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State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: November 16, 2010

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Brenan, Hinton, Laux, Maurey)
Office of the General Counsel (Young, Bennett, Leveille, Williams)

RE: Docket No. 100009-EI – Nuclear cost recovery clause.

AGENDA: 11/30/10 – Regular Agenda – Post-Hearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\100009.RCM.DOC

Case Background

On March 1, 2010, Progress Energy Florida, Inc. (PEF) and Florida Power & Light Company (FPL) filed petitions seeking prudence review and final true-up of the 2009 costs for certain nuclear power plant projects pursuant to Rule 25-6.0423, Florida Administrative Code, (F.A.C.) and Section 366.93, Florida Statutes (F.S.). On April 30, 2010, PEF filed a petition seeking approval to recover estimated 2010 costs and projected 2011 costs. On May 3, 2010, FPL filed its petition seeking approval to recover estimated 2010 costs and projected 2011 costs. Both companies requested recovery of these costs through the Capacity Cost Recovery Clause (CCRC).

PEF's petitions addressed two nuclear projects. The first PEF project is a multi-phased uprate of the existing nuclear generating plant, Crystal River Unit 3 (CR3 Uprate). PEF obtained

an affirmative need determination for the CR3 Uprate by Order No. PSC-07-0119-FOF-EI.[1] The second PEF project is the construction of two new nuclear generating plants, Levy Units 1 & 2 (LNP). PEF obtained an affirmative need determination for the LNP by Order No. PSC-08-0518-FOF-EI.[2]

FPL's petitions also addressed two nuclear projects. The first FPL project is composed of extended power uprate activities at its existing nuclear generating plants, Turkey Point Units 3 & 4 and St. Lucie Units 1 & 2. FPL obtained an affirmative need determination for its extended power uprate project by Order No. PSC-08-0021-FOF-EI.[3] The second FPL project is the construction of two new nuclear generating plants, Turkey Point Units 6 & 7. FPL obtained an affirmative need determination for the two new nuclear generating plants by Order No. PSC-08-0237-FOF-EI.[4]

Traditionally, all eligible power plant construction projects have been afforded the same regulatory accounting and ratemaking treatment. That is, once the need for a project has been determined, the utility books all expenditures associated with the project into account 107 Construction Work in Progress (CWIP) for that particular project. A monthly allowance-for-funds-used-during-construction (AFUDC) rate is applied to the average balance of this account and the resulting dollar amount is then added to the account balance. This process continues until the completion of the project.

Once the plant is placed in commercial service, the CWIP account balance is transferred to the appropriate plant-in-service account and becomes part of the utility's rate base. The impacts of including the total project costs in a utility's rate base, as well as the impacts of additional plant operational expenses, are addressed during a subsequent proceeding wherein it is determined whether customer base rate charges should be changed in order to provide the opportunity to recover these costs.

In 2006, the Florida Legislature enacted Section 366.93, F.S. (creating an alternative cost recovery mechanism), in order to encourage utility investment in nuclear electric generation in Florida. Section 366.93, F.S., authorized the Commission to allow investor-owned electric utilities to recover certain construction costs in a manner that reduces the overall financial risk associated with building a nuclear power plant. In 2007, Section 366.93, F.S., was amended to include integrated gasification combined cycle plants, and in 2008, the statute was amended to include new, expanded, or relocated transmission lines and facilities necessary for the new power plant. The statute required the adoption of rules that provide for, among other things, annual

[1] PSC-07-0119-FOF-EI, issued February 8, 2007, in Docket No. 060642-EI, In re: Petition for determination of need for expansion of Crystal River 3 nuclear power plant, for exemption from Bid Rule 25-22.082, F.A.C., and for cost recovery through fuel clause, by Progress Energy Florida, Inc.
[2] PSC-08-0518-FOF-EI, issued August 12, 2008, in Docket No. 080148-EI, In re: Petition for determination of need for Levy Units 1 and 2 nuclear power plants, by Progress Energy Florida, Inc.
[3] PSC-08-0021-FOF-EI, issued January 7, 2008, in Docket No. 070602-EI, In re: Petition for determination of need for expansion of Turkey Point and St. Lucie nuclear power plants, for exemption from Bid Rule 25-22.082, F.A.C. and for cost recovery through the Commission's Nuclear Power Plant Cost Recovery Rule, Rule 25-6.0423, F.A.C.
[4] PSC-08-0237-FOF-EI, issued April 11, 2008, in Docket No. 070650-EI, In re: Petition to determine need for Turkey Point Nuclear Units 6 and 7 electrical power plant, by Florida Power & Light Company.

reviews and cost recovery for nuclear plant construction through the existing capacity cost recovery clause. Rule 25-6.0423, F.A.C., was adopted to implement Section 366.93, F.S.

Pursuant to Rule 25-6.0423(4) and (5), F.A.C., once a utility obtains an affirmative need determination for a power plant covered by Section 366.93, F.S., the affected utility may petition for cost recovery using the alternative mechanism. Three types of prudently incurred costs are described in the rule for such consideration.

- Site selection costs are costs incurred prior to the selection of a site. A site is deemed selected upon the filing for a determination of need. (Rule 25-6.0423(2)(e) and (f), F.A.C.)

- Preconstruction costs are those costs incurred after a site is selected through the date site clearing work is completed. (Rule 25-6.0423(2)(g), F.A.C.)

- Construction costs are costs that are expended to construct the power plant including, but not limited to, the costs of constructing power plant buildings and all associated permanent structures, equipment and systems. (Rule 25-6.0423(2)(i), F.A.C.)

In Order No. PSC-08-0749-FOF-EI, issued October 12, 2008, the Commission approved stipulations among the parties to Docket No. 080009-EI, recommending that site selection costs be treated in the same manner as pre-construction costs. Pursuant to Section 366.93(2)(a), F.S., and Rule 25-6.0423(5), F.A.C., all prudently incurred preconstruction costs, as well as the carrying charges on prudently incurred construction costs are to be recovered directly through the CCRC.

Rule 25-6.0423(5), F.A.C., sets forth the process by which the Commission conducts an annual hearing to determine the recoverable amount that will be included in the CCRC pursuant to Section 366.93, F.S. This is the third year of the nuclear cost recovery roll-over docket (NCRC).

Intervention in the 2010 NCRC proceeding was granted to the following parties: the Office of Public Counsel (OPC), Florida Industrial Power Users Group (FIPUG), White Springs Agricultural Chemicals Inc. d/b/a PCS Phosphate – White Springs (PCS Phosphate), Southern Alliance for Clean Energy (SACE), and the Federal Executive Agencies (FEA). Testimony and associated exhibits were filed by PEF, FPL, OPC, SACE, and Commission staff.

The evidentiary hearing for the PEF portion of the 2010 NCRC was held on August 24-25, 2010. The FPL portion of the evidentiary hearing was held on August 26-27, 2010 and September 7, 2010. During the FPL portion of the hearing FPL, OPC, and FIPUG filed a motion to defer the resolution of all FPL-specific issues until the 2011 NCRC. On September 7, 2010, the Commission approved the motion.[5]

[5] TR 1813.

Subsequently, on October 26, 2010, the Commission approved staff's recommendation addressing one legal issue and all the factual issues pertaining exclusively to PEF. However, the Commission deferred Issue 3A (does the Commission have the authority to require a "risk sharing" mechanism) because the resolution of this issue would impact both FPL and PEF, and the Florida First District Court of Appeal stayed this proceeding in all matters pertaining to FPL. On October 26, 2010, staff's recommendation was to defer resolution of Issue 3A to the 2011 NCRC proceeding due to the pending court case. However, since the Commission will not vote on staff's recommendation for Issue 3A until after the court case has been resolved, the underlying reason for staff's original recommendation will no longer apply. Therefore, staff has revised its recommendation to move forward with a resolution of Issue 3A.

All parties, excluding FEA, filed post-hearing briefs on September 10, 2010. The Commission has jurisdiction over these matters pursuant to Section 366.93, F.S., and other provisions of Chapter 366, F.S.

Discussion of Issues

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?

Recommendation: No. Section 366.93, F.S., expressly provides that a utility is entitled to recover all prudently incurred costs resulting from the construction of nuclear power plants. The statute does not set a dollar limit on the amount a utility can recover through the NCRC. Requiring a risk sharing mechanism exceeds the scope of the plain and expressed language and intent of the statute. (Young, Williams, Bennett)

Position of the Parties

PEF: No. The Commission is governed by the express legislative authority in Section 366.93, F.S. Section 366.93, F.S., provides the scope of the Commission's authority which is the development of alternative cost recovery mechanisms for the recovery of all costs prudently incurred for a nuclear power plant. The Commission cannot depart from this scope by rule or order to alter the utility's ability to recover prudently incurred costs for a nuclear power plant according to an unspecified "risk sharing" mechanism.

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 nonbinding 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.

OPC: Yes. The Commission has broad authority to insure that the purpose and intent of the rule and statute are met in order to protect customers from imprudence. The statute and rule allow the Commission to keep costs from escalating to unfair dimensions that would require customers to bear all the risk when the existing projects face significant uncertainty. For LNP, the Commission can utilize the specific provisions of the rule implementing the statute to customers.

PCS PHOSPHATE: Yes. Pursuant to its obligation to ensure fair, just and reasonable rates, the Commission retains the authority to require PEF to adopt appropriate measures, including risk-sharing mechanisms, to ensure ratepayers are not subjected to unnecessary and unmitigated risks or costs.

FIPUG: Yes. The Commission must ensure that customers' rates are fair, just and reasonable. The Commission must closely monitor nuclear projects which are extraordinarily expensive and may result in costs which unfairly shift totally to ratepayers. The Commission should develop a risk sharing mechanism in a future proceeding.

SACE: Yes. The Commission does have such authority in order to fulfill its obligation to determine and fix "fair, just and reasonable" rates for Florida ratepayers. Fla. Stat. § 366.06.

The Commission also has broad authority under the rule and statute to protect customers from imprudent expenditures. The Commission should develop a "risk-sharing" mechanism which would provide a strong incentive to utilities to control costs by shifting some of the risk of these projects from the ratepayers to the utilities.

Staff Analysis: To examine whether the Commission has the authority to require a "risk sharing" mechanism, staff believes that it is critical to analyze Section 366.93(2), F.S., and past Commission precedent. Section 366.93(2), F.S., states in pertinent part:

> Within 6 months after the enactment of this act, the 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 recovery in rates of all prudently incurred costs.

(Emphasis added)

The statute expressly provides that a utility shall be allowed to recover all prudently incurred costs. The statute is silent regarding a risk sharing mechanism. Thus, staff believes that the only statutory requirement is that the utility prove that its costs for constructing or modifying a nuclear power plant were prudently incurred.

In addition, following the directive from the Florida Legislature, the Commission adopted Rule 25-6.0423, F.A.C., which expressly provides for recovery of all prudently incurred costs resulting from the siting, design, licensing, and construction of a nuclear power plant. Rule 25-6.0423, F.A.C., implements the statute by using the exact or similar language from Section 366.93, F.S., and does not provide for a risk sharing mechanism that would preclude a utility from recovering all prudently incurred costs. However, the rule does provide for an annual prudence review of the prior year's costs. Although costs are initially recovered on a projected basis, ultimately, a utility must prove that those costs were prudently incurred to avoid a disallowance of recovery (i.e., refund costs determined to be imprudently incurred). Thus, staff believes that the only requirement is that the utility must prove its costs were prudently incurred to recover said costs.

The intervenors argue that the Commission has the authority to implement a risk sharing mechanism pursuant to its authority to prescribe fair, just, and reasonable rates. FIPUG Br. 5; SACE Br. 26-27. They contend that "the statute and the rule allow the Commission to keep costs from escalating to unfair dimensions that would require customers to bear all of the risk when the existing projects face significant uncertainty." OPC Br. 5. Also, the intervenors assert that the Commission has broad authority and discretion to ensure that the purpose and intent of the rule and statute are met in order to protect customers from imprudence. OPC Br. 5. Moreover, they believe that without an implementation of a risk sharing mechanism, the utilities do not have "skin in the game." PCS Br. 13. The intervenors cite several Florida cases as

examples to support their position that the Commission has broad authority and discretion to implement a risk sharing mechanism. OPC Br. 6-8.[6]

Staff agrees with the intervenors that the Commission has broad authority and discretion to set fair, just, and reasonable rates and charges. The cases citied by the intervenors have merit for said proposition. For example, staff believes that Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), and Richter v. Florida Power Corporation, 366 So. 2d 798 (Fla. 2d DCA, 1979), are persuasive of the broad principle it espouse. In Storey v. Mayo, the Court held that "the power of the Commission over privately-owned utilities is omnipotent within the confines of the statutes and the limits of organic law." Id. at 307; OPC Br. 6. In Richter v. Florida Power Corporation, the Court held that

> Chapter 366, Chapter 366, Fla.Stat. (1977) embraces the statutory regulation of public utilities. In § 366.01 the legislature has mandated that the regulation of public utilities "is declared to be in the public interest and this chapter . . . shall be liberally construed for the accomplishment of that purpose."

Id. at 799; OPC Br. 6.

Section 366.93, F.S., however, is unambiguous in its language as it relates to recovery of costs, and it restricts the Commission's authority by statute from implementing a risk sharing mechanism that would preclude a utility from recovery of all prudently incurred costs, despite its broad authority to set fair, just, and reasonable rates per Storey v. Mayo. The statute specifically states that the recovery mechanism adopted by the Commission shall be designed to allow a utility to recover all prudently incurred cost. Moreover, it is settled law in Florida that when a general statute and a specific statute covers the same subject area, the specific statute controls. School Board of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 1233 (Fla. 2009).[7] Here, the Commission's authority pursuant to Section 366.06, F.S., to set fair, just, and reasonable rates does not control cost recovery, because the Florida Legislature enacted Section 366.93, F.S., to specifically govern nuclear cost recovery in Florida. Thus, staff believes that the Commission's authority is limited as it relates to implementing a risk sharing mechanism for recovery of the costs associated with nuclear power plants.

Staff does believe, however, that the Commission has the authority to address options relating to the timing of recovery and matters associated with rate impacts over the term of the projects, prior to and subsequent to the commercial in service dates of the nuclear power plants. For example, in Order No. PSC-09-0783-FOF-EI, issued November 19, 2009, in Docket No. 090009-EI, In re: Nuclear cost recovery clause, the Commission approved PEF's request to

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[6] In its brief, OPC cited for this proposition Storey v. Mayo, 217 So. 2d 304 (Fla. 1968); Richter v. Florida Power Corporation, 366 So. 2d 798 (Fla. 2d DCA, 1979); City Gas Co. v. People Gas System, Inc., 182 So. 2d (Fla. 1965); Southern Bell v. Bevis, 279 So. 2d 285 (Fla. 1973); and Gulf Power Company v. Bevis, 296 So. 2d 482 (Fla. 1974). OPC also cited Order No. PSC-05-0187-PCO-EI, issued February 17, 2005, in Docket No. 041291-EI, In re: Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season that exceed storm reserve balance, by Florida Power & Light Company.

[7] School Board of Palm Beach County v. Survivors Charter Schools, Inc., were cited in both PEF's and FPL's briefs for the proposition that when a general statute and a specific statute covers the same subject area, the specific statute controls. PEF Br. 12; FPL Br. 4.

establish a rate management plan whereby costs approved for recovery could be deferred to a later date in order to manage the rate impact for PEF's customers in a given year.[8] This authority is derived from the Commission's broad ratemaking powers to set fair, just, and reasonable rates and charges pursuant to Section 366.04, F.S., and does not conflict with the ultimate directive of Section 366.93, F.S., to allow recovery of all prudently incurred costs.

In conclusion, based upon the analysis above, staff recommends that the Commission find it does not have the authority under the existing statutory framework to require a utility to implement a risk sharing mechanism that would preclude a utility from recovering all prudently incurred costs resulting from the siting, design, licensing, and construction of a nuclear power plant. To do so, the Commission would limit the scope and effect of a specific statute, and an agency may not modify, limit, or enlarge the authority it derives from the statute. Rinella v. Abifaraj, 908 So. 2d 1126, 1129 (Fla. 1st DCA 2005).

[8] In 2009 PEF requested a midcourse correction to defer $198 million of nuclear cost included in the Capacity Cost Recovery Clause in order to mitigate rate impact to its customers. The midcourse correction was approved by Order No. PSC-09-0208-PAA, issued April 6, 2009, in Docket No. 090001-EI, In re: Fuel Adjustment Clause.