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Electronic Filing

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b. Docket No. 120009-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 ten (10) pages.

e. The document attached for electronic filing is: Florida Power & Light Company's Motion to Strike Portions of the Testimony of Public Counsel Witness Jacobs.

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FPSC-COMMISSION CLERK

8/3/2012

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Power Plant)
Cost Recovery Clause)

Docket No. 120009-EI
Date Filed: August 3, 2012

**FPL'S MOTION TO STRIKE PORTIONS OF THE
TESTIMONY OF PUBLIC COUNSEL WITNESS JACOBS**

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code, moves to strike three short, specific portions of the Office of Public Counsel ("OPC") witness William Jacobs's testimony.¹ Each portion asks that the Commission establish an arbitrary cap on recoverable costs for the Extended Power Uprate ("EPU") work at FPL's Turkey Point nuclear plant. The legal substance of OPC's request has been litigated and decided in two prior orders where the Commission determined that it must follow the nuclear cost recovery statute and rule, and cannot order a "risk sharing" mechanism that would disallow prudently incurred costs.

FPL requests that the following portions of Witness Jacobs's testimony be stricken:

- "Specifically, the Commission should place FPL on notice that it will disallow from recovery through the nuclear cost recovery mechanism any amounts associated with the Turkey Point EPU project that exceed FPL's recent \$1.6 billion construction cost estimate for the Turkey Point uprate." See, William Jacobs Direct Testimony ("Jacobs Direct"), p. 9, lines 19-23;
- "In the next sections of my testimony I will develop the reasons why, in my opinion, the Commission should disallow from recovery the costs of extended uprate activities at Turkey Point that exceed FPL's recent construction cost estimate of \$1.6 billion." Jacobs Direct, p. 11, lines 7-10; and

¹ In accordance with Rule 28-106.204(3), Florida Administrative Code, FPL contacted counsel for each party in this docket to determine whether they object to this Motion. The Office of Public Counsel opposes this motion. Progress Energy Florida takes no position on this motion. FPL was unable to reach the Southern Alliance for Clean Energy, PCS Phosphate – White Springs, the Florida Industrial Power Users Group, Florida Retail Federation, and Federal Executive Agencies to ascertain their positions on this motion prior to filing.

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- “To protect customers, the Commission should place FPL on notice that, if it exceeds FPL’s recent \$1.6 billion construction cost estimate at completion for Turkey Point, the Commission will disallow the increment above that level from recovery through the nuclear cost recovery docket.” Jacobs Direct, p. 23, lines 12-13.

The right 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 enacted to promote utility investment in nuclear generation – which FPL has relied on in undertaking work of enormous difficulty and complexity for the benefit of its customers. The Legislature’s nuclear cost recovery framework recognizes the uncertainty associated with large, complex, long-term nuclear construction projects. OPC’s unlawful claim negates 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. The testimony supporting this claim should be stricken -- because it goes to a request that has previously been denied by the Commission and is not allowed by law -- freeing the Commission and parties to focus on issues properly framed pursuant to the Nuclear Cost Recovery (“NCR”) statute and rule.

By asking the Commission to set a hard cap on cost recovery for FPL’s EPU project work at the Turkey Point nuclear plant, OPC witness Jacobs’s testimony violates Florida’s nuclear cost recovery statute, nuclear cost recovery rule, and is contrary to prior legal rulings by the Commission.

1. Three portions of OPC witness Jacobs’s testimony should be stricken because they seek relief that cannot legally be granted pursuant to Florida law.

The three challenged portions of OPC’s testimony violate the Florida NCR statute, Sections 366.93 and 403.519, the NCR rule set forth in Rule 25-6.0423, Florida Administrative Code, and is contrary to the Commission’s 2010 and 2011 NCR orders, and should therefore be stricken.

a. OPC’s Testimony Violates Section 366.93(2), Florida Statutes.

All the designated portions should be stricken because they seek relief not permitted by Section 366.93, Florida Statutes. Section 366.93 requires that the Commission “promote utility investment in nuclear ... power plants *and allow for the recovery in rates of all prudently incurred costs....*” Section 366.93(2), Florida Statutes.

OPC witness Jacobs claims that amounts in excess of a hard cap of \$1.6 billion on Turkey Point EPU costs should be disallowed, without regard to whether the costs were prudently incurred. The challenged testimony is contrary to Section 366.93(2) and therefore should be stricken.

b. OPC’s Testimony Violates Section 403.519(4)(e), Florida Statutes.

The designated portions should also be stricken as seeking relief not permitted by Section 403.519(4)(e), Florida Statutes. Section 403.519(4)(e) states in relevant part:

After a petition for determination of need for a nuclear ... power plant has been granted, the right of a utility to recovery any costs incurred prior to commercial operation ... 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 Section 120.57, that certain costs were imprudently incurred.... Imprudence shall not include any cost increases due to events beyond the utility’s control.

Section 403.519(4)(e), Florida Statutes.

Witness Jacobs’s challenged testimony violates this legal standard for several reasons. By claiming that Turkey Point EPU work costs above a dollar threshold should be disallowed, the challenged testimony: (i) fails to meet the statute’s requirement of alleging that “certain costs were imprudently incurred”; (ii) seeks disallowances of amounts not yet spent or subject to prudence review; and (iii) fails to separate out amounts already found prudent in past NCR cases.

Witness Jacobs's claim for a disallowance based on a cap rather than on the prudence of costs clearly violates Section 403.519(4), and should be stricken.

c. OPC's Testimony Violates the NCR Rule.

Similarly, the challenged portions of testimony seek relief not permitted by the nuclear cost recovery rule. Rule 25-6.0423(5)(c)(2) provides:

The Commission shall, prior to October 1 of each year, conduct a hearing and determine the ... prudence of actual construction expenditures expended by the utility.... Annually, the Commission shall make a prudence determination of the prior year's actual construction costs.... In making its determination of reasonableness and prudence the Commission shall apply the standard provided pursuant to Section 403.519(4)(e), F.S.

The Commission's NCR governing this proceeding clearly limits prudence reviews to the *prior year's* decisions and costs. In this year's docket 2011 decisions and costs are subject to prudence review.

Public Counsel's challenged testimony seeks an order in the 2012 docket (i) disallowing amounts to be expended in the future which are not yet subject to prudence review; and (ii) are based on a total that includes costs found prudent in prior years' cases. Similar to FPL's points concerning Section 403.519(4)(e) above, OPC witness Jacob's challenged testimony does not bear any relation to the NCR prudence review process established by statute and rule, and should be stricken.

d. OPC's Challenged Testimony Turns A Cost Estimate Into A Binding Cap, Violating the NCR Statute and Rule.

Section 403.519(4)(a)3, Florida Statutes, requires FPL to include a "nonbinding estimate" of the cost of the nuclear plant in its need determination petition. Section 366.93(5) requires FPL 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 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. OPC’s “hard cap” testimony, in contrast, violates the NCR law by asking the Commission to order a binding cost threshold to be applied to a subset of EPU costs as a basis for ordering a disallowance. OPC is asking for the opposite of the non-binding cost estimate process provided for in the NCR statute and rule. For this additional reason the challenged portions of OPC’s testimony should be stricken.

e. OPC’s Testimony is Contrary to Prior Commission Orders.

During the 2010 NCRC case, the Commission was asked to decide Issue 3a **as a legal issue** which stated:

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?

After full briefing, the Commission decided it does not have such legal authority:

[W]e do 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 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.

Order No. PSC 11-0095-FOF-EI, Docket No. 100009-EI, issued February 2, 2011 at p. 9.

Asked by an intervenor to reconsider its decision, the Commission confirmed its legal ruling:

We find our authority is limited under Section 366.93(2), F.S., in creating a risk sharing mechanism that would prevent a utility from recovering prudently incurred costs.

In conclusion, PCS Phosphate's Motion for Reconsideration is denied in its entirety. PCS Phosphate's motion fails to identify a point of law or fact that we failed to consider when rendering our decision that we did not 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.

[I]t is ORDERED by the Florida Public Service Commission that the White Springs Agricultural Chemicals Inc. d/b/a/ PCS Phosphate – White Springs Motion for Reconsideration that we did not 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 is denied in its entirety.

Order Denying Motion for Reconsideration, Order No. PSC-11-0224-FOF-EI, Docket No. 100009-EI, issued May 16, 2011, at pp. 9-10.

Pointing to its 2010 decision, the Commission rejected a similar OPC request for a disallowance threshold in the 2011 NCR case. In rejecting a “breakeven” disallowance cap proposed by OPC's same witness in the 2011 NCR case, the Commission stated:

We note that the cost escalation concern was an argument previously presented by intervenors in support of a risk sharing mechanism. [citing to Order No. PSC-110095-FOF-EI, issued February 2, 2011, Docket No. 1000009-EI, In re: Nuclear cost recovery clause, at page 7]

We determined that we do not have the authority to “...require a utility to implement a risk sharing mechanism that would preclude a utility from recovering all prudently incurred costs. [*id.* at page 9] (emphasis added)

The Commission should therefore strike the challenged portions of OPC's 2012 testimony because the Commission determined in its 2010 and 2011 NCR orders that it does not have authority to implement a mechanism that would preclude a utility from recovering all prudently

incurred costs, such as the hard cap which is the subject of the challenged portions of OPC Witness Jacobs testimony.

2. The Commission Should Apply Its Prior NCR Legal Decisions.

OPC is asking the Commission yet again to grant relief that the Commission has twice said it does not have authority to order. OPC cannot seriously claim that Mr. Jacobs's request for a hard cap to disallow NCR costs raises any different legal issue than the previously rejected claims for (i) a risk sharing mechanism to disallow NCR costs discussed in the 2010 NCR case, or (ii) a "breakeven analysis" cap to disallow NCR costs discussed in the 2011 case.

Since this is a legal issue, not a factual issue requiring consideration of evidence, the Commission should grant FPL's motion and limit the issues for hearing to those properly before the Commission pursuant to the NCR statute and rule.

Finally, FPL asks the Commission to give effect to the Commission's prior NCR legal decisions, discussed above, and strike the requested portions of Witness Jacobs's testimony. The Commission has ruled on this issue twice, and neither legal decision was appealed. OPC does not have the right to raise the same rejected legal issue each year. See, e.g., Florida Power Corp. v. Garcia, 780 S. 2d 34, 42 (Fla. 2001) (Commission's "prior, unappealed ruling" operated as "a bar to a subsequent determination" of essentially the same claim).

WHEREFORE, for the foregoing reasons, FPL respectfully requests that the Prehearing Officer enter an order granting FPL's motion to strike the portions of Public Counsel witness William Jacobs's testimony as set forth in this motion.

Respectfully submitted this 3rd day of August, 2012.

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**CERTIFICATE OF SERVICE
DOCKET NO. 120009-EI**

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Strike Portions of the Testimony of Public Counsel Witness Jacobs was served via electronic mail and U.S. mail this 3rd day of August, 2012 to the following:

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