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Sent: Monday, February 16, 2009 4:55 PM
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Subject: E-Filing (Docket No. 090079-EI)
Attachments: 090079 OPC and FAG Response to PEFs petition for Emer Waiver of 60-day notice req in rule 26-6.140, (F.A.C.).pdf

Electronic Filing

a. Person responsible for this electronic filing:

Charles J. Rehwinkel, Associate Public Counsel
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b. Docket No. 090079-EI

In re: Petition for Rate Increase by Progress Energy Florida, Inc.

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

d. There are a total of 9 pages.

e. The document attached for electronic filing is **Public Counsel's Response to Progress Energy Florida's Petition for Emergency Waiver of the 60-Day Notice Requirement in Rule 25-6.140, (F.A.C.)**.

Thank you for your attention and cooperation to this request.

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DOCUMENT NUMBER-DATE

01262 FEB 16 8

2/16/2009

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Rate Increase by)
Progress Energy Florida)
_____)

Docket No. 090079-EI

Filed: February 16, 2009

**PUBLIC COUNSEL AND FLORIDA ATTORNEY GENERAL'S RESPONSE
TO PROGRESS ENERGY FLORIDA'S PETITION FOR EMERGENCY WAIVER
OF THE 60-DAY NOTICE REQUIREMENT IN RULE 25-6.140, (F.A.C.)**

The Citizens of the State of Florida, through the Office of Public Counsel and the Attorney General ("Respondents"), files their response to Progress Energy Florida's ("PEF" or "Company") Petition for Emergency Waiver of the 60-Day Notice Requirement in Rule 25-6.140, (F.A.C.) ("Petition") as follows:

On February 12, 2009 a sequence of events occurred, to wit:

- At approximately 8:00 A.M., PEF filed its Test Year Notification letter appearing to signal its intent to file a rate case and a docket number was concurrently established;
- At approximately 9:25 A.M., PEF filed the instant Petition;
- At approximately 11:05 A.M., the Public Counsel filed his statutory Notice of Intervention; and
- At approximately 4: 57 PM, the Florida Attorney General filed his Motion to Intervene in the docket.

These events at the Florida Public Service Commission signaled the official beginning of the impending PEF rate case. At 10:00 A.M. (ET), the same day, PEF's parent company, Progress Energy, initiated a webcast to report 2008 earnings.

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01262 FEB 16 8

FPSC-COMMISSION CLERK

In its Petition, PEF seeks a waiver from the requirements of the Commission's Rule 25-6.140, F.A.C. ("Rule"), which requires that a company wait at least 60 days after filing a Test Year Notification letter before filing the Minimum Filing Requirements ("MFRs") which, among other things, are a prerequisite to establishing certain statutory timeframes and deadlines for Commission action. In order to avoid the Chapter 120 timeframes for granting a waiver, PEF claims that an emergency exists and asks that the petition be considered and granted on an expedited basis.

In support of its Petition, PEF states several things:

- That the rules exist only for the benefit of the Commission and its administration of the hearing process;
- That PEF has substantially complied with the requirements of the rule by working out the key hearing dates and timeframes ahead of time;
- That the emergency exists in part because failed settlement negotiations somehow prevented them from filing the Test Year Notification; and
- That strict adherence to the Rule would discourage settlement negotiations in the future.

It is important to note that this Petition and proposed rate reductions contained in a PEF press release and communicated to Investors are unrelated. Commission action on the Petition will not affect the announced rate reductions.

Respondents strongly take issue with PEF's filing and characterizations of the basis for its request – especially the so-called "emergency" -- and the putative intended beneficiaries of the rule. The company brazenly describes a closed system that exists solely for the benefit of the Company and its investors. On a day when the two established statutory representatives of the ratepaying public swiftly demonstrate their intent to be involved from the very beginning of the case, PEF has the temerity to suggest that the timing of the hearings, which drive the timing and

conduct of discovery and public input, are not a matter of their concern. Clearly, the Rule has a more substantive impact and any waiver of it may be better dealt with under the provisions of Section 120.542, Florida Statutes.

On page 1 of the petition, PEF states that prior to filing its test year letter, they have “provid[ed] the PSC and its Staff time to coordinate schedules and staffing requirements, and set prehearing, service hearing, and technical hearing dates for PEF’s base rate proceeding...” Astoundingly, they represent that they have these matters worked out. If there is any doubt as to their certainty of these facts, at virtually the same time the Petition was being filed, Progress Energy CEO, Bill Johnson, was telling select Wall Street investors that they had secured a tentative schedule for the hearing with a September hearing date. See attached slide excerpt for the Progress Energy February 12, 2009, Webcast of 2008 earnings.

Nowhere does any concern about intervenors or ratepayers appear to factor into PEF’s calculus. Contrary to their representations, the 60 day rule provides a meaningful opportunity for the rate paying public to provide input – even if it is just suggestive or advisory – regarding hearing timeframes and hardships for customers and their witnesses. Ordinarily this opportunity would be compelling. In this case where Florida Power and Light has already filed its case and had hearing dates of August 4-7 and 10-14, 2009, tentatively set, the criticality becomes overwhelming.

The Public Counsel and the Attorney General (and other regularly participating intervenors) are vitally impacted by the discovery and testimony timeframes, which are in turn heavily influenced by the hearing and prehearing dates. For this reason, it is patently wrong to suggest that the rule does not impact the determination of fair, just and reasonable rates. Respondents take issue with any suggestion that procedural due process is not impacted by the events that have already occurred, and the Commission taking action to grant the waiver.

Respondents also flatly dispute that an emergency exists. The Petition fails to expressly demonstrate what any such emergency is and that any implied emergency is not one of its own making. If the alleged emergency is in the nature of an earnings impact, it is certainly not stated

and most certainly not demonstrated. If any discussion of earnings occurred as a basis for having hearings set in order for the company to meet timeframes given to Wall Street investors, issues of substantive due process could be implicated. Clearly, the Company cannot assert that it has made any public or private showing that potential earnings impacts warrant an emergency treatment or hardship waiver. Any hearing schedule bind that the company perceives themselves to be in due to pre-filing discussions with Commission employees is one solely of its own making and investor representations.

Apart from potential due process concerns, Respondents also take issue with the characterization that adherence to the rule will chill settlement negotiations. Respondents have a concern that the mere fact of PEF having had unofficial, pre-filing communications with unstated persons at the Commission (where the appearance exists that potential improper determinative communications could be attempted) could itself chill intervenors' willingness to engage in settlement negotiations. More alarming and troubling is the Petition's disclosure of alleged actual settlement negotiations in this situation.

In a misguided effort to demonstrate hardship, PEF states that the Commission should find that hardship exists requiring waiver because:

“PEF has been engaged in settlement negotiations in an effort to avoid initiation of a base rate proceeding at this time. These settlement efforts delayed PEF's filing of the Test Year Notification while settlement discussions appeared fruitful.”

Ignoring what appears to be an improper effort to cast blame on unstated negotiators for the failure of negotiations, this statement is inappropriate and unworthy of reliance in resolving this Petition. Customarily, settlement negotiations conducted in the context of PSC proceedings are confidential. This confidentiality usually extends to the very fact of settlement negotiations and any unauthorized disclosure of such can potentially be deemed an ethical lapse. Beyond this, Respondents fail to see how this remotely rises to the level of a hardship.

Ironically, inclusion of this representation based upon a possible confidentiality breach in the Petition probably does more harm to the potential of *future* settlement negotiations than PEF's postulation suggests. Curiously, PEF makes no affirmative representation that any confidential settlement negotiations prevented it from filing, or imposed a prohibition on the Company to not file, its Test Year Notification. Nowhere in the Petition is there any kind of representation that they were not, for example, repeatedly encouraged to go ahead and file the Test Year Notification in any settlement negotiations that allegedly occurred. Absent such an affirmative representation regarding any prohibitory (as to Test Year Notification filing) impact or terms of alleged settlement negotiations, the PSC cannot make a determination that a hardship or emergency exists.

Respondents emphasize again that, at the same time that PEF filed the Petition and the Test Year Notification, they also issued a press release and indicated that they would be reducing the fuel adjustment charge and the nuclear cost recovery charge by a combined \$407 million. The outcome of this Petition and this docket has no bearing on those proposals. The announced reductions will occur regardless.

In summary, PEF has not met any burden of demonstrating that an emergency exists, that a hardship exists or that the Rule is merely procedural, and that it does not impact other parties. Respondents urge that it be denied and that any waiver proceed under the normal waiver process set out in Chapter 120, Florida Statutes.

Dated this 16th day of February, 2009.

Respectfully submitted,

BILL McCOLLUM
Attorney General

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s/ Cecilia Bradley
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Attorneys for the Citizens
of the State of Florida

DOCKET NO. 090079-EI
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **Response to Petition for Waiver** has been furnished by U.S. Mail and electronic mail to the following parties on this 16th day of February, 2009.

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s/Charles J. Rehwinkel
Charles J. Rehwinkel
Associate Public Counsel

4Q-2008 Earnings Call

February 12, 2009



Tentative Schedule for PEF's 2010 Base Rate Proceeding

- Test year letter filing Feb 12, 2009
- File rate case Mar 20, 2009
- Rate case hearing ~Sept-09
- Staff recommendation Oct/Nov-09
- FPSC final order Dec-09
- New rates effective Jan 1, 2010