

ORIGINAL

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**Sent:** Monday, August 15, 2005 1:45 PM  
**To:** Filings@psc.state.fl.us  
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**Subject:** Docket No. 041272  
**Attachments:** PEF Motion to Vacate Automatic Stay.pdf

Attached for filing in Docket No. 041272 on behalf of Progress Energy Florida is Progress Energy Florida, Inc.'s Motion to Vacate Automatic Stay.

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8/15/2005

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Progress Energy Florida, Inc.'s )  
petition for approval of storm cost )  
recovery clause for extraordinary )  
expenditures related to Hurricanes )  
Charley, Frances, Jeanne, and Ivan. )  
\_\_\_\_\_ )

Docket No.: 041272

Submitted for Filing:  
August 15, 2005

**PROGRESS ENERGY FLORIDA, INC'S MOTION TO VACATE AUTOMATIC STAY**

Progress Energy Florida, Inc. ("PEF" or "the Company"), pursuant to Rule 25-22.061, F.A.C., and Rule 9.310, Fla. R. App. Pro., moves to vacate the automatic stay entered pursuant to Rule 9.310 by the appeal of the Office of Public Counsel ("OPC") of Order No. PSC-05-0748-FOF-EI.

On July 14, 2005, in Order No. PSC-05-0748-FOF-EI, this Commission granted PEF's petition for approval of its storm cost recovery clause providing for the recovery of PEF's extraordinary storm recovery expenses in the amount of \$231,839,389 directly from PEF's customers over the next two years. On August 12, 2005, OPC filed a Notice of Appeal of the Final Order. Under Rule 9.310, Fla. R. App. Pro., OPC's notice of appeal automatically stays Order No. PSC-05-0748-FOF-EI, pending review by the appellate court. Rule 9.310 further provides that this automatic stay may be lifted by the lower tribunal. In this case, however, the stay can and must be lifted by the Commission under Rule 25-22.061, F.A.C. Rule 25-22.061 provides that when a public body appeals an order involving an increase in a utility's rates, the Commission *shall* vacate the stay upon motion by the utility and the posting of a bond or corporate undertaking. See Rule 25-22.061(3)(a), F.A.C. (emphasis added). For the following reasons, the automatic stay resulting from OPC's appeal should be vacated in this case pursuant to Rule 25-22.061(3)(a).

Under Rule 25-22.061(3)(a), if the appealed order involves a utility's increased rates, the Commission must vacate the stay upon motion by the utility. Although the storm recovery charges PEF is authorized to collect from PEF's customers do not increase PEF's base rates, they do amount to an increase in what the customers are paying for their service. The Commission has vacated an automatic stay where the appealed order involved an increase in what customers paid for service. In Re: Application for amendment of Certificate No. 247-S by North Fort Myers Utility, Inc., In Re: Application for limited proceeding for approval of current service rates, charges, classifications, rules, and regulations, Order No. PSC-95-0612-PCO-SU, 1995 Fla. PUC Lexis 734 (May 19, 1995). The term "rates," as used in this rule, more broadly encompasses any and all payments collected by a utility from its customers. Indeed, all customer payments, whether they are called rates, charges, or something else, reflect costs incurred by the utility and will impact a utility's financial condition if they cannot be collected because of the automatic stay. Thus, the intent of the rule, to allow a utility to receive payment from customers for costs incurred while an appeal is pending upon assurance that reimbursement will be made if the order is reversed, applies equally to all customer charges, whatever they are called. Therefore, the automatic stay must be lifted pursuant to Rule 25-22.061(3)(a) to allow PEF to collect payments from customers for the storm costs PEF incurred as authorized by the Commission.

Here, PEF is willing to collect this monthly charge subject to refund, like the Commission allowed Florida Power & Light ("FPL") to do even before FPL's storm recovery cost proceeding was fully litigated. See In re: Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season, Order No. PSC-05-0187-PCO-EI, Docket No. 041291-EI (Feb. 17, 2005). A copy of PEF's corporate undertaking in this regard as

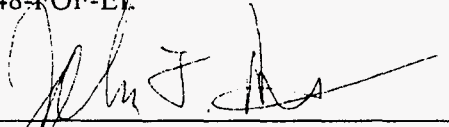
required by Rule 25-22.061(3)(a), F.A.C., is attached hereto as Exhibit "A." In the FPL proceeding, the Commission authorized FPL to collect charges from its customers before the Commission approved the reasonableness of those costs. The Commission did so based on FPL's commitment that it would refund to customers any of the costs it collected that were subsequently disallowed by the Commission after the hearing. In the instant case, PEF's storm costs have now been approved by the Commission following a fully litigated hearing. As such, there is even more justification for allowing PEF to collect subject to refund while OPC appeals the Commission's order in PEF's case.

As additional justification for permitting PEF to collect its 2004 hurricane costs from customers, the 2005 hurricane season has begun, with the state of Florida having already experienced tropical storms and hurricanes. In order to ensure that PEF will have the financial capability to promptly respond to storms affecting PEF's service territory during the current hurricane season, and maintain reliable electric service, PEF must start recovering its 2004 storm costs now. Indeed, this concern regarding the recovery of 2004 storm costs before the start of the 2005 hurricane season is precisely why the Commission permitted FPL to recover its 2004 storm costs before the full evidentiary hearing. See Order No. PSC-05-0187-PCO-EI. In that proceeding, the Commission accepted as reasonable FPL's argument that "implementing any surcharge after the start of the 2005 hurricane season would leave FPL having not recovered any of its 2004 storm damage costs in excess of its reserve."

PEF further requests, pursuant to Rule 25-22.061(5), F.A.C., that its motion to vacate the automatic stay be ruled upon by Commissioner Baez, who is currently assigned as the prehearing officer in this case. Under subsection (5), all motions filed pursuant to subsection (3) of Rule 25-22.061 may be ruled upon by the Chairman or the Commissioner assigned as the prehearing

officer in the case. Because PEF is seeking relief pursuant to subsection (3)(a) of this rule, PEF requests that Commissioner Baez rule on its motion to vacate the automatic stay.

WHEREFORE, for the reasons stated above, PEF moves to vacate the automatic stay entered upon OPC's appeal of Order No. PSC-05-0748-FOF-EL



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following counsel of record electronically and via U.S. Mail on this 15<sup>th</sup> day of August, 2005.

Jennifer Brubaker, Esquire  
Office of the General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

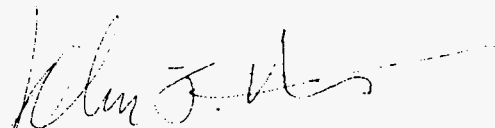
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Attorneys for Florida Retail Federation

  
\_\_\_\_\_  
Attorney



# Progress Energy

H. William Habermeyer, Jr.  
President and Chief Executive Officer  
Progress Energy Florida, Inc

August 15, 2005

Mr. Braulio Baez  
Chairman  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: Docket Number 041272  
Storm Cost Recovery Subject to Refund

Dear Mr. Baez:

In connection with Florida Public Service Commission ("Commission") action taken on July 14, 2005 in Docket No. 041272-EI, Progress Energy Florida, Inc. hereby submits this Corporate Undertaking for all amounts collected under the approved storm recovery charge subject to potential refund as the Commission may order subsequent to the outcome of the Office of Public Counsel's appeal of Order No. PSC-05-0748-FOF-EI.

Sincerely,

PROGRESS ENERGY FLORIDA, INC.

By: H. William Habermeyer, Jr.

Title: President and Chief Executive Office

SWORN TO AND SUBSCRIBED before me this 15 day of August, 2005.

\_\_\_\_\_  
Notary Public

Printed name: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

P.O. Box 14042  
MAC - CX2C  
St. Petersburg, FL 33733



Helen M. Kyriakou  
Commission # DD455582  
Expires October 24, 2009  
Bonded Troy Fair - Insurance Inc. 800-385-7019

TPA#2060595.1

EXHIBIT A