BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause.	DOCKET NO.: 150009-EI FILED: September 4, 2015

CITIZENS' POST-HEARING BRIEF

Pursuant to Order No. PSC-15-0149-PCO-EI, issued April 1, 2014, the Citizens of the State of Florida by and through the Office of Public Counsel ("Citizens" or "OPC"), hereby submit this Post-Hearing Brief.

STATEMENT OF BASIC POSITION

FPL

In 2013, the Legislature amended Section 366.93, Florida Statutes (F.S.), more commonly referred to as the Nuclear Cost Recovery Clause (NCRC). The pertinent part of NCRC, Section 366.93 (3)(a)-(c), F. S., now reads as follows:

> (3)(a) After a petition for determination of need is granted, a utility may petition the commission for cost recovery as permitted by this section and commission rules.
>
> (b) During the time that a utility seeks to obtain a combined license from the Nuclear Regulatory Commission for a nuclear power plant or a certification for an integrated gasification combined cycle power plant, the utility may recover only costs related to, or necessary for, obtaining such licensing or certification.
>
> (c) After a utility obtains a license or certification, it must petition the commission for approval before proceeding with preconstruction work beyond those activities necessary to obtain or maintain a license or certificate.
>
> 1. The only costs that a utility that has obtained a license or certification may recover before obtaining commission approval are those that are previously approved or necessary to maintain the license or certification.

2. In order for the commission to approve preconstruction work on a plant, it must determine that:

a. The plant remains feasible; and

b. The projected costs for the plant are reasonable.

(d) After a utility obtains approval to proceed with postlicensure or postcertification preconstruction work, it must petition the commission for approval of any preconstruction materials or equipment purchases that exceed 1 percent of the total projected cost for the project. Such petition shall be reviewed and completed in the annual Nuclear Cost Recovery Clause proceeding in which it is filed or in a separate proceeding by the utility.

(e) A utility must petition the commission for approval before beginning the construction phase.

1. The only costs that a utility that has obtained commission approval may recover before beginning construction work are those that are previously approved or necessary to maintain the license or certification.

2. In order for the commission to approve proceeding with construction on a plant, it must determine that:

a. The plant remains feasible; and

b. The projected costs for the plant are reasonable.

The new statutory scheme amends the original one and creates "hold points" in the utility's expenditure incurrence and adds phases to the Commission's review of the recovery of costs related to nuclear projects. The statutory changes also require that before a nuclear project moves from one phase to the next phase for cost recovery, the Commission must approve the transition and may do so only after determining that the project remains feasible and the projected costs are reasonable.

Currently, the Turkey Point Units 6 and 7 project remains in the licensing phase with FPL seeking to obtain a combined operating license (COL) from the Nuclear Regulatory Commission (NRC) for the project. (TR 213, H.E. 43) The projected NRC schedule for the issuance of the COL has now slipped to March 2017. (TR 213)

FPL has filed its 2015 feasibility study to support its continuing with Turkey Point Units 6 and 7 project. The primary cost drivers in FPL's feasibility analyses are capital costs for the generation options, projected fuel costs, and projected environmental impact costs. (TR 502) These three components of the feasibility analysis must accurately reflect the proposed project costs for the analysis to provide meaningful results. (TR 502) FPL's feasibility analysis of the Turkey Point Units 6 and 7 project is flawed because the analysis utilizes unreasonably low costs for Turkey Point Units 6 and 7. (TR502-503) Although FPL claims that the Vogtle and Summer project costs informed its Turkey Point Units 6 and 7 feasibility study (TR 220), FPL's feasibility study failed to consider the significant costs increases in the Vogtle and Summer nuclear projects for both the owners and the contractor.[1] (TR 503, 510)

FPL has also proposed to incur, defer, and later recover what it describes as Initial Assessment costs. FPL asserts that the Initial Assessment costs are needed to develop its feasibility analysis for the Florida Public Service Commission to authorize FPL moving from the COL phase to the preconstruction phase. (TR 231-232) FPL has asked that it be allowed to incur these costs (for later recovery under the NCRC) for Initial Assessments that are not necessary to obtaining or maintaining the COL. (TR 512) In light of the amendments to Section 366.93, F.S., costs not associated with obtaining or maintaining the COL cannot be incurred and deferred for later recovery in the NCRC prior to the NRC issuing the COL and prior to FPL obtaining Commission approval to proceed with preconstruction work. Since this is the NCRC proceeding, OPC offers no opinion on whether another cost recovery mechanism is appropriate should FPL nevertheless choose to proceed with the Initial Assessment studies prior to the issuance of the COL and Commission approval to proceed to the preconstruction phase;

[1]The two AP 1000 plants under construction are Southern Company's Vogtle Electric Generating Plant (Vogtle) being built in Georgia and SCANA Corporation's V.C. Summer Nuclear Generation Station (Summer) being built in South Carolina. (TR 173-174, H.E. 73)

however, FPL has not met the statutory conditions in order to seek recovery for these charges in this year's NCRC. OPC notes that FPL has indicated that costs for the Initial Assessment studies are being recorded in a Construction Work in Progress (CWIP) account. (H.E. 43)

Prior to FPL seeking to progress from the licensing phase to the initiation of preconstruction work upon receipt of the COL, the cost estimates that will be relied upon in the feasibility analysis should be based on actual, binding bids from qualified EPC or EP/C contractors with an appropriate amount of contingency added to the bids. (TR 513) In lieu of binding bids from qualified contractors, the feasibility analysis should reflect the higher costs experienced in the Vogtle and Summer projects and at a minimum include the owners' costs and an estimate of the contractor's costs related to the Vogtle and Summer projects. FPL should submit this updated analysis as a not-to-exceed cost or cap above which FPL would not seek cost recovery from ratepayers for the Turkey Point Units 6 and 7 project. (TR 513-514) With respect to FPL continuing to seek a COL from the NRC for Turkey Point Units 6 and 7, OPC is not recommending any adjustments for these specifically COL-related costs. (TR 512-513) However, FPL should be required to correct its flawed feasibility analysis during this cycle of the NCRC proceeding for the Commission's consideration as appropriate. (TR 513)

Duke

For the Duke phase of this Docket, the OPC entered into a Stipulation with all parties that resolved Issues 9, 10, 11, and 16. This stipulation was approved by the Commission at the outset of the hearing. On the remaining Duke issues (8, 12, 13, 14 and 15), the OPC took no position and the Commission approved "Type 2" stipulations between the Staff and Duke. The OPC will accordingly not brief the Duke issues.

POSITIONS AND ARGUMENT ON DISPUTED ISSUES

ISSUE 1: Should the Commission approve as reasonable what FPL has submitted as its 2015 annual detailed analysis of the long-term feasibility of completing the Turkey Point Units 6 & 7 project, as provided for in Rule 25-6.0423, F.A.C?

POSITION: *No. FPL's 2015 feasibility analysis is flawed because the analysis utilizes unreasonably low costs for Turkey Point Units 6 and 7. The capital costs of the generation options, projected fuel costs and projected environmental impact cost components of the feasibility analysis must accurately reflect the proposed project costs for the analysis to provide meaningful results. FPL's feasibility study failed to consider the significant cost increases in the Vogtle and Summer nuclear projects for both the owners and the contractor. *

As part of FPL's 2015 NCRC filing, FPL submitted its 2015 feasibility study. Currently, FPL is in the COL phase and the projected date for the issuance of the COL is March 2017. (H.E. 43) As OPC's Witness Dr. William Jacobs testified ". . . the primary cost drivers in FPL's feasibility analysis are capital costs of the generation options, projected fuel costs, and projected environmental impact costs. (TR 502) He stated that these three components of the feasibility analysis must accurately reflect the proposed project costs for the analysis to provide meaningful results. (TR 502) The City of Miami provided testimony dealing with the environmental assumptions. OPC will focus its analysis and argument on the capital costs inputs for the Turkey Point Units 6 and 7.

Dr. Jacobs testified that FPL's 2015 feasibility analysis is flawed. (TR 502) The inputs for the Turkey Point Units 6 and 7 project are based on old, dated, and understated data. As part of its feasibility study, FPL established a non-binding cost estimate range to demonstrate the feasibility of the proposed project. (TR 816) FPL Witness Scroggs testified that the non-binding costs estimate range had been adjusted to current year dollars by assuming a 2.5% escalation over the years between 2007 and present. (TR 219) He also stated that a breakeven cost analysis

was developed as an overnight cost and was directly compared to the cost estimate range to assess the economic feasibility of the project. (TR 219)

Under cross examination, FPL Witness Scroggs stated that FPL used a study completed for the TVA Bellefonte project with Turkey Point-specific builders' costs for roadways, civil work, and transmission that would be specific to Turkey Point to establish the cost estimate range. (TR 251) He confirmed that the TVA study for the Bellefonte site was published in 2005. (TR 251) He conceded that a lot of changes to the TVA Bellefonte site had occurred since 2005; the reactor design changed from a GE boiling water reactor (used in the 2005 study) to an AP1000 reactor and then the project was cancelled. (TR 251-252) Witness Scroggs also testified that FPL did a cost estimate check in 2010 using actual Westinghouse pricing information, integrated with an updated balance of plant cost estimates. (TR 244) However, the vintage of the Westinghouse price book information that was used was 2009. (TR 253) Hence, FPL's non-binding cost estimate range was established over 10 years ago and subsequently tested for reasonableness 6 years ago against actual pricing information. More importantly, the cost estimate range has not been updated to reflect the increased costs of the AP 1000 plants currently under construction. (TR 247)

Witness Jacobs is the Independent Construction Monitor for the Georgia Public Service Commission for the Vogtle project, one of the lead AP 1000 projects. (TR 498, 503) As the Independent Construction Monitor, he meets regularly with the project management personnel and regularly visits the Vogtle site to monitor construction activities and assess the project schedule and budget. (TR 498) As the Independent Construction Monitor and a Nuclear Project Management expert, he analyzed the reasonableness of the Turkey Point Unit 6 and 7 project cost estimates. (TR 503) Dr. Jacobs testified that the feasibility analysis for the Turkey Point

Units 6 and 7 is flawed because the analysis uses unreasonably low costs for the project. (TR 503) He based his expert opinion on the cost overruns being experienced at the AP 1000 nuclear construction projects at Plants Summer and Vogtle, which are currently under construction. (TR 503) Inexplicably, Witness Scroggs, stubbornly adhered to the prefiled testimony position that FPL's cost estimate range continued to be reasonable based on the annual review of the Turkey Point Units 6 and 7 capital cost estimates as compared to the U.S. AP 1000 progress reports and Concentric Advisors' review of U.S. AP 1000 project overnight and total estimated costs. (TR 220)

The cost estimates used by FPL are based on the current, publicly reported costs for the Vogtle and Summer projects. (TR 220, 503) However, as Dr. Jacobs testified, the publically reported costs of these projects are not the actual costs being incurred. (TR 503) As Witness Jacobs noted, the Vogtle and Summer projects are being constructed using fixed/firm price engineering, procurement, and construction (EPC) contracts. (TR 503) The Vogtle and Summer fixed/firm contracts protect the owners from most of the risks of capital cost increases due to labor increases resulting from lower productivity than estimated, the impact of engineering design changes, the impact of material cost increases, and the impact of schedule delays. (TR 503-504) Thus, the only project costs being reported are those of the owners under the EPC contract, not the actual costs being incurred and absorbed by the contractors. (TR 504)

While Dr. Jacobs acknowledged that the precise amount of the costs being absorbed by the contractors on these projects cannot be disclosed since they are confidential, he notes that they can be inferred. (TR 504) First, he observed that many of the cost increases are schedule driven, thus they can be deduced based on the increase in construction schedule durations. (TR 504) Dr. Jacobs testified that the Vogtle plant construction schedule duration increased by 72%,

which is a 39 month delay. To illustrate his point, Dr. Jacobs utilizes the contract labor increases for Vogtle. He provides an estimate of the contractor's costs at between $40 million to $50 million per month based on the contractor's 5,000 workers at the Vogtle site. Applying this amount, Dr. Jacobs concludes that the Vogtle project contractor could be absorbing between $1.56 billion to $1.95 billion in labor costs alone for this project. (TR 505) He further testified that $1.1 billion in additional costs are subject to litigation between the Vogtle owners and the contractor, and are not included in the publicly reported numbers. Since these project cost increases have not been included in the publicly reported number, they are not accounted for in FPL's flawed feasibility analysis. (TR 505-506) Dr. Jacobs goes on to conclude that ". . . it is highly unlikely that in the next round of AP 1000 construction projects, contractors will offer fixed/firm price EPC contracts given the magnitude of the cost overruns for both the Vogtle and Summer projects." (TR 506) In his expert opinion, the capital costs to build Turkey Point Units 6 and 7 will be far greater than the costs borne by the owners of Vogtle and Summer under the fixed/firm price EPC contracts and the publicly reported owners-only costs currently being used by FPL for its feasibility analysis. (TR 506, 507)

Witness Scroggs attempted to down play the import of the actual cost impacts due to the schedule delays experienced in the Vogtle and Summer projects. In fact, he denied that the actual cost increases experienced on the Vogtle and Summer projects should have any impact on the Turkey Point Units 6 and 7. (TR 248) He asserted that requiring FPL to account for the cost overruns on the Vogtle and Summer project fails to acknowledge the lessons learned from the first wave of new nuclear projects and how these lessons learned will impact the Turkey Point Units 6 and 7 project. (TR 643-644) He claimed that the lessons learned have been applied in developing the revised project schedule. (TR 644) However, this displays unabashed optimism

in the face of the unblemished track record of the nuclear industry to fail to build ANY nuclear plants on time and under budget since 1976, as confirmed by Witness Reed. (TR 757)

FPL Witness Reed testified that studies have shown the reduction in capital costs between first of its kind nuclear plants and the next wave plants is between 3% to 11%. (TR 722) Given that Dr. Jacobs estimated a minimum increase of Plant Vogtle contractor labor costs of $1.56 billion, an 11% reduction would amount to approximately a $1.38 billion increase that could be expected for the next wave of AP 1000 nuclear plants construction projects (i.e. Turkey Point Units 6 and 7). Witness Reed further acknowledged that the estimated nominal costs for the recent EPU uprates for St. Lucie and Turkey Point were $750 million and $657 million, not including carrying costs, for a total of approximately $1.4 billion. (TR 731) However, the total final cost for FPL's St. Lucie and Turkey Point EPU Uprates was $3.3 billion, or more than double the original estimate. (TR 732) Witness Reed conceded that the costs for FPL's recent EPU uprates for St. Lucie and Turkey Point increased significantly from the original estimate to the final project costs. (TR 733) He acknowledged that if the Turkey Point Units 6 and 7 project costs ". . . ended up being twice what is expected, that that would be an issue." (TR 736-737)

Witnesses Scroggs and Reed also acknowledged that it is unlikely that a fixed/firm contract would be offered to or used by FPL. (TR 253, 254, 752) They also concurred that FPL would seek to recover from its ratepayers any necessary and prudently incurred costs. (TR 253, 754) Thus, given the history of FPL's under estimation of its nuclear projects, the actual cost overruns experienced by the currently-under-construction Vogtle and Summer plants, and the highly unlikely prospect of obtaining a fixed/firm contract for Turkey Point Units 6 and 7, the risk of significant cost increases (which will be borne by FPL customers) requires that FPL's feasibility study be updated to reflect current and accurate cost information.

FPL also relied upon the Concentric Advisors' review of the U.S. AP 1000 project overnight and total costs to assert that its cost estimate range continues to be an important benchmark, and they compare themselves against that benchmark as part of supporting the reasonableness of its Turkey Point Unit 6 and 7 project cost estimates. (TR 243-244) Witness Scroggs was shown the Concentric Energy Advisors Update to AP 1000 Project Costs (Concentric Report) dated December 2014, which was provided in response to OPC discovery by FPL. (H.E. 73) He conceded that in a footnote the overnight cost for Vogtle did not include the recently announced delays which are discussed above. (H.E. 73, TR 245) He also acknowledged that the Concentric Report did not include the ongoing costs under litigation, along with the scheduling delays, both of which could materially affect the overnight costs. (TR 245-246) The Concentric Report also noted that the Summer project costs had not been updated in two years. (H.E. 73) Moreover, the Concentric Report notes that there was a 19 to 26 month delay related to fabrication of the coolant pumps and the fully integrated project schedule had not been released. The Concentric Report noted that even though the delays could affect the overnight costs at Plant Summer, they were not reported by SCANA and thus not included in the report. (H.E. 73) Based on the caveats in the Concentric Report that potentially impactful cost increases were not included in the overnight costs used as a benchmark by FPL, it cannot be ignored that the overnight costs in the most recent Concentric Report fail to support the reasonableness of FPL's feasibility study.

As noted by Dr. Jacobs, relatively small changes in assumed capital costs can have a significant impact on the feasibility analysis. (TR 507) Using Witness Sim's feasibility analysis as the starting point, when Dr. Jacobs performed a sensitivity analysis and increased the capital costs by 7.91% over a 40-year operating life, the result was that no cases demonstrated Turkey

Point Units 6 and 7 would remain feasible. (TR 507-508, 534-535) When Dr. Jacobs performed a similar sensitivity analysis and increased the capital costs by 36.7% over a 60-year life, the result was that no cases that showed Turkey Point Units 6 and 7 remained feasible. (TR 534-534) Despite Witness Sim's claim that OPC's analysis was flawed because Dr. Jacobs changed only the nuclear capital costs and assumed that nothing else changed from what FPL currently assumes (TR 850), Witness Sim conceded that it was largely correct that in Dr. Sim's own sensitivity analysis he changed one of the assumptions while leaving the other assumptions and forecasts unchanged. (TR 860) Thus, Dr. Sim utilized a process similar to the one used by Dr. Jacobs in performing his sensitivity analysis and which Dr. Sim claimed was flawed.

Dr. Jacobs recommends that FPL gather additional information to better inform the estimated costs of the project based on the ongoing work at the Vogtle and Summer projects. (TR 528-529) Dr. Jacobs testified that ". . . the best indicator of expected true costs for the Turkey Point Units 6 and 7 project will be the actual, binding bids from qualified engineering, procurement and/or construction (EPC or EP/C) contractors with an appropriate amount of contingency added to the bids. (TR 510-511) FPL Witness Scroggs also testified that a firm bid would be the best estimate of capital costs for the Turkey Point project based on terms and conditions having been negotiated, a firm schedule established and approvals to move forward. (TR 243) Dr. Jacobs made it clear that ideally a binding bid would be a firm contract from an EPC contractor that would lay out the terms and the conditions and what the costs of the project would be. He further explained that the binding bid would be the initial bid for the project, not necessarily an executed contract. (TR 539) Dr. Jacobs testified that, while a binding bid may be difficult to obtain at this phase in the project, he nevertheless recommends that binding bids

should be obtained before the Commission hears FPL's petition to begin preconstruction. (TR 529)

Thus, prior to FPL seeking to progress from the licensing phase to the preconstruction work upon receipt of a COL, and upon receiving Commission approval to initiate preconstruction work, the cost estimates that will be relied upon in the feasibility analysis should be based on actual, binding bids from qualified EPC or EP/C contractors with an appropriate amount of contingency added to the bids. (TR 513) In lieu of binding bids from qualified contractors, the feasibility analysis should reflect the higher costs experienced in the Vogtle and Summer projects and, at a minimum, include the owners' costs and an estimate of the contractor's costs related to the Vogtle and Summer projects; and FPL should submit this updated analysis as a not-to-exceed cost or cap above which FPL would not seek cost recovery from ratepayers for the Turkey Point Units 6 and 7 project. (TR 513-514) With respect to FPL continuing to seek a COL from the NRC for Turkey Point Units 6 and 7, OPC is not recommending any adjustments for these COL related costs in this year's NCRC. (TR 512-513) However, FPL should be required to correct its flawed feasibility analysis during this cycle of the NCRC proceeding for the Commission's consideration as appropriate. (TR 513)

ISSUE 1A: What is the current total estimated all-inclusive cost (including AFUDC and sunk costs) of the proposed Turkey Point Units 6 & 7 nuclear project?

POSITION: * The current total estimated all-inclusive costs of Turkey Point Units 6 and 7 are based on non-binding estimates which are significantly understated. *

For the reasons discussed in Issue 1, the current total estimated all-inclusive costs of Turkey Point Units 6 and 7 are based on non-binding estimates which are significantly understated.

ISSUE 1B: What is the current estimated planned commercial operation date of the planned Turkey Point Units 6 & 7 nuclear facility?

POSITION: * No position.*

ISSUE 2: Should the Commission find that FPL's 2014 project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Turkey Point Units 6 & 7 project?

POSITION: * No position.*

ISSUE 3A: (Legal): Pursuant to Section 366.93, Florida Statutes, can costs, which are not related to, or necessary for, obtaining or maintaining a combined license from the Nuclear Regulatory Commission for a nuclear power plant be incurred prior to the issuance of the COL and deferred for later recovery?

POSITION: * No. The plain language of Section 366.93, Florida Statutes, requires that only costs related to, or necessary for, obtaining a combined license for the Nuclear Regulatory Commission prior to the issuance of the COL are eligible for recovery through the NCRC. Further, the statute requires that, before preconstruction costs can be incurred for recovery through the NCRC, the utility must first seek Commission approval and prove up the continued feasibility of the project and the reasonableness of the costs. *

In 2013, the Legislature amended the language in Section 366.93, F.S., the NCRC statute. While this is the first time since these Legislative amendments were enacted that the Commission has been presented an issue regarding the implementation of the new language, the guiding principle of statutory construction is that the plain language should govern. In *J.R. v Palmer*, 2015 LEXIS 1055; 40 Fla. L. Weekly S 267, the Florida Supreme Court stated that "[o]ur statutory analysis begins with the **plain meaning** of the actual **language** of the statute, as we discern legislative intent primarily from the text of the statute." (Emphasis in original) Id. at

14. The Court further stated that if the statutory language is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; and the statute must be given its plain and obvious meaning. Id. The Court added that ". . . courts of the state are 'without power to construe an unambiguous statute in a way which would extend, modify, or *limit*, its express terms or its *reasonable and obvious implications*. To do so would be an abrogation of legislative power.'" Id. (Emphasis in original, citations omitted). In *Metro. Cas. Ins. Co. v. Tepper,* 2 So.3d 209 (2009), the Court asserted that in the interpretation of statutes, words in common use are to construed in their natural, plain, and ordinary signification, unless it appears they were used in a technical or other sense. Those definitions may be derived from dictionaries. Id. at 214. In this case, the operative words in the pertinent part of the statute are not being used in a "technical or other sense;" thus, they must be given their natural, plain, and ordinary meaning and not modified irrespective of any reasonable or obvious implications.

The pertinent part of Section 366.93 (3)(a)-(c), F. S., now reads as follows:

> (3)(a) After a petition for determination of need is granted, a utility may petition the commission for cost recovery as permitted by this section and commission rules.
>
> (b) During the time that a utility seeks to obtain a combined license from the Nuclear Regulatory Commission for a nuclear power plant or a certification for an integrated gasification combined cycle power plant, the utility may recover only costs related to, or necessary for, obtaining such licensing or certification.
>
> (c) After a utility obtains a license or certification, it must petition the commission for approval before proceeding with preconstruction work beyond those activities necessary to obtain or maintain a license or certificate.
>
> 1. The only costs that a utility that has obtained a license or certification may recover before obtaining commission approval

are those that are previously approved or necessary to maintain the license or certification.

2. In order for the commission to approve preconstruction work on a plant, it must determine that:

a. The plant remains feasible; and

b. The projected costs for the plant are reasonable.

(d) After a utility obtains approval to proceed with postlicensure or postcertification preconstruction work, it must petition the commission for approval of any preconstruction materials or equipment purchases that exceed 1 percent of the total projected cost for the project. Such petition shall be reviewed and completed in the annual Nuclear Cost Recovery Clause proceeding in which it is filed or in a separate proceeding by the utility.

(e) A utility must petition the commission for approval before beginning the construction phase.

1. The only costs that a utility that has obtained commission approval may recover before beginning construction work are those that are previously approved or necessary to maintain the license or certification.

2. In order for the commission to approve proceeding with construction on a plant, it must determine that:

a. The plant remains feasible; and

b. The projected costs for the plant are reasonable.

With the statutory amendments, the Legislature has created "hold points" in the utility's expenditure incurrence and added phases to the Commission's review of the recovery of costs related to nuclear projects. Section 366.93(3)(b), F.S., provides that "[d]uring the time that a utility seeks to obtain a combined license from the Nuclear Regulatory Commission for a nuclear power plant . . . . the utility may recover only costs related to, or necessary for, obtaining such licensing or certification." This is the COL phase of cost recovery. This section clearly mandates that only costs associated with securing the COL are eligible for cost recovery while the license is being sought. The legislation further contemplates that non-qualifying costs (i.e. not related to securing the license) cannot be incurred in the licensing phase and ever be eligible for advanced

recovery through the NCRC. Currently, FPL is still in the process of seeking a COL from the NRC. The projected license issuance date is March 2017. (H.E. 43) While March 2017 is the NRC's estimated date for a decision on the Turkey Point project (TR 213), Witness Scroggs indicated the NRC focuses on emerging issues that affect the existing nuclear fleet. He further opined that federal budgetary issues affect the NRC's resources and the allocation of those resources. (TR 214) In sum, while March 2017 is the earliest practical date for the issuance of the COL, there is always the possibility of additional delays.

The next phase under the new statutory scheme is the preconstruction phase. Section 366.93(3)(c), F.S., inserts a hold point in the process and provides that after the COL is granted, the utility " . . . must petition the commission for approval before proceeding with preconstruction work beyond those activities necessary to obtain or maintain a license or certificate." (Emphasis added). In this Section, the "activities" clearly refers only to those activities necessary to obtain and maintain the license issued by NRC as referenced in Section 366.93(b), F.S. This Section unambiguously provides that, for any activities that are preconstruction, but not necessary to obtain or maintain the COL, a petition for Commission approval must be sought before said preconstruction work can proceed and ever become eligible for recovery through the NCRC.

Section 366.93, F.S., further, requires before the Commission may approve non-COL preconstruction costs for recovery through the NCRC, the utility must petition the Commission for approval and must demonstrate that the project remains feasible and that the project costs are reasonable. Section 366.93(c)(1), F.S., reinforces subsection (b) that ". . . only costs that a utility that has obtained a license or certification may recover before obtaining commission approval are those that are previously approved or necessary to maintain the license or certification." This

section established the new standard by which the Commission must make a determination before any new preconstruction work, not necessary to obtain the COL, can be recovered through the NCRC.

The steps mandated by the law are clear. The utility must first obtain a COL. The utility must then petition the Commission to move into the preconstruction phase before proceeding with any preconstruction work. The Commission must make a determination regarding whether the utility has met the statutory standard that the project remains feasible and that the costs are reasonable. Thus, the plain reading of the 2013 statutory amendments shows that Legislature inserted intentional hold points in the spending on activities to build a nuclear power plant. Likewise, the Legislature now requires findings that the overall project remains feasible and the projected costs are reasonable before any additional customer money is spent on the next phase of the project and, thus, becomes eligible for recovery through the NCRC. Since FPL is clearly in the COL phase of the project and has not petitioned (and cannot do so legally) to move to the preconstruction phase, under the plain meaning of the statute any non-COL related costs incurred prior to the statutory approval process are ineligible for consideration and recovery through the NCRC.

ISSUE 3B: Are the Initial Assessment costs incurred as set forth in FPL's Petition and Testimony for which FPL is seeking deferred recovery, costs that are related to or necessary for obtaining or maintaining a combined license?

POSITION: * No. The Initial Assessment costs are not necessary to obtain or maintain a combined license from the NRC. The Initial Assessment costs are preconstruction costs. While FPL maintains that the Initial Assessment study cost are needed for its NCRC feasibility study, the hearing evidence demonstrates that the studies are not being created to meet any NRC requirement. *

As discussed in Issue 3A, Section 366.93(3)(b), F.S., provides that "[d]uring the time that a utility seeks to obtain a combined license from the Nuclear Regulatory Commission for a nuclear power plant . . . . the utility may recover only costs related to, or necessary for, obtaining such licensing or certification." It is uncontested that FPL is still seeking to obtain a COL from the NRC and is not expected to obtain its license prior to March 2017. (TR 213, H.E. 43)

Witness Scroggs testified that the Initial Assessments ". . . consist of studies required to further refine the revised schedule and substantiate assumptions supporting the feasibility study." (TR 231) He argued that the Initial Assessments ". . . are reasonable to support a decision to proceed to preconstruction and to support the filings FPL will make to seek approval to begin preconstruction." (TR 231-232) Further, in FPL's response to OPC Interrogatory No. 4, FPL stated that:

> Initial Assessment analyses are required to inform the project schedule and cost estimates that will be relied upon in the 2016 feasibility analysis that will support FPL's anticipated request to proceed from the licensing phase to the initiation of "pre-construction work" upon receipt of the COL.

(TR 512) Based on FPL's description of these Initial Assessment costs, Dr. Jacobs determined that these costs are ". . . preconstruction costs and these costs are not related to or necessary to obtain or maintain the COL." (TR 512) He further concluded that ". . .the Initial Assessment costs as described by FPL are preconstruction work beyond those activities that are necessary to obtain or maintain a combined license from the NRC for a nuclear power plant." (TR 512)

In Witness Scrogg's rebuttal testimony, he reaffirmed that the Initial Assessments would provide additional schedule and cost granularity to better inform the feasibility analysis that will support the decision to move into preconstruction work following receipt of the COL in early 2017. (TR 640) He also stated that the Initial Assessments will help ensure that the future work

will comply with the requirements of the COL. He added that the feasibility analysis which the Initial Assessments will support is scheduled to be provided for the Commission's consideration in the 2016 NCRC. (TR 641) Witness Scroggs further contended that the Initial Assessment studies are being conducted to support the Florida Statutory (feasibility) requirements and are not being provided to the NRC to obtain or maintain the COL (TR 655-656, 660). Since a direct linkage to the NRC COL process cannot be shown, FPL argues that since (1) the feasibility analysis is part of the NCRC process; (2) the NCRC filing requirements must be satisfied; and (3) the Initial Assessment studies are needed for the feasibility study to get cost recovery, thus the Initial Assessment are "related to" the COL process. (TR 647) However, this highly attenuated and circular reasoning does not hold up under any scrutiny. The Initial Assessment costs simply do not qualify for recovery through the NCRC given the clear language of the statute and the timing of the expenses.

Moreover, it cannot be logically inferred that the new statutory scheme permits or requires FPL to engage in preconstruction work such as the "preconstruction" feasibility study and the Initial Assessment Studies to be able to obtain a COL and be eligible for COL-related cost recovery. If recovery of preconstruction work costs is allowed, this would be a fundamental violation of the hold point the Legislature inserted into the NCRC cost recovery. No amount of "preconstruction work" costs, regardless of the small size, can be incurred and later recovered under the NCRC if it fails to qualify under the bright line test established by the 2013 amendments. Pursuant to Section 366.93, F.S., FPL can only seek to recover costs that it has prudently incurred to obtain a COL. In accordance with that statute, Dr. Jacobs testified that ". . . only costs related to or necessary for, obtaining the COL be approved for recovery at this time." (TR 512) Moreover, Dr. Jacobs recommends that FPL continue to seek a COL given that they

have spent a significant percent of the total costs to obtain the COL irrespective of the feasibility analysis. (TR 513) Thus, OPC is recommending that FPL continue to pursue a COL as well as update its flawed feasibility analysis.

In testimony, FPL has tried to suggest that in order to obtain a COL, it is necessary to present the Commission in 2016 a feasibility analysis that will support moving into preconstruction work. Under the strict wording of the new Florida statutory scheme, it is premature to petition the Commission for approval to move into the preconstruction phase before a COL is obtained, thus obviating the need that the Initial Assessment studies be done now. Witness Scroggs also testified that in his opinion (noting he is not a lawyer), under 10 CFR 52.97, the NRC may not issue a combined license until it makes a finding that there is a reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of the Atomic Energy Act, and NRC regulations. (TR 705) Although he testified that the Initial Assessments will allow FPL to confirm that the planned work and, therefore, the project schedule reflect that construction will be in conformity with the license, this statement presumes that a COL has already been obtained. (TR 706) Tellingly, when asked if the evidence of compliance that FPL must submit to the NRC includes the Initial Assessment studies, Witness Scroggs conceded that "[s]o, explicitly, no, there isn't a form that these initial assessments satisfy that will directly relate to the NRC." He also tried to argue that some of the information that must be submitted to the NRC during construction to demonstrate compliance might come from these initial assessments (TR 685-686); however, this question and response again presume that a COL has been obtained and construction has begun. Clearly, this does not comport with Section 366.93, F.S., for cost recovery in this year's NCRC. The costs are simply non-qualifying and ineligible for advance recovery.

Moreover, Witness Scroggs admitted he was aware that Duke Energy Florida (Duke) had terminated its EPC contract for construction of the Levy Nuclear Power Plant and announced its plans not to complete construction. (TR 663) He further acknowledged that, despite the cancellation of the EPC contract and the very public decision not to complete the Levy construction, the NRC has continued to process Duke's COL application for the Levy Nuclear Power Plant. (TR 663-664) In fact, he also acknowledged that rather than refusing to process the COL application for the Levy Nuclear Power Project, the NRC made the COLA for Levy the lead application. (TR 664) Finally, Witness Scroggs conceded that if the initial assessment work was not done, FPL could still receive the COL for the Turkey Point Units 6 and 7 project. (TR 665) Therefore, the COL for the Turkey Point project can be obtained without the Initial Assessments as evidenced by Witness Scroggs' concessions. There is no reasonable nexus that can be made to claim that the Initial Assessments are "related to" obtaining the COL.

Furthermore, the COL can be maintained without any further preconstruction or construction work as evidenced by the status of the Levy project. Section 366.93(c)(1), F. S., makes clear that "[t]he only costs that a utility that has obtained a license or certification may recover before obtaining commission approval are those that are previously approved or necessary to maintain the license or certification." (Emphasis added). This language specifies that only costs "necessary to maintain" the COL are eligible for recovery after the COL has been obtained. There is no "related to" language in Section 366.93(c)(1) which expands the eligibility for recovery to include costs "related to" maintaining a COL. As the Levy Project amply demonstrates, there is no nexus between "the utility must continue with the preconstruction and construction phases" on a project and "the utility maintaining a COL."

ISSUE 3C: Should the Commission approve FPL's proposal to incur and defer for later recovery its Initial Assessment costs, as set forth in FPL's petition and supporting testimony?

POSITION: *No. Based on the plain language of the statute, the Commission has no discretion to approve FPL's incurring preconstruction costs for deferral and later recovery through the NCRC prior to the issuance of the COL.*

As discussed in Issue 3A, the 2013 statutory amendments have created a new procedure for cost recovery of nuclear costs through the NCRC. Section 366.93(3)(b), F. S., provides that "[d]uring the time that a utility seeks to obtain a combined license from the Nuclear Regulatory Commission for a nuclear power plant . . . .the utility may recover only costs related to, or necessary for, obtaining such licensing or certification." (Emphasis added). Section 366.93(3)(c), F. S., states that after the COL is granted the utility " . . . must petition the commission for approval before proceeding with preconstruction work beyond those activities necessary to obtain or maintain a license or certificate." (Emphasis added). When Section 366.93(b) is coupled with Section 366.93(c), it is clear the Legislature left no discretion regarding the timing of when certain nuclear costs are eligible for recovery. Only COL-related costs necessary to secure a COL are eligible for NCRC recovery so long as the NRC license application is pending. Moreover, it is abundantly clear that non-COL related, preconstruction costs are not eligible for recovery through the NCRC if incurred before the Commission approves a petition to move into the preconstruction phase. Witness Scroggs attempts to conflate the requirements of the two separate statutory provisions by applying the "related to" language from 366.93(b) regarding obtaining the COL to Section 366.93(c) regarding maintaining a COL. (TR 647) However, a close reading of the statutory language of Section 366.93(c) makes obvious that the words "related to" do not appear in this provision. As the Court clearly stated in

JR v. Palmer, ". . . the courts of the state are 'without power to construe an unambiguous statute in a way which would extend, modify, or *limit*, its express terms or its *reasonable and obvious implications*. To do so would be an abrogation of legislative power.'" (Emphasis in original, citations omitted). Id. at 14. The Court further stated in *Florida Tel. Corp. v. Carter*, 70 So. 2d 508, 510 (1954), that "[w]hile the Legislature may have the power to change the law and provide for all such matters to be disposed of in one proceeding, it is beyond the power of the Commission to change the law" (addressing whether a penalty for inadequate service could be addressed in a rate case under the then existing statutory scheme). Similarly, the Commission cannot in this case circumvent the unambiguous language of Section 366.93, F. S., in a way that would extend, modify, or limit the express terms or its reasonable and obvious implications by creating a rationale or interpretation that defeats the hold point requirements.

Witness Scroggs also testified that the Initial Assessment studies are being done to provide a higher predictability in cost and schedule for key activities to better inform the feasibility analysis that will be used by FPL to support the decision to move into preconstruction work. (TR 640) While it may be true that the Initial Assessment studies will be used to support FPL proceeding to the preconstruction phase, it does not change the non-qualifying status of the costs. Furthermore, it would also put the cart before the horse, in that, FPL has not obtained a COL and thus cannot seek approval to move into preconstruction work at this time. However well-intentioned the motive is, it does not qualify the expenditure for advance recovery in the NCRC. Witness Scroggs complained that actionable bids require detailed scope of work, firm schedule milestones, and contractual terms and conditions. He asserted that given the impacts of the recent NCRC statutory amendments, FPL is unable to provide the requite level of schedule and funding commitments that would be necessary to solicit meaningful and realistic bids from

potential participants at this stage of the project. (TR 641) Again, while this may be true, Section 366.93, F. S., unambiguously says what is required for cost recovery and the procedure that must be followed. Simply because FPL finds it hard to comply with these provisions does not create the right to ignore the clearly articulated procedure and go outside the law.

Dr. Jacobs acknowledged that obtaining binding bids at this point in the project could be difficult. (TR 529) He testified that the binding bids should be sought before the Commission considers FPL's petition to begin preconstruction activities. He further stated that the cost of obtaining the bids would be considered preconstruction work. (TR 529) He then explained that FPL can do whatever work is necessary to receive the best information they can to inform their cost estimate as needed. (TR 531) When asked if the costs of obtaining bids or preconstruction work beyond those necessary to obtain or maintain the COL were recoverable, Dr. Jacobs testified that he was not a cost recovery expert and gave his opinion that FPL could recover those costs but not through the NCRC. (TR 521)

FPL Witness Grant-Keene testified that "Preliminary Survey and Investigation Charges," FERC account 183, is the balance sheet account used for recording preliminary feasibility studies prior to receiving a need determination. (TR 570, H.E. 79) She agreed that once construction for an electric power plant commences, the costs accumulated in FERC account 183 are transferred to FERC account 107, Construction Work in Progress (CWIP). (TR 571, H.E. 79) In Response to OPC Interrogatory 35, FPL noted in the context of a gas fired electric power plant, all costs charged to FERC account 183 are transferred to CWIP upon receipt of site certification, which signals the project will move toward construction. (H.E. 79) Witness Grant-Keene further affirmed the Initial Assessment costs are currently being record as CWIP in FERC account 107. (TR 571) In addition, FPL's February 18, 2015 presentation entitled New Nuclear Update

(Scroggs Late-Filed Deposition Exhibit No. 9) confirmed the Initial Assessments, totaling $5 million through 2016 are being recorded in the CWIP account. (H.E. 43) In response to OPC Interrogatory No. 32, FPL stated that once construction is complete and the asset is placed into service, all CWIP charges in FERC account 107 will be transferred to FERC account 101, plant-in-service.[2] (H.E. 79)

The 2013 statutory amendments to Section 366.93, F. S., apply to cost recovery through the NCRC, and not to any other form of regulatory recovery. For plants whose costs are not eligible for accelerated recovery through the NCRC, a prudence review of costs would be conducted in the next rate case after the plant is placed into service, using the prudence standard of ". . . what a reasonable utility manager would have done, in light of conditions and circumstances that were known, or should [have] been known, at the time the decision was made." *Southern Alliance v. Graham*, 113 So. 3rd 742, 750 (2013).

In this docket, FPL is proposing to incur and defer for later recovery its Initial Assessment costs through the NCRC. As discussed above, the Initial Assessments costs are preconstruction costs that are not related to or necessary to obtain the COL, or necessary to maintain the COL. Under Section 366.93, F. S., the Commission has no discretion to waive the timing of eligibility of certain costs, such as allowing preconstruction costs to be incurred and deferred for later recovery through the NCRC. Thus, the Commission must deny FPL's request

[2] As noted in FPL's response to OPC Interrogatory No. 33, for a plant under traditional ratemaking cost recovery where construction has not begun and the project is subsequently abandoned, the preliminary survey and investigations costs incurred would be recorded to FERC account 426.5, Other Deductions, or to the appropriate operating expense account. (H.E. 38) However, for a regulatory mandated project, these costs would be transferred to FERC account 182.2, Unrecovered Plant and Regulatory Costs, or an appropriate operating expense account and the balance of account 182.2 amortized to an operating expense account 407, Amortization of Property Losses, Unrecovered Plant and Regulatory Study Costs over a period specified by either the Commission or FERC. (H.E. 38)

to approve its proposal is to incur and defer for later recovery Initial Assessment costs through the NCRC.

ISSUE 4: What jurisdictional amounts should the Commission approve as FPL's actual 2014 prudently incurred costs and final true-up amounts for the Turkey Point Units 6 & 7 project?

POSITION: *No position*

ISSUE 5: What jurisdictional amounts should the Commission approve as reasonably estimated 2015 costs and estimated true-up amounts for FPL's Turkey Point Units 6 & 7 project?

POSITION: * The Commission must exclude for recovery in this docket any costs related to Initial Assessment Costs or any other non-COL costs that are not necessary to obtaining or maintaining a COL.*

Witness Scroggs testified that the Initial Assessment costs have been incurred. However, FPL is not seeking to recover these costs as part of its 2016 NCRC factor. Therefore, they have been adjusted out of FPL's request, as shown on Line 14 of Schedule AE-6 and Line 14 of Schedule P-6. (TR 231-232) OPC concurs with FPL deleting the Initial Assessment costs from recovery in this docket. Further, the Commission should exclude any additional costs related to the Initial Assessment Costs or any other non-COL related costs that are not necessary to obtaining or maintaining a COL to the extent any have been included. Moreover, the Commission should decline at this time to make any findings of reasonableness or prudence as it relates to the projected Initial Assessment costs, as this would be unlawful pursuant to Section 366.93, F. S.

ISSUE 6: What jurisdictional amounts should the Commission approve as reasonably projected 2016 costs for FPL's Turkey Point Units 6 & 7 project?

POSITION: * The Commission must exclude for recovery in this docket any costs related to Initial Assessment Costs or any other non-COL costs that are not necessary to obtaining or maintaining a COL. *

Witness Scroggs testified that the Initial Assessment costs have been incurred. However, FPL is not seeking to recover these costs as part of its 2016 NCRC factor. Therefore, they have been adjusted out of FPL's request, as shown on Line 14 of Schedule AE-6 and Line 14 of Schedule P-6. (TR 231-232) OPC concurs with FPL deleting the Initial Assessment costs from recovery in this docket. Further, the Commission should exclude any additional costs related to the Initial Assessment Costs or any other non-COL related costs that are not necessary to obtaining or maintaining a COL to the extent any have been included. Moreover, the Commission should decline at this time to make any findings of reasonableness or prudence as it relates to the projected Initial Assessment costs, as this would be unlawful pursuant to Section 366.93, F. S.

ISSUE 7: What is the total jurisdictional amount to be included in establishing FPL's 2016 Capacity Cost Recovery Clause factor?

POSITION: * The Commission must exclude for recovery in this docket any costs related to Initial Assessment Costs or any other non-COL costs that are not necessary to obtaining or maintaining a COL. *

Witness Scroggs testified that the Initial Assessment costs have been incurred. However, FPL is not seeking to recover these costs as part of its 2016 NCRC factor. Therefore, they have been adjusted out of FPL's request, as shown on Line 14 of Schedule AE-6 and Line 14 of Schedule P-6. (TR 231-232) OPC concurs with FPL deleting the Initial Assessment costs from

recovery in this docket. Further, the Commission should exclude any additional costs related to the Initial Assessment Costs or any other non-COL related costs that are not necessary to obtaining or maintaining a COL to the extent any have been included. Moreover, the Commission should decline at this time to make any findings of reasonableness or prudence as it relates to the projected Initial Assessment costs, as this would be unlawful pursuant to Section 366.93, F. S.

DEF

ISSUE 8: Should the Commission find that during 2014, DEF's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Levy Units 1 & 2 project?

POSITION: *No position*

ISSUE 9: What jurisdictional amounts should the Commission approve as DEF's actual 2014 prudently incurred costs for the Levy Units 1 & 2 project?

POSITION: Resolved by the Commission-approved Stipulation among the Duke phase Parties.

ISSUE 10: What jurisdictional amounts should the Commission approve as reasonably estimated 2015 exit and wind down costs and carrying costs for the Levy Units 1 & 2 project?

POSITION: Resolved by the Commission-approved Stipulation among the Duke phase Parties.

ISSUE 11: What jurisdictional amounts should the Commission approve as reasonably projected 2016 exit and wind down costs and carrying costs for the Levy Units 1 & 2 project?

POSITION: Resolved by the Commission-approved Stipulation among the Duke phase Parties.

ISSUE 12: Should the Commission find that during 2014, DEF's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Crystal River Unit 3 Uprate project?

POSITION: *No position*

ISSUE 13: What jurisdictional amounts should the Commission approve as DEF's actual 2014 prudently incurred costs for the Crystal River Unit 3 Uprate project?

POSITION: *No position*

ISSUE 14: What jurisdictional amounts should the Commission approve as reasonably estimated 2015 exit and wind down costs and carrying costs for the Crystal River Unit 3 Uprate Project?

POSITION: *No position*

ISSUE 15: What jurisdictional amounts should the Commission approve as reasonably projected 2016 exit and wind down costs and carrying costs for the Crystal River Unit 3 Uprate Project?

POSITION: *No position*

ISSUE 16: What is the total jurisdictional amount to be included in establishing DEF's 2016 Capacity Cost Recovery Clause Factor?

POSITION: Resolved by the Commission-approved Stipulation among the Duke phase Parties.

Dated this 4th day of September, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE
Docket No. 150009-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 4th day of September, 2015, to the following:

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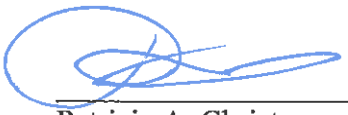

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