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In re: Review of coal costs for Progress Energy Florida's Crystal River Unites 4 and 5 for 2006 ad 2007

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

d. There are a total of 38 pages.

e. The document attached for electronic filing is Citizens' Post-Hearing Statement of Positions and Post-Hearing Brief.

(See attached file: 070703.brief.sversion.dcc)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of coal costs for Progress Energy Florida's Crystal River Units 4 and 5 for 2006 and 2007.	DOCKET NO. 070703-EI DATED: May 26, 2009

CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF

Pursuant to Order No. PSC-08-0710-PCO-EI, the Citizens of the State of Florida, by and through the Office of Public Counsel ("OPC"), hereby submit their Post-Hearing Statement of Positions and Post-Hearing Brief.

Preliminary Comment On Organization: OPC has combined its Post-Hearing Statement of Positions and its Post-Hearing Brief into a single document. Each position statement will be set off with asterisks. OPC will consolidate its arguments on the subparts of Issue 1 into two presentations addressing 2006 and 2007.

STATEMENT OF BASIC POSITION

Progress Energy Florida's ("PEF's") own bid evaluations prove that, at the critical decision points when PEF procured bituminous coal to be delivered to Crystal River Units 4 and 5 ("CR4-5") in 2006 and in 2007, producers submitted offers to PEF to supply considerably less expensive sub-bituminous coal. PEF's inability to accept them caused PEF to pay unreasonably high prices for coal in 2006 and 2007. PEF's efforts to repudiate its RFP bid evaluations after the fact and/or replace those bids with more expensive alternatives are transparently self-serving distortions and diversions. The Commission should require PEF to refund $33.9-35.6 million[1] to customers.

[1] The two values correspond to the alternative methodologies for quantifying the cost of Btus that would be added to the blended coal to match the number of Btus in an "all bituminous" scenario that are discussed below.

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PRELIMINARY STATEMENT

Unlike many cases that come before the Commission, the imprudent conduct of PEF was established before this docket began. The imprudence of PEF was determined by the Commission in Docket No. 060658-EI and is a given in this case. The sole question for the Commissioners is whether the imprudent conduct adversely affected PEF's customers in the form of unreasonably high coal costs at CR4-5 during 2006 and 2007.

As applied to the facts, the question becomes: When PEF was unable to take advantage of the units' ability to burn sub-bituminous coal as a consequence of its imprudent lack of testing and imprudent failure to obtain the necessary federal permit, were there available to PEF, at the points in time when it decided to procure coal , more economical sub-bituminous options than the bituminous coal that PEF purchased in 2004 for delivery to CR4-5 in 2006 and that PEF purchased in 2006 for delivery in 2007? When one logically applies the conclusions and methodology of Order No. PSC-07-0816-FOF-EI to the relevant circumstances, the answer is an unequivocal, unambiguous "Yes."

<u>ISSUE 1</u>: Did the imprudences in PEF's fuel procurement activities determined in Order PSC-07-0816-FOF-EI result in the costs of coal actually delivered to Crystal River Units 4 and 5 during 2006 and 2007 being unreasonably high?

Yes. Applying the findings and cost comparison methodology contained in Order No. PSC-07-0816-FOF-EI to the facts bearing on 2006 and 2007 establishes that the costs borne by customers were unreasonably high in the amount of $33.9-36.6 million.

a. <u>How should the reasonableness of the costs of coal delivered to Crystal River Units 4 and 5 during 2006 and 2007 be measured?</u>

*The reasonableness should be measured by the "yardstick" of Order No. PSC-07-0816-FOF-EI. In that Order, the Commission compared the costs of the 20% highest costing tons actually delivered by water with the evaluated costs of alternatives. The Commission recognized that, had PEF been able to purchase the alternative (low sulfur)

sub-bituminous coal, PEF would have spent less for SO2 emissions allowances. The Commission did not reduce the amount of overcharges to be refunded by the cost of coal handling upgrades that the plant would have required, for the reason that such costs would have been considered in base rate proceedings.*

b. **<u>What candidates for alternative coal purchases should the Commission consider in evaluating whether more economical coal was available for delivery to Crystal River Units 4 and 5 during 2006?</u>**

*The Commission should look to the numerous bids to supply sub-bituminous coal in 2006 that PEF received in April 2004, because that is the relevant procurement decision point in time. Four producers of sub-bituminous PRB coal submitted six offers lower than the bituminous coal that PEF was forced to buy because it did not have a permit to burn sub-bituminous coal.

PEF's proposed alternative, a tiny spot purchase, did not occur until 2006, after market prices had risen. PEF is using "hindsight" to artificially increase the cost of the alternative. Moreover, the purchase is not representative in any event.*

c. **<u>By what amount, if any, were the costs of coal actually delivered to Crystal River Units 4 and 5 unreasonably high in 2006?</u>**

Had PEF accepted the 2004 Kennecott bids, under the PSC formula coal costs would have been lower by $14.7-15.4 million. Had PEF instead purchased the "typical PRB" coal from North Rochelle, the differential would have been approximately $12.4-13.1 million. To these amounts, one must add $1.1 million, to account for the fact that the alternative coal not purchased contained far less sulfur and would have resulted in lower costs of emissions allowances.

COMBINED ARGUMENT ON ISSUES I, Ia, Ib, and Ic

In Order No. PSC-07-0816-FOF-EI, the Commission compared the highest costing 20% of actual deliveries with the evaluated cost of the sub-bituminous alternatives to determine whether PEF's coal costs were unreasonably high during the time frame encompassed by Docket No. 060658-EI. Both OPC and PEF performed analogous comparisons in the evidence they presented in this case. The witnesses for OPC and PEF substantially agreed as to the cost of the actual deliveries; however, they disagreed on the choice of the sub-bituminous alternatives appropriate for use in the comparison. For 2006, OPC witness David Putman used one of several bids submitted

by producers of PRB sub-bituminous coal in April 2004. For the following reasons, the Commission should adopt his choice of alternatives, and assess the question of unreasonably high costs accordingly.

In April 2004, PEF issued a Request For Proposals in which PEF requested interested coal producers to submit offers to supply CR4-5 during 2005, 2006, and 2007. After receiving the bids, PEF's procurement personnel analyzed them on the basis of "cash" costs and "evaluated" costs. An "evaluated" cost takes into account the impact of the particular characteristics of the coal under consideration on the operations of the unit that would burn it. Depending on how the coal being measured compares to a base line of operational considerations, the evaluated cost of the coal may be more or less than the "cash" cost, which is the price that the producer would charge PEF. In Order No. PSC-07-0816-FOF-EI, the Commission stated that the evaluated cost is the appropriate value to use when assessing whether PEF had available a sub-bituminous alternative that would have been less expensive than the bituminous coal it purchased.

Of all of the bidders that offered to deliver coal in each of the years 2005, 2006, and 2007, the six lowest bids in terms of dollars per million Btu – when measured on the basis of "evaluated costs" – were submitted by Kennecott, Arch, Triton, and Peabody, all of whom offered to supply sub-bituminous coal. (Exhibit 19) At the time, PEF still had not obtained a permit to burn sub-bituminous coal; therefore, it could not legally take advantage of the lower costs of the sub-bituminous alternatives. With the offers of the sub-bituminous producers in hand, and having determined them to be the lowest costing alternatives when measured on the basis of "evaluated costs," PEF instead proceeded to

purchase more expensive bituminous coal from other bidders and from a bituminous producer already under contract. (Exhibit 18)

OPC witness David Putman testified, and OPC submits, that the bids that were solicited by PEF and that were before PEF at the time it made the decision to purchase coal for delivery in 2006 comprise the universe of alternatives that should be compared with "actual delivered costs" to ascertain whether PEF incurred unreasonably high costs of coal during 2006. These bids are the best evidence of the availability and cost of the sub-bituminous alternatives to PEF *at the time PEF shopped and purchased.* To focus on the alternatives that were presented to PEF at the time it made the decision is consistent with the proposition that regulation should hold a regulated utility accountable on the basis of what the utility knew or should have known at the time it made the decision under review. To compare transactions or prices associated with any other point in time would be to substitute different market conditions for those that governed at the time PEF made the decision to buy coal. Accordingly, Mr. Putman used the lowest evaluated costs that resulted from the 2004 RFP—represented by two bids from Kennecott Coal—as the 2006 alternative. While he observed that PEF had the opportunity to contract with the bidders into the 2004 RFP for deliveries in 2007 as well as 2005 and 2006, Mr. Putman did not fault or critique PEF's decision to contract for deliveries in only 2005 and 2006. He reasoned that the timing of deliveries is a question separate and apart from the question of whether PEF purchased the most economical coal that was offered at the time of the decision. (Tr.-282) To do otherwise would be to second guess the utility's decision based on hindsight. At the time PEF made its decision to purchase coal it did not know, and could not have known, that 2004 prices for coal to be delivered in 2007

would prove to be materially lower than 2006 prices for delivery in 2007. Thus, Mr. Putman testified that the Commission should compare to actual 2006 delivered costs the evaluated cost of the most economical alternatives that PEF received in response to the April 2004 RFP it employed to evaluate the market and to identify the best candidates for contracts for deliveries in 2006.

Mr. Putman's intent was to emulate the calculation methodology that the Commission employed in Order No. PSC-07-0816-FOF-EI. To that end, in supplemental testimony he amended his original calculation to quantify the cost of additional tons of coal that would be necessary to equate, in a 20/80 sub-bituminous/bituminous mixture, the total number of Btus that PEF received in the bituminous coal that was actually delivered. Mr. Putman provided values based on two assumptions. The first is that the "make-up" tons would be bituminous coal. The alternative – and the one which OPC regards as more consistent with Order No. PSC-07-0816-FOF-EI – is the assumption that the make-up tons would consist of the same 20/80 blend that formed the basis for the Commission's findings.

Astonishingly, PEF's approach to the fact that in 2004 four producers of sub-bituminous coal submitted six offers lower than the proposals of the bituminous producers with whom it contracted was to *ignore* the bids, as though they didn't exist. When recounting PEF's procurement activities in the 2004 RFP, bids, and procurement decisions bearing on the selection of the alternative to 2006 actual deliveries, in his direct testimony PEF witness Weintraub said only, "Some of the coals were procured under competitive bid processes which occurred in 2005 and earlier." (TR-47)

In lieu of the 2004 bids, when comparing actual costs with the sub-bituminous alternatives, PEF witness Heller used the cost of approximately 3,000 tons of sub-bituminous coal that PEF purchased from Peabody for use in a May 2006 test burn at CR5. By using the cost of the coal purchased for a test burn, Mr. Heller artificially increased the cost of the sub-bituminous alternative that he then compared with the actual delivered costs. The market prices for sub-bituminous coal increased between April 2004 (the time of PEF's solicitation and purchase decision) and *two years later* in 2006 (when it purchased 3,000 tons—a relatively tiny quantity--on the spot market for a test burn). Regulated utilities generally complain about the use of "hindsight regulation;" ironically, in this instance PEF used "hindsight" (the knowledge that prices increased between 2004 and 2006) to inflate the cost of the sub-bituminous alternative.

PEF witness Weintraub defended Mr. Heller's choice, and criticized Mr. Putman's analysis, on the basis that PEF used "real transactions" to represent the sub-bituminous alternative. (TR-538) However, Mr. Weintraub ignored an important point. The nature of a comparison between actual costs—here the delivered costs of the 20% highest costing tons, according to data that PEF reported to FERC—and the corresponding cost of the alternative to those actual deliveries necessarily involves a "purchase not made." In other words, when Mr. Weintraub says that the less expensive sub-bituminous coal that was offered to PEF in 2004 was not the subject of a real contract and subsequent delivery, *he is making OPC's point*. The 3,000 tons of Peabody coal that PEF purchased in 2006—*two years* after the pertinent procurement decision-- may have been a "real transaction," but the offers to deliver more economical sub-bituminous coal in 2006 that PEF received but could not accept in 2004 were a missed opportunity. The

"real transaction" amounts to little more than a diversionary tactic. It is an effort to divert the Commission's attention away from the favorable market conditions that prevailed when PEF made its major procurement decisions, of which the sub-bituminous bids to the 2004 RFP should have been a part.

PEF challenged Mr. Putman's choice of the lowest evaluated 2004 bid on a number of grounds. None withstands analysis.

Mr. Putman's assumption that the evaluated cost he employed represented the second year of a contract beginning in 2005 was consistent with Order No. PSC-07-0816-FOF-EI. PEF's Mr. Weintraub asserted that the choice of a 2004 bid for delivery in 2006 would have been problematic because 2006 was the second, not the first, year of the 2005-2007 timeframe for deliveries that PEF identified in its RFP document. (TR-543) Mr. Weintraub appeared to imply that Mr. Putman necessarily and unrealistically was expecting a bidder to "sit out" a year of deliveries in 2005. Mr. Weintraub mistakenly characterized Mr. Putman as expecting a producer to begin a contract in 2006 when the bid was to begin in 2005. However, Mr. Weintraub overlooked the fact that in Order No. PSC-07-0816-FOF-EI, the Commission determined that PEF should have been purchasing sub-bituminous coal in 2003, 2004, and 2005. Had PEF conducted its procurements in the manner consistent with the findings in Order No. PSC-07-0816-FOF-EI, it would have contracted with one or more producers to purchase sub-bituminous coal for delivery in 2005, and the 2004 RFP would have constituted the practical, real world opportunity for it to have done so. Therefore, when Mr. Putman used the prices bid for deliveries in 2006, he was assuming these prices would have been the pricing component of the second year of a contract that began with deliveries in 2005, not the beginning

prices of a contract. (TR-476) In this manner, Mr. Putman harmonized the actual procurement opportunities available to PEF with the conclusion in Order No. PSC-07-0816-FOF-EI that PEF should have been purchasing sub-bituminous coal in the 2003-2005 timeframe.

The Commission did not limit PEF to Wyoming coal in Order No. PSC-07-0816-FOF-EI. PEF witness Weintraub disputed Mr. Putman's choice of 2006 alternatives on the basis that it was not the "same PRB coal" on which the Commission "received evidence" in Docket No. 060658-EI. (TR-544-545) It appeared PEF was claiming that only coal from Wyoming could be an "approved candidate," until such time as the Commission "received evidence" on another source. (TR-555) This claim is absurd. First, when in Order No.PSC-07-0816-FOF-EI the Commission defined the Powder River Basin, it referred to coal sources in the states of Wyoming and Montana. (Order at page 2) In terms of the Commission's only reference to the area within the Powder River Basin, Wyoming and Montana received "equal billing" in the order. The word "Wyoming" appears nowhere else in the order. (The Kennecott coal that Mr. Putman used in his 2006 comparison is mined in Montana.)

Next, the characteristics and specifications of coals are not necessarily functions of their geographical locations. What matters is not the state or county of origin, but whether the coal is suitable for use in CR4-5. When PEF finally applied for and received a permit to burn sub-bituminous coal, neither PEF's application nor the permit limited PEF to coal mined in a particular county or state. (Exhibits 14 and 16)

In addition, when PEF issued its RFP, the specifications within the RFP were functions of properties, contents, and characteristics, not geographical origin. In a

subsequent RFP, when Mr. Weintraub was intrigued by an extremely economical offer of sub-bituminous coal from Indonesia, he identified it as a "coal of interest," not a "coal disqualified by geographical origin." (Exhibit 2, Item 10, p.54) Under the convoluted scenario depicted by Mr. Weintraub, a coal could not be considered an alternative to bituminous coal until (1) PEF failed to purchase it, (2) either the Commission or an intervener disputed its decision not to purchase, (3) the Commission "received evidence" on the coal in a subsequent fuel-related proceeding and deemed it appropriate to use, and (4) the company performed lengthy test burns two or more years after the opportunity to purchase had passed. To defend against a refund, PEF uncharacteristically is willing to name the Commission procurement-officer-in-chief. Its scenario would ensure that opportunities to lower customers' fuel costs will have passed PEF by before PEF is positioned to take advantage of them. Even witness Weintraub did not attempt to defend this construct under questioning. He said, in response to hypothetical questions concerning whether the Commission could fault PEF for failing to take advantage of coals from various locations outside the PRB, "The Commission could (do) what they please to, absolutely." (TR-565-566). If the Commission can take action with respect to missed opportunities regardless of geographical origin, it follows that any party can identify the issue and request the Commission take the action which, PEF's witness acknowledged, falls within the Commission's jurisdiction and powers. The Commission should reject out of hand the assertion that only the coal "on which it received evidence" in a prior docket can be a candidate for the role of alternative to bituminous coal in this docket.

The testing process would not have increased the cost of the Kennecott bids. PEF witnesses Weintraub and Stenger together described a scenario in which test burns lasting months would have caused PEF to delay negotiating a purchase of the Kennecott coal for approximately a year, during which time the price would have risen materially above that of the original bid. The contention that the test burns would have added months to the procurement process is contradicted by the evidence.[2] When in the past PEF conducted test burns of new coals, those burns lasted several *days*, *not* several months. (Exhibit 59) PEF's history of test burns is consistent with the testimony of OPC witness Putman, the former manager of fuel supply for Southern Company Services, who stated a test burn lasting several days is sufficient to develop most of the information the utility needs regarding the effect of the coal on the unit. (TR-485) The successful May 2006 test burn at CR 5 of a sub-bituminous/bituminous blend—the test burn on which PEF based its application for a permit to burn sub-bituminous coal—lasted 2 ½ days. (Exhibit 59 at page 2 of 16) The author of the 2006 test burn report (who also was in charge of the test), Dan Donochod, observed that an additional several weeks of an "extended burn" would position PEF to order the sub-bituminous coal in commercial quantities. (Exhibit 50, at page 3 and 4 of 16) Mr. Donochod also commented that the May 2006 test burn would enhance the ability to quickly test other sub-bituminous coals. (Exhibit 59, at page 4 of 16)

Assuming *arguendo* that PEF had desired an extended test burn of Kennecott coals that would have required 8-12 months, it would still have been necessary for PEF to contract for a quantity of Kennecott coal sufficient to burn the blend during such an

[2] PEF witness Stenger, who contended that the test burn would have required several months at a minimum, has never conducted a test burn. (TR-675)

extended test burn time frame. The 2004 RFP provided the opportunity to contract for a supply of sub-bituminous coal in quantities that would permit the lengthy testing that PEF says would be necessary. (Exhibit 2, Item 11, at p. 50-51) In short, whether the testing would have been of short duration, as PEF's history indicates and OPC's witness maintains, or drawn out over a year, as PEF unconvincingly insists, the fact remains that PEF missed an opportunity in its 2004 RFP.

Witness Weintraub's assertion that it was unreasonable for OPC's witness to assume that Kennecott would have agreed to a "shortened" contract at the same bid price is contradicted by his former employer's example. PEF witness Weintraub argued that OPC witness Putman incorrectly assumed that Kennecott would have agreed to maintain the bid price in a one-year contract. (TR-543) Again, Mr. Weintraub did not understand that Mr. Putman assumed 2006 would have been the second year of the contract. In addition, the marketing arm of Progress Fuels Corporation—which submitted bids to supply bituminous coal to PEF in 2004, and of which Mr. Weintraub was a principal officer at the time—agreed to maintain its bid price in a shortened contract during the utility's 2004 solicitation activities. Specifically, Progress Fuels Corporation offered to supply coal for all three years of the time frame encompassed by the 2004 RFP, but agreed to supply coal for the same bid price when PEF contracted for deliveries in only 2005-2006. (TR-567-568) With respect to the reasonableness of Mr. Putman's assumption, it appears that Mr.Weintraub—or at least the company of which he was a principal officer—held a very different view than the one he presented in testimony.

Mr. Putman used the correct transportation costs in his analysis. In rebuttal testimony, PEF contended that OPC witness Putman used "outdated" transportation costs. PEF added increased transportation costs to its (already increased) commodity costs to arrive at an "alternative" far more expensive than the evaluated cost that Mr. Putman took from PEF's bid evaluation sheets. However, the transportation costs that Mr. Putman used were the same transportation costs that PEF built into the development of evaluated costs during the RFP process. (Exhibit 2, Item 10, p.30) PEF ignored its own practice of securing transportation services at the same time it negotiated a contract for the coal. (TR-426-427) PEF's own documents demonstrate that PEF had the ability to quantify transportation costs accurately, and then quickly lock them into contracts. In Exhibit 18, the utility's procurement officer reported to management that, as a result of the 2004 RFP activity, PEF would purchase from Massey Energy 360,000 tons in 2005 and 180,000 tons in 2006 at a delivered cost of $2.693/MMBtu; and purchase 360,000 tons in both 2005 and 2006 from Progress Fuels at a delivered cost of $2.735/MMBtu. By comparing the prices of these contracts to the delivered costs shown on the bid evaluation sheet, one can see that the transportation component in the contract was identical to the transportation component that PEF incorporated in its analysis of bids. (TR-428-429). PEF did not allow the transportation component of the evaluated cost of *bituminous* coal to become "outdated." Instead, it acted concurrently with the negotiation of the contract for the commodity to secure transportation at the cost that prevailed at the time the bid was received. This was prudent on PEF's part. By the same standard, it would have been *imprudent* for PEF to use less care in quantifying the cost of transporting sub-bituminous coal or delay securing commitments to transport the coal at that price. Stated differently,

PEF's contention that Mr. Putman's transportation cost assumptions are "outdated" depends upon the assumption that PEF would have imprudently sat on its hands and allowed costs to increase rather than arrange for transportation when the costs were known. Based upon the bituminous example, the Commission must either regard the transportation component of the evaluated costs shown on PEF's bid summaries as the appropriate costs to include in the comparison with actual delivered costs, or assume that PEF did not quantify the costs of transporting sub-bituminous coal with the same degree of prudent precision and care, or would have allowed such costs to increase by imprudent neglect or delay. Only by allowing PEF to employ a double standard with which to resist a refund can the Commission conclude that Mr. Putman did not use the appropriate transportation costs in his comparison.[3]

The sodium content of the Kennecott coal was no bar to its use in CR4 and CR5. In rebuttal testimony, PEF witness Stenger contended the sodium content of the Kennecott "Spring Creek" coal, which (absent blending) would contain approximately 8% sodium, would have presented operational issues in the form of the propensity for slagging, and, therefore, would have required lengthy testing—if it qualified at all. Ms. Stenger did not incorporate in her testimony any recognition of either (a) the ability of CR4 and CR5, by virtue of design, to accommodate coals having severe slagging properties or (b) the diluting effect of combining the Kennecott "Spring Creek" coal with

[3] This point applies with equal force to PEF's efforts to use transportation costs higher than those embedded in the evaluated costs of the Indonesian coals, which Mr. Putman employed as the sub-bituminous alternative to 2007 actual costs.

bituminous coal having far lower sodium content in a 20/80 sub-bituminous/bituminous blend.[4]

The Commission received as evidence in this docket the testimony and exhibits of Joe Barsin, who testified for OPC in Docket No. 060658-EI. Mr. Barsin's role in the prior docket was to rebut assertions by PEF witnesses that CR4-5 could not accommodate sub-bituminous coals because not enough was known about their properties at the time they were built. Mr. Barsin testified concerning the detailed research his company, Babcock and Wilcox, performed in the 1970s and then incorporated in the design of CR4-5. Among the research papers that he attached as exhibits to his rebuttal testimony was one entitled "*Experience With High Sodium Sub-Bituminous Coal, presented at the American Society of Mechanical Engineers Annual Meeting of November 16-21, 1280, prepared b J.R. Barsin, Product Manager, Babcock and Wilcox Co.*. Notwithstanding the assertions of PEF's witnesses, the specific properties of sodium were known at the time, and their effects were managed through the advanced design of the units.

The specific problem that coals containing high concentrations of sodium present to some units is one of "slagging"—that is, the depositing of combustion byproducts on the surfaces of boiler walls. Mr. Barsin testified at length regarding the measures his company incorporated in the design of CR4-5 to prevent and/or manage slagging. Principally, the design incorporated the sizing and configuration of critical components of

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[4] While she did not take into account the design parameters of the units, Ms. Stenger included among her exhibits a photograph of a boiler wall covered with slag. An assistant held up an enlargement of the photograph during Ms. Stenger's testimony, for added effect. Nowhere did PEF identify the unit, much less provide information about the design capabilities of the unit. Nowhere did PEF identify the coal that was being burned in the unit. Nowhere did PEF disclose how long the interval had been since the slag was last removed from the boiler. While the witness said the photograph was for "illustration," clearly PEF hoped the Commissioners would be led by the visual image to have an (unwarranted by proof) negative reaction to the Kennecott coal. The decision in this case must be related to an analysis of facts, not a reaction to a visual image that PEF made no effort to demonstrate to be representative of conditions at CR4-5.

the boiler to allow the units to accommodate severely slagging coals. In fact, the units were designed to enable PEF to burn Illinois Basin bituminous coal in them. Illinois Basin coal has slagging properties worse than any of the sub-bituminous coals that PEF considered. (TR-532) This fact is extremely significant to this docket, because *PEF plans to burn Illinois Basin bituminous coal in CR4-5 after it completes the installation of scrubbers on the units.* (TR-304; Exhibit 28) PEF plans to begin burning Illinois Basin coal because the scrubbers, by removing SO2 from stack gases, will enable PEF to burn coal having higher concentrations of sulfur and continue to comply with emissions standards. The fact that PEF is pursuing confidently its plan to burn a coal with more extreme slagging properties than any coal[5] that was offered during the RFPs is revealing. It shows that the concern that PEF expresses over the possible effects of the Kennecott "Spring Creek" coal has far more to do with resisting a refund rather than with impacts on boiler performance.

The fact that PEF's witness ignored the dilution effect of a 20/80 blend is equally significant. While the Kennecott "Spring Creek" coal contains approximately 8% sodium, when blended with bituminous coal that PEF typically burns, the sodium content would fall to approximately 1.61%. (TR-448-451; Exhibit 57) In this reduced concentration, the sodium content is more or less typical and presents no special concern; for instance, the "design basis" blend of 50% sub-bituminous and 50% Eastern bituminous coal is specified at 1.5% sodium. Moreover, to have some sodium in the coal is desirable, because sodium enhances the efficiency of the electrostatic precipitator. (TR-452-454) Indeed, some producers of coal containing less sodium than the desired concentration offer to add sodium to their coal so that it is more acceptable to buyers.

[5] To this point, PEF has never conducted a test burn of Illinois Basin bituminous coal.

(TR-453-454). When one considers the design features of the units and the diluting effect of a 20/80 blend, one must conclude that the sodium content that might have been an issue for other units[6] is of no operational consequence at CR4-5. If anything, the sodium would help the efficiency of the units' precipitator.

The only pertinent consideration regarding the sodium content of the Kennecott "Spring Creek" coal is whether PEF captured the O&M expense associated with sodium in its evaluation process. For instance, if the sodium content of the Kennecott "Spring Creek" coal would require PEF to operate soot blowers more frequently than they would run when burning the "baseline" coal built into the model, that fact should be captured by the quantitative evaluation process and reflected in the evaluated cost. (TR-442-445)

Despite efforts by OPC to obtain detailed information regarding PEF's evaluation process, the record is ambiguous on this point. PEF claims to use either VISTA, a sophisticated computer program, or a spreadsheet containing parameters derived from VISTA, when it evaluates different coals. VISTA is capable of "modeling" the impact of different sodium levels on the costs of operating the particular unit in which it would be burned. (TR-443-445) If PEF incorporated this feature of VISTA when it evaluated the coals offered during the 2004 RFP, then the full effect of the sodium content will have been reflected in the evaluated cost that PEF ranked lowest among the bids it received. The bid summaries provided to OPC do not contain a column labeled "sodium," and it may be that not all of the capabilities of VISTA were brought to bear on the evaluation of

[6] PEF offered into evidence an answer to a Staff interrogatory in the fuel docket in which FPL recites that it did not purchase Spring Creek coal for its Scherer unit because of its sodium content. Unlike CR4-5, Scherer was not designed to burn severely slagging coals. Unlike CR4-5, Scherer burns 100% sub-bituminous coal, meaning that the high sodium content would not be diluted to normal levels in a blend of sub-bituminous and bituminous coals. In light of those differences, that FPL would elect not to purchase Spring Creek coal for Scherer is not surprising.

the coals, including the Kennecott "Spring Creek" coal. Because its descriptions of the evaluation process in testimony and discovery were vague, OPC submits the ambiguity on this subject must be resolved against PEF, which has the burden of proof in this case.

However, even if one assumes that a fuller consideration of the effect of the sodium content of Kennecott "Spring Creek" coal would have increased its evaluated cost, and assumes further the cost would be increased to the extent it was no longer the lowest bid,[7] that would not have signaled the end of the role of sub-bituminous coals in the procurement process. Several other producers of sub-bituminous coals submitted bids that were more economical, on an evaluated basis, than either the bids of bituminous coal or the cost of the existing contract to which PEF turned for a portion of its 2006 requirements. If PEF had possessed a permit to burn sub-bituminous coal, and if PEF had concluded that the Kennecott "Spring Creek" coal was not the most economical alternative when the impact of its sodium content on O&M was reflected in the evaluation, it would have turned to the bids of sub-bituminous coal that would have displaced Kennecott's #1 ranking. As this is the logical progression in the procurement process, it is also the course that the regulatory analysis should follow when comparing the sub-bituminous alternative to the cost of actual deliveries in 2006. Thus, the process does not end if the Commission concludes, for any reason, that the Kennecott "Spring Creek" coal does not present the appropriate sub-bituminous alternative for the analysis.

During the hearing, counsel for PEF appeared to argue that the analysis of alternatives is necessarily confined to a single coal—an "all-or-none" scenario in which, if PEF can persuade the Commission that the Spring Creek coal's sodium content is a reason to eliminate it from consideration, PEF is "safe at home" for 2006. (TR-494; 498)

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[7] Based on the record, one cannot conclude that either of these assumptions is operative.

As OPC said at the time, the analysis of 2006 does not end if the particular coal that OPC's witness used to quantify the differential in costs is somehow disqualified. All of the information needed to compare the costs of the other bids with the actual delivered costs is in the record.

The bid that ranked #2 in the April 2004 RFP was submitted by Triton Coal Company-North Rochelle. Since the North Rochelle coal is the same coal PEF selected for the test burn that it began, and then aborted, in 2004, it is an example of the "typical" PRB coal that, PEF argued, is the only coal on which the Commission heard evidence in Docket No. 060658-EI. The North Rochelle coal does not contain an unusual amount of sodium. Even PEF witness Stenger acknowledged that had PEF completed its testing, obtained a permit, and installed the minimal improvements needed prior to 2004, PEF could have ordered and burned the North Rochelle coal in commercial quantities after that point. (TR-674)

The producer's bid received an evaluated cost scoring of $2.00/MMBtu, compared to the value of $1.84/MMBtu that PEF assigned to the Kennecott "Spring Creek" coal; therefore, it would have been only slightly more expensive than the Kennecott coal. More importantly, it was less expensive on an evaluated basis than the bituminous coal that PEF purchased as a result of the 2004 solicitation, and would have been considerably less expensive than the 20% highest costing deliveries of bituminous coal during 2006.

PEF's bid summaries contain the Btu content, the sulfur content, and the evaluated cost in $/MMBtu. Mr. Putman's Exhibit 20 provides the mathematical formula for calculating the total cost of a particular coal candidate. In his exhibit, he used the Btu

and evaluated cost values for the Kennecott coal; however, the values for the North Rochelle (or any coal candidate for which the Btu content, sulfur content, and evaluated cost values are known) can be readily substituted in the formula. Moreover, this is not a process that would be "outside the record" since all the information needed is included in record testimony and evidence. To demonstrate that a record – based derivation of alternatives other than the Spring Creek coal are available to the Commission, OPC has made a simplistic approximation based on a ratio of values taken from exhibits admitted into evidence.

Using the commodity cost of the Kennecott Spring Creek alternative shown to be $19,757,283 on Exhibit 20, and a straightforward ratio of the evaluated costs of the Spring Creek and Triton North Rchelle coals, ($1.85/MMBtu and $2.00/MMBtu respectively), it is possible to approximate the different savings that would be attributable to the North Rochelle coal. A ratio of 1.85/2.00 shows that the evaluated cost of the North Rochelle coal was 1.081 times higher than that of the Spring Creek coal. This means that the North Rochelle alternative would have been 1.081 times more expensive than the Spring Creek option. When 1.081 is multiplied by the Spring Creek coal cost of $19,757,283, the result is $ $21,357,622.

Exhibit 20 also provides the cost of the actual 2006 deliveries to which the cost of an alternative coal must be compared. It is $35,193,668. Subtracting the cost of the North Rochelle alternative of $21,357,622 from the cost of the actual deliveries results in a savings of approximately $13.8 million. To this would be added the savings associated

with lower emissions of SO2. (As the sulfur contents of the two sub-bituminous coals are close, the savings in the costs of emissions allowances would not vary materially.)[8]

Comparing this total cost with the cost of the actual deliveries shows that incorporating the North Rochelle coal in a 20% blend would have lowered coal costs by $13 million dollars.

OPC submits that PEF has shown no basis upon which to disavow the role of the Kennecott bids as the lowest costing sub-bituminous alternative, and that including this alternative in a 20/80 blend of sub-bituminous and bituminous coals would have saved customers $14.7 million when compared to the cost of the actual 2006 deliveries. Even if (for the sake of argument) the Commission is persuaded that the Kennecott coal was not the best or most economical sub-bituminous alternative, it should recognize that PEF also had available an offer of Triton North Rochelle sub-bituminous coal that would have saved customers $13 million using the same comparison.

PEF did not "cover" its imprudence with later purchases that mitigated the differential in costs between the actual deliveries and the sub-bituminous alternative. (This particular subject relates to both the 2006 and 2007 analyses. OPC will develop it here, and incorporate it by reference later in the brief.) At one point in the proceeding, much attention was devoted to PEF's answer to Staff Interrogatory 29(A). In its answer, PEF essentially claimed that its purchases of low Btu bituminous coal (that it blended with higher Btu coal) and several spot purchases proved to be more economical than the sub-bituminous alternatives that were available at the time of the procurement decisions in 2004 and 2006. The assumptions that PEF employed in the calculations are seriously

[8] As stated, this is an approximation. Using data in the record, a more precise calculation can be made.

flawed. When corrected, the same comparison demonstrates that the sub-bituminous alternatives were far more economical.

First, it should be noted that the purchases of low Btu bituminous coal do not show up until the year 2007. Accordingly, even if one were to adopt PEF's mistaken promise (see below), 29(A) says nothing about an "offset" for the unreasonably high costs of 2006. Second, in its answer PEF uses as the proxy for the cost of the sub-bituminous alternative, the cost of the 2006 "actual transaction" (of 3000 tons) that, as OPC demonstrated earlier, reflected market conditions that had risen during the *two years* since the point in time at which PEF had the opportunity to take advantage of far lower bids that were submitted to the 2004 RFP. Only by allowing PEF to distort the conditions that governed at the time PEF made the relevant procurement decision can the Commission accept the value for the commodity that PEF incorporated in its answer to 29(A).

The same is true with respect to the transportation costs that PEF incorporated in its answer to 29(A). PEF did not use the transportation costs that it embedded in the evaluated costs of the bids to the RFPs, but instead assumed higher costs. Earlier, OPC demonstrated that PEF's practice was to quantify transportation costs accurately when it scored the bids, then secure the transportation arrangements promptly while those costs were "current" and while it was negotiating a contract with the bidder. Since PEF followed this prudent course, why should the Commission entertain an exhibit that does not reflect the same prudent course with respect to the sub-bituminous alternative?

When these inflated, flawed assumptions are replaced with the evaluated cost figures *that PEF developed* during the RFP process, the "conclusion" that one draws

from 29(A) becomes markedly different. In fact, the cost of the sub-bituminous alternative, including *all* transportation, is less expensive than the cost of the vaunted mitigation efforts, even when the last leg of the transportation between the terminal facility and the plant site is excluded. (TR-432)

Even if this were not the case, 29(A) does nothing to demonstrate "mitigation" by PEF. It is important to note that the fundamental comparison to be made is not the cost of the sub-bituminous alternative with another alternative. As delineated in Order No. PSC-08-0716-FOF-EI, it is the cost of the sub-bituminous alternative with the 20% most costly deliveries. The 20% highest costing actual deliveries in 2006 and 2007 were more expensive than the sub-bituminous alternatives *after the purchases of low Btu bituminous coal and spot purchases have been taken into account.* This means that the sub-bituminous alternative and the purchases reflected in 29(A) are not mutually exclusive: all of the purchases shown on 29(A) would have had the effect of lowering the costs borne by customers. Said differently: After the effect of the purchases of low Btu bituminous coal and spot purchases of bituminous coal detailed on 29(A), there remained the opportunity in the highest remaining 20% of deliveries to provide savings had PEF been able to displace them with the sub-bituminous alternatives that were available during the 2004 and 2006 RFP procurement activities.

The Commission should reject PEF's claim that it should increase the estimate of required capital costs and apply them to an additional cost-effectiveness test. PEF witness Heller contended that the Commission underestimated the capital costs that should be associated with preparing the units to burn a 20/80 blend of coals. He also

argued that the Commission should apply its cost-effectiveness test anew. He is mistaken.

In Docket No. 060658-EI, the Commission reasoned that the decision to purchase sub-bituminous coal would be justified if the savings associated with burning the coal more than offset the cost of necessary improvements. Having satisfied itself that the comparison justified the purchase, the Commission then determined that, because the capital costs were of the type normally recovered through base rates, it would not reduce the refund by the amount of capital costs. Had PEF made the improvements, they would have been in service continuously beginning in 2003. Moreover, the costs would have been built into base rates, and would have been incurred and recovered over time whether or not PEF burned sub-bituminous coal. In other words, the capital costs would have been fixed costs. For that reason, there is no occasion to apply a "cost-effectiveness test" a second time. Rather, by burning sub-bituminous coal whenever it is more economical than the alternative commodity, PEF can increase the savings attributable to the initial capital investment and thereby enhance the original cost-effectiveness ratio.[9] One of Mr. Heller's exhibits demonstrates his awareness that depreciation expense associated with the improvements would be incurred in each year. (Exhibit 13) However, while he wrote his prefiled testimony in August 2008, he was not aware until his deposition in January 2009 that the Commission had excluded the capital costs from the calculation of

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[9] By analogy, consider a car buyer who calculates that the incremental investment needed to purchase a hybrid is justified, and the extra cost will be recovered, if gas prices stay above $2.25/gallon for three years. The buyer finances the car over five years. As projected, gas prices are higher during years 1-3. If gas prices also stay higher in years four and five, the buyer does not revisit the purchase decision, because he/she must make all 60 payments regardless. But additional savings beyond the initial payback period will make the original decision, already fully justified, even more cost-effective.

the refund. (TR-222-224) The Commission should reject his attempt to apply these fixed costs a second time.

d. <u>What candidates for alternative coal purchases should the Commission consider in evaluating whether more economical coal was available for delivery to Crystal River Units 4 and 5 during 2007?</u>

Consider two Indonesian bids of sub-bituminous coal that PEF ranked as the two lowest evaluated costs in its 2006 RFP. Indonesia is a leading producer of coal for international markets. The coals had low ash and low sulfur, both valuable properties. The Indonesian bids were far more economical than Louis Dreyfus' PRB bid to the same RFP. Precisely the same reasons that prevented PEF from purchasing PRB coal during 2003-2005 precluded PEF from purchasing Indonesian sub-bituminous coal in 2006. Those reasons compelled a refund in Docket No. 060658-EI, and do so again in this proceeding.

e. <u>By what amount, if any, were the costs of coal actually delivered to Crystal River Units 4 and 5 unreasonably high in 2007?</u>

Comparing the evaluated costs of the 2006 Indonesian bids with the 20% highest costing tons actually delivered in 2007, the 2007 coal costs at CR4 and CR5 were unreasonably high by the amount of $13 million – $13.6 million, excluding interest. In addition, the Indonesian coal contained far less sulfur than the coal actually delivered in 2007, and would have enabled PEF to save customers $5 million – $5.3 million in the form of lower costs of emissions allowances.

COMBINED ARGUMENT ON ISSUES I(d) AND I(e)

Indonesian sub-bituminous coal is within the universe of potential alternatives.

When PEF solicited bids in 2006 to supply CR4-5 during 2007, two producers of Indonesian coal submitted offers. PEF scored the Indonesian offers on the same "evaluated" basis as the other bids it received. On an evaluated basis, the Indonesian bids ranked #1 and #2. (TR- 316)

Docket No. 060658-EI encompassed the period of time ending in 2005. PEF witness Weintraub referred to the Indonesian offers in his testimony in Docket no. 060658-EI. About them, he said,

> Q. Was the sole PRB offer in responses to the January 2006 RFP a better value than the bituminous coals that the company purchases as a result of the RFP?
>
> A. No it was not. But there were two Indonesian sub bituminous coal offers that ranked ahead of the bituminous coal bids that we purchased. We did not purchase the Indonesian sub-bituminous coal product because the plant had no prior experience with this type of coal, the CR4 and CR5 units were undergoing modifications to safely handle the PRB coal for a test burn as recommended by our outside engineering consultant, and the test burn of PRB sub-bituminous coals had not yet occurred.

However, in its direct testimony in this docket, PEF's approach was to ignore the Indonesian bids—much as it had ignored the 2004 RFP. Instead, PEF witness Heller used the bid of Louis Dreyfus, a coal broker, to supply PRB coal in 2007. That bid was considerably more expensive than the Indonesian offers that PEF ranked #1 and # 2 on the basis of evaluated costs. For the following reasons, in selecting the Louis Dreyfus bid PEF artificially inflated the cost of the sub-bituminous alternative that it compared to the actual delivered costs of 2007 to ascertain whether actual costs were unreasonably high. Mr. Heller's comparison was flawed because he did not employ the lowest costing alternative that was available to PEF at the time it made its purchase decision. The impediment to PEF was not the geographical origin of the coal, but the inability to accept the offer and burn the coal legally, because it had not prudently sought a permit.

Mr. Heller's use of the Louis Dreyfus bid is another example of attempting to artificially define the scope of this docket so as to eliminate lower costing alternatives from consideration. The effort to exclude Indonesia as a legitimate alternative is at odds

with PEF's own actions. Even though PEF could not burn sub-bituminous coal at the time it received bids to the 2006 RFP, Mr. Weintraub was interested in pursuing the subject with Indonesian producer PT Adaro. How could PEF identify the Indonesian coal as a "coal of interest," yet later instruct its witness to exclude those bids from consideration in this docket? OPC submits PEF's strategy for resisting another refund explains the discrepancy. For the same reasons that OPC discussed above with respect to PEF's efforts to read into Order No. PSC-07-0816-FOF-EI an intent to draw a boundary around Wyoming, the Commission should reject PEF's claim that Indonesian coal is beyond the scope of this docket.

Considerations other than the lowest evaluated costs would have made the Indonesian coals attractive at the time of procurement, had PEF been able to take advantage of the offers. OPC witness David Putman testified that competition among the different coal-producing basins can lead to lower prices than one would find among sources that are located in the same geographical basin. (TR-438)

Then there is the matter of risk management. Each coal-producing basin presents its own delivery risk profile. Disruptions in delivery can occur with deliveries from the Central Appalachian area, from the Powder River Basin, or from any other source. The best way to manage delivery risks is to diversify one's sources of coal. (TR-439) Adding Indonesia, which is one of the two largest exporters of coal to the international market, would have helped to diversify PEF's delivery risk. In fact, in 2005-2006 when some utilities received less coal from the PRB area than they had ordered due to rail difficulties, some utilities were able to fill the gap by purchasing coal from Indonesia. (TR-474)

The attractive attributes of the Indonesian coal extended beyond considerations of prices, ongoing enhancement of competition, and risk management. The coals contained extremely low levels of ash and sulfur. Lower ash means less material to form slag, and fewer particulates to remove with the precipitator. Lower sulfur means lower emissions of SO2 and, therefore, lower cost of emissions allowances. (TR-316)

OPC witness Putman explained that Indonesia's principal markets are India and other parts of Asia: however, when market conditions are such these producers can offer coals at competitive prices, they present an additional opportunity to add to supply sources. (TR-476) In fact, Indonesian sub-bituminous coal is no stranger to Florida. Tampa Electric purchased Indonesian coal from PT Adaro in commercial quantities for several years in the 1990s. (TR-349)

However, the opportunities occasionally presented by market conditions to purchase Indonesian coal can be realized only if the utility holds a permit authorizing it to burn sub-bituminous coal. As Mr. Weintraub acknowledged in Docket No. 060658-EI, at the time PEF received the Indonesian bids in 2006, PEF was still putting together the plan to conduct the first complete test burn of sub-bituminous coal. The test burn would occur in May 2006. It would be followed by an application to the Florida Department of Environmental Protection ("DEP") for a permit to burn sub-bituminous coal. The DEP would issue the permit in May, 2007. Only thereafter would PEF be in a position to acquire sub-bituminous coal from the Indonesian producers who submitted bids to the February 2006 RFP. The same imprudences that led the Commission to require PEF to refund overcharges to customers in Docket No. 060658-EI prevented PEF from taking advantage of the opportunity presented by the Indonesian bids in the 2006 RFP.

The email from PT Adaro's agent presents no basis upon which to challenge the Indonesian bids' status as the most economical alternatives available to PEF at the time it made its procurement decision in 2006 to purchase for delivery in 2007.

During a deposition that followed the filing of PEF witness Weintraub's rebuttal testimony, he alluded to an email he had received from Mr. Fred Murrell, Indonesian producer PT Adaro's agent in the U.S. Mr. Weintraub said the email showed that PT Adaro was "unresponsive" and (impliedly) not serious about its bid to the 2006 PEF procurement. PEF did not have the email at the time of the deposition, but attached it as a late-filed exhibit to the deposition. After review, OPC submits this email and PEF's argument are much ado about nothing.[10]

PEF issued the RFP in February 2006. Again, in direct testimony Mr. Weintraub said of the Indonesian bids: "We did not purchase the Indonesian sub-bituminous coal product because the plant had no prior experience with this type of coal, the CR4 and CR5 units were undergoing modifications to safely handle the PRB coal for a test burn as recommended by our outside engineering consultant, and the test burn of PRB sub-bituminous coals had not yet occurred."

Mr. Weintraub's direct testimony does not support his testimony that PT Adaro was "unresponsive" and not serious about its 2006 bid. *If PEF genuinely had reason to doubt that PT Adaro intended to honor its bid, why would Mr. Weintraub have not listed that as a reason for not purchasing Indonesian coal?* Instead, he listed only the same reasons—i.e., the lack of preparation, the absence of a test burn, etc. —that formed the

[10] It is ironic that PEF, which did not have a permit to burn sub-bituminous coal, and therefore had neither the authority nor the intent to buy sub-bituminous coal, and which nonetheless issued a major RFP to PT Adaro and numerous other producers inviting them to submit bids to supply sub-bituminous coal to CR4-5 during 2007, is now expressing doubt as to whether PT Adaro was serious about its bid.

basis for a refund in Docket No. 060658-EI when identifying all of the reasons why PEF did not purchase Indonesian coal. Both witness Heller and witness Weintraub were questioned extensively in their first depositions about the Indonesian offers and neither witness expressed any doubts about whether one of the bids was "real".

Moreover, in their rebuttal testimony, neither witness Weintraub, nor witness Heller, nor witness Stenger professed to have any doubts regarding whether PT Adaro was serious about its 2006 bid to supply coal in 2007.

As to the email: During the discovery period of this docket, OPC witness David Putman attempted to contact Mr. Murrell to gain information about PT Adaro's deliveries of sub-bituminous Indonesian coal to Tampa Electric, and also to learn more about its 2006 bid to PEF. His inquiry prompted Mr. Murrell to inform PEF of the contact. During his later deposition of April 1, 2009, Mr. Weintraub referred to the email and claimed that it reinforced his feeling at the time that PT Adaro was being "unresponsive." The timing of this claimed "unresponsiveness" is significant.

PEF received the bids of PT Adaro and others in February of 2006. Subsequently, Mr. Weintraub said he scheduled two meetings with representatives of PT Adaro. According to Mr. Weintraub, the "unresponsiveness" to which he alluded did not manifest itself until the second meeting. (Exhibit 2, Item 10, p. 54, 66) The second meeting took place in May 2006. (Exhibit 2, Item 10, p. 66) At no time during the discussions did PEF offer to buy coal from PT Adaro. (Exhibit 2, Item 10, p. 55) OPC submits that these facts do not support removing the Indonesian offers from their position as of the lowest evaluated costs in the 2006 RFP.

However, the best evidence for OPC is the email itself. Because of the amount of attention the email has received, OPC will set forth here the entire message:

Brett:

I was contacted by telephone by a consultant for Florida Office of Public Counsel in relation to Progress Energy. I wanted to let you know that an attempt was made to speak with me.

I suspect that I will speak with the consultant sooner or later. The question was about whether we had offered coal in the past – 2007, I believe. We don't retain records very long for Adaro offerings and I don't remember the specifics independently. However, at that time, we were sold out in Indonesia, and it is possible that we responded to any inquiry that we would be unresponsive.

At any rate, you might get the same question from Public Counsel. The fellow calling me is David Putman, formerly of Southern Company. David is a very capable fellow, who I think did a great job at SCS. I haven't spoken with him in ten or more years.

Note that the author of the hearsay statement begins by stating he has neither written records nor an independent memory to aid him. These admissions by themselves would lead any reasonable person to place no confidence in the reliability of the message—a point that OPC would pursue *if the message had any relevance.* It does not. Clearly, Mr Murrell mistakenly believed that OPC's forthcoming inquiry was to be on the subject *of 2007 offers*. If that was the case, said Mr. Murrell, his company may have been (he was less than definite) *unresponsive.* In the vernacular of the business of procuring coal through formal solicitations, an *offer* has a distinct and precise meaning, as do the terms response and *unresponsive.* Moreover, as the record of this proceeding has demonstrated, an offer in an RFP conducted in one year will relate to deliveries of coal in subsequent years. OPC's intended inquiry related to an offer that PT Adaro definitely submitted to PEF's 2006 RFP. Mr. Murrell said in his email the PT Adaro may have declined to submit an offer to a 2007 solicitation. *There is a complete mismatch in timing.* Mr.

Murrell, after first citing his lack of records and absence of memory, answered a different question that the one OPC's consultant planned to pose.

PEF's witness Weintraub stated that PT Adaro became "unresponsive" during the second of two meetings between PEF and PT Adaro. The second meeting occurred in May of 2006. Accepting, for purposes of argument, that PT Adaro may have exhibited less interest in May 2006, OPC witness David Putman noted that such a decline in interest would not have meant that PT Adaro was not ready to execute a contract with PEF when it submitted the bid in February of 2006. Mr. Putman explained that a respondent in an RFP who is found to have submitted a bid without having coal to sell in the event the bid is accepted would see its reputation damaged in the industry. (TR- 437) Common sense says it is highly unlikely that PT Adaro, a substantial player in the international market, would have risked its reputation by submitting anything other than a "real" bid in 2006, and even more highly improbable that in 2009 PT Adaro's agent would volunteer that it was not serious about the bid it submitted to the 2006 RFP. One possible explanation for a perceived lack of enthusiasm on the part of PT Adaro during the May meeting is that PT Adaro, having received no response from PEF to its bid, had decided to look elsewhere in the market. (TR-437) If events unfolded in this way, said Mr. Putman, they represented, not a false bid from a non-serious bidder, but a missed opportunity on the part of PEF. (TR-476) Of course, the opportunity was lost, not because PEF was slow to respond, but because PEF had no ability to burn the coal that PT Adaro offered at an extremely low evaluated cost.

Also, one cannot discount the possibility that PT Adaro became aware of the purchase for the May 2006 test burn, knew that PEF did not have a permit, and knew

therefore that *PEF* was not a serious potential *buyer* at the time. However, to conclude that the email does not have the effect that PEF claimed, it is not necessary to go farther than the mismatch in timing and the plain meaning of the words the author used.

Cost of Emissions Allowances

OPC witness Putman did not "double count" when he quantified the impact of the sub-bituminous alternative on the cost of emissions allowances in a second discrete step. Having quantified the differential in costs of actual 2006-2007 deliveries of bituminous coal and the evaluated costs of the sub-bituminous alternative, Mr. Putman proceeded to add, to the unreasonable overcharges thus calculated, the savings that PEF would have realized in the form of lower emissions allowances had it been able to blend sub-bituminous coal with the bituminous coal during 2006 and 2007. As to this additional item of overcharges, PEF complained on two fronts.

First, PEF asserted that Mr. Putnan should have used actual values for the cost of emissions allowances, rather than the projected values on his Exhibit 25. Mr. Putman's effort throughout his testimony was to track the refund methodology that the Commission employed in Order No. PSC-08-0710-PCO-EI. In fact, the source of his cost of allowances was the very exhibit on which the Commission relied in its Order. OPC acknowledges that some of those values were actual at the time, and does not object to the use of actual values for the cost of emissions allowances in 2006 and 2007.

PEF also contended that Mr. Putman "double counted" the impact on the costs of emissions allowances, because the impact was already quantified during the quantification of evaluated costs. The record in this docket does not support this

contention. Nor does PEF's acquiescence to Order No. PSC-08-0710-PCO-EI, in which the Commission developed the impact in a separate step in precisely the same fashion. (In fact, it is *because* the Commission developed the SO2 issue in a separate step that Mr. Putman "followed suit," as he set out to emulate the Commission's methodology in all respects.) In Docket No. 060658-EI, PEF witness Heller developed an "evaluated cost" of sub-bituminous coal that took into account the parameters that PEF incorporates in its evaluation process. The Commission largely adopted Mr. Heller's methodology in Order No. PSC-08-0710-PCO-EI, then developed the additional consideration of the differential in the costs of emissions allowances. When the Commission issued the order, PEF did not complain or seek reconsideration of the SO2 factor on the basis of "double counting."

During this proceeding, OPC attempted to obtain from PEF details of its "VISTA" evaluation process. PEF supplied only the bid summary sheets, some of which were made part of the record. The sheets contain a statement of the cost of an emission allowance. However, that in itself is not proof that the impact of the offered coal being evaluated on overall emissions allowances was factored into the evaluation fully. Mr. Putman compared the "credit" that a particular coal received within the evaluation process with a calculation of the reduction in costs that would result when used. He could find no indication that the evaluation process provided recognition of the benefit, within the evaluated cost assigned to the coal, that was commensurate with the large impact on overall costs of emissions allowances that would be associated with the coal. (TR-465)

Nor did PEF demonstrate that an adequate relationship existed. PEF's participation consisted of the bald claim that Mr. Putman had double counted, and a

calculation in which PEF "added back" certain costs, without ever demonstrating they had ever been in the evaluation process in the first place. In this dispute, the burden of proof is on PEF. PEF has not met its burden with respect to its contention that Mr. Putman (and thus the Commission in Order No. PSC-08-0710-PCO-EI) double counted the value of lower emissions allowances.

ISSUE 2: **If the Commission determines that the costs of coal delivered to Crystal River Units 4 and 5 during 2006 and 2007 were unreasonably high, should it require PEF to issue a refund to its customers? If so, in what amount?**

Yes. One of the Commission's most important functions is to insulate customers from having to bear costs that have been made unreasonably high as a consequence of utility imprudence. In this instance, the Commission should order Progress Energy to refund to customers the amount of $35,575,517 plus interest.

ISSUE 3: **Based on the evidence of PEF's fuel procurement approach and activities as they relate to Crystal River 4 and 5, what additional action, if any, should the Commission take in this docket?**

* To prevent PEF from wasting a valuable asset for which its customers have been paying, the Commission should direct PEF to conduct a test burn of blends designed to ascertain the highest percentage of sub-bituminous coal that can be used in a blend while maintaining 105% overpressure and satisfying all environmental requirements. The tests should be overseen by an independent engineering firm. The report should be furnished to the Commission by a date certain. If the results support the use of a blend containing more than 20% sub-bituminous coal, PEF should apply to the FDEP to have its permit amended.*

PEF did not test burn sub-bituminous coal in CR4 and CR5 until May 2006. Subsequently, when it applied to the FDEP for the permit authorizing it to burn the coal at CR4-5, it requested permission to burn as much as a 50/50 blend, which is also the

design basis fuel that PEF prescribed for its units at the time they were designed and built. The FDEP permit limits PEF to 20% sub-bituminous coal because 20% approximates the only blend that PEF tested. However, the FDEP also invited PEF to perform tests of blends containing higher percentages of sub-bituminous coal to support a permit authorizing greater use of sub-bituminous coal. The author of the report on the successful May 2006 test burn outlined the steps, including specific needed repairs, that PEF should take preparatory to full-scale operations with a PRB blend. During her deposition, Ms. Stenger said that following the test burn PEF decided not to pursue them because the economics of PRF coal had changed. She estimated that, once given a directive to proceed, readying the units to operate under the permit that FDEP issued in 2007 would require an additional 7-12 months to complete. Stenger depositon, Exhibit 2, Item 11, at p. 38-41, 73. No action has been taken with respect to testing higher ratios of sub-bituminous coal. OPC believes PEF's failure to follow through on this matter compounds its past imprudence. The situation calls for the active oversight of the Commission.

To be clear, with this recommendation OPC is not attempting to reopen or re-litigate the appropriate level of refund that the Commission ordered in Order No. PSC-07-0816-FOF-EI; nor does OPC seek to advocate the use of a blend containing more than 20% sub-bituminous coal as the Commission calculates the appropriate amount of refund in this docket. Rather, OPC submits that on a forward looking basis, and in the clear absence of any PEF initiative for doing so, the Commission should require PEF to take all actions necessary to ensure that it can in the future utilize all of the flexibility for which customers are paying.

CONCULSION

For the reasons stated herein, the Commission should require PEF to refund $35.6 million to its customers.

Respectfully submitted,

J.R. Kelly
Public Counsel

s/ Joseph A. McGlothlin
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DOCKET NO. 070703-EI
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF** has been furnished by U.S. Mail to the following parties on this 26th day of May, 2009.

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