

Dorothy Menasco

From: Costello, Jeanne [jcostello@carltonfields.com]
Sent: Monday, August 06, 2012 4:26 PM
To: Filings@psc.state.fl.us
Cc: alex.glenn@pgnmail.com; Gamba, Blaise N.; Bryan S. Anderson - Florida Power & Light (bryan.anderson@fpl.com); Erik L. Saylor (saylor.erik@leg.state.fl.us); F. Alvin Taylor (ataylor@bbrslaw.com); Gary A. Davis (gadavis@enviroattorney.com); Jamie Whitlock; jbrew@bbrslaw.com; Jessica Cano (jessica.cano@fpl.com); john.burnett@pgnmail.com; Jon C. Moyle Jr. (jmoyle@moylelaw.com); Keino Young; Kenneth Hoffman (Ken.hoffman@fpl.com); Bernier, Matthew R.; Walls, J. Michael; Michael Lawson; Paul Lewis Jr. (paul.lewisjr@pgnmail.com); Randy Miller - White Springs Agricultural Chemicals, Inc. (rmiller@pscphosphate.com); rehwinkel.charles@leg.state.fl.us; Robert Scheffel Wright (swright@gbwlegal.com); Robert Smith (rpjrb@yahoo.com); Samuel Miller (samuel.miller@tyndall.af.mil); Vicki Gordon Kaufman (vkaufman@moylelaw.com); 'Woods, Monica'
Subject: Docket 120009 Filing
Attachments: PEF Brief in Opposition to Proposed Issues 1 2 and 3.pdf



PEF Brief in
pposition to Pro
Docket 120009

In re: Nuclear Cost Recovery Clause

1. Attached for filing is Progress Energy Florida, Inc.'s Brief in Opposition to Proposed Issues 1, 2 and 3;
2. This document is being filed on behalf of Progress Energy Florida, Inc.
3. This document contains ten (10) pages.
4. This document is being filed by

Jeanne Costello on behalf of Blaise N. Gamba
4221 W. Boy Scout Blvd., Ste. 1000
Tampa, Florida 33607-5780
Direct: 813.229.4917 | Fax: 813.229.4133 jcostello@carltonfields.com | www.carltonfields.com

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause

Docket No. 120009-EI
Submitted for Filing: August 6, 2012

**PROGRESS ENERGY FLORIDA, INC.'S BRIEF IN OPPOSITION TO
PROPOSED ISSUES 1, 2, AND 3**

Progress Energy Florida, Inc. ("PEF" or the "Company") provides the Florida Public Service Commission (the "Commission"), its brief in opposition to the admittance in the 2012 Nuclear Cost Recovery Clause ("NCRC") proceeding of proposed Generic Legal Issue 1 and proposed PEF-Legal/Policy Issues 2 and 3. PEF opposes Generic Legal Issue 1 because the issue is unnecessary since, by the express terms of the governing statute, Section 366.93, Florida Statutes, the Commission must answer this issue that it does not have the authority. PEF opposes proposed PEF-Legal/Policy Issues 2 and 3 because they directly contradict the governing statutes and rules and, therefore, are in contravention of the law. In sum, the Commission neither has the legal authority nor the policy discretion to contravene the express directives of the Florida Legislature, as more fully explained below.

ARGUMENT

- A. Proposed Generic Legal Issue. Issue 1: Does Section 366.93, Florida Statutes, authorize the Commission to disallow recovery of all, or a portion of, the carrying costs prescribed by Section 366.93(2)(b), Florida Statutes?**

PEF Position on Proposed Generic Legal Issue 1:

Section 366.93, Florida Statutes, does not authorize the Commission to disallow recovery of all, or a portion of, the carrying costs prescribed by Section 366.93(2)(b), Florida Statutes.

For this reason, while the issue is appropriately framed as to whether the Commission has this express statutory authority, the clear answer that it does not renders this issue unnecessary in this proceeding. Simply put, there is no reason to include an issue in the NCRC proceeding that is plainly answered on the face of the statute.

Section 366.93(2)(b) provides that,

[w]ithin 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, including new, expanded, or relocated electrical transmission lines and facilities that are necessary thereto, or of an integrated gasification combined cycle power plant. Such mechanisms shall be designed to promote utility investment in nuclear or integrated gasification combined cycle power plants, and allow for the recovery in rates of all prudently incurred costs and shall include, but not be limited to:

(a) Recovery through the capacity cost recovery clause of any preconstruction costs.

(b) Recovery through an incremental increase in the utility's capacity cost recovery clause rates of the carrying costs on the utility's projected construction cost balance associated with the nuclear or integrated gasification combined cycle power plant. To encourage investment and provide certainty, for nuclear or integrated gasification combined cycle power plant need petitions submitted on or before December 31, 2010, associated carrying costs shall be equal to the pretax AFUDC in effect upon this act becoming law. For nuclear or integrated gasification combined cycle power plants for which need petitions are submitted after December 31, 2010, the utility's existing pretax AFUDC rate is presumed to be appropriate unless determined otherwise by the commission in the determination of need for the nuclear or integrated gasification combined cycle power plant. Section 366.93(2)(b), Fla. Stats. (emphasis supplied).

Plainly, the Florida Legislature declared that the Commission shall allow for the recovery of the carrying costs on the utility's projected construction cost balance associated with the nuclear power plant. Shall means shall; the Commission must allow for the recovery of carrying costs on the utility's projected construction cost balance. § 366.93(2)(b), Fla. Stats.; Merriam-Webster's Dictionary, at <http://www.merriam-webster.com/dictionary/shall> (last accessed Aug.

2, 2012) (“shall” means “will have to, must”); Neal v. Bryant, 149 So. 2d 529, 532 (Fla. 1962) (according to its normal usage, the use of the word “shall” in a statute has a mandatory connotation). Conversely, then, the Commission does not have the authority under Section 366.93 to disallow recovery of all or any portion of the statutorily prescribed carrying costs. Id.; United Telephone Co. of Florida, v. Public Service Commission, 496 So. 2d 116, 118 (Fla. 1986) (the Commission derives its power solely from the legislature and cannot exercise jurisdiction where none has been granted); Rinella v. Abifaraj, 908 So. 2d 1126, 1129 (Fla. 1st DCA 2005) (an agency cannot disregard or ignore the express statutory provisions nor can it modify, limit, or enlarge the authority it derives from the statutes).

Because the Florida Legislature plainly requires the Commission to allow the recovery of the statutorily-prescribed carrying costs the proposed Generic Legal Issue 1 is unnecessary in this NCRC proceeding. The Commission by the express terms of Section 366.93(2)(b) does not have the authority to disallow the recovery of all or a portion of the carrying costs prescribed by Section 366.93(2)(b).

B. Proposed PEF--Legal/Policy Issue 2: Does the Commission have the authority to disallow recovery of any AFUDC equity on the Crystal River Unit 3 Uprate project in 2012 and 2013 due to the delay caused by the lack of implementation of a final decision to repair or retire CR3? If yes, should the Commission exercise this authority and what amount should it disallow, if any?

PEF Position on Proposed PEF—Legal/Policy Issue 2:

This issue is improper and should not be included in this NCRC proceeding because it is contrary to law. As PEF explained in its position with respect to Generic Legal Issue 1, as a threshold legal matter the Commission does not have the authority to disallow recovery of all or

any portion of the carrying costs prescribed by Section 366.93(2)(b). In that section, the Florida Legislature states that the Commission shall allow the recovery of the carrying costs on the utility's projected construction cost balance associated with the nuclear power plant. §366.93(2)(b), Fla. Stats. The Florida Legislature made clear in that section that carrying costs included all components of the Allowance for Funds Used During Construction ("AFUDC"). *Id.* ("To encourage investment and provide certainty, for nuclear ... power plant need petitions submitted on or before December 31, 2010, associated carrying costs shall be equal to the pretax AFUDC in effect upon this act becoming law."). Indeed, the Florida Legislature defined "costs" to include but not be limited to "all capital investments, including rate of return," among taxes and all expenses. §399.93(1)(a), Fla. Stats. The Commission, therefore, does not have the authority to disallow recovery of any AFUDC equity on the Crystal River Unit 3 Uprate project in 2012 and 2013 and this proposed issue is legally improper.

The Commission is bound by its express statutory authority. Indeed, here the Commission implemented by rule alternative cost recovery mechanisms that mirror the definitions and mechanisms in Section 366.93. See Rule 25-60423 (1), (2)(d), (5), F.A.C. An agency is further required to follow its own rules. See Collier County Bd. of County Com'rs v. Fish & Wildlife Conservation Comm'n, 993 So. 2d 69, 72-73 (Fla. 2d DCA 2008) (citing Vantage Healthcare Corp. v. Agency for Health Care Admin., 687 So. 2d 306, 308 (Fla. 1st DCA 1997) ("An agency action which conflicts with the agency's own rules is erroneous."). Thus, according to the express provisions of Section 366.93(2)(b), Florida Statutes, and the Commission's own Rule 25-6.0423, F.A.C., PEF is allowed the recovery of carrying costs including AFUDC equity on the construction cost balance associated with the Crystal River Unit 3 Uprate project in 2012 and 2013.

The Commission has no authority beyond the authority granted by the Florida Legislature. United Telephone Co. of Florida, 496 So. 2d at 118. As a result, the Commission cannot modify, limit, or enlarge the authority granted by the Florida Legislature. Rinella, 908 So. 2d at 129; Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI, p. 9 (the Commission found it had no authority to require a utility to implement a risk sharing mechanism that precluded the utility from recovering costs the utility was entitled to under the nuclear cost recovery statute because to do so would limit the scope and effect of the statute, which the Commission had no authority to do). The Commission also cannot entertain as a matter of policy that which is legally impermissible to consider. This proposed legal or policy issue asks the Commission if it has the authority to modify and limit the authority granted the Commission by the Florida Legislature in Section 366.93(2)(b), Florida Statutes. This is an improper issue and should not be considered an issue in this NCRC proceeding.

It bears emphasis that PEF Issues 16, 17, and 18 admitted in this docket address the reasonableness of PEF's actual/estimated 2012 and projected 2013 Crystal River Unit 3 Uprate project costs, including whether PEF is reasonably estimating and projecting cost recovery in 2012 and 2013 in the absence of a final decision to repair or retire Crystal River Unit 3. Proposed PEF Issue 2, therefore, assumes that PEF has demonstrated that its actual/estimated 2012 and projected 2013 Crystal River Unit 3 Uprate project costs are reasonable, and proposes that the Commission determine its authority legally or as a policy matter to nevertheless disallow recovery of any AFUDC equity on the Crystal River Unit 3 Uprate project in 2012 and 2013. The Commission does not have the authority to disallow the recovery of prescribed carrying costs on reasonable Crystal River Unit 3 Uprate project construction costs. Simply put, the Commission does not have the authority to disregard express statutory directives or to act

contrary to its own rules. Proposed PEF Legal/Policy Issue 2 is therefore improper and should not be admitted as an issue in this NCRC proceeding.

C. PEF—Legal/Policy Issue 3: Does the Commission have the authority to defer all determinations of prudence and reasonableness for the Crystal River Unit 3 Uprate project (and, thus, defer cost recovery in 2013) until a final decision to repair or retire has been implemented? If yes, should the Commission exercise this authority?

PEF Position on PEF—Legal/Policy Issue 3:

Proposed PEF—Legal/Policy Issue 3 is also legally improper and should not be admitted as an issue in this NCRC proceeding. The Commission does not have the legal authority to unilaterally defer all determinations of prudence and reasonableness for the Crystal River Unit 3 Uprate project and, thus, defer cost recovery in 2013. Because the Commission lacks this express authority, this issue is improper.

Rule 25-6.0423 implements the alternative cost recovery mechanisms required by the Florida Legislature in Section 366.93. Rule 25-6.0423(5)(c) establishes annual NCRC proceedings to review the prudence and reasonableness of costs that the utility “shall submit for Commission review and approval” on an annual basis by prescribed dates. *Id.* at ¶ (5)(c)1.-5. (emphasis added). Rule 25-6.0423 further states that the Commission “shall include carrying costs on the balance of construction costs determined to be reasonable or prudent in setting the factor in the annual Capacity Cost Recovery Clause proceedings,” *Id.* at ¶ (b)3 (emphasis added); “[a]nnually, shall make a prudence determination of the prior year’s actual construction costs and associated carrying costs, *Id.* at ¶ (5)(c)2, (emphasis added); and “shall include those costs it

determines ...to be reasonable or prudent in setting the Capacity Cost Recovery Clause factor in the annual Fuel and Purchased Power Cost Recovery proceedings.” Id. at ¶ (5)(c)3.

It is a well-settled that an agency is required to follow its own rules. See Collier County Bd., 993 So. 2d at 72-73 (citing Vantage, 687 So. 2d at 308 (“An agency action which conflicts with the agency’s own rules is erroneous.”)). Waiver or variance of an agency rule, including the Commission’s rules, is prescribed by the Florida Legislature under Section 120.542, Florida Statutes. The Florida Legislature provides that variances and waivers of agency rules shall be granted “when the person subject to the rule” satisfies the prescribed criteria for waiver or variance of the rule requirements under Section 120.542. §120.542(2), Fla. Stats. (variances and waivers shall be granted “when the person subject to the rule” demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness). Only the “person subject to” Rule 25-6.0423, which is the utility, can obtain a waiver or variance of the rule requirements requiring the Commission to annually determine the prudence and reasonableness of the costs for a nuclear power plant project.

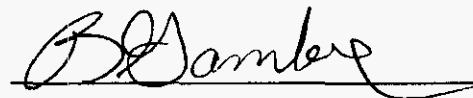
PEF has not requested a waiver or variance of the requirements of Rule 25-6.0423, nor has PEF moved this year to defer or stipulated to the deferral of the determinations that the Commission is required to annually make with respect to the Crystal River Unit 3 Uprate project. As a result, the Commission is required to follow its rule and make a determination of the prudence and reasonableness of the Crystal River Unit 3 Uprate project costs PEF has submitted to the Commission for review and approval. Rule 25-6.0423, F.A.C. The Commission does not have the unilateral authority to defer the mandated determinations of reasonableness and prudence until an unspecified time in the future. This action runs contrary to the nuclear cost

recovery structure set up by the Florida Legislature and this Commission in Section 366.93 and Rule 25-6.4023. §366.93(2), Fla. Stats. (the alternative cost recovery mechanisms for the recovery of nuclear power plant project costs “shall be designed to promote utility investment in nuclear ... power plants and allow for the recovery in rates of all prudently incurred costs”); Rule 25-6.0423(1), F.A.C. (“The purpose of this rule is to establish alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of nuclear ... power plants in order to promote electric utility investment in nuclear ... power plants and allow for the recovery in rates of all such prudently incurred costs.”). PEF asserts, therefore, that proposed PEF Legal/Policy Issue 3 is a legally inappropriate issue and should not be admitted in the 2012 NCRC proceeding.

CONCLUSION

For all of these reasons, PEF objects to the admittance of proposed Issues 1, 2, and 3 and respectfully requests that the Prehearing Officer decline to admit these proposed issues in the 2012 NCRC proceeding as inconsistent with the express statutory and rule directives in Section 366.93, Florida Statutes, and Rule 25-6.0423, F.A.C.

Respectfully submitted,

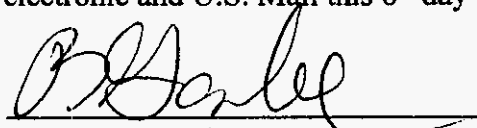


R. Alexander Glenn
State Regulatory General Counsel
John T. Burnett
Associate General Counsel II
PROGRESS ENERGY FLORIDA
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (727) 820-5587
Facsimile: (727) 820-5519

James Michael Walls
Florida Bar No. 0706242
Blaise N. Gamba
Florida Bar No. 0027942
Matthew R. Bernier
Florida Bar No. 0059886
CARLTON FIELDS, P.A.
Post Office Box 3239
Tampa, FL 33601-3239
Telephone: (813) 223-7000
Facsimile: (813) 229-4133

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to counsel and parties of record as indicated below via electronic and U.S. Mail this 6th day of August, 2012.


Attorney

Keino Young
Michael Lawson
Staff Attorney
Florida Public Service Commission
2540 Shumard Oak Blvd
Tallahassee 32399
Phone: (850) 413-6218
Facsimile: (850) 413-6184
Email: kyoung@psc.fl.state.us
mlawson@psc.fl.state.us

Charles Rehwinkel
Associate Counsel
Erik Saylor
Associate Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400
Phone: (850) 488-9330
Email: rehwinkel.charles@leg.state.fl.us
Saylor.erik@leg.state.fl.us

Vicki G. Kaufman
Jon C. Moyle, Jr.
Moyle Law Firm, P.A.
118 North Gadsden Street
Tallahassee, FL 32301
Phone: (850) 681-3828
Fax: (850) 681-8788
Email: vkaufman@moylelaw.com
jmoyle@moylelaw.com

Bryan S. Anderson
Jessica Cano
Florida Power & Light
700 Universe Boulevard
Juno Beach, FL 33408-0420
Phone: (561) 691-7101
Facsimile: (561) 691-7135
Email: bryan.anderson@fpl.com
Jessica.cano@fpl.com

Capt. Samuel Miller
USAF/AFLOA/JACL/ULFSC
139 Barnes Drive, Ste. 1
Tyndall AFB, Fl 32403-5319
Phone: (850) 283-6663
Fax: (850) 283-6219
Email: Samuel.Miller@Tyndall.af.mil

Kenneth Hoffman
Florida Power & Light
215 South Monroe St., Ste. 810
Tallahassee, FL 32301-1858
Phone: (850) 521-3919
Fax: (850) 521-3939
Email: Ken.Hoffman@fpl.com

Paul Lewis, Jr.
Progress Energy Florida

James W. Brew
F. Alvin Taylor

106 East College Avenue, Ste. 800
Tallahassee, FL 32301-7740
Phone: (850) 222-8738
Facsimile: (850) 222-9768
Email: paul.lewisjr@pgnmail.com

Robert Scheffel Wright
John T. LaVia
c/o Gardner Law Firm
1300 Thomaswood Drive
Tallahassee, FL 32308
Email: schef@gbwlegal.com

Gary A. Davis
James S. Whitlock
Davis & Whitlock, P.C.
61 North Andrews Avenue
P.O. Box 649
Hot Springs, NC 28743
gadavis@enviroattorney.com
jwhitlock@environattorney.com

Brickfield Burchette Ritts & Stone, PC
1025 Thomas Jefferson St NW
8th FL West Tower
Washington, DC 20007-5201
Phone: (202) 342-0800
Fax: (202) 342-0807
Email: jbrew@bbrslaw.com
ataylor@bbrslaw.com

Randy B. Miller
White Springs Agricultural Chemicals, Inc.
PO Box 300
White Springs, FL 32096
Email: RMiller@pscphosphate.com
(via email only)

Robert H. Smith
11340 Heron Bay Blvd.
Coral Spring, FL 33076
Email: rpjrb@yahoo.com
(via email only)