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090009-EI

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause )  
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Docket No. 090009-EI  
Filed: September 18, 2009

**POST-HEARING BRIEF AND STATEMENT OF ISSUES AND POSITIONS  
OF WHITE SPRINGS AGRICULTURAL CHEMICALS, INC.  
d/b/a PCS PHOSPHATE – WHITE SPRINGS**

Pursuant to the Public Service Commission’s March 6, 2009 Order Establishing Procedure, Order No. PSC-09-0137-PCO-EI and subsequent rulings, White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs (“PCS Phosphate” or “PCS”) submits its post-hearing statement of issues and positions.

**I. STATEMENT OF BASIC POSITION**

**A. General**

PCS Phosphate confines its positions in this matter to issues involving Progress Energy Florida (“PEF” or “Progress”). PCS Phosphate does not challenge the prudence of actual costs for the years 2006-08 that Progress claims are recoverable under the nuclear cost recovery clause associated with the Levy Nuclear project (“LNP” or “Levy”), but addresses the substantial questions regarding this project going forward that must be explored. Finally, PCS Phosphate takes no position on Issues 2 and 3, but in all other respects its positions remain as stated in the Pre-Hearing Order to the extent not revised or clarified below.

**B. Levy Nuclear Feasibility**

Pursuant to the statutory and regulatory scheme enacted in Florida, in addition to auditing PEF costs that are recoverable under the nuclear cost recovery Rule, Rule 25-6.0423 F.A.C., the Commission must 1) assess the prudence of claimed costs, and 2)

determine whether to approve a detailed analysis of the on-going feasibility of completing the Levy project. This is the first year in which the prudence of NCRC-qualified costs are being reviewed pursuant to the new Rule. It also is the first time that the Commission will apply the on-going feasibility requirement to new nuclear construction projects. These reviews converge this year with a veritable “perfect storm” of events that concern both problems with the Levy project and changing circumstances that are external to Progress. These developments un-mistakably demonstrate the need for rigorous and effective Commission oversight.

First, the schedule delay occasioned by PEF's serious mis-calculation regarding the utility's request for a Limited Work Authorization (“LWA”) as part of its Combined Operating License application (“COLA”) at the Nuclear Regulatory Commission (“NRC”) has eviscerated the Progress plan to be at the front of the first wave of new nuclear projects and eliminated any possibility that either Levy unit will be in service by the time PEF needs additional base load generating capacity. The delay, which at this point remains of indeterminant duration but will permanently shift the project schedule, has profound ramifications for the project, Progress, and PEF ratepayers.

Second, the economic slowdown associated with the recession has produced substantial and lasting changes that directly impact PEF's resource planning requirements. The most evident changes in these circumstances include:

- The current decline in forecasted demand that PEF has translated into a long range slowing of demand growth;
- Plummeting natural gas prices that similarly have lowered and re-shaped long term fuel price forecasts; and
- Capital market contraction that has significantly affected the availability of capital on reasonable terms for long lead time capital projects.

TR. 1539-40; Bradford at pp. 17-19. In addition, potential changes in national energy policy and legislation are aimed at placing greater emphasis on development of enhanced energy efficiency and renewable resources. TR. 1539-40. Individually, the project delay of any of these external changes could reasonably influence a decision going forward concerning nuclear plant construction. None are ordinary year-to-year fluctuations and cannot be treated as such. Collectively, these developments are fundamental and have altered the structure of long-term energy markets in Florida and elsewhere.

These basic changes in circumstance, along with other uncertainties tied to new reactor development (e.g., reactor design certification delays,<sup>1</sup> capital markets, the time required to re-establish a nuclear qualified supply chain, etc.) have prompted re-thinking and utility-initiated delays in new nuclear projects<sup>2</sup>. Along those same lines, Progress consistently has confirmed that it has not made a final decision to move forward with construction of the Levy units. PEF asserts that it regularly evaluates key factors that may influence a going forward decision from the utility's perspective, and that overall project cost certainly is one of those factors. TR. 2086.

The nuclear cost recovery Rule (reinforced and supplemented by the Commission's August 2008 Order determining a need for the Levy units) requires that Progress submit a detailed analysis of the long term feasibility of completing the Levy project. This necessary check on early recovery of nuclear costs parallels the on-going assessments that Progress, potential joint partners, Wall Street financiers, rating agencies, and anyone else with a financial stake in a nuclear project must make. No one expects

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<sup>1</sup> See Exh. 132, August 27, 2009 NRC letter outlining the reasons for additional delays in the NRC's design certification review of the Westinghouse AP1000 reactor.

<sup>2</sup> TVA has announced that it may not move forward with the Westinghouse AP1000 project previously announced for its Bellefonte site (TR. 446) and Duke Energy recently announced that it may delay moving forward with its previously announced AP1000 units (TR. 457). See also TR. 881.

that a decision to build a nuclear unit is a static, one time event. It is a sequential process that must be regularly re-visited. TR. 2079.

The NRC is responsible for determining the technical feasibility of the AP1000 reactor and the suitability of the proposed Levy site. As Florida's economic regulatory body, the Commission's oversight must encompass the expected economic feasibility of continuing with the projects. Economic feasibility in this context has its ordinary and expected meaning: whether the plants are expected, using current and realistic assumptions, to produce power that will yield net economic benefits to consumers. TR. 1539.

In its initial filing in this docket, PEF failed to offer an economic feasibility assessment altogether, and argued that only project technical and legal feasibility mattered. The fact that updated expected in-service dates and total project costs currently are not available given the status of the Levy project delays no doubt influenced PEF's decision to adopt that posture. There is, however, no avoiding the fact that the Progress filing did not satisfy the express requirements of the Florida nuclear cost recovery statute, the nuclear cost recovery Rule, the mandates of the Commission Need order, or basic common sense. In rebuttal, the company cobbled together a patently flawed economic assessment that applies stale and clearly questionable assumptions, and which Progress itself disavows as the type of analysis that it would rely upon in making business decisions.

The PCS Phosphate recommendations concerning the on-going feasibility of continuing with the Levy units recognize that Florida's policy encouraging new nuclear development neither usurps utility management prerogatives nor serves as a blank check irrespective of changed circumstances or consumer impacts. Particularly where, as here,

fundamental changes have occurred, the Commission must require a detailed and up-to-date economic assessment before authorizing cost recovery of expected expenditures, and it must set reasonable cost recovery limits that are mindful of rate impacts on consumers.

Next, the significant impact of the Levy project on consumer rates has already proven to be un-manageable. PEF sought Commission approval earlier this year to defer \$198 million of 2009 approved cost recoveries to mitigate unacceptable rate impacts. In the instant filing, PEF proposes a five year amortization of \$298.7 million in unrecovered costs, again because the rate impacts of recovering the full amount in a single year are unacceptable. PCS supports the PEF alternative cost recovery proposal in this docket because a reduction in LNP spending is expected as a consequence of the project delay, but deferring project costs without controlling spending will not be practicable for long. Our recommendations will align consumer and PEF interests in a manner that makes sense in the long term if the project continues.

### **C. Prudence**

The Rule requires an annual review of the prudence of PEF's actions, decisions and expenditures associated with the project. The Progress decision to execute the engineering, procurement and construction ("EPC") contract for LNP with the Westinghouse/ Shaw, Stone & Webster Consortium at the end of 2008, and before the NRC established a review schedule for the LWA request, was a questionable PEF management decision that likely will have far-reaching project consequences.

Under the nuclear cost recovery Rule, prudence questions are evaluated annually if they have become apparent (rather than upon conclusion of the project as under traditional cost of service ratemaking). While this process moves prudence reviews closer in time to project actions and decisions, it makes timely identification of imprudent

events more problematic, and the consequences of imprudent decisions more difficult to quantify. In this case, the Office of Public Counsel has presented detailed testimony concerning the circumstances associated with the Progress LWA request, the acknowledged geo-technical complexity of the proposed Levy site, and NRC staff concerns regarding those geotechnical issues and the scope of the LWA request.

Based on the record, our conclusion is that the apparent “group think” at Progress, which presumed NRC silence to be acquiescence in general to the PEF proposed review schedule, was unreasonable. The NRC staff regularly and un-mistakably stated that a review schedule could not be established until the agency’s technical staff had evaluated PEF’s responses to the Requests for Additional Information (“RAIs”) that addressed site geology. The NRC apparently moved with due dispatch after receiving the detailed response just prior to Thanksgiving, advised Progress that a schedule would be established by the end of January 2009, and did precisely that through the conference call conducted on January 23, 2009.

PEF’s expressed shock that the NRC staff determined it could review the LWA request no sooner than it expected to process the COLA reveals only the disconnect between PEF’s internal expectations and what actually was transpiring at the NRC. The low probability of not getting the requested LWA that PEF attributed to this critical matter throughout 2008, according to one PEF witness, apparently was not independently vetted by anyone outside the PEF licensing and management teams (i.e., those heavily vested in receiving the LWA). TR. 1101-02.

Given the critical importance of the LWA to the Progress schedule, this was a crucial management error that perpetuated an unsubstantiated presumption. PEF’s decision to execute the EPC under these circumstances, while knowing that a decision on

the LWA schedule was imminent, was unreasonable. Thus, based on this record, a finding of imprudence is warranted. PCS, however, recommends that a separate proceeding be established, in which Progress carries the burden of proof, in order to fully air this issue.

## **II. SPECIFIC ISSUES**

### **PEF Project Management and Oversight**

**ISSUE 21A:** Was it reasonable and prudent for PEF to execute its EPC contract at the end of 2008? If the Commission finds that this action was not reasonable and prudent, what actions, if any, should the Commission take?

**PCS Phosphate:** \*No. PCS Phosphate supports OPC. Moreover, the Commission should conduct a detailed examination of the EPC contract's execution in view of the known and reasonably expected ramifications of an unfavorable NRC determination concerning the Limited Work Authorization request.\*

### **PEF's Limited Work Authorization Request and Execution of the EPC Contract**

From the outset, Progress considered obtaining a LWA from the NRC to be critical to its schedule for the Levy project. PEF's need for an LWA to achieve a commercial in-service date of mid-2016 stems directly from complex geotechnical site issues that were expected to require more time for site specific reviews and site preparation than might be required at other sites.

In brief, the proposed Levy site, like most of Florida, is largely comprised of layers of limestone. Given its solubility in water, limestone formations, particularly near sources of moving water, are likely to contain voids, fractures and other irregularities. The specific conditions that exist at the proposed locations for the Levy reactor buildings and other critical structures obviously must be addressed to ensure safe operation during normal circumstances as well as during a seismic event. Successfully understanding and



resolving the complex geotechnical issues is a critical issue for the NRC staff in preparing a Final Safety Evaluation Report for the Levy project.

Using several consultant teams, PEF took 18 months to perform test borings and various other tests and analyses in order to address those issues in its COLA application. Miller Rebuttal, p.29. During that same period, Progress actively participated in the NRC's development of the new LWA Rule in 2006 and 2007. TR. 1932. Progress also regularly consulted with the NRC staff on the LWA and site geotechnical issues. The basic and undisputed timeline reads as follows (see Staff Composite Exh. 2; item 12):

- In January 2008, Progress advised the NRC at a public meeting that the COLA for the Levy project would include an LWA request. Exh. Miller Rebuttal, p.23.
- On January 10, 2008, PEF met with NRC technical staff to review Levy geotechnical issues.
- The NRC stated in February 2008 that applicants should give advance notice of their intent to request an LWA.
- On March 5, 2008, PEF formally notified the NRC that it intended to request an LWA with its Levy COLA filing. Miller Rebuttal, p.23.
- On June 30, 2008, PEF met with NRC managers to discuss the need for Levy and overall plans for the project. Miller Rebuttal, p.23; Exh. 118.
- On July 28, 2008, PEF met with NRC technical staff on the Levy geotechnical issues. Exh. 118.
- On July 30, 2008, filed its COLA/ LWA application with the NRC. TR. 1174.
- There is very little precedent for NRC consideration, and an LWA request under the new NRC Rule. Miller Rebuttal, p.22. This was first LWA to accompany a COLA request under the new LWA Rule. It also was the first LWA request under the Rule for a Greenfield site. (Southern Company had filed an LWA request with its early site permit request for the Vogtle AP1000). TR. 1846.
- On September 5, 2008, the NRC requested that PEF revise the scope of the LWA to include dewatering and permeation grouting. TR. 1179.
- On September 9, 2008, PEF management held a "drop-in" meeting with NRC management to review the overall plan for LNP and the project schedule.

- On September 12, 2008, PEF supplemented its filing to revise the proposed scope of the LWA as the NRC requested. TR. 1174.
- On October 6, 2008, the NRC project manager, Brian Anderson, issued a docketing letter for Levy, which indicates that the application is sufficient for review. The letter expressly stated that a review schedule for Levy could not be established until a host of RAIs relating to geotechnical issues could be answered. Exh. 119.
- Progress submitted the RAI responses shortly before Thanksgiving on November 20, 2008.
- PEF immediately pressed for information on the Levy review schedule, but were effectively advised that staff needed to evaluate the RAI responses first (and that the holiday schedules of certain essential staff would affect that review schedule). TR. 1847. PEF was advised in December 2008, however, that it would receive the review schedule before the end of January 2009. TR. 1317-18.
- On January 23, 2009, the NRC staff disclosed during a conference call that reviewing the LWA request would take as long as the review of the COLA. Miller Direct, p.7.

Throughout this entire period, Progress remained confident that an LWA would be approved in time to support the project schedule. Indeed, Progress maintains that it was stunned by the January 2009 NRC staff determination concerning its LWA request. PEF acknowledges that its proposed schedule was “aggressive” and that a longer period might be required for the LWA, but it fully expected a schedule that would support its overall project schedule. Also, comfortable in its belief that an acceptable LWA / Environmental Impact statement schedule would be established, PEF executed its EPC contract with the Westinghouse Consortium at the end of 2008.

The NRC’s decision regarding review of the LWA request precipitated the current schedule slippage. Miller Direct, p.7. This, in turn, led PEF to announce in its May 1, 2009, filing that it would need to seek to re-negotiate aspects of the still-drying EPC. Miller Direct, p.19. In rebuttal, PEF clarified that it was not negotiating a change order to

the EPC (as provided in the EPC change order procedures). See TR. 1875. In either event, the cost and schedule consequences of this event have not been finally disclosed.

Two questions surrounding these events come quickly to mind. The first concerns how badly Progress mis-judged the NRC on a matter that was essential to the project schedule. The short answer seems to be that PEF's presumptions were both unsubstantiated and untested by anyone independent of and beyond the LNP licensing team and PEF senior management (both being heavily invested in achieving their proposed project schedule). PEF witness Doughty, who testified concerning PEF's oversight, risk management and controls, confirmed that he was aware of no independent vetting of the risk and probability assigned to the LWA issued in the project risk matrix. TR. 1101-02.

From an NRC staff perspective, the geotechnical issues were complex and critical to the safety review. The staff directly admonished Progress that no scheduling decisions could be reached until the geotechnical RAI responses had been evaluated (Exh. 119), and PEF's NRC expert confirmed that no inference could reasonably be drawn from that disclosure other than the obvious: the staff needed more information and a better understanding of the issue. TR. 1991. By all accounts, the NRC staff work diligently through the holiday season to do exactly that, and that the staff immediately advised Progress of the scheduling decision once it had been made. In short, although keenly aware of PEF's schedule desires, the NRC constructed a review schedule based on its resources and the perceived complexity of the issues presented.

PEF's rebuttal makes numerous references to a December 4, 2008 comment by the NRC project manager for the Levy project at a public scoping meeting that a

“ballpark” estimate of the time required to review an LWA request was 24 months, but Mr. Anderson further stated that:

“The detailed review scheduled activities will be made publicly available once we have completed the development of our schedule.”

Exh. 126. PEF’s NRC expert confirmed that the quoted sentence above most accurately reflects the NRC staff perspective on the schedule. TR. 1994.

Tellingly, nowhere in its testimony in this docket does Progress discuss the LWA review schedule from the only perspective that mattered: the time required for the NRC to do its job right. PEF regularly infers from the fact that the NRC expressed concern about the geotechnical issues and the scope of the LWA that the NRC was working on those issues. While this fact seems self-evident, the PEF presumption that NRC staff’s focus on the issue would lead to an LWA schedule that PEF considered timely is not. It could equally have been inferred that the NRC staff considered the issue to be complicated, a serious matter for the safety evaluation, and that it would require a lot of work. Given the importance of these issues, PEF’s presumption concerning the LWA was unreasonable.

Furthermore, two consequences of that unreasonable decision were 1) PEF presented an unrealistic and unachievable project schedule to the Commission in the Need docket, and 2) PEF appears to have pre-maturely executed its EPC contract with the Consortium. As OPC witness Jacobs accurately described, PEF unreasonably assumed risks in executing the EPC under these circumstances.

**ISSUE 22:** Should the Commission find that for the year 2008, PEF’s accounting and costs oversight controls were reasonable and prudent for Levy Units 1 & 2 project and the Crystal River Unit 3 Uprate project?

**PCS Phosphate:** \*PCS Phosphate agrees with and adopts the position of the OPC.\*

The record supports a finding that decisions made by Progress were not reasonable under the prevailing circumstances. For those decisions, the Commission must carefully examine Progress' decision-making and to the extent Progress has failed to provide sufficient evidence to demonstrate the prudence of its actions, the Commission must find that Progress's accounting and costs oversight controls were not reasonable and prudent.

**PEF's Project Feasibility: Levy Nuclear Project**

**ISSUE 23:** Should the Commission approve what PEF has submitted as its annual detailed analysis of the long-term feasibility of continuing construction and completing the Levy Units 1 & 2 project, as provided for in Rule 25-6.0423, F.A.C., and Order No. PSC-08-0518-FOF-EI (Determination of Need Order)?

**PCS Phosphate:** \*No. The information submitted by Progress does not satisfy the requirements of a detailed analysis on the feasibility of completing the project based on current and reasonable assumptions.\*

**Legal Requirements**

The Florida statute authorizing early cost recovery for certain nuclear power plant costs provides, in pertinent part:

The utility shall report to the commission annually the budgeted and actual costs as compared to the estimated in-service cost of the nuclear or integrated gasification combined cycle power plant provided by the utility pursuant to s. 403.519(4) [*i.e.*, in the Need proceeding], until the commercial operation of the nuclear or integrated gasification combined cycle power plant. Section 366.93(5).

The nuclear cost recovery Rule, 25-6.0423 (5)( c)(5) F.A.C., provides as follows:

By May 1 of each year, along with the filings required by this paragraph, a utility shall submit for Commission review and approval a detailed analysis of the long-term feasibility of completing the power plant.

In the Levy nuclear project Need proceeding, Docket No. 080148-EI, Progress submitted a cumulative present value revenue requirement ("CPVRR") sensitivity

assessment to demonstrate that the high estimated capital costs of the Levy units could be expected to yield net benefits to PEF consumers over the life of the units based on projected fuel price (natural gas) and emission cost estimates for SO<sub>2</sub>, NO<sub>x</sub> and CO<sub>2</sub> (assuming a range of costs based on then-pending proposed federal cap and trade legislation). In its final Order granting a determination of Need for the Levy units, the Commission accepted PEF's assessment that the units were likely to be cost-effective for consumers under most scenarios modeled, but required an annual update to that analysis as follows:

ORDERED that Progress Energy Florida, Inc. shall provide a long-term feasibility analysis as part of its annual cost recovery process which, in this case, shall also include updated fuel forecasts, environmental forecasts, non-binding capital cost estimates, and information regarding discussions pertaining to joint ownership.<sup>3</sup>

In sum, both the Legislature and the Commission recognized the need to closely and continually evaluate the economic feasibility of nuclear units for which early cost recovery has been approved. The statute specifies that Progress must annually update its expected total in-service project cost compared to the estimate given in the need proceeding. The nuclear cost recovery Rule requires an annual detailed feasibility analysis intended to confirm the basic economic premise reached in the Need determination that pursuing the project remains likely to payoff for ratepayers in the long run. Since that core issue was challenged in the Need case, the updated data expressly required by the Need Order goes directly to demonstrating the continuing economic feasibility of LNP for PEF ratepayers.<sup>4</sup>

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<sup>3</sup> Order No. PSC-08-0518-FOF-EI, dated August 12, 2008, at p. 24 (the "Need Order").

<sup>4</sup> For further evidence of the elements of a feasibility analysis, *see*. Staff Comp. Exh. 2, Item 5 (FPL stated that it "believes that Rule 25.6.0423(5)(c)(5), F.A.C. requires a detailed analysis of the long-term feasibility of completing the power plant" and noting that its analysis included a "comparison of key assumptions utilized in current and prior economic analyses"; "Total costs and total cost differentials for all fuel and

PEF's direct filing in May 2009 disregarded the above-quoted requirements. To be precise, PEF submitted updated fuel, SO<sub>2</sub> and NO<sub>x</sub> price forecasts and re-submitted its projected CO<sub>2</sub> cost estimates from the Need docket. TR.1869; see Exh. 97-98. The PEF fuel forecasts, particularly for natural gas, failed to reflect the dramatic plunge in prices that had occurred and which had already been reflected in Department of Energy long range fuel price forecasts. Exh. 103. The re-submitted CO<sub>2</sub> estimates referred to cap and trade bills no longer under consideration using analyses long since superceded.

More importantly, Progress did nothing with the data that it did file. TR.1390. The PEF updated fuel and environmental cost forecasts (Exhibits 97 and 98), filed in partial compliance with the Need order, are applied to nothing and lead nowhere. At first, PEF maintained that following the Need determination, only legal and technical feasibility mattered. TR. 1194-95. Progress also maintained that TOR schedules (project costs tracked relative to original estimates) were not actually required by the nuclear cost recovery Rule, so they were not being submitted. TR.931-32. Progress did not address the fact that such information is directly required by the statute.

Progress also referred to the nominal attributes of any new base-load nuclear capacity (low fuel costs, fuel diversity, the absence of green house gas emissions) as general evidence in support of the project, but none of those general characteristics address whether the levy units, at the proposed site, entering commercial service at a defined time and a reasonably estimated cost is feasible. The feasibility analysis required by the nuclear cost recovery Rule is project specific. TR. 2080-81.

As was painfully apparent, given the analytical limbo created by the Levy project

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environmental compliance costs scenarios . . . .”; and “feasibility analyses results . . .”.

delay, Progress did not possess updated LNP project cost and schedule information required to perform the required economic assessments. Rather than concede that it did not, and could not, comply with the Rule and Need order mandates, PEF seemingly hoped that the Commission would accept the premise that costs really did not matter (while PEF, at the same time, proposed cost recovery mitigation measures to lessen unacceptable nuclear cost related rate impacts).

PCS Phosphate witness Peter Bradford explained that the long-term feasibility analysis required by the Rule largely concerned economic feasibility. TR.1519-22. Mr. Bradford, who as chair of two different state utility regulatory commissions that had to address the cost consequences of first generation nuclear units and addressed nuclear licensing issues as a commissioner of the Nuclear Regulatory Commission, explained the critical importance of a rigorous economic feasibility analysis under the incentive cost recovery Rules that are now applicable in Florida. TR.1519-20. He also explained that project delays and escalating costs have long been a focal point of investor concern regarding new nuclear plant construction and have contributed to a number of cancellations or suspension of previously announced plans to construct new units. TR. 1521-22.

Mr. Bradford noted that critical assumptions underlying the 2008 Need determination are no longer valid. The expected in-service dates of the Levy units are now uncertain. Progress cannot give an updated estimate of total project cost that reflects the schedule slippage. PEF cannot explain whether the project delay will affect PEF's procurement of long lead time items. Plunging fuel prices have substantially altered the economics of new nuclear power relative to other supply resources. Declining load growth forecasts have pushed back PEF's need for additional capacity (and the project



delay has pushed the commercial operation of the units beyond that capacity need in any event). TR. 1522-23. The project slippage also has delayed, or possibility permanently impaired, PEF's efforts to secure joint owners or financial partners for LNP.

Progress does not dispute the accuracy of these observations or their expected lasting impact. See e.g., TR. 2081-83. Each of these developments is significant. Collectively, they unquestionably require close Commission oversight of the economic feasibility of continuing the project.

Progress has acknowledged that it continues to evaluate whether to continue to proceed with the Levy project. TR. 1871 (Miller); TR. 2079 (Lyash). Receipt of regulatory approvals, including the Need determination, SCA approval, issuance of a COL for the AP1000 reference plant (currently Vogtle), and even issuance of a COL for the Levy project, will not be dispositive of a PEF decision to proceed. Progress will continue to evaluate a number of key factors on an "on-going basis." TR. 1871-72. Moving forward with this project is not a one-time, snapshot decision, but involves a continuing assessment of those key factors, and PEF agrees that project costs are one of those factors. TR. 1893-94; 2078-79.

There is nothing surprising in this disclosure. Indeed, it would be troubling if PEF responded otherwise. After all, if nothing else, the Levy project, even at the outdated estimate of \$17.2 billion, is three times the size of PEF's existing rate base and certainly represents a "bet the company" proposition for Progress. See Exh.63. On the other hand, PEF cannot reconcile its continuing assessment of LNP project feasibility with its position that the Commission should not regularly scrutinize project economic feasibility after a Need determination has been issued. The clear language and impact of

the statute Rule, and the Levy Need Order mandate an annual, detailed and current update of economic feasibility.

The incentives in the nuclear cost recovery Rule to promote new nuclear development do not mitigate the actual risks of such projects. The Legislature and Commission clearly recognized that early recovery of project costs and accelerated prudence assessments required by the nuclear cost recovery Rule shifted financial risks of building new nuclear projects from PEF shareholders and creditors to PEF ratepayers. The on-going long term feasibility requirement of the Rule serves the crucial purpose of safeguarding consumer interests by ensuring that those risks are reasonable through rigorous and continuous oversight of the project economics. No other investor in the project would do less.

In rebuttal, Progress conceded that project costs were important, but maintained that costs were not the only factor affecting project feasibility. TR. 2086. PEF also asserted that year-to-year variations in load and fuel forecasts should not lead to an annual re-visiting of the Need determination. While PEF objected to being required to supply any quantitative showing that the project remains cost-effective, the utility submitted a revised CPVRR analysis. TR 2066. In providing it, PEF hastened to explain that it did so only in response to a staff discovery request, and that Progress did not consider a snapshot CPVRR analysis to be a useful tool in assessing project economic feasibility. TR.2067. Instead, PEF asserted that project costs should only be considered in a “qualitative” sense in evaluating project feasibility. TR. 2072. In any event, PEF claimed, based on the assumptions in its “updated” CPVRR analysis, that completing LNP continued to be economic in the long run. TR.2070.

The short answer to PEF’s first point is that none of the changed circumstances

discussed above can be considered normal year-to-year variations. PEF does not dispute that the project slippage is permanent, the ramifications of which are still undetermined, there has been a sea change in fuel prices and load growth expectations, and access to capital markets also has fundamentally changed. A detailed assessment of the expected cost-effectiveness of LNP clearly is required in these circumstances.

Even if such dramatic events had not occurred, a “qualitative” discussion of project costs is not sufficient to satisfy the Rule requirements (or the dictates of the Need Order). As described above, an essential component of the incentive treatments afforded to a utility under the nuclear cost recovery Rule is that it must, in turn, demonstrate that continuing with a project remains in the best economic interests of the consumers that are fronting a substantial portion of project cost in advance. This means that a detailed economic analysis using current and reasonable assumptions should always be required. This applies most particularly to the items specified in the Need order (updated fuel and environmental costs, updated total project costs, and the status of joint ownership for the project). If Progress has determined that a CPVRR analysis is not appropriate, it can propose an alternative mode of analysis, but it cannot be excused from the obligation to prepare and submit such analyses.

Next, the revised CPVRR calculations that PEF supplied in its rebuttal are transparently flawed. First, and most obviously, PEF has neither updated in-service dates nor updated estimated project costs upon which it can base a CPVRR evaluation. PEF attempted sensitivities of the in-service dates and possible changes on the project capital cost<sup>5</sup>, but the company has not provided any specific update to these values, so the

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<sup>5</sup> A 25% increase in capital costs (a sensitivity that PEF modeled) would increase the total project cost to \$21.5 billion. This increase of \$4.3 billion alone equates to roughly two-thirds of PEF’s existing rate base.

resulting calculations amount to little more than sensitivities of the Need case, not an assessment of current project expectations.

Also, PEF continued to use the CO2 cost estimates from its Need filing even though those estimates have plainly been superseded and can no longer be considered relevant. None of the national carbon cap and trade bills modeled in the Need docket remain under consideration by Congress. Instead, in June 2009, the House of Representatives passed the American Clean Energy and Security Act (generally referenced as the “Waxman-Markey” bill for its primary sponsors). TR.2097. This bill focused heavily on mitigating the compliance cost impact on the U.S. economy generally, and electricity ratepayers specifically while endeavoring to lower carbon emissions over time. TR.2100-01. PEF’s direct case filed in May noted that Waxman-Markey was pending (see footnote to Exh. 98). PEF’s rebuttal, filed after both passage of the bill and analyses of its expected cost that have been prepared by the Environmental Protection Agency, among others, ignored the legislation altogether. TR. 2097. EPA’s analysis of the bill calculated carbon compliance costs that are substantially lower than all the scenarios PEF presented in the Need docket last year. TR. 2098-99; Exh. 155. While national regulation of carbon emissions remains a work in progress, PEF undeniably avoided providing updated information on the expected cost of compliance.

Further, the fuel price forecasts submitted by PEF witness Miller (that were never applied to any analysis of project feasibility), plainly were out of line with the changed reality pertaining to fuel prices and long-term forecasts. See Exh. 103. The PEF revised updated forecasts supplied in rebuttal are PEF proprietary forecasts prepared for the company’s own purposes. TR.2102. These forecasts show lowered natural gas prices that

rapidly escalate once the Levy units are placed in service<sup>6</sup>.

In sum, a rigorous, detailed analysis of the continuing economic feasibility of completing the proposed units using current and reasonable assumptions is a vital element of the annual nuclear cost recovery reviews required under the Rule. Progress did not supply the required analysis in the first instance, and the revised analysis that PEF offered in rebuttal is wholly inadequate given the changed circumstances relating to the project. The Commission should not approve the feasibility analysis filed by PEF in this docket.

**ISSUE 23A:** If the Commission does not approve PEF's long term feasibility analysis of Levy Units 1 & 2, what further action, if any, should the Commission take?

**PCS Phosphate:** \* Levy cost recoveries in 2010 should be suspended until PEF completes its assessment of project schedule options, negotiates its EPC agreement changes, files a detailed updated economic feasibility assessment utilizing current cost estimates and realistic natural gas price forecasts, and receives Commission findings of on-going feasibility and reasonableness.\*

The Commission should state in unequivocal terms that PEF's filing did not meet the standards of detail, currency and thoroughness that is required by the Rule and its' Order. The Commission should further state that PEF's annual filings must establish the economic reasonableness and feasibility of each Levy unit. This should include a detailed assessment of alternative supply and demand resources (including but not limited to conventional generation, renewable energy, enhanced energy efficiency and peak load management, and grid enhancements).

The Commission should get the annual review process for Levy back on track by requiring that Progress prepare and submit an updated project feasibility analysis once the

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<sup>6</sup> Attached is Exh. 103 revised to chart the "mid reference" national gas prices shown on PEF rebuttal Exh. 129 (JL-2).

utility has re-established expected cost and in-service dates for the Levy units. That analysis should be subject to discovery and challenge in a separate proceeding.

Cost recovery for estimated LNP costs should follow rather than precede Commission approval of this analysis. Consequently, the Commission should not approve recovery of estimated 2010 Levy costs at this time. In addition, upon review and approval of an updated feasibility analysis for the Levy project, the Commission should establish reasonable spending limits that align project needs with consumer rate impacts.

The above measures are necessary to preserve the consumer safeguards established in the statute and Rule that are an essential check on the risk-shifting incentives established by the nuclear cost recovery Rule. Given the numerous project uncertainties, the Commission must insist that Progress resolve the project status before receiving an advance recovery of estimated costs. One could hardly expect that PEF's shareholders, lenders, and potential joint partners would require any less. Ratepayers are entitled to at least as much assurance regarding the project's basic details and continuing viability.

**ISSUE 23B:** What further steps, if any, should the Commission require PEF to take regarding the Levy Units 1 & 2?

**PCS Phosphate:** \*The Commission should indicate that PEF's failure to fulfill the standards expected of an entity undertaking construction of projects of this magnitude may result in appointment of a special master empowered to take all necessary measures to assure PEF customers of the prudence and reasonableness of PEF decision-making.\*

**ISSUE 30:** What system and jurisdictional amounts should the Commission approve as reasonably estimated 2009 costs for PEF's Levy Units 1 & 2 project?

**PCS Phosphate:** \*PCS Phosphate agrees with and adopts the position of the OPC.\*

**ISSUE 31:** What system and jurisdictional amounts should the Commission approve

as reasonably projected 2010 costs for PEF's Levy Units 1 & 2 project?

**PCS Phosphate:** \*PCS Phosphate agrees with and adopts the position of the OPC.\*

In addition, the Commission should suspend Levy Project nuclear cost recoveries in 2010 until PEF completes its assessment of project schedule options, negotiates whatever changes the utility deems necessary to its EPC agreement with Westinghouse/SSW, files a detailed updated feasibility assessment, based on a current cost estimate as well as a realistic estimate of future natural gas prices, demonstrating the continuing cost-effectiveness of each Levy unit compared to alternative supply and demand resources (subject to further hearings), and receives findings of on-going feasibility and reasonableness from the Commission.

**PEF's 2010 Capacity Cost Recovery Clause Amount**

**ISSUE 32:** Should the Commission approve PEF's alternative cost recovery proposal, as set forth in PEF's Petition and supporting Testimony, as to recovery of NCRC costs?

**PCS Phosphate:** \*Yes, to the extent Progress' actual / estimated 2009 costs are deemed reasonable.\*

**ISSUE 32A:** If the answer to Issue 32 is yes, what is the total jurisdictional amount to be included in establishing PEF's 2010 Capacity Cost Recovery Clause factor?

**PCS Phosphate:** \*PCS Phosphate agrees with and adopts the position of the OPC.\*

**ISSUE 32B:** If the answer to Issue 32 is no, what is the total jurisdictional amount to be included in establishing PEF's 2010 Capacity Cost Recovery Clause factor?

**PCS Phosphate:** \*No position.\*

Respectfully submitted this 18<sup>th</sup> day of September, 2009.

BRICKFIELD, BURCHETTE, RITTS & STONE, P.C.

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by electronic mail and/or U.S. Mail this 18th day of September 2009 to the following:

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