

Ruth Nettles

From: Mile, Beverly [Beverly.Mile@fpl.com]
Sent: Monday, August 25, 2008 4:36 PM
To: Filings@psc.state.fl.us
Cc: Anderson, Bryan; Butler, John; Cordes, Tiffany
Subject: Electronic Filing - 080009-EI Florida Power & Light Company's Memorandum on Additional Issues.
Attachments: FPL'S MEMORANDUM ON ADDITIONAL ISSUES.doc

Electronic Filing

a. Person responsible for this electronic filing:

Bryan Anderson, Attorney
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408
(561) 304-5253
bryan_anderson@fpl.com

b. Docket No. 080009-EI

Petition for Approval of Nuclear Power Plant Cost Recovery Amount to be Recovered During the Period January - December 2009, Including Final True-Up for the Period Ending December 2007, Actual/Estimated True-Up for the Period Ending December 2008, and Projections for the Period Ending December 2009.

c. Documents are being filed on behalf of Florida Power & Light Company.

d. There are a total of 8 pages in the attached document.

e. The document attached for electronic filing is Florida Power & Light Company's Memorandum on Additional Issues.

Thank you for your attention and cooperation to this request.

Beverly Mile, ACP
Senior Legal Assistant to
Bryan S. Anderson and
Jessica A. Cano
Law Department
Direct Line: (561) 691-7724
Facsimile: (561) 691-7135
E-Mail: beverly_mile@fpl.com

THIS IS A PRIVATE, CONFIDENTIAL COMMUNICATION

The information contained in this e-mail is private and confidential information intended only for the use of the individual or entity named above as addressee. If the recipient is not the intended recipient or the employee or the agent responsible for delivering the e-mail to the intended recipient, you are hereby notified that any dissemination or copying of this information is strictly prohibited. If you have received this e-mail in error, please contact us immediately at: (561) 691-7724.

DOCUMENT NUMBER-DATE

07724 AUG 25 08

8/26/2008

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Power Plant Cost Recovery)
Amount To Be Recovered During The)
Period January – December 2009, Including)
Final True-Up For The Period Ending)
December 2008, And Projections For the)
Period Ending December 2009)

Docket No. 080009-EI

Filed: August 25, 2008

**FLORIDA POWER & LIGHT COMPANY'S
MEMORANDUM ON ADDITIONAL ISSUES**

Florida Power & Light Company (“FPL” or the “Company”), for its Memorandum on Additional Issues authorized by Order No. PSC-08-0554-PCI-EI, issued on August 21, 2008 (the “Order”), states as follows.

The Order asks that parties set forth their rationale for including, excluding or modifying an issue proposed by the Florida Industrial Power Users Group (“FIPUG”) and an issue proposed by the Office of Public Counsel (“OPC”). FPL does not object to inclusion of FIPUG’s proposed issue. FPL requests that OPC’s issue be excluded or modified for the reasons explained in this memorandum.

OPC’s proposed issue asks “[h]as PEF/FPL demonstrated that the uprate-related costs it seeks to recover in this docket are incremental to those it would incur in conjunction with providing safe and reliable service during the period associated with the extension of its operating license, had there been no uprate project?” Order at p. 1.

At the outset, FPL wishes to be clear that only uprate-related costs are included in FPL’s uprate nuclear cost recovery rule filings. Every component that is being either upgraded or replaced as part of FPL’s uprates is -- on a stand-alone basis -- necessary to support the increase in electrical output. As such, all of the uprate project costs are within the definition of “cost” in Section 366.93 and Rule 25-6.0423, as discussed in this memorandum.

DOCUMENT NUMBER-DATE

07724 AUG 25 8

FPSC-COMMISSION CLERK

OPC's proposed issue should be excluded because it is inconsistent with the definition of "cost" stated in Section 366.93 (1), Fla. Stat. and in Rule 25-6.0423(1)(b), which provisions govern this proceeding. In the alternative, OPC's issue should be modified to state the legal issue that it presents, and included in the legal issues section of the Prehearing Order.

Summary of Uprate Issues Subject to Determination in this Proceeding.

In this 2008 nuclear cost recovery proceeding, for the Turkey Point and St. Lucie nuclear plant uprate projects FPL is seeking recovery of carrying costs on its 2008 actual/estimated and 2009 projected construction costs. There are no 2007 carrying costs included in FPL's request because FPL first began accruing carrying costs on its construction balances in January 2008, after the Commission approved the need determination for the nuclear uprates.

In summary, there are several points for determination in this case with respect to the uprate projects. Actual 2007 construction costs are subject to a final prudence determination in this year's proceeding. FPL's 2008 actual/estimated construction costs and projected 2009 construction costs are subject to determinations of "reasonableness". Actual costs for 2008 and 2009 will be subject to final determinations of prudence in future years. Based upon the Commission's determination of prudent actual 2007 construction costs, and reasonable 2008 and 2009 expected construction costs, FPL's carrying costs on its projected construction cost balance are to be determined and included for recovery through the capacity clause.

Section 366.93, Fla Stat. and Rule 25-6.0423, F.A.C. Define "Cost".

Section 366.93(2), Fla. Stat., provides for recovery of all prudently incurred nuclear power plant costs for eligible nuclear projects, as further defined in the statute and Commission rules:

[T]he commission shall establish, by rule, alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing and construction of a nuclear... power plant. Such mechanisms shall be designed to promote utility investment in nuclear ... power plants and allow for the recovery in rates of all prudently incurred costs, and shall include, but are not limited to:

(b) Recovery through an incremental increase in the utility's capacity cost recovery clause rates of the carrying costs on the utility's projected construction cost balance associated with the nuclear or integrated gasification combined cycle power plant.

Section 366.93(2), Fla. Stat. (emphasis added).

“Cost” is defined in Section 366.93 and in the Commission’s nuclear cost recovery rule, Rule 25-6.0423. Both the statute and the rule define “cost” as follows:

“Cost” includes, but is not limited to, all capital investments, including rate of return, any applicable taxes, and all expenses, including operation and maintenance expenses, related to or resulting from the siting, licensing, design, construction, or operation of the nuclear ... power plant.”

Section 366.93(1)(a), Fla. Stat.; Rule 25-6.0423(2)(b).¹

2. **OPC’s Proposed Issue Should Be Rejected As Contrary to Florida Law.**

FPL is entitled to recover “all prudently incurred costs” that are “related to or resulting from the siting, licensing, design, construction or operation” of the uprates. See Section 366.93(2) and Rule 25-6.0423(2)(b) and discussion above. Construction carrying costs are to be recovered through the capacity clause. When placed into service, revenue requirements are to be recovered through base rate adjustments and capacity clause recovery will cease. Rule 25-6.0423(7).

¹ The Rule contains the same definition language as Section 366.93(1)(a) with the addition of a reference back to the statute’s definition of “cost”.

OPC's proposed issue as framed in the Order Allowing Memorandum on Additional

Issues states:

OPC

ISSUE:

Has PEF/FPL demonstrated that the uprate-related costs it seeks to recover in this docket are incremental to those it would incur in conjunction with providing safe and reliable service during the period associated with the extension of its operating license, had there been no uprate project?

Order No. PSC-08-0554-PCO-EI, issued August 21, 2008, p. 1.

Considered against the backdrop of Section 366.93 and Rule 25-6.0423, it is clear that OPC's proposed issue is inconsistent with the provisions of Florida law governing this proceeding in several ways, and should be rejected.

First, OPC's proposed issue incorrectly suggests what costs are even subject to collection in this proceeding. From reading OPC's issue, one might infer that some or all of FPL's prudently incurred construction costs of the uprate projects are sought for recovery through the capacity clause in this docket. This is not the case. Rather, it is only the uprate project *carrying costs* that are subject to recovery through the capacity clause. See Section 366.93(2)(b). All of the prudently incurred construction costs from FPL's uprate projects will be capitalized and included among the costs included in petitions for approval of base rate increases as the uprates are placed into commercial service, as provided for under Section 366.93(4), Fla Stat. and Rule 25-6.0423(7).

Second, OPC's proposed issue incorrectly suggests that a narrower class of costs is covered by the rule than those which are prudent and are "related to or resulting from the siting, licensing, design, construction or operation" of the uprates. See Section 366.93(2) and Rule 25-

6.04231(2)(b). From reading OPC's proposed issue, one would infer that the law requires -- which it does not -- that in addition to being "related to or resulting from" the uprates, that costs must also be "incremental to those it would incur in conjunction with providing safe and reliable service during the period associated with the extension of its operating license, had there been no uprate project." OPC's proposed issue thus represents an impermissibly narrow re-definition of "cost," contrary to the clear definition of "cost" already provided for in Section 366.93 and Rule 25-6.0423, and thus should be rejected.

Third, OPC's proposed issue is framed in terms of imposing a burden of proof on FPL (i.e., see the "Has PEF/FPL demonstrated that the uprate-related costs it seeks to recover in this docket are incremental ...). No such burden is contained in, or consistent with, the statute or rule. OPC for its part has not identified a single such cost possibly included in FPL's uprate project. Accordingly, OPC's framing of this issue impermissibly seeks to place a new, affirmative burden of proof on FPL on a legal element not contained in any statute or rule, and should be rejected.

3. Possible Modification of OPC's Proposed Issue.

As discussed above, OPC's proposed issue is inconsistent with the clear definition of "cost" contained in Section 366.93 and Rule 25-6.0423, as well as purports to create a new legal element for utilities to prove. For these reasons, FPL believes that it is appropriate to exclude OPC's proposed issue.

If OPC's proposed issue was to be included, then it should be re-framed as what it is -- an issue of law -- and contained in the legal and policy portion of the prehearing memorandum. The legal issue could be phrased as:

Does the NCRC Rule permit a utility to include as construction costs the full cost of upgrading and replacing components as part of the uprate projects, or only the portion of such cost that is “incremental” to what would have been incurred to extend its operating licenses?

Such a new interpretation of law might then be made applicable in future proceedings, as it would be manifestly unfair to apply it in hindsight in this case on the eve of trial.

FPL notes that Staff, in its prehearing statement, says in relation to OPC’s proposed issue that “the carrying costs on construction recovered through the Clause should be based on capital investments that are incremental to those that FPL would have otherwise incurred. A detailed analysis showing how FPL calculated the incremental capital investments was not provided.” Staff’s Prehearing statement at p. 6.

OPC’s proposed issue, and Staff’s position, highlight the incorrectness of including OPC’s proposed issue in this proceeding. FPL’s filings in this proceeding are focused on complying with the plain language of the statute and rule, as well as the draft nuclear filing requirements discussed with Staff and other parties. There has never been a suggestion, prior to OPC’s statement of the proposed issue, and Staff’s statement of position, that any additional legal requirement or element for proof existed like that stated in the proposed issue -- and review of the statute and rule shows there is none.

If the statute or rule, or even the draft nuclear filing requirements utilized by the parties, contained the need to present a “detailed analysis” of the type suggested by Staff, FPL of course would have provided one in its direct case. However, making up a new legal element or requirement, not provided for by statute or rule, in the middle of a case, obviously is not consistent with the basic requirements of due process or with sound regulatory practice.

To be clear, FPL's rebuttal testimony submitted in this proceeding shows that every component that is being either upgraded or replaced as part of FPL's uprates is -- on a stand-alone basis -- necessary to support the increase in electrical output. As such, all of the uprate project costs are within the definition of "cost" in Section 366.93 and Rule 25-6.0423. While FPL's uprate project will likely result in an increase in overall plant reliability, no components are being replaced as part of the uprate project with the intention of extending the life of the plant and hence all would be "incremental" if that were a relevant inquiry.

Rather, through exclusion of OPC's proposed issue or, in the alternative, modification to state the issue as a matter of law which can be briefed and decided, FPL is seeking to ensure that nuclear cost recovery in its first round of application maintains focus upon the definition of "cost" provided for in the applicable statute and rule.

WHEREFORE, FPL requests that OPC's proposed issue be excluded for the reasons stated herein or, in the alternative, revised to state a legal issue which, if found by the Commission to constitute a legal requirement in the course of this proceeding, should be expressly made applicable only to future years' proceedings.

Respectfully submitted this 25th day of August, 2008.

R. Wade Litchfield
Vice President and General Counsel
Bryan S. Anderson
Carla G. Pettus
Attorneys for
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420

By: s/ Bryan S. Anderson
Bryan S. Anderson
Fla. Authorized House Counsel No. 219511

CERTIFICATE OF SERVICE

Docket No. 080009-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery or U.S. Mail on this **25th day of August 2008** to the following:

Lisa Bennett, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

J. R. Kelly, Esq./Joseph McGlothlin, Esq
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399

J. Michael Walls, Esq.
Diane M. Tripplett, esq.
Carlton Fields Law Firm
P.O. Box 3239
Tampa, Florida 33601-3239

John T. Burnett, Esq.
Progress Energy Service
Company, LLC
P.O. Box 14042
St. Petersburg, Florida 33733-4042

John W. McWhirter, Jr., Esq.
McWhirter Reeves
Attorneys for FIPUG
400 North Tampa Street, Suite 2450
117 South Gadsden Street
Tampa, Florida 33602

Michael B. Twomey, Esq.
Attorney for AARP
Post Office Box 5256
Tallahassee, Florida 32314-5256

James W. Brew, Esq.
Attorneys for PCS Phosphate-White Springs
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, NW,
Eighth Floor, West Tower
Washington, DC 20007-5201

Karin S. Torain, Esq.
Atty for PCS Phosphate/White Springs
PCS Administration (USA) Inc.
Suite 400
Skokie Boulevard
Northbrook, IL 60062

By: s/ Bryan S. Anderson
Bryan S. Anderson
Fla. Authorized House Counsel
No. 219511

