18). Consumers should have the use of their money to do with as they choose until PEF attempts to prove that its actions attendant to the CR3 steam generator replacement were prudent, notwithstanding the cracking of the containment building.

G. PEF Should Not Be Permitted to Charge Ratepayers for SO_2 and NO_X Allowances.

For the reasons set forth above, monies PEF seeks to recover through the ECRC as a result of the CR3 outage should likewise be denied pending the June 2012 prudency hearing.

Furthermore, PEF should not be allowed to charge ratepayers for additional SO_2 and NO_X allowances at the market rate of such allowances. PEF had an inventory of these environmental

credits which exceeded its need to expend them. Most of these environmental credits were allocated to PEF by the federal Environmental Protection Agency at no cost. (Tr. 257, l. 2-9).

PEF had sufficient no-cost allowances to offset all emissions related to the CR3 outage. (Tr. 258, l. 3-6). Additionally, PEF made no purchases of allowances related to the CR3 outage. (Tr. 324, l. 10-16). However, PEF did not use the first in, first out (FIFO) accounting method, an approach recognized by Generally Accepted Accounting Principles (GAAP), to account for the allowances. (Tr. 259, l. 17-19). Use of FIFO would result in no charge to ratepayers for these credits – the same amount PEF paid for the credits.

Rather, PEF seeks to use the average market approach and allocate additional costs to ratepayers even when no costs were paid for the CR3 allowances. PEF argues that allowances have always been treated in this manner. However, on cross-examination, PEF's Mr. Foster admitted that PEF has asked the Commission to change accounting practices in the past. (Tr. 326, l. 17-19). Tellingly, no such request was made in this case, as it would have inured to ratepayers' benefit rather than to PEF's. The Commission should reject the accounting approach PEF requests in favor of the first in, first out approach.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Commission should enter an order denying PEF's request to recover any costs resulting from the outage of the CR3 nuclear power plant until it determines in Docket No. 100437-EI whether the events or actions leading to the CR3 outage were reasonable and prudent. The Commission should also disallow PEF's request to recover any monies from consumers premised upon an unsupportable assumption of insurance

monies being available for only one accident when PEF has represented to the Commission and others that a second delamination event has occurred.

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