

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition on behalf of Citizens of )  
the State of Florida to require ) DOCKET NO. 060658-EI  
Progress Energy Florida, Inc. to )  
refund to customers \$143 million ) Filed: February 27, 2007  
\_\_\_\_\_ )

**RESPONSE OF CITIZENS TO PEF'S MOTION  
TO STRIKE STAFF TESTIMONY**

The Citizens of the State of Florida, through the Florida Office of Public Counsel, file their Response to Progress Energy Florida Inc.'s ("PEF") Motion to Strike the testimony of Staff witness Bernard Windham, and state:

1. At page 2, PEF construes Mr. Windham's Testimony addressing foreign coal as implying a position on the merits of OPC's contention regarding Powder River Basin coal. This is not the first time that PEF has detoured from its task at hand to read such an argument into Staff's testimony. Recently, PEF made the identical argument in a motion to extend time to which Citizens had agreed. When Citizens' counsel indicated that he intended to respond to the argumentative portion of the motion to extend unless PEF modified its stance, PEF agreed to circulate a message to parties and Staff disavowing any knowledge of the reason for Mr. Windham's choice of wording. A copy of the message is attached.<sup>1</sup> The Commission should disregard the baseless statement made in PEF's subsequent Motion to Strike.

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<sup>1</sup> While the attachment contains a "confidential" tag, it clearly is not confidential, as it was distributed to all parties.

2. In its motion, PEF makes largely a due process argument. Citizens would point out that PEF identified and asked for the extension of time it said it needs to respond to Staff's testimony. Any due process argument would be addressed by the granting of the extension designed to enable PEF to protect its interests in light of Staff's testimony.


3. Essentially, PEF asserts that Staff's testimony is irrelevant to any issue raised by the Petition. Citizens would point out that one thrust of the Petition and Citizens' presentation is that PEF favored transactions with its affiliates over more economical alternatives. Citizens believe Staff's testimony is relevant to the case, in that it tends to prove that assertion.

4. At page 9, PEF concludes, "The Commission, therefore, should not "second guess" the implicit if not explicit determinations at the time of each fuel proceeding that PEF acted reasonably and prudently by allowing Mr. Windham's testimony to be considered." Here, PEF is out of bounds. In the Motion to Strike, PEF first asserts—not that the Commission is foreclosed by past rulings from considering prudence now, an argument it lost when the Commission denied PEF's Motion to Dismiss—but that Mr. Windham's testimony raises new issues, or is irrelevant to issues raised by OPC's Petition. The sentence on page nine is a new effort to dispute the Commission's ability to entertain evidence of imprudence following approval of collections. By extension PEF would continue to object to the proceeding on the Petition. Order No. 12645 among others, established that there is no "implicit or

explicit" finding of prudence attached to initial authority to collect fuel costs from customers. The Commission observed at the time that, in return for the benefit of current recovery, the utilities must accept a degree of uncertainty attached to the Commission's refusal to relinquish its jurisdiction until all relevant facts are brought before it. The prudence of PEF's actions and inactions is at issue in the docket, whether or not the Commission grants PEF's motion to strike Staff's testimony. The question raised by PEF's motion to strike is—not whether prior approvals to collect foreclose receipt of evidence of imprudence, because they do not—but whether Staff's testimony falls within the allowable scope of the proceeding initiated by OPC's Petition.

In Sum, OPC believes the Motion to Strike should be denied. Even if the Commission strikes Staff's testimony—which OPC does not suggest or support—the prudence or imprudence of PEF's fuel procurement actions (and inactions) remains at issue in the docket.

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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the Response of Citizens to PEF's Motion to Strike Staff Testimony to Progress Energy Florida's has been furnished by electronic mail and U.S. Mail on this 27<sup>th</sup> day of February, 2007 to the following:

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**From:** Costello, Jeanne [JCostello@CarltonFields.com] on behalf of Walls, J. Michael [JWalls@CarltonFields.com]  
**Sent:** Friday, February 16, 2007 1:19 PM  
**To:** McGLOTHLIN.JOSEPH  
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**Subject:** Docket No. 060658

Dear Joe,

I understand you had a question regarding the motion for extension of time to respond to Staff's testimony. We are not arguing that Mr. Windham agrees that PEF should not have purchased PRB coal for CR4 and CR5 when we refer to his assumption at page 11, lines 14-19 of his testimony because we don't know why Mr. Windham is making that assumption. We are simply pointing out that he has assumed away the very issue in this proceeding and raised another issue, i.e. whether PEF should have purchased foreign low sulfur compliance coal, which we cannot fairly and adequately respond to in the time originally allotted for rebuttal testimony for OPC and AARP (by February 20) to respond to PEF's testimony on the issue in this case. Accordingly, we need an extension of time to respond to Staff's testimony. That is the sole purpose of the motion (although we do reserve the right to move to strike the Staff testimony because it does raise a new issue).

I hope this clarifies the purpose of our motion and satisfies your concerns.

Mike

Confidential: This e-mail contains a communication protected by the attorney-client privilege. If you do not expect such a communication from Mike Walls, please delete this message without reading it or any attachment, and then notify Mike Walls at [mwalls@carltonfields.com](mailto:mwalls@carltonfields.com) of this inadvertent delivery.

2/24/2007