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Electronic Filing

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b. Docket No. 090009-EI

In re: Nuclear Cost Recovery Clause.

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

d. There are a total of 27 pages.

e. The document attached for electronic filing is Citizen's Post-Hearing Statement of Positions and Post-Hearing Brief.
(See attached file: 090009.brief.final.sversion.doc)

Thank you for your attention and cooperation to this request.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause.	DOCKET NO.: 090009-EI FILED: September 18, 2009

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

Pursuant ot Order No. PSC-09-0604-PHO-EI, the Citizens of the State of Florida, by and through the Office of public ("OPC"), hereby submit their Post-Hearing Statement of Positions and Post-Hearing Brief. In this brief OPC will address FPL and PEF separately.

I. FPL:

PRELIMINARY STATEMENT

Despite the large amounts of costs that FPL is incurring to advance its nuclear projects, those projects are still in early, formative stages. Similarly, the Commission continues to fashion and shape the regulatory approach that it will apply to this and future annual "rounds" of its review of utilities' requests to collect the costs of their nuclear projects through the nuclear cost recovery clause. In the hearing on FPL's request, OPC did not urge the Commission to disallow, at this point, any of the costs for which FPL seeks recovery during 2010. OPC did, however, raise two issues that challenge directly the adequacy of the information that FPL presented in support of its request, and a third that identifies a risk of higher costs to which FPL's current course would expose customers. Specifically, through the testimony of its expert witness, nuclear engineer Dr. William Jacobs, OPC asserted that (1) in its presentation FPL did not demonstrate that the costs of uprate projects that it seeks to recover through the nuclear cost recovery

clause would not have been needed for the long term maintenance and reliable operation of the nuclear units had there been no uprate projects; (2) FPL failed to submit an annual, detailed, long term feasibility study of its new nuclear projects sufficient to comply with the rule governing the nuclear cost recovery clause; and (3) FPL is pursuing a form of contractual structure that, by placing responsibility for the construction function with an entity other than those who are responsible for engineering and procurement, would increase FPL's risks and expose customers to the possibility of unreasonably and unnecessarily high costs.

In all proceedings before the Commission, a petitioning utility has the burden of proving that it is entitled to the relief that it requests. In this case, FPL seeks to invoke an extraordinary ratemaking treatment. Also, ratepayers will be called upon ultimately to bear the staggering costs of FPL's hugely expensive nuclear projects. With respect to the adequacy and quality of the evidence that FPL submits in support of its annual requests in the nuclear cost recovery docket, it is therefore doubly important that the Commission require FPL to "get it right"—even if "getting it right" requires a new or supplemental presentation. The Commission will not be in a position to gauge whether FPL has *satisfied* the standards applicable to its requests until FPL first *addresses* those standards.

Because many of the high costs will be incurred in future years, well after the utilities implement the initial plans and decisions now being pursued and developed, it is also important that the Commission identify potential risks and questionable management

directions when they first arise, so that the utilities cannot claim "surprise" or "hindsight" in the event the Commission moves in future proceedings to protect customers from unreasonably high costs flowing from the utilities' continued devotion to earlier poor choices.

OPC'S STATEMENT OF BASIC POSITION

Require FPL to prove that claimed uprate costs are unrelated to those needed for long term operations and maintenance. Direct FPL to update the capital cost component of its annual/long term feasibility analysis. Inform FPL that any contract structure that departs from EPC will be scrutinized for unreasonable costs.

ISSUE 7: Should the Commission find that for the year 2008, FPL's project management, contracting, and oversight controls were reasonable and prudent for the Turkey Point Units 6 & 7 project and the Extended Power Uprate project?

For Turkey Point Units 6 & 7, see Issue 7A. With respect to the EPU project, no position at this time.

ISSUE 7A: Is FPL's decision in 2008 to pursue an alternative to an Engineering Procurement Construction (EPC) contract for the Turkey Point 6 & 7 project prudent and reasonable?

*No. Given the proprietary nature of the AP1000 technology, separating the construction function from engineering and procurement in a project as large and complex as the Turkey Point 6 & 7 project would expose FPL and its customers to the risk of unreasonably high costs. *

COMBINED ARGUMENT ON ISSUES 7 AND 7(A)

OPC witness William Jacobs is a nuclear engineer with extensive, national and international experience in nuclear projects. That experience includes overseeing the start-up

of new nuclear units. (TR-473) In his testimony, Dr. Jacobs observed that FPL has been pursuing a form of contractual organization that differs from the traditional engineering, procurement, and construction (EPC) format. The EPC arrangement places overall responsibility for the engineering, procurement, and construction functions with a single entity. By contrast, FPL is considering an "EP and C" arrangement, in which the construction function is not performed by the same contractors who design the project and work with vendors. Specifically, FPL hired a consortium of Black & Veatch and Zachary Corporation (BVZ) as the preconstruction engineer, and is pursuing a plan to engage a separate construction engineer. (TR-473).

Dr. Jacobs testified that all of the utilities that have chosen the AP1000 technology and that have reached the stage of finalizing contractual arrangements elected to employ the EPC structure. (TR-480) He explained why an approach other than the EPC structure would increase FPL's risk and expose it to higher costs. In a project as large and complex as the new nuclear units, those responsible for design and procurement must interface with the construction activities frequently. If the design and procurement work is being performed by one contractor and the construction work is being performed by another, disputes between the contractors over the relative scopes of work and divisions of responsibility will arise. A turnkey operation under the terms of an EPC structure would enable FPL to reduce and better manage such risks. (TR 478-479)

Further, the AP1000 nuclear generation technology is the proprietary property of Westinghouse Shaw. The AP1000 "package" includes proprietary, modular construction technology as well as the proprietary generation technology. Accordingly, even if FPL were to attempt to place the construction function with another entity, FPL would have to negotiate

with Westinghouse Shaw to acquire the proprietary construction modules that comprise part of the AP1000 technology.

Additional considerations buttress Dr. Jacobs' point. The terms of an EPC contract can be negotiated such that the consortium, not FPL, will have responsibility for managing the many interfaces between designers and those performing construction. (TR-469, 645) The terms of an EPC contract can be negotiated to place the responsibility for delays on the EPC contractor. (TR-479, 646) The terms of an EPC contract can be negotiated such that each contractor becomes jointly and severally liable, not only for its actions, but for those of the other contractors. (TR-479, 646) By employing Westinghouse Shaw in an EPC contract, FPL could benefit from the experience with AP1000 projects that the consortium will have acquired by that time—experience that BVZ definitely is lacking (TR-479, 646: Confidential Exhibit 45).

In view of the potential for non-EPC arrangements to increase the risk of higher costs, Dr. Jacobs recommended that the Commission inform FPL now that it will protect ratepayers from unreasonable costs attributable to a decision to depart from the EPC arrangement. Dr. Jacobs raised the concern specifically to forestall a future claim by FPL of "hindsight regulation" on the part of the Commission. (TR-478)

FPL's response took several forms, none of which are persuasive. First, FPL witness Steven Scroggs described the examples of utilities who have elected the EPC format as "a selectively limited group of projects." (TR-610) The selectively limited group to which Dr. Jacobs referred consisted of the full universe of utilities which have entered into any kind of final contracts. (TR-643) Next, Mr. Scroggs asserted that Dr. Jacobs wrongly assumed that

the advantages he attributed to the EPC form of contract are still available in the market. Mr. Scroggs' testimony implied that the witness or FPL knows the content of EPC contracts between utilities and Shaw Westinghouse. They do not know such content; the terms of such contracts are confidential. Mr. Scroggs could say only that he has reviewed the "public versions" of the contracts. The Commission is familiar with "public versions" of confidential documents—such as the ones that are prepared at the insistence of FPL. These are documents that are interspersed with blacked out or deleted material. Mr. Scroggs agreed that FPL would similarly shield the terms of any EPC agreement that it may enter. (TR-655 C, D) He therefore had no basis for the claim that certain terms are unavailable in the market.

FPL witnesses testified that FPL has preserved the EPC option. FPL perhaps misunderstood Dr. Jacobs' point. Neither Dr. Jacobs nor OPC claims that FPL has excluded the EPC approach from possible consideration. Further, neither Dr. Jacobs nor OPC is criticizing FPL for not having entered into an EPC arrangement at this early stage. The sole point we present to the Commission is that FPL indisputably is exploring an arrangement other than the EPC arrangement-one that carries greater risk for ratepayers-and the Commission should inform FPL now that it will be held accountable if it fails to manage risks appropriately.

Next, FPL witness Mr. Scroggs complained that OPC is being inconsistent with its comments on contractual organization. Mr. Scroggs stated OPC has criticized Progress Energy Florida for having entered into an EPC contract, and now criticizes FPL for not having done so. Mr. Scroggs characterized OPC's positions in the docket as "opportunistic" and "mutually contradictory and self-cancelling." (TR-615) FPL's strident characterizations cannot obscure the lameness of its arguments. Only by ignoring pertinent facts and adopting

a superficial, overly simplistic, and therefore misleading view of the two OPC positions could one assert that OPC is being inconsistent in its assessment of PEF's and FPL's contracting activities. OPC's criticism of PEF is—not that it entered into an EPC contract—but that it entered into its EPC contract well before it was assured that the NRC's review of its request for a Limited Work Authorization would permit PEF project work to proceed on the timeline contemplated by the EPC agreement. As a result of having jumped the gun, OPC contends that PEF made major contractual commitments at too early a point. This is a far cry from criticizing PEF for having selected the EPC format.

During cross-examination of Mr. Scroggs, it became clear that the witness, who based his claim of "inconsistency" on the bare fact that PEF had entered into an EPC contract, knew much more about PEF's circumstances. Mr. Scroggs was aware of the element of "timing" that applied to the PEF situation, and agreed that the "timing" consideration distinguished PEF's situation from that of FPL. (TR-647-648[1]) The "complaint" by FPL of disparate treatment on the part of OPC is contrived and bogus.

With respect to AP1000's proprietary construction modules, FPL witness Steven Scroggs spoke hopefully of "expanded supply chains." He suggested that Westinghouse Shaw may decide to leverage its participation in the modular construction through partnerships (TR-652). Clearly, even if Westinghouse Shaw decides to enter joint arrangements of the type Mr. Scroggs described for the furnishing of modules, Westinghouse Shaw will do so only on its terms and only if it has decided such arrangements are in its self-interest. More importantly, whether it is based on insight or is instead mere conjecture, Mr.

[1] Mr. Scroggs said, "The circumstances in terms of the timing of the projects and the level of commitment of the projects are definitely different between the two utilities." (TR-647)

Scroggs' response misses the point. Once a utility chooses the AP1000 technology, it will be unable to avoid dealing with Westinghouse Shaw in the construction phase of the project. (TR 652-653)

FPL witness John Reed claimed that, by raising now the prospect of potentially higher costs resulting from a riskier contractual arrangement, OPC is somehow encouraging the Commission to engage in "hindsight review." (TR-779) Mr. Reed must be temporally challenged. Unless "up" suddenly has become "down" and "before" now means "after," OPC has been unable to divine any credible rationale for Mr. Reed's assertion. Mr. Reed agreed that the standard that regulators apply to their review of utility decisions is what the utility knew or should have known at the time of the decision. (TR-822) Dr. Jacobs raised the concern regarding the choice of contractual structures well in advance of the point at which FPL will incur related costs purposely to preclude a claim of "hindsight regulation" in the future. FPL has yet to explain how a "fair warning" communicated to the utility years prior to costs being incurred can amount to "hindsight review." The response seems more kneejerk than rational. One wonders how far in advance a party or the Commission must raise an issue to avoid the "hindsight review" claim. It may be that, as long as the argument is within the tool kit of means to resist a disallowance, no time frame will suffice for the purpose. [2]

[2] During cross-examination, Mr. Reed testified that he could support a decision by FPL to enter into an EPC arrangement. (TR-828) Earlier, he testified in support of FPL's decision to examine an alternative to the EPC structure. While at one point Mr. Reed described OPC's position on the contractual issue as "vague" (TR-825), Mr. Reed's willingness to endorse whatever course his client elects to pursue is clear.

ISSUE 8: **Should the Commission approve what FPL has submitted as its annual detailed analyses of the long-term feasibility of completing the Turkey Point 6 & 7 project, as provided for in Rule 25-6.0423, F.A.C.?**

No. FPL updated its assumptions in other respects, but did not update its estimate of the cost of Turkey Point 6&7. Without the updated construction costs, FPL's "updated feasibility study" is worthless.

ISSUE 8A: **If the Commission does not approve FPL's long term feasibility analyses of Turkey Point 6 & 7, what further action, if any, should the Commission take?**

The Commission should order FPL to conduct the proper updated feasibility study by a time certain. Once the Commission receives it, the Commission should evaluate whether the project remains feasible on a long term basis.

COMBINED ARGUMENT ON ISSUES 8 AND 8A

Commission Rule 25-6.0423(6)(c)(5) states: "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 (nuclear) power plant." To test the feasibility of their projects, the utilities have adopted a comparison of the costs of the nuclear project with the corresponding costs of an alternative gas-fired, combined cycle generator. In this case, FPL submitted updated information, assumptions, and projections regarding the cost parameters of the alternative combined cycle unit. FPL compared the updated combined cycle projections with the same capital costs of the proposed nuclear unit that it prepared in mid-2007 and submitted as part of the feasibility analysis in the 2008 nuclear cost recovery hearing. (TR-821)

Every now and then an issue comes along that does not require much in the way of analysis or argument to resolve it. This is an example of such a straightforward, 'clear cut" matter. Rule 25-6.0423(6)(c)(5) requires a detailed analysis of feasibility to be performed annually. There can be no dispute over that proposition. The study involves a comparison between the proposed nuclear project and the cost of the alternative. FPL supplied the current estimates of the alterative, but did not update the capital costs of the proposed nuclear plant. There is no dispute over what FPL put forward as the capital cost component of its "study." Therefore, the study is not "detailed;" rather, it is *incomplete*. FPL has performed only half the study that the rule requires. OPC submits there is no room for credible argument on this point.

FPL tried. FPL asserts that the mid-2007 capital cost estimate for the nuclear unit is still "the best information available." (TR-788) This claim suffers from the same fatal flaw as the half-study that FPL submitted: FPL's mid-2007 estimate is the "best available" precisely because FPL chose not to update its projection. (TR-821) FPL is trying to lift itself by pulling on incomplete bootstraps.

FPL also alludes to the changing, volatile nature of the components of the capital cost estimate.[3] Once it has performed the fully updated and detailed feasibility analysis, FPL will be free to offer any caveats, disclaimers, and explanations that it believes are pertinent. However, FPL cannot avoid the requirement of the rule that it submit a full, detailed feasibility analysis annually.

[3] The parameters of the alternative combined cycle unit, including fuel forecasts, are volatile, too, but FPL updated those components of its feasibility study. (TR-820)

At stake is more than a technical omission in FPL's filing. FPL is proposing an enormous expenditure of capital—estimated (in 2007) at $17 billion. While the feasibility of the nuclear project is dependent upon a number of variables and considerations, the *chief* such component is the projected capital investment that will be necessary to place the unit into service. The projected capital costs are essential to the Commission's ability to monitor the project *continuously* over time. By omitting the updated capital cost estimate, FPL is creating the impression that it is withholding bad news that would place into question the prudence or wisdom of moving forward with the project. As guardian of customers' pocketbooks, the Commission must not permit FPL to "finesse" this important requirement. The Commission adopted the requirement of an annual feasibility study for good reason. It must not now allow FPL to circumvent the requirement.

ISSUE 11: Are FPL's 2008 actual, 2009 actual/estimated and 2010 projected EPU project costs separate and apart from the nuclear costs that would have been necessary to provide safe and reliable service had there been no EPU project?

*FPL has not met its burden of proving that these costs are separate and apart from the nuclear costs that would have been necessary to provide safe and reliable service had there been no EPU project. *

ARGUMENT

Issue 11 was carried over from last year's nuclear cost recovery hearing. In that hearing, OPC witness Dr. Jacobs addressed the "eligibility standard" the Commission should apply to requests for authority to collect costs of uprate projects through the nuclear cost recovery clause. He articulated the need to differentiate between those costs of additions that would be needed to continue to maintain and operate an existing nuclear unit over the long term, on the one hand, and those additions that would not be installed "but for" the decision

to increase the operating capacity of the unit (uprate). Costs that fall into the former category should be collected through base rates. Only costs that are distinct from those needed for long term reliability should be eligible for clause-based recovery. Parties referred to this distinction as the "separate and apart" test. From the outset, the "separate and apart" label referred to Dr. Jacobs' contention that the utility should perform an analysis of additions that would be needed over a 20-year horizon for the purpose of comparing the investments that would have been necessary without the uprate with those that are attributable solely to the uprate. Also from the outset, FPL resisted the test.

In this case, FPL has taken the tack of "appropriating" (through repetition) the "separate and apart" phrase and claiming that its existing practices satisfy the requirement. While FPL's testimony is replete with the use of the phrase "separate and apart," a careful analysis of FPL's testimony on the subject refutes the claim. FPL asserts that the 20-year period advocated by Dr. Jacobs would be overly burdensome, if not impossible. To the contrary, as Dr. Jacobs testified, the analysis he proposed is no different than the logical measures a utility would take to assess the economics of a 20-year license renewal project. (TR-497) Next, FPL contends that its detailed engineering studies are designed to identify precisely the additions that will be necessary to complete the uprate projects. Unfortunately for FPL's argument, the engineering analyses that identify additions for the uprates do nothing to assess whether the same additions would have been necessary to maintain and operate the units over the long term. This particular argument of FPL simply begs the larger question. The distinction between those additions that FPL identified as necessary for the uprates (and for which FPL seeks recovery through the nuclear cost recovery clause) on the basis of an analysis of uprate needs, on the one hand, and the as-yet unidentified components

that would be necessary over the long term without an uprate on the other hand, led to the identification of the issue.

FPL asserts that it periodically performs an analysis of future nuclear capital needs, and that analysis provides assurance that its uprate costs are eligible for clause-based recovery. Unfortunately also for this argument, FPL's periodic analysis of needed capital additions covers only a seven-year planning horizon—far too short to assess whether additions identified for the uprate may also have been necessary had there been no uprate project. (TR-677)

FPL points to the NRC's licensing review process as evidence that it has identified the additions that would have been needed in the absence of the uprate projects. Unfortunately again for FPL's argument, in the licensing review process the NRC concerns itself only with safety-related items. These items constitute far less than the full universe of possible additions. (TR-676)

Finally, FPL witness Rajiv Kundalkar testified that a decision to deny recovery of costs through the nuclear cost recovery clause would in the long run increase the overall costs to ratepayers. During cross-examination, however, he said that he was not advocating that the Commission permit FPL to recover any costs through the clause that it determines to be ineligible for that purpose. (TR-678-679)

CONCLUSION

For the reasons developed in this brief, the Commission should require FPL to comply fully with the requirement that it prepare a detailed, long term feasibility study

annually. To ensure that only eligible uprate costs are being recovered through the clause, it should direct FPL to compare the additions identified for the uprate projects against those that would be necessary to operate the units reliably over the long term. Finally, the Commission should place FPL on notice that it will protect customers from a choice of contractual structures that exposes them to unnecessary risks and unreasonable costs.

II. PEF

PRELIMINARY STATEMENT

The propositions advanced by the Citizens are straightforward. This Commission is faced with its first test under its prudence determination obligations of the Nuclear Cost Recovery Provisions of Section 366.093, Fla. Stat., and Rule 25-6.0423, F.A.C.

Progress Energy suggests that the legislative intent provisions of the Statute and Rule mean that the Commission should not look closely at PEF's actions. Citizens believe that this argument is an effort to get the Commission to take its eye off the ball. The Citizens of Florida are being asked to absorb a significant portion of the hundreds of millions of dollars of site selection, pre-construction and carrying cost allowed by law. This is a benefit to PEF in the near term since it will allow the company the ability to get the project underway with significantly lessened risk compared to the last round of nuclear plants 30-40 years ago.

With this benefit comes the obligation to spend wisely and prudently in implementing Section 366.093. The Commission Rule 25.6.0423 (5) (c) 3 provides that once a cost is actually expended and determined to be reasonable and prudent (as

provided pursuant to Section 403.519 (4) (e), F.S.), then such a cost "shall not be subject to disallowance or further prudence review. Even if the company abandons the project before completion, it can recover costs even greater than those approved by the Commission through that date.

Section 403.519 (4) (e), F.S. states...

> (e) After a petition for determination of need for a nuclear or integrated gasification combined cycle power plant has been granted, ***the right of a utility to recover any costs incurred prior to commercial operation, including, but not limited to, costs associated with the siting, design, licensing, or construction of the plant and new, expanded, or relocated electrical transmission lines or facilities of any size that are necessary to serve the nuclear power plant, shall not be subject to challenge unless and only to the extent the commission finds, based on a preponderance of the evidence adduced at a hearing before the commission under s. 120.57, that certain costs were imprudently incurred.*** Proceeding with the construction of the nuclear or integrated gasification combined cycle power plant following an order by the commission approving the need for the nuclear or integrated gasification combined cycle power plant under this act shall not constitute or be evidence of imprudence. ***Imprudence shall not include any cost increases due to events beyond the utility's control.*** Further, a utility's right to recover costs associated with a nuclear or integrated gasification combined cycle power plant may not be raised in any other forum or in the review of proceedings in such other forum. Costs incurred prior to commercial operation shall be recovered pursuant to chapter 366.

It is this provision of law that is triggered by the fact scenario facing the Commission regarding the LNP.

As a preliminary matter, OPC notes what is not at issue here. No Levy Nuclear Plan (LNP) costs that are subject to final approval for prudence are at issue. Nor are any

costs subject to recovery on a projected basis. In fact, no costs have yet been identified as being subject to disallowance. All three issues raised by the OPC and Intervenors through expert testimony and development of the record through cross-examination, are essentially designed to make the customers case that two nuclear generation projects---one involving near term recovery of nearly $400 million for the entire project and the other involving recovery of nearly $400 million of early development costs, and up to $17 billion or even more---deserve the greater scrutiny at this stage of the projects and the Commissions' oversight

Boiled down to its essentials, OPC asks for these outcomes related to the LNP:

1. Create a spin-off docket to make a final determination or defer until 2010 final determination of the prudency of costs caused by the act of signing the LNP EPC contract on December 31, 2008;

2. Order PEF to file a cover feasibility study after finalizing and executing the renegotiation of the LNP EPC; and

The Citizens pursue these outcomes as an appropriate balance between seeking Commission determinations that could prematurely end viable, customer-beneficial projects and between allowing PEF to expend customer-provided funds without the stewardship obligation that the legislature intended to accompany pre-start up cost recovery.

Each of the outcomes is reasonable because the Commission does not have all of the facts needed to make a determination in the case of the LNP. Several key elements of the projects' financial structure including the final EPC cost, joint ownership and perhaps, additional Board of Directors action are still to be determined in 2009, with a potential decision to be made regarding an increase in a cost beginning January 1, 2010. (EX 101, p.42) This lack of information makes a determination about the actual impact of PEF's decision to sign the EPC on December 31, 2008 indeterminable.

OPC'S STATEMENT OF BASIC POSITION

PEF has not met its burden of demonstrating that its actions related to the signing of the Engineering, Procurement and Construction (EPC) contract on December 31, 2008 were reasonable and prudent in light of circumstances known or knowable to management at the time of signing. Also, PEF has not submitted a sufficient or compliant long-term feasibility analysis related to completing of the Levy Nuclear Project as required by Commission Rule 25-6.043, F.A.C., and the LNP Determination of Need Order. The Commission should consider spinning off the issues surrounding the LNP project schedule delay and also require PEF to file additional information related to the circumstances surrounding the signing of the EPC and the feasibility of the LNP project based on revised costs. Additionally, the Commission should place PEF on notice that costs expended prior to issuance of any license amendment request (LAR) approval could be subject to further prudence review if the related LAR(s) are denied.

ISSUE 2: When a utility elects to defer recovery of some or all of the costs that the Commission approves for recovery through the Capacity Cost

Recovery Clause, what carrying charge should accrue on the deferred balance?

No Position.

ISSUE 3: **Should FPL and PEF be permitted to record in rate base the incremental difference between Allowance for Funds Used During Construction (AFUDC) permitted by Section 366.93, F.S. and their respective most currently approved AFUDC, for recovery when the nuclear plant enter commercial operation?**

No position.

ISSUE 21: **Should the Commission find that for the year 2008, PEF's project management, contracting, and oversight controls were reasonable and prudent for the Levy Units 1 & 2 project and the Crystal River Unit 3 Uprate project?**

No. The Commission should note the status of the NRC's review and approval process notify PEF that costs expended for projects yet to be licensed – although recoverable at this time – may be subject to prudence review if not licensed.

ARGUMENT

Due to the limited time between the conclusion of hearing and the coincidence of the PEF rate case beginning on September 21, 2009 in Docket No. 090079-EI, the OPC has chosen to file a brief on the PEF issues that is relatively succinct and focus on issue 21A. OPC offers the expert testimony of Dr. William R. Jacobs the commission should PEF on notice that any costs that may be stranded as a result of its decision to expend over $300 million on CR3 Phases II & III prior to achieving licensing, would be subject to an imprudence finding if and when the related investment was deemed to be unusable for completing the Uprate for reasons of licensing denial. (TR-1467-1473)

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?

No. based on the circumstances the PEF knew or should have reasonably known, it was not reasonable or prudent for PEF to sign the EPC contract with the Consortium.

ARGUMENT

Due to the limited time between the conclusion of hearing and the coincidence of the PEF rate case beginning on September 21, 2009 in Docket No. 090079-EI, the OPC has chosen to file a brief on the PEF issues that is relatively succinct. This matter is an important one that has involved extensive record development that included hours of deposition testimony and a very extensive document and discovery production by PEF as well as lengthy testimony at hearing. Unfortunately there is not adequate time to fully a develop a discussion of the record in a brief beyond citation to the essential facts that support the Citizens contentions.

The OPC is satisfied that the Company has been very responsive with information necessary for understanding the events that are at issue in this case. However, the evidence in this case is compelling in support of only one conclusion: The record is not sufficient to make a final determination with respect to the issues of prudence and feasibility raised by the intervenors in this docket. For this reason, OPC seeks a finding by the Commission that a final prudency determination of LNP costs yet to be adjudicated should not occur unless and until there is a final determination regarding the circumstances of the signing of the Engineering Procurement & Construction (EPC)

contract on December 31, 2009 and any required renegotiation of the contract or its provisions.

Specifically, with respect to the LNP Project, the Citizens seek a determination by the commission:

1. That PEF should not be allowed to recover, on a permanent basis, any costs attributable to, and/or arising out of, the delay in the scheduled commercial operation date (COD) of 2016 (Unit 1) and 2017 (Unit 2) of the Levy Nuclear Plant (LNP) project.

2. That PEF be required to perform an analysis of the long term feasibility of completing the LNP project based on the costs as determined after conclusion of any ongoing renegotiation of the EPC and any other financing, including joint ownership.

The preponderance of the evidence in the record in this case supports the findings by the Commission that PEF did not act prudently when it signed the EPC contract under the circumstances that it knew at the time.

The circumstances that PEF knew or should have reasonable known are:

1. That the initial negotiation and cash flows of the EPC were dependent on a COD date of 2016 and 2017 for LNP Units 1 & 2, respectively (TR 1223-1227);

2. That the COD dates of 2016 and 2017, for the LNP Units 1 & 2 were dependent upon the Nuclear Regulatory Commission (NRC) agreeing to review the Limited Work Authorization (LWA) sought by PEF on July 28, 2008 and amended on September 12, 2009 (TR-1223-1229; 1238-1239);

3. That the COLA and LWA supporting geological data submitted by PEF contained critical information about the geology of the LNP site that was unknown in the geology literature(Exh.149, p.94-000022);

4. That the correspondence by the NRC on October 6, 2009 made meaningful and pointed references to the complexity of the geology of the LNP sight with reference in each of the three paragraphs relating to the review schedule(TR-1373);

5. That PEF had no evidence of any indication by the NRC that they would grant the LWA review on the schedule that PEF wanted(TR-1797-1801);

6. That PEF substituted a new vendor (Paul Rizzo) for certain critical geotechnical data analysis activities less than 4 months from the COLA submittal date(TR 1344-1345,1357; Exh.149 p. 94-000169)

7. The new geotechnical data vendor developed a plan to characterize the LNP site geology in a way that was unknown in the literature and sought confirmation of it by a geologist at the University of Florida (Dr. Randazzo) on the very eve of the COLA submittal (Exh. 149, p.94-000022);

8. The opinion by Dr. Randazzo was not as supportive or far-reaching as that sought by Paul Rizzo (Exh.149; p.94-000007-88);

9. The opinion by Dr. Randazzo was cited by PEF in its LWA supplemental filing on September 12, 2008 (Exh. 152);

10. The NRC staff noted the lack of support for the opinion of Dr. Randazzo and asked for further information in the RAIs (Exh.101, p.5);

11. That PEF's belief that excavation and dewatering activities in the non-nuclear commercial construction world would be persuasive to the NRC staff was unfounded due to the NRC's very different public safety goals (TR 1381-1386);

12. That the statements of NRC staff in a public meeting on December 4, 2008 where not actually relied upon by the PEF in any way with respect to the decision to sign t he EPC on December 31, 2008 (TR 1788-1790);

13. That the December 4, 2008 statement by the NRC staffer Bryan Anderson, had no reliance value due to the vague and general terms in which it was expressed (Exh. 120);

14. That the NRC had stated in October 6th letter that it would develop an LWA review schedule after review of the Requests for Additional Information (RAIs) relating to geotechnical issues (Exh. 101, p.1);

15. That the RAI responses provided by PEF were submitted on November 20, 2008 (TR-1992);

16. The PEF RAI responses were submitted on the Thursday before Thanksgiving and the statement by Bryan Anderson was made on the fourth day after return from Thanksgiving holidays and no meaningful review of the RAI responses could have occurred (TR-1992-1923);

17. That the December 4, 2008 statement by NRC staffer Andersen was not reported to senior management nor was it tracked in any of the key management reporting documents relating to the LNP project (TR-2164-2167);

18. That PEF in fact did not rely nor could reasonable have relied in any way on the December 4, 2008 statement of Bryan Anderson;

19. That PEF was told by the NRC sometime in December that they could expect an LWA review schedule determination before January 31, 2009 (TR-1838; Exh. 146, p. 47.03531)

20. That the LWA was considered by PEF to be a critical risk issue that was tracked on the weekly LINC document (Exh. 101, pp. 11-25);

21. That the December 2008 Nuclear Project Development report showed the NRC's LWA approval schedule to be a risk/critical issue (Exh. 146, p.47-03531);

22. PEF signed the EPC on December 31, 2008 (TR-1454);

23. On January 23, 2009, the NRC orally informed PEF that the LWA would be reviewed concurrently with the COLA – effectively denying the request (TR-1454; 1800-1802)

The above factors are cited for the proposition that despite the statements of surprise and the denials of actual knowledge about the what the NRC staff might do with respect to the LWA schedule, the company ***reasonably should have known*** that the NRC staff might be reluctant to give an early approval to work on a site with complex geotechnical characteristics.

PEF's testimony amounts to little more than a "no news is good news" approach to evaluating the risk that the NRC staff would proceed cautiously given all of the factors surrounding the geology, the newness of PEF's assertion about the geology, the newness

of the LWA rule and complete lack of precedent for decision-making in the latest wave nuclear plant licensing which hadn't occurred in at least 30 years, the issues surrounding the geotechnical data collection vendor, and the many other factors that were known or should have been known to PEF.

The Commission should find that by a great preponderance of the evidence that the expert opinion of Dr. William R. Jacobs is correct that the company was too quick to sign the EPC based solely on what was known or should have been known at the time of the signing. It should find that the company was not reasonable to assume that only their view of the NRC's review approach and probable review timeline should be given any credence given the circumstances and the potential impact to the schedule if they were wrong.

The OPC's view of the imprudence of the timing of the EPC execution as contained in the testimony of Dr. Jacobs is not based on hindsight in any way. As the record abundantly demonstrates the overwhelming facts before PEF should have indicated caution. Instead, they signed the EPC knowing that the NRC was going to issue the schedule decision within 30 days.

There is conflicting testimony about the impact of the signing. The Commission need not speculate on this. The correct course of action given that PEF at least reasonably should have known that the NRC might act cautiously would be to hold the issue over for further determination based upon the results of the renegotiation. At that point the

Commission and the parties would be in a better position to judge if and to the extent of any impact on the overall costs of the LNP project. This would mean that the Commission would not have to speculate on the outcome of the renegotiation or the Company's consideration of the other factors identified in Dr. Jacobs testimony and exhibits.

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)?

No. The Commission should order PEF to file a feasibility analysis per the rule after renegotiation the EPC and then the Commission should evaluate whether the project remains feasible on a long term basis.

ARGUMENT

Due to the limited time available to brief this issue in the context of the imminent PEF rate case, the OPC stands on the expert testimony of Dr. William R. Jacobs and supports the analysis provided by PCS Phosphate in its post hearing statement

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF** has been furnished by electronic mail and U.S. Mail on this 18th day of September, 2009, to the following:

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