Marguerite McLean

100009-EI

From: LOWE, AMY [Amy.Lowe@fpl.com]
Sent: Friday, September 10, 2010 4:37 PM
To: Filings@psc.state.fl.us
Subject: Electronic Filing - Docket # 100009-EI
Attachments: FPL's Post Hearing Brief.pdf; FPL's Post Hearing Brief.doc

Electronic Filing

a. Person responsible for this electronic filing:

Jessica A. Cano, Esq.
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
(561) 304-5226
Jessica.Cano@fpl.com

b. Docket No. 100009-EI

IN RE: Nuclear Power Plant Cost Recovery Clause

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

d. There are a total of twelve (12) pages.

e. The document attached for electronic filing is:

Florida Power & Light Company's Post-Hearing Brief

(See attached file(s): FPL's Post Hearing Brief.doc; FPL's Post Hearing Brief.pdf)

Regards,
Amy Lowe, CLA
Certified Legal Assistant
Senior Legal Assistant to
Bryan Anderson, Senior Attorney
Florida Power & Light Company
Office: (561) 304-5608 Fax: (561) 691-7135
Email: amy.lowe@fpl.com

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Power Plant Cost Recovery Clause)	Docket No. 100009-EI Filed: September 10, 2010

FLORIDA POWER & LIGHT COMPANY'S POST-HEARING BRIEF

Florida Power & Light Company ("FPL" or the "Company") hereby files with the Florida Public Service Commission (the "PSC" or the "Commission") its Post-Hearing Brief in the above-referenced docket, pursuant to Order No. PSC-10-0538-PHO-EI and Order No. PSC-10-0115-PCO-EI, and states as follows:

On September 7, 2010, the Commission approved the Stipulation among FPL, the Office of Public Counsel, and the Florida Industrial Power Users Group and the deferral of issues until the 2011 Nuclear Cost Recovery Clause proceeding. This approval resolved all FPL issues in this docket (Issues 1, 3b, and 16-27) except for Issue 3a. Accordingly, FPL is providing its position and post-hearing brief on Issue 3a.[1]

ISSUE 3a: **Does the Commission have the authority to require a "risk sharing" mechanism that would provide an incentive for a utility to complete a project within an appropriate, established cost threshold? If so, what action, if any, should the Commission take?**

FPL: *No. FPL is entitled to recover *all* its prudently incurred costs, regardless of the ultimate total. Additionally, FPL is required to provide a non-binding cost estimate for nuclear projects, not a binding threshold for use in a "risk sharing" mechanism. The ability to recover all prudent costs and the provision for a non-binding cost estimate are critical to the legal framework intended to promote nuclear generation. A "risk sharing" mechanism would violate both the letter and intent of the law.*

[1] FPL takes no position on the issues identified for Progress Energy Florida in this docket.

I. INTRODUCTION

Issue 3a introduces the concept of a "risk sharing" mechanism for the first time in the nuclear cost recovery process. The exact operation of such a mechanism is unclear, but it appears to suggest that costs incurred in the development of a nuclear power plant that exceed some "appropriate, established cost threshold" may not be recovered by the utility developing the nuclear power plant, regardless of whether those costs were prudently incurred. Such a mechanism is contrary to the clear language of the Florida statutes governing nuclear cost recovery, notwithstanding the Commission's general authority to ensure fair, just and reasonable rates.

Even if it were permitted by law, it would be poor public policy to implement a "risk sharing" mechanism, as utilities would need to include substantial contingencies within the "appropriate, established cost threshold" in order to take into account the risk of costs exceeding the threshold, leading to higher total project cost estimates. At the same time, if a project ultimately cost less than the "threshold," customers could be burdened with paying more than the actual cost of the project, as cost savings under such a mechanism would presumably be shared with the utility. Additionally, establishment of a "risk sharing" mechanism is unnecessary given the prudence, reasonableness and annual feasibility analysis already required by Rule 25-6.0423, F.A.C., which rule ensures that only prudently incurred costs will be included in rates and that proceeding with a nuclear project remains economically feasible. For all these reasons, as described further below, the Commission cannot and should not require a "risk sharing" mechanism for nuclear cost recovery purposes.

II. FLORIDA LAW DOES NOT PERMIT A "RISK SHARING" MECHANISM

A. A "Risk Sharing" Mechanism Would Violate Section 403.519, Florida Statutes

Section 403.519(4), Florida Statutes, Section 366.93, Florida Statutes, and Rule 25-6.0423, Florida Administrative Code ("the Nuclear Cost Recovery Rule") establish the legal and regulatory framework for the recovery of costs in the development of nuclear generation in Florida. Section 403.519(4), Florida Statutes, applies to the determination of need for a nuclear-fueled power plant and emphasizes the Florida Legislature's desire to improve fuel diversity, reduce dependence on fuel oil and natural gas, reduce air emission compliance costs, and contribute to the long-term stability and reliability of the electric grid in Florida. It further makes clear that a utility is entitled to recover all its prudently incurred costs in the development of nuclear generation. Specifically, with respect to cost recovery after a determination of need is granted, it states:

> ***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...***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.***

§ 403.519(4)(e), Fla. Stat. (emphasis added).

A "risk sharing" mechanism that disallows recovery of costs above an established threshold would violate the utility's right to recover its costs, and would challenge the recovery of those costs without the requisite showing by a preponderance of the evidence that certain costs were imprudently incurred. Indeed, the proposed "risk sharing" mechanism could provide for the disallowance of *prudently* incurred costs that exceeded the established threshold. To the extent it is argued that all costs above the threshold are inherently imprudent, such argument

would fall far short of meeting the requirement that a preponderance of the evidence demonstrate that *certain costs* were imprudently incurred. The mere fact that the final cost of a project exceeded a cost estimate is not, on its own, evidence of imprudent decision making. Accordingly, it is clear that such a mechanism is contrary to the plain language of Section 403.519(4)(e), Florida Statutes, and should be rejected.

B. A "Risk Sharing" Mechanism Would Violate Section 366.93, Florida Statutes

Section 366.93, Florida Statutes, establishes certain parameters for nuclear cost recovery, and requires the Commission to establish by rule a cost recovery mechanism that promotes utility investment in nuclear power plants and "allow[s] for the recovery in rates of ***all*** prudently incurred costs. § 366.93(2), Fla. Stat. (emphasis added). To the extent there is any doubt about the types of costs that are recoverable, the statute defines "cost" as including but 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. § 366.93(1)(a), Fla. Stat. In response to the direction provided in Section 366.93, the Commission promulgated the Nuclear Cost Recovery Rule. This rule states, among other things, that its purpose is to promote utility investment in nuclear generation and to allow for the recovery in rates of ***all*** such prudently incurred costs, and includes the definition of "cost" provided in Section 366.93(1)(a). *See* Rule 25-6.0423(1) and (2)(d), Fla. Admin. Code.

As explained by the Florida Supreme Court, it is an "elementary principle" of statutory construction that significance and effect must be given to every word, phrase, sentence and part of a statute – and words in a statute should not be construed as mere surplusage. *School Board of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009), citing

Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc., 948 So. 2d 599, 606 (Fla. 2006).

A "risk sharing" mechanism that disallows recovery of costs above an established threshold would violate the mandate in Section 366.93 (and the stated purpose of the Nuclear Cost Recovery Rule) that utilities be permitted to recover all their prudently incurred costs. It is clear that utilities are permitted to recover such costs, regardless of whether they total above or below some pre-established threshold. Accordingly, a "risk sharing" mechanism would be contrary to the plain language of Section 366.93, Florida Statutes, as well as contrary to Section 403.519(4), Florida Statutes discussed in the prior section of this brief.[2]

C. A Binding Cost Threshold for use in a "Risk Sharing" Mechanism is Contrary to Law

Another key component to the nuclear cost recovery framework established by the legislature and adopted by the Commission in its Nuclear Cost Recovery Rule is the use of a nonbinding cost estimate for nuclear power plant projects. Section 403.519(4)(a)3, Fla. Stat., requires the utility to include a "nonbinding estimate" of the cost of the nuclear power plant in its need determination petition. Section 366.93(5) requires the utility to annually report to the Commission the budgeted and actual costs of developing the nuclear power plant as compared to the estimated nonbinding cost estimate provided during the need determination, "with the understanding that some costs may be higher than estimated and other costs may be lower." The

[2] The ability to recover all prudently incurred costs is also consistent with the prudence standard originally espoused by U.S. Supreme Court Justice Brandeis in 1923:

> There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown...adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return...[would provide] a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as a matter of opinion.

Southwestern Tel. Co. v. Pub. Serv. Comm., 262 U.S. 276, 289 (1923).

annual reporting requirement, along with the express recognition that some costs may be higher and some costs may be lower, was adopted by the Commission in Rule 25-6.0423(8)(f), Fla. Admin. Code. A "risk sharing" mechanism, however, would violate this concept by requiring a binding cost estimate threshold for cost recovery purposes.

D. A "Risk Sharing" Mechanism is Contrary to the Legislature's Intent to Promote Utility Investment in Nuclear Generation

The two foregoing principles – the ability to recover all prudently incurred costs and the use of a non-binding cost estimate – are critical elements of the nuclear cost recovery framework that the Florida Legislature expressly intended to promote utility investment in nuclear generation. *See* § 366.93(2), Fla. Stat., declaring that the Commission's cost recovery mechanism "shall be designed to promote utility investment in nuclear" power plants. This framework recognizes the uncertainty associated with such large, complex, long-term nuclear construction projects. It is these principles which have enabled FPL's pursuit of additional nuclear generation – with all its baseload, emission-free, low-fuel cost benefits – for FPL's customers. The establishment of a "risk sharing" mechanism would essentially negate both of these key statutory and regulatory concepts, which FPL has depended upon in all its decisions to initiate and to continue pursuing additional nuclear generation, and would therefore violate the intent and spirit of the law, as well as the letter of the law. For this additional reason, the Commission should find that a "risk sharing" mechanism is not authorized by Florida law.

It is critical for the application of the nuclear cost recovery statutes to be consistent with the Legislature's intent to promote utility investment in nuclear generation by minimizing the inherent financial risk to the utility. First, the pursuit of additional nuclear generation, even within the cost recovery framework provided by law, is not a risk free endeavor. Secondly, already in the first three years of nuclear cost recovery, there have been instances in which

parties' interpretation and application of the nuclear cost recovery statutes and rule has introduced additional regulatory risk that exceeds the risk contemplated by the Florida Legislature. Neither the financial risk associated with nuclear development nor the increased regulatory risk introduced in the application of the nuclear cost recovery process is currently reflected in FPL's authorized return on equity. The incremental risk introduced by a new "risk sharing" mechanism, that further calls into question a utility's ability to recover prudently incurred costs, could be so great as to prevent utilities from investing in, or continuing to invest in, nuclear generation.

E. The Commission's General Ratemaking Authority Does Not Alter the Nuclear Cost Recovery Framework

The Commission's authority to fix "fair, just and reasonable rates" pursuant to Section 366.06, Florida Statutes, does not provide the authority necessary for the establishment of a "risk sharing" mechanism, as some may argue. It has long been settled that when a general statute and a specific statute cover the same subject area, the specific statute controls. For example, in determining that the specific statutory scheme providing procedures applicable to charter school charter terminations controls when in conflict with the Administrative Procedures Act, the Florida Supreme Court stated "we are mindful of the principle that specific statutes covering a particular subject area will control over a statute covering the same subject in general terms." *School Board of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009), citing *Maggio v. Fla. Dep't of Labor & Empl. Sec.*, 899 So. 2d 1074, 1079 (Fla. 2005). The specific statutes governing nuclear cost recovery in Florida and directing the Commission to allow the recovery of all prudent costs – not the Commission's general authority to fix fair, just and reasonable rates – therefore control. As discussed above, the statutes governing nuclear cost recovery do not permit the creation of a "risk sharing" mechanism.

III. EVEN IF IT WERE LEGAL, THE COMMISSION SHOULD NOT IMPLEMENT A "RISK SHARING" MECHANISM

Even if a "risk sharing" mechanism were permitted by law (which it clearly is not), it would be poor public policy to implement such a mechanism. Use of a mechanism that sets a cap on the project total cost would logically result in utilities developing project cost estimates with sufficient contingency to substantially limit the probability of a cost overrun. By doing so, the Commission would risk encouraging utilities to set much higher cost estimates and budgetary targets for nuclear projects, which realistically would be necessary in order to take into account the financial risks associated with nuclear construction. FPL believes that this is less desirable for customers from a policy perspective than cost recovery based upon the actual prudently incurred costs of the project, which permits customers to pay the correct and accurate amount for a project. Similarly, by introducing a "risk sharing" mechanism that applies equally in the cases of cost "over-runs" and cost "under-runs," FPL's customers could be burdened with higher rates than necessary if the final cost of the project was less than the established cost threshold, because a "risk sharing" mechanism would allow the Company to retain a portion of the savings. Such a situation would result in FPL's customers paying more than the actual cost of the project, which FPL submits is also not in customers' best interests.

Finally, it must be noted that a "risk sharing" mechanism is simply not needed within the context of nuclear cost recovery. The Nuclear Cost Recovery Rule currently requires utilities to submit "a detailed analysis of the long-term feasibility of completing the power plant." Rule 25-6.0423(5)(c)5, Fla. Admin. Code. In this feasibility analysis, FPL provides an updated analysis of the cost-effectiveness of the nuclear power plant, using nonbinding project cost-estimates, competing resource options, load forecasts, and a range of fuel costs and emission compliance costs, all of which are subject to Commission review and scrutiny through the annual nuclear

cost recovery process. The results of such cost-effectiveness analyses can assure both the Commission and FPL's customers that proceeding with the project is appropriate, regardless of whether the total project cost used in that analysis is above or below an established cost estimate threshold. Similarly, the prudence and reasonableness reviews provided for through the nuclear cost recovery process protect customers' interests in ultimately paying only for project costs that have been prudently incurred.

IV. CONCLUSION

For all the foregoing reasons, a "risk sharing" mechanism cannot, and should not, be required. Such a mechanism would violate Section 403.519(4) and Section 366.93 of the Florida Statutes, as well as a number of provisions of the Nuclear Cost Recovery Rule. The Commission's broad authority to ensure fair, just and reasonable rates pursuant to Section 366.06 does not authorize the Commission to violate Section 403.519(4) and Section 366.93, and the express provisions entitling utilities to the recovery of all prudently incurred costs. Further, even if such a mechanism were permitted by law, it would be inappropriate, potentially harmful to customers, and unnecessary given the annual feasibility analysis already required by rule. Accordingly, the Commission should find that it does not have the authority to require a "risk sharing" mechanism and should not require one.

Respectfully submitted this 10th day of September, 2010.

Bryan S. Anderson
Fla. Auth. House Counsel No. 219511
Mitchell S. Ross
Fla. Bar No. 108146
Jessica A. Cano
Fla. Bar No. 0037372
Attorneys for Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
(561) 304-5226
(561) 691-7135 (fax)

By: *s/ Jessica A. Cano*
Jessica A. Cano
Fla. Bar No. 0037372

CERTIFICATE OF SERVICE
DOCKET NO. 100009-EI

I HEREBY CERTIFY that a true and correct copy of FPL's Post Hearing Brief was served electronically and by U.S. mail this 10th day of September, 2010 to the following:

Anna Williams, Esq.
Lisa Bennett, Esq.
Keino Young, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
LBENNETT@PSC.STATE.FL.US
KYOUNG@PSC.STATE.FL.US
ANWILLIA@PSC.STATE.FL.US

J. R. Kelly, Esq.
Charles Rehwinkel, Esq.
Joseph McGlothlin
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399
mcglothlin.joseph@leg.state.fl.us
Kelly.jr@leg.state.fl.us
Rehwinkel.Charles@leg.state.fl.us

J. Michael Walls, Esq.
Blaise Huhta, Esq.
Carlton Fields Law Firm
P.O. Box 3239
Tampa, Florida 33601-3239
mwalls@carltonfields.com
bhuhta@carltonfields.com
Attorneys for Progress

Dianne M. Triplett, Esq.
Progress Energy Florida
229 1st Avenue N PEF-152
St. Petersburg, Florida 33701
dianne.triplett@pgnmail.com
Attorney for Progress

Jon C. Moyle, Jr., Esq.
Vicki Gordon Kaufman, Esq.
Keefe Anchors Gordon & Moyle, PA
118 North Gadsden Street
Tallahassee, Florida 32301
vkaufman@kagmlaw.com
jmoyle@kagmlaw.com
Attorneys for FIPUG

John W. McWhirter, Jr., Esq.
Davidson McWhirter, P.A.
PO Box 3350
Tampa, Florida 33601
jmcwhirter@mac-law.com
Attorney for FIPUG

R. Alexander Glenn, Esq.
John T. Burnett, Esq.
Progress Energy Service Company, LLC
P.O. Box 14042
St. Petersburg, Florida 33733-4042
john.burnett@pgnmail.com
alex.glenn@pgnmail.com
Attorneys for Progress

James W. Brew, Esq.
F. Alvin Taylor, Esq.
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, NW
Eighth Floor, West Tower
Washington, DC 20007-5201
jbrew@bbrslaw.com
ataylor@bbrslaw.com
Attorneys for PCS Phosphate

Randy B. Miller
White Springs Agricultural Chemicals, Inc.
Post Office Box 300
15843 Southeast 78th Street
White Springs, Florida 32096
RMiller@pcsphosphate.com

Mr. Paul Lewis, Jr.
106 East College Ave., Suite 800
Tallahassee, Florida 32301-7740
paul.lewisjr@pgnmail.com

Captain Shayla L. McNeill
Air Force Legal Operations Agency (AFLOA)
Utility Litigation Field Support Center (ULFSC)
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319
shayla.mcneill@tyndall.af.mil

Gary A. Davis, Esq.
James S. Whitlock, Esq.
Gary A. Davis & Associates
P.O. Box 649
Hot Springs, NC 28743
Gadavis@enviroattorney.com
jwhitlock@enviroattorney.com
Attorneys for SACE

By: *s/ Jessica A. Cano*
Jessica A. Cano
Fla. Bar No. 0037372