BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause	**DOCKET NO. 160009-EI** **Date: May 16, 2016**

THE SOUTHERN ALLIANCE FOR CLEAN ENERGY'S COMMENTS IN OPPOSITION TO FLORIDA POWER AND LIGHT COMPANY'S PETITION FOR A WAIVER

The Southern Alliance for Clean Energy ("SACE"), by and through its undersigned counsel, pursuant to R. 28-104.003, F.A.C. hereby submits its Comments in Opposition to Florida Power and Light Company's (FPL) Petition for Waiver of Rule 25-6.042(6)(c)5, F.A.C.

INTRODUCTION

The "early cost recovery" law, Section 366.93, F.S., when adopted in 2006 created an alternative cost recovery mechanism for nuclear reactor construction. It also effectively shifted the financial risk of new reactor construction from power company shareholders to its customers. Section 366.93(3), F.S., for instance, allows a utility to recover all prudent preconstruction costs – which includes carrying costs, such shareholder return on equity, from customers. Section 366.93(6), F.S. allows a utility to abandon a reactor project and collect all its construction costs from its customers. The Commission promulgated R. 25-6.0423, F.A.C. to implement the early cost recovery law. It wisely required that a power company provide a feasibility analysis before it could obtain a reasonableness determination for future projected nuclear construction costs. It provides specifically that "each year a utility shall submit for Commission review and approval a detailed analysis of the long-term feasibility of the completing the power plant." R. 25-60423(6)(c)5, F.A.C.

There is great uncertainty and risk surrounding the completion of FPL's proposed Turkey Point 6 & 7 reactors. The project is complex and financially risky with all the financial risk being

borne by its customers. The in-service dates for the proposed reactors have already been moved back three times – most recently to the 2027-28 timeframe. We are now 8 years from the 2008 need determination granted to FPL to build the reactors and it is no closer to committing to the build the project than it was in 2008. In FPL's most recent petition – the Company provides no clue as to when the projects will be built or how much the units will cost customers – if they are built at all. Most troubling from a consumer protection perspective is that FPL customers have spent approximately $280 million dollars on a project that FPL has never committed to build or has ever provided a binding a cost estimate. This year, FPL is requesting that customers foot another $22 million – brining the sunk cost total of the proposed reactors to approximately $300 million. Given the high-cost, high-risk nature of this speculative reactor project on customers, proving that the reactors are economically feasible before approving more cost recovery from customers is more critical than ever.

Yet, on April 27, 2016 FPL filed its Petition for Waiver of Rule 25-6.0423(6)(c)5, F.A.C. stunningly requesting to be relieved from providing a feasibility analysis to the Commission as part of its annual nuclear cost recovery from stating that it "violates the principles of fairness" and imposes a "substantial hardship" on FPL. If approved, customers will be required to fund reactor development costs with no long-term feasibility to determine if the plant remains feasible. And the Commission will have to make a determination of the reasonableness of future costs while effectively wearing a blindfold. The irony of the Company's request should not be lost on the Commission. It is the monopoly utility's captive customers that are being stripped of principles of fairness and being burdened by a substantial hardship as they continue to pay for proposed reactors for which FPL has not committed to build. In addition to a lack of commitment to build, FPL now wants to be relieved of providing a feasibility study — while continuing to request additional customers dollar for cost recovery. It is unfortunate that

FPL sees no purpose in the feasibility analysis' use in ensuring that customers are protected from cost recovery on reactor projects that may be no longer feasible. The rule is intended to assist the Commission in determining the reasonableness of future expenditures on financially risky reactor projects. The feasibility analysis since 2008 has been a critical tool in helping the Commission, regardless of the stage of development of project development, in determining prudence and reasonableness of costs to be recovered from customers.[1] Certainly, if a project were no longer feasible, it would not be reasonable for the Commission to approve future costs related to the project. How can the Commission determine continued feasibility without the required feasibility analysis? Consumer protection and good public policy (and the Commission's rule) demand that FPL prove its proposed reactors are feasible and that the reactors will provide customers with a net economic benefit that is superior to other resource alternatives.

SUMMARY OF ARGUMENT

In addition to the public policy benefit in denying FPL's waiver request; the request should be denied because it fails to meet the criteria of the waiver statute. Section 120.542, F.S. requires that several criteria be met, including that the requirement: 1) "violate principles of fairness;" or 2) that it impose a "substantial hardship." §120.542(2), Fla. Stat. In summary, FPL alleges in its petition that submission of a feasibility analysis of its proposed reactors would serve no legitimate regulatory purpose; it would not change FPL's decision to obtain required

[1] *See e.g.* Order PSC 15-0521-FOF-EI, Docket No. 150009-EI, November 2, 2015. ("The assessment of the feasibility analysis for the TP Project is based on multiple factors. FPL provided an adequate spectrum of assumptions on which the feasibility analysis was based. We find that for the 2015 NCRC proceeding, FPL's analysis fully considered the economic, regulatory, technical, financial, environmental, and joint ownership considerations impacting the feasibility of continuing the TP Project. Although uncertainty surrounding the various assumptions continues to exist, we find that continuing the TP Project appears feasible at this time. We find FPL's 2015 detailed analysis of the long-term feasibility of continuing the TP Project is reasonable.")(emphasis added).

permit approvals; forecasts provided will be supplanted by newer forecasts; that a feasibility analysis is a complex undertaking; and as such the requirement for a feasibility violates the principles of fairness and presents a substantial hardship. ¶¶ 17-22. Yet, FPL misreads and misapplies the requirements of the waiver statute and relies on past Commission orders in support of its request that are not applicable in FPL's case. While FPL lists off a host of inconveniences if it complies with the Commission's rule, the inconveniences do not meet the standards in the waiver statute or the commission orders upon which FPL relies. Since the Company does not provide sufficient support for its request that it be relieved from filing a feasibility study, the Commission should deny FPL's request for a waiver from Rule 25-6.0423(6)(c)5, F.A.C.

FPL's PETITION DOES NOT SUPPORT ITS CLAIM OF VIOLATION OF PRINCIPLES OF FAIRNESS

FPL's petition does not support the Company's claim that the Commission's rule requirement violates principles of fairness. Section 120.542, F.S. clearly provides the criteria for the granting of a waiver by an agency.

> 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. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. (emphasis added) §120.542(2), Fla. Stat.

The requirement for a violation of principles of fairness is that the literal application of the rule affects a particular power company in a manner significantly different that the way it affects other similarly situated power companies. A review of

FPL's petition finds no support for a claim that application of the rule will result in it affecting FPL any differently than it would any other power company. FPL must state "specific facts that that would justify a waiver" from the Commission's rule. Id at (5)(c). FPL lists off a number of inconveniences to the Company if it complies (¶¶ 17-22), yet none provide any facts as to how FPL will be treated differently from any another "similarly situated person" pursuing nuclear cost recovery, let alone in a "significantly" different manner. As such, FPL clearly has not met the criteria in the waiver statute for violation of principles of fairness.

FPL's PETITION DOES NOT SUPPORT CLAIM OF SUBSTANTIAL HARDSHIP

Since FPL's petition is devoid of any support meeting the statutory requirement for showing a violation of principles of fairness, it must show that the requirement to provide a feasibility analysis imposes a substantial hardship on the Company in order to be granted a waiver by the Commission. FPL must provide a factual basis of a "substantial hardship" described as a "demonstrated economic, technological, legal, or other type of hardship" to the Company. §120.542(5)(c), Fla. Stat. It fails to do so. The facts it alleges and the Commission orders upon which it relies do not meet the statutory requirement of substantial hardship. The Company's petition states that the feasibility analysis would serve no regulatory or project purpose and as such, should serve as a "substantial hardship" as interpreted by past Commission decisions. ¶17. It continues by stating that if "FPL were to perform a feasibility analysis in in 2016, it would not affect FPL's decision to obtain its required approvals . . . it expects to receive in 2017." ¶18. Additionally, forecast submitted today would be "supplanted by newer forecasts and assumptions in the future." ¶19. It concludes by stating that a feasibility analysis is a

"complex undertaking." ¶20 .The Company's assertions don't comport with the requirements of the waiver statute, and misapply past Commission orders to the facts in this case. These facts, even taken at face value, cannot and do not form the basis of a substantial hardship determination by this Commission.

First, if the FPL truly believes that the Commission's requirement to require a feasibility analysis serves no regulatory or project purpose, then it should petition the Commission to amend the rule. *See* §120.54(7), Fla. Stat. FPL's opinion on whether the feasibility analysis serves a regulatory purpose in FPL's stage of reactor development is an argument for rule amendment - it is not grounds for a "substantial hardship." It must "demonstrate" a hardship through specific facts. §120.542(5)(c), Fla. Stat. Yet, the Company has not factually demonstrated how the actual application of the feasibility rule provision presents a hardship to FPL, rather it argues why the application of the feasibility study does not serve a regulatory or project purpose. That is not the statutory criteria the Company must meet to garner a waiver – it must provide a "demonstrated" substantial hardship to the agency. The legal nuance here is that a demonstrated hardship – such as for example providing duplicative information to the agency – can lead to no regulatory purpose[2], but the argument does not work in reverse. In other words a rule requirement, that in the opinion of a petitioner serves no regulatory purpose for petitioner's project, cannot be the basis for a demonstrated substantial hardship on its own – but rather it must be demonstrated through facts on how the application of the rule will create a hardship on the Company. FPL is clearly misapplying the law in its petition. On this basis alone, its argument of substantial hardship should be dismissed.

The Company additionally misapplies Commission precedent in support of its request. FPL's reliance on PSC Order No. 02-0782-PAA-EI is a prime example of a misapplication of

[2] *See* Order No. PSC Order No. 02- 0782-PAA-EI.

both Commission precedent and the law. Through PSC Order No. 02-0782-PAA-EI the Commission granted Florida Power Corporation's rule waiver request, finding that a requirement to file an earnings surveillance report that covered the same time frame as a projected rate case would be duplicative. The Commission stated in particularity:

> We agree, and find that assigning manpower to a time consuming task that amounts to little more than reformatting information that has already been provided amounts to a violation of principles of fairness and would consume valuable manpower of the utility needlessly. Id. at 5

This waiver request focused on reformatting information in to a different form that had already been provided to the Commission. First this case is easily distinguishable from FPLs present request. In the instant case, no information has been provided by FPL to the Commission regarding a feasibility analysis, hence there can be no duplication of information because FPL has petitioned the Commission to be relieved of providing any feasibility analysis to the Commission. This case is easily distinguishable as it represents a diametrically different fact pattern from the facts in FPL's pending waiver request. Additionally, this case exposes FPL's misapplication of law in its petition. The Commission granted Florida Power Corporation's petition because it demonstrated that producing duplicative data served no regulatory purpose and therefore imposed a hardship. FPL on the other hand is of the opinion that the feasibility analysis provision serves no regulatory purpose for FPL without providing a demonstrated hardship on the Company, such as duplication of information in the above case, or substantial hardship on FPL and its personnel, as in the case below.

FPL cites to PSC Order No. 12-0532-PAA-GU as additional support of its request. Yet that request for waiver in this case turned on the limited resources of a tiny investor-owned utility, FPUC, and its related companies: Chesapeake and Indiantown utilities. The utilities requested time to develop a blended depreciation schedule in light of an ongoing reorganization

and consolidation. The Commission found that a waiver was appropriate in light of the reorganization and consolidation and acknowledged the "substantial hardship" that would be placed on the "Companies' resources and personnel" in light of the ongoing consolidation activities. Id. at 4. In the instance case, FPL is not going through consolidation or reorganization with associated companies that impact the filing of a feasibility analysis. In this order, the relative size of the companies played an important role because the required filing would have taxed the companies' existing resources and personnel. The Commission has understandably taken a power company's relative size into consideration in approving measures that reduce strict regulatory compliance. For instance, in Docket 130204, FPUC asserted that it would face costs similar to its much larger investor-owned utility counterparts to update a 2009 Technical Potential Study. The Commission accepted FPUC assertion that due to its small size that completing the study would represent an unreasonable burden on its ratepayers. Order No. PSC-13-0645-PAA-EU. Unlike FPUC, FPL is not a relatively small utility company. FPUC generates 0.31% of statewide energy sales and FPL generates 47.35%. Id. at 3. This makes FPL more than 153 times larger than FPUC in terms of electricity generation. FPL is the largest investor-owned utility in Florida, and one of the largest in the country, with a customer base of 4.8 million customers and it had a 2015 net income of approximately $1.65 Billion.[3] FPL has not provided specific facts to support a substantial hardship on the company's resources and personal or any other economic hardship other than to say that the feasibility analysis is a "complex" undertaking and will require "250 man hours," and vague references to "time and effort." ¶ 20. As to man hours, six staff people working five days to prepare a feasibility analysis is not a "substantial" hardship to one of the largest power companies in the nation. That is likely why FPL did not avail itself of specific economic hardship allegations in its petition.

[3] NextEra Energy Annual Report 2015, p. 79.

In fact, FPL has provided a feasibility study to the Commission annually and has never pleaded substantial hardship in the past. It begs the question, why now? One can only speculate as to the reasons for its unwillingness to not file such a study, but one plausible reason is that the proposed reactors are simply no longer economically feasible and FPL is attempting to delay the filings of economic feasibility in the hope that there will be improvement in the economics of its proposed reactors. If that is the case, then a feasibility analysis is especially critical in determining whether FPL customers should continue footing the bill for a speculative reactor project which is deemed not feasible.

Additionally, FPL misses the point in its statement that if "FPL were to perform a feasibility analysis in in 2016, it would not affect FPL's decision to obtain its required approvals" as support for its petition. ¶18. The nuclear cost recovery docket is intended primarily for the recovery of prudently incurred costs and a reasonableness determination of future projected costs for development of nuclear reactors. Whether the filing of feasibility analysis changes FPL's behavior is of no import in this docket; the question before the Commission is should it approve FPL's recovery of costs for its activity related to pursuing Turkey Point 6 & 7? A feasibility analysis is a critical component to answering that question in nuclear cost recovery docket. It is important to note that the Section 366.93(3)(a), F.S. states that a "utility may petition the Commission for cost recovery." (emphasis added). Therefore, if FPL wishes to pursue its required permits without a filing a feasibility study, its shareholders can and should cover the costs associated with the activities – not its customers. Although, this is an option that FPL has rejected in the past.[4] The Commission is under no obligation to, and should not grant cost recovery or a reasonableness determination for projected costs for FPL's speculative reactors without a feasibility study.

[4] Docket No. 150009, Transcript from Hearing, Volume, pp. 306-07

Moreover, FPL argues in its petition that any feasibility analysis it provides will be "supplanted by newer forecasts and assumptions in the future." ¶19. FPL seems surprised that analysis provided this year will be updated in later years. It fact, annual feasibility study filings seem completely consistent with FPL's proclaimed "careful, stepwise approach." ¶7. Yet, oddly FPL now sees this careful time-tested process as the basis for a "substantial hardship" determination. In fact it is customary practice (and required by rule) to file updated feasibility analysis annually. FPL has done so in previous nuclear cost recovery proceeding dockets since 2008. ¶6. The notion that FPL will be better positioned to provide a more accurate feasibility study in future years is not compelling. That is the case with all studies, there is always more certainty with future analysis, but it does not naturally follow that FPL should not perform the analysis – especially given the financial risk borne by customers.

CONCLUSION

FPL customers must be protected from imprudent or unreasonable cost recovery from FPL's financially risky reactor project. The feasibility analysis provision in the Commission's rule has been a critical tool in achieving customer protection. FPL should not be relieved from complying with this consumer protection provision. Good public policy and the Commission's rule require the annual filing of a long-term feasibility analysis if a monopoly utility wants to recover nuclear reactor development costs from its captive customers. The Company's waiver request fails to meet the statutory criteria for a waiver, which must include a showing of a violation of principles of fairness or a substantial hardship. Moreover, FPL relies on past Commission orders that are not applicable in the current case. Given that FPL fails the legal test for a waiver, there is but one option left for the Commission: to deny the waiver request.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail this 16th day of May 2016, to the following:

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