Ruth Nettles 090009-EI

From: Lynette Tenace [ltenace@kagmlaw.com]
Sent: Friday, September 18, 2009 4:26 PM
To: Filings@psc.state.fl.us
Cc: Keino Young; mwalls@carltonfields.com; Ljacobs50@comcast.net; jwb@bbrslaw.com; jessica.cano@fpl.com; Charles Rehwinkel; john.burnett@pgnmail.com; shayla.mcneill@tyndall.af.mil; support@saporitoenergyconsultants.com
Subject: Docket No. 090009-EI
Attachments: FIPUG Post-Hearing Statement of Issues and Positions and Post-Hearing Brief 09.18.09.pdf

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

a. The name, address, telephone number and email for the person responsible for the filing is:

Vicki Gordon Kaufman
Jon C. Moyle, Jr.
Keefe Anchors Gordon & Moyle
118 North Gadsden Street
Tallahassee, FL 32301
(850) 681-3828
vkaufman@kagmlaw.com
jmoyle@kagmlaw.com

b. This filing is made in Docket No. 090009-EI, In re: Nuclear Cost Recovery Clause.

c. The document is filed on behalf of Florida Industrial Power Users Group.

d. The total pages in the document are 11 pages.

e. The attached document is FIPUG's Post-Hearing Statement of Issues and Positions and Post-Hearing Brief.

Lynette Tenace

NOTE: New E-Mail Address
ltenace@kagmlaw.com

Keefe, Anchors Gordon & Moyle

Keefe, Anchors, Gordon and Moyle, P.A.
The Perkins House
118 N. Gadsden St.
Tallahassee, FL 32301
850-681-3828 (Voice)
850-681-8788 (Fax)
www.kagmlaw.com

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear cost recovery clause.	DOCKET NO. 090009-EI
	FILED: September 18, 2009

THE FLORIDA INDUSTRIAL POWER USERS GROUP'S POST-HEARING STATEMENT OF ISSUES AND POSITIONS AND POST- HEARING BRIEF

The Florida Industrial Power Users Group (FIPUG), by and through its undersigned counsel, files this Post-Hearing Statement of Issues and Positions and Post-Hearing Brief. FIPUG reaffirmed its party status in this annual proceeding by filing notice with the Commission on March 31, 2009.

BASIC POSITION AND SUMMARY

FIPUG supports the development of cost effective, reasonable and prudent energy sources to serve Florida consumers. However, the development of such energy resources, particularly nuclear power plants, must be accomplished in a reasonable and prudent fashion and in accord with Florida law and Florida Public Service Commission ("Commission") rules.

Commission Rule 25-6.0423, Florida Administrative Code, governs these proceedings. The Commission should not lose sight of Rule 25-6.0423(5)(c)5 which states: **By May 1 of each year, along with the filings required by this paragraph, a utility shall submit for Commission review and approval a detailed analysis of the long-term feasibility of completing the power plant.** (emphasis added). The record before the Commission lacks sufficient evidence to support the long-term feasibility of the nuclear projects proposed by Florida Power and Light Company ("FPL") and Progress Energy Florida, Inc. ("PEF"). The Commission should require that additional cost data be provided, especially capital costs

associated with the PEF Levy Nuclear Project, before it decides the long-term feasibility of the projects.

Finally, as consumers shoulder the real finanical risks of the development of these nuclear power projects, evidenced by the respective requests FPL and PEF filed to increase consumers' bills on January 1, 2010 related to the development of these nuclear power plants, this Commission should direct both utilities to explore strategic partnerships with each other so that the costs and risks to Florida consumers (and the respective utilities) are reduced.

FIPUG POSITION REGARDING SELECT ISSUES IN DISPUTE

FIPUG has not taken a position on every issue in the case, including proposed issue stipulations between staff and the respective investor-owned utilities. FIPUG's decision to not take a position on a particular issue should not be viewed as support, neutrality or opposition to an issue. FIPUG expressly reserves the right to subsequently take a position should the issue be contested or disputed at some point in the future. For this docket, FIPUG's positions on issues it disputes are set forth below in summary fashion followed by detailed proposed findings of fact and conclusions of law as appropriate.

FLORIDA POWER AND LIGHT COMPANY

ISSUE 7A: Is FPL's decision in 2008 to pursue an alternative to an Engineering Procurement Construction (EPC) contract for the Turkey Point 6 & 7 project prudent and reasonable?

FIPUG: *No. Separating the construction portion from the engineering and procurement portions of an engineering, procurement and construction contract ("EPC") imposes greater risks on ratepayers for scheduling delays and uncertainty related to scope of services.*

Discussion: No nuclear power plant previously developed in the United States by an investor-owned utility has utilized a contracting strategy which separates the "C", or construction, from the "EP", the engineering and procurement. Stated differently, all nuclear plants operated currently in this country by investor-owned utilities were constructed using an engineering, procurement, construction contractual scheme. This arrangement is prudent when one reflects on the complex nature of developing a nuclear power plant. An EPC contractual arrangement is tantamount to "one stop shopping," in that all questions, concerns and issues will be handled by a single point of contact, the EPC contractor. Should FPL continue to pursue its strategy of contracting for the engineering and procurement separately, without direct contractual linkage to the construction portion of the project, it is more likely that questions/disputes will arise regarding scope, responsibility and execution of work. Such questions/disputes will undoubtedly increase the costs of the project, and consequently, should not be recovered as prudently incurred costs.

FPL's expert witness Reed suggested in his report attached to his direct testimony that the decision to not pursue an EPC arrangement at this time was based, in significant part, on the desire to provide Black & Veatch/Zachry ("BVZ") with experience with the AP 1000 design, something BVZ currently lacks. See, Exhibit JJR-1, Page 26 of 36 to Reed Pre-filed Direct Testimony. Consequently, FPL used a sole source process to select BVZ to provide engineering services related to the construction and operating license application ("COLA") submitted to the Nuclear Regulatory Commission ("NRC"). Two

other companies have more experience with the AP 1000 design, and FPL should pursue an EPC contractual arrangement with these two competitors. Id. FPL's decision to pursue a risky, largely untested strategy of separating the construction element from the engineering and procurement elements of a key contract for the successful development of the project is questionable, especially when the purported benefits of this strategy, fostering more competition and possibly some cost savings, has not been quantified in any meaningful way, but was essentially a "back of the envelope" analysis at best.

ISSUE 8: **Should the Commission approve what FPL has submitted as its annual detailed analyses of the long-term feasibility of completing the Turkey Point 6 & 7 project, as provided for in Rule 25-6.0423, F.A.C.?**

FIPUG: *No. Detailed and updated construction costs should have been provided. Without such information, the Commission cannot undertake properly its responsibility to determine whether completing the project is feasible.*

Discussion: It is important to put in proper context the Commission's decision as to whether or not to allow FPL to recover additional monies from ratepayers to support development of FPL's proposed nuclear power plants. Legislative guidance set forth in Section 366.93, Florida Statutes, directed the Commission to adopt rules providing for alternate cost recovery mechanisms that will encourage investor-owned electric utilities to invest in nuclear power plants. Without this legislation, FPL's nuclear project costs would be recovered in base rates by means of a rate case. Importantly, in a rate case, FPL would have to prove up the details and prudence of the costs it seeks to recover.

FPL's failure to provide detailed updated construction costs for the proposed nuclear power plants cannot be merely overlooked and fails to meet its burden of proof. The Commission should require FPL to provide promptly updated detailed construction costs of its proposed nuclear projects.

ISSUE 8A: **If the Commission does not approve FPL's long term feasibility analyses of Turkey Point 6 & 7, what further action, if any, should the Commission take?**

FIPUG: *The Commission should require FPL to prepare and file, in a timely fashion, an updated feasibility study. The Commission should suggest that FPL explore a strategic partnership with other Florida investor-owned utilities and provide additional information on risk and cost reduction to consumers. FPL should use its best efforts to forge a meaningful strategic partnership with other Florida investor-owned utilities.*

ISSUE 11: **Are FPL's 2008 actual, 2009 actual/estimated and 2010 projected EPU project costs separate and apart from the nuclear costs that would have been necessary to provide safe and reliable service had there been no EPU project?**

FIPUG: *Insufficient evidence was provided at hearing to meet FPL's burden of proof that such costs are separate and apart from nuclear costs that would have been necessary to provide safe and reliable service had there been an EPU project.*

PROGRESS ENERGY OF FLORIDA, INC.

ISSUE 21A: **Was it reasonable and prudent for PEF to execute its EPC contract at the end of 2008? If the Commission finds that this action was not reasonable and prudent, what actions, if any, should the Commission take?**

FIPUG: *No. PEF did not act reasonably in executing the engineering, procurement and construction (EPC) contract on December 31, 2008 given the uncertainty surroundings the status of its request for a limited work authorization (LWA).*

Discussion: It was not reasonable and prudent for PEF to execute the EPC contract on December 31, 2008. Certain key events within the EPC were conditioned upon the issuance of an LWA. PEF witness Jon Franke testified that during his interactions with the Nuclear Regulatory Commission regarding regulatory approval of the uprate project that any prudent utility should have a good sense of how the regulator viewed and is likely to act on an application for approval. "Any prudent utility would work with NRC staff prior to submittal of its license application to ensure the successful approval of the application after it is submitted." See Jon Franke Rebuttal Testimony, page 4, lines 11-14. Franke testified that he has been provided reasonable assurance that application for the full uprate will be approved by the NRC. See Jon Franke Rebuttal Testimony, page 4, lines 3-6.

In stark contrast, PEF received written communication from the NRC on October 6, 2008 in which PEF was expressly informed that the requested scheduling dates for its COLA application would be difficult to meet due to NRC work load issues and complex geotechnical aspects of the Levy project site. Key PEF officials went to Washington in person on or about December 2008, shortly before the execution of the EPC contract, to discuss key issues with NRC commissioners and staff, but neglected to question the status of the LWA request, a key component of the Levy project. PEF witness Lyash stated, "I travelled to Washington to meet with the NRC to explain that the company was prepared to discuss the Company's COLA. We did not specifically discuss the LWA, but at no time in this meeting with the NRC did the NRC ever inform us that the NRC

was not going to issue an LWA for the LNP as the company requested," (emphasis added) Jeff Lyash, Rebuttal Testimony, page 13, lines 6-11. The NRC should not be faulted for failing to answer a question that was not asked. With the LWA issuance driving many key components of the EPC contract, it was imprudent for PEF to fail to inquire as to the status of the LWA request during this December 2008 visit with top NRC officials, then execute the EPC on December 31, 2008. The ratepayers should not be responsible for additional costs associated with having to renegotiate the change order to address the revised project schedule resulting from the NRC's decision to process the LWA simultaneously with the COLA, which caused a schedule shift delay. This change order has yet to be negotiated, even though PEF contends the EPC contract provided "an orderly framework for the adjustment to the schedule and the amendment of the EPC contract for such risks as the NRC decision regarding the LWA that occurred." See PEF statement of position on issue 21A.

ISSUE 23: Should the Commission approve what PEF has submitted as its annual detailed analysis of the long-term feasibility of continuing construction and completing the Levy Units 1 & 2 project, as provided for in Rule 25-6.0423, F.A.C., and Order No. PSC-08-0518-FOF-EI (Determination of Need Order)?

FIPUG: *No. Asking the Commission to judge the long term feasibility of the Levy Nuclear project without knowing "all end" project costs is unreasonable, unwarranted, and inconsistent with the nuclear cost recovery rule, 25-6.0423, F.A.C.*

Discussion: Rule 25-6.0423(5)(c)5, F.A.C., clearly provides that the Commission must judge the long-term feasibility of completing the proposed nuclear power plant.

PEF conveniently decided to focus on the technological and regulatory feasibility of completing the project, and largely ignored the economic feasibility of completing the project. Tellingly, PEF could not answer with any reasonable degree of certainty the following basic question, "How much is this project going to cost?" If PEF cannot satisfactorily answer this question, it cannot reasonably expect this Commission to approve the long-term feasibility of the project.

PEF admitted that total project costs are a key component of the project. In order to make a determination of long-term feasibility, the key component of project costs should be detailed within a reasonable degree of certainty. PEF provided no updated detailed information regarding the capital costs of the project. Instead, it provided evidence that the capital costs are uncertain given the need to re-negotiate a key portion of the EPC contract, namely the schedule. If one assumes a worst case scenario, as is the practice in environmental regulatory matters to ensure the protection of the natural environment,[1] the costs of the project could increase by more than four billion dollars. See transcript, page 2148, lines 4-12. Assuming a worst case scenario in an economic regulatory context, which is arguably appropriate given the economic impact upon ratepayers, this $17.2 billion project could become a $21.2 billion project. Surely this Commission, consistent with its rule which calls for "a detailed analysis," needs more information to determine the long-term feasibility of the project. The Commission should defer its decision on the long-term feasibility of the project

[1] Determinations must be based strictly on maximum impacts authorized by the proposed application, not speculation of a lesser impact. *See Sierra Club v. Department of Community Affairs,* Case No. 03-0150GM, 2006 WL 1674277, at *40 (Fla. Div. Admin. Hrgs. Jun. 16, 2006) quoting *Sheridan v. Lee County*, 1992 WL 880138, 16 FALR 654, 688-689 (Admin. Comm. 1994).

and order PEF to provide updated cost information, including any costs associated with the re-negotiated EPC schedule when such information is available.

Finally, PEF should also be required to explore a strategic partnership with other Florida investor-owned utilities and provide additional information on risk and cost reduction to consumers, assuming a partnership could be forged.

ISSUE 23A: If the Commission does not approve PEF's long term feasibility analysis of Levy Units 1 & 2, what further action, if any, should the Commission take?

FIPUG: *The Commission should require PEF to prepare and file, in a timely fashion, an updated feasibility study which includes detailed cost information flowing from PEF's revised project schedule.*

ISSUE 23B: What further steps, if any, should the Commission require PEF to take regarding the Levy Units 1 & 2?

FIPUG: *The Commission should require PEF to provide additional capital cost information on Levy Units 1 and 2 so that the Commission has the necessary information to determine whether the project meets the requirement for long-term feasibility. Included with this information should be cost information related to the renegotiated EPC schedule.*

s/ Jon C. Moyle, Jr.

Jon C. Moyle, Jr.
Vicki Gordon Kaufman
Keefe, Anchors, Gordon & Moyle
118 North Gadsden Street
Tallahassee, FL 32301
(850) 681-3828 (Voice)
(850) 681-8788 (Facsimile)
jmoyle@kagmlaw.com
vkaufman@kagmlaw.com

John W. McWhirter, Jr.
P.O. Box 3350
Tampa, FL 33601-3350
(813) 505-8055 (Voice)
(813) 221-1854 (Facsimile)
jmcwhirter@mac-law.com

Attorneys for FIPUG

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Industrial Power Users Group's Post-Hearing Statement of Issues and Positions and Post-Hearing Brief was served via Electronic Mail and First Class United States Mail this 18th day of September, 2009, to the following:

Keino Young, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
kyoung@psc.state.fl.us

J. Michael Walls, Esq.
Dianne M. Triplett, Esq.
Carlton Fields Law Firm
P.O. Box 3239
Tampa, Florida 33601-3239
mwalls@carltonfields.com

E. Leon Jacobs, Jr.
Williams & Jacobs, LLC
Counsel for SACE
1720 S. Gadsden St. MS 14
Suite 201
Tallahassee, Florida 32301
Ljacobs50@comcast.net

James W. Brew, Esq.
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, NW
Eighth Floor, West Tower
Washington, DC 20007-5201
jwb@bbrslaw.com

Bryan S. Anderson
Jessica A. Cano, Attorney
Attorneys for Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
jessica.cano@fpl.com

J. R. Kelly, Esq.
Charles Rehwinkel, Esq.
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399
rehwinkel.charles@leg.state.fl.us

R. Alexander Glenn, Esq.
John T. Burnett, Esq.
Progress Energy Service Company, LLC
P.O. Box 14042
St. Petersburg, Florida 33733-4042
john.burnett@pgnmail.com

Captain Shayla L. McNeill
Utility Litigation & Negotiation Team
Staff Attorney
AFLOA/JACL-ULT
139 Barnes Drive
Tyndall AFB, FL 32403-5317
850-283-6663
shayla.mcneill@tyndall.af.mil

Thomas Saporito
Saporito Energy Consultants
P.O. Box 8413
Jupiter, FL 33468-8413
support@saporitoenergyconsultants.com

s/ Vicki Gordon Kaufman
Vicki Gordon Kaufman