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Subject: e-filing (Dkt. No. 110009-EI)

Attachments: 110009.response to motion to strike.pdf

Electronic Filing

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b. Docket No. 110009-EI

In re: Nuclear Cost Recovery Clause.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 28 pages.

e. The document attached for electronic filing is OPC's Response to FPL's Motion to Strike Testimony.
(See attached file: 110009.response to motion to strike.pdf)

Thank you for your attention and cooperation to this request.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause.	DOCKET NO.: 110009-EI FILED: July 28, 2011

OPC'S RESPONSE TO FPL'S MOTION TO STRIKE TESTIMONY

The Citizens of the State of Florida, through the Office of Public Counsel ("OPC"), hereby respond to the pleading characterized as a "Motion to Strike Office of Public Counsel's Testimony Collaterally Challenging the Commission's Need Determination, Requesting Implementation of a Risk sharing Mechanism, and Proposed Issues 3, 4, 5a and 5b" ("Motion to Strike" or "Motion") filed by Florida Power & Light Company ("FPL") on July 21, 2011.

PRELIMINARY STATEMENT

In its Motion to Strike, FPL argues that the testimony of OPC's witnesses addressing (1) the imprudence of FPL's decision to "fast track" its EPU projects and (2) the deficiencies of the methodology that FPL employed to study the long term feasibility of its EPU projects in this proceeding are prohibited "collateral attacks" on the Commission's order granting FPL's petition for a determination of need for the EPU projects. FPL also contends that Dr. Jacobs' testimony recommending that the Commission disallow costs that the Commission deems imprudent as a consequence of FPL's imprudent decision to "fast track" the EPU projects is an attempt to relitigate the Commission's decision regarding a "risk sharing" mechanism, would subject FPL to impermissible "hindsight review," and is inconsistent with the provisions of Section 403.519,

F.S. FPL is wrong on all of these counts. Its Motion to Strike should be denied, for the following reasons.[1]

I. AS AN INTERVENOR, OPC IS ENTITLED TO EXERCISE THE RIGHTS TO DUE PROCESS AFFORDED BY THE FLORIDA ADMINISTRATIVE PROCEDURE ACT.

Docket No. 110009-EI is the proceeding to consider and rule on the petitions of FPL and PEF for authority to collect costs through the Commission's nuclear cost recovery clause. Section 350.0611(1), Florida Statutes, authorizes OPC to intervene and participate as a party in Commission proceedings. By Order No. PSC-11-0009-PCO-EI, dated January 3, 2011, the Commission established Docket No. 110009-EI in the continuing proceeding on utilities' requests to collect costs through the nuclear cost recovery clause. On January 6, 2011, OPC filed its Notice of Reaffirming Party Status. As an Intervenor, and substantially affected party representing the customers of FPL, OPC is guaranteed the rights afforded parties under Florida's Administrative Procedure Act, Chapter 120, Florida Statutes ("APA"). OPC's rights under the APA must be the beginning point of the analysis of each of the utilities' challenges to OPC's issues.

Section 120.57(1)(b), F.S. states: "All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative." FPL's request to recover costs of its EPU projects gives rise to legitimate issues concerning the prudence with which FPL has managed the projects, the appropriateness of the manner in which it has measured the long term

[1] FPL challenges several of OPC's issues, which are now identified as issue nos. 10A, 10B, 16, 17, and 18. At the direction of the Prehearing Officer, parties submitted memoranda of law on the challenges to the issues on July 26, 2011. Because of the close relationship between the testimony and the issues, as well as similarities in the arguments, some degree of redundancy between OPC's July 26 pleading and this Response will be necessary.

economic feasibility of the EPU projects, and the measures the Commission should take to shield customers from the consequences of imprudent decisions. OPC has presented prefiled testimony addressing these subjects, and through participation in the prehearing process has framed issues fairly designed to inform the Commissioners about OPC's points of contention with FPL and provide the procedural vehicles for explicit rulings on OPC's assertions. In this Response, OPC will demonstrate that to grant any portion of FPL's Motion to Strike would be to violate OPC's rights to participate in evidentiary hearings that are explicitly guaranteed by the APA.

II. THE COMMISSION DID NOT APPROVE FPL'S DECISION TO "FAST TRACK" ITS EPU PROJECTS IN THE ORDER GRANTING FPL'S PETITION TO DETERMINE NEED

In his testimony, Dr. Jacobs asserts that FPL was imprudent to pursue the highly complex EPU on a "fast track" basis. FPL has moved to strike the testimony on this subject. The motion is without merit.

As Dr. Jacobs testifies, the term "fast track" is a term of art that has a distinct and special meaning in the engineering/construction industries. Normally, a project of the size of FPL's EPU projects (400+ MW, at a cost of more than $2 billion) would be developed through procedures and sequences designed to control costs and reduce risks. Specifically, the completion of "design engineering" (through which the needed plant modifications are identified and complete technical specifications are developed) will precede the solicitation of bids; then, the availability of complete specifications will enable bidders to offer price assurances; then, the bids will be translated to price-certain contracts; then, the project will be constructed and implemented. "Fast tracking" involves a decision to depart from this normal sequence and undertake activities in parallel, thereby dispensing with bids based on full specifications and forgoing price-assured contracts. A decision to "fast track" takes on cost risk for the sake of

meeting a targeted completion date. Dr. Jacobs testifies that, due to the enormous complexity of the EPU projects and the severe uncertainty that it presented, the decision to "fast track" the EPU at a time when little-to-no design engineering had been accomplished was imprudent, and exposed FPL and its customers to high risks and increased cost. He testifies that the imprudence of the decision is being manifested now in the form of dramatic increases in the estimates of capital costs required to complete the projects. Dr. Jacobs states that because the process of design engineering needed to enable FPL to achieve a measure of cost certainty is now only approximately 50% complete, it is likely that the process will continue to reveal additional project scope (more needed modifications) and lead to additional increases in the estimates.

FPL argues that this testimony is a "collateral attack" on Order No. PSC-08-0021-FOF-EI, issued in Docket No. 070602-EI on January 7, 2008 ("EPU Determination of Need Order") and a violation of the "doctrine of administrative finality." FPL bases its argument on its assertion that in its petition and testimony in Docket No. 070602-EI it said that it intended to "expedite" the EPU schedule. However, the term "fast track" connotes far more than "expediting" a schedule. "Fast tracking" is a completely different approach to a construction project. Nowhere in its 2007 need determination petition or supporting testimony did FPL apprise the Commission of an intent to "fast track" the EPU projects. FPL's complete "case" for its argument consists of its attempt to bridge the evidentiary and conceptual gulf between "expedite" and "fast track" with the use of a single, unwarranted, backfilling, bootstrapping conjunctive. At page 5 of the Motion to Strike, FPL states:

> More than three years after the Commission issued its need determination order, OPC now argues that FPL should not have undertaken the project on an expedited *or "fast track"* schedule . . .
> (emphasis provided)

Thus, in the absence of any disclosure to the Commission regarding an intent to "fast track" the EPU projects in the 2007 determination of need docket, FPL now tries to retroactively inject the concept into the determination of need order four years after the fact by erroneously presuming an equivalency between the generic term "expediting" and the industry's term of art "fast tracking." The use of "or" to tie the concepts is creative; however, it is also brazen under the circumstances, because FPL's premise is wholly unsupported. The equivalency on which FPL's argument entirely depends simply does not exist.

Equally as important to the Commission's consideration of FPL's argument are the scope and content of the EPU Determination of Need Order. Docket No. 070602-EI was a stipulated case. The Commission acted upon stipulations that ". . . serve to address each of the issues that had been identified for hearing." EPU Determination of Need Order, at page 2. The Commission approved stipulations that incorporated affirmative findings in the largely standardized (for determination of need cases) areas of the need for electric system reliability and integrity; need for fuel diversity; need for baseload generating capacity; need for adequate electricity at a reasonable cost; absence of mitigating renewable energy sources or conservation measures; the most cost-effective source of power; the exemption of the EPU projects from the requirements of the Commission's "bid rule"; and the applicability of Rule 25-6.0423, F.A.C. to the costs of the EPU projects.

The Commission recited in the Order that FPL proposed to complete the uprate to all four nuclear units during separate outages beginning in 2011 and ending in 2012. However, it did not make a decision approving a "fast tracking" treatment of the EPU. It could not have done so, because FPL did not disclose such an intent to the Commission, much less ask the Commission to approve it. While OPC will demonstrate that FPL's reliance on the doctrine of administrative

finality is misplaced in other areas of its Motion to Strike, the argument does not even come into play with respect to Dr. Jacobs' testimony on the subject of imprudent "fast-tracking," because the Commission never addressed "fast-tracking." OPC is attaching a copy of the EPU Determination of Need Order as *Exhibit A to this Response.*

III. OPC IS NOT ASKING THE COMMISSION TO IMPOSE HINDSIGHT REVIEW.

In its Motion to Strike Dr. Jacobs' testimony on the imprudence of the "fast track" decision, FPL accuses OPC of advocating impermissible "hindsight regulation." FPL is mistaken. In the instant docket, FPL witness Terry Jones discusses at length the severe complexity of the EPU projects. See Mr. Jones' prefiled testimony, at pages 35-38. OPC's witness testifies specifically that the extreme complexity that Mr. Jones describes—and that renders the decision to "fast track" imprudent--was known by FPL from the inception of the EPU projects. See prefiled testimony of Dr. Jacobs, at pages 23-25. OPC is not asking for hindsight review, but rather for an evaluation of FPL's conduct that takes into account information that FPL knew, or should have known, at the time it decided to "fast track" the EPU. Moreover, the testimony of OPC's witness gives rise to a factual and legal dispute, the resolution of which should occur following the evidentiary hearing during which OPC avails itself of the rights afforded by the APA. FPL's motion is as premature as its argument is misplaced.

IV. OPC IS NOT ATTEMPTING TO RELITIGATE THE COMMISSION'S DECISION ON A "RISK SHARING PLAN."

Dr. Jacobs recommends that the Commission determine that the decision to "fast track" the EPU was imprudent, and disallow as imprudent the increment of costs above the cost of the alternative, non-EPU portfolio that the "fast tracking" causes FPL to incur. In its Motion to Dismiss, FPL describes the employment of a "breakeven analysis" to quantify any such

increment as a form of "risk sharing plan," of the type the Commission voted not to adopt in Order No. PSC-11-0224-FOF-EI, issued in Docket No. 100009-EI on May 16, 2011. FPL is wrong. A risk sharing plan contemplates the possibility that a utility may incur costs that are prudent, but that might be disallowed despite a showing of prudence pursuant to a requirement that it share risks with customers. Dr. Jacobs does not attempt to impose a risk sharing plan. Rather, he testifies that the Commission should use the "breakeven point" to measure the excessive costs arising from the imprudent "fast track" decision. In other words, the costs caused by the "fast tracking" approach that exceed those associated with the non-EPU alternative are, by definition, imprudent. There is no "sharing of risks" if all costs disallowed by the Commission are disallowed on the basis of the utility's imprudence. In addition, the testimony of OPC's witness gives rise to a factual and legal dispute that should be resolved following the conclusion of the evidentiary hearing conducted pursuant to the APA. FPL's motion is as premature as its argument is unfounded.

V. OPC'S TESTIMONY IS CONSISTENT WITH SECTION 403.519, F.S.

OPC observes at the outset that FPL is arguing in this portion of its Motion to Strike legal matters that are appropriately briefed at the conclusion of the evidentiary hearing. The Commission should not permit FPL to eliminate OPC's opportunity to present its case, including legal argument, through an untimely exercise that is the equivalent of a "preemptive strike" based solely on FPL's self-serving view of the case.

Section 403.519(4)(e) provides that "proceeding with the construction of the nuclear . . . power plant following an order by the commission approving the need for the nuclear. . power plant under this act shall not constitute evidence of imprudence. Imprudence shall not include any cost increases due to events beyond the utility's control." If a utility could immunize itself

from all challenges of imprudence merely by "proceeding with the construction" of the unit that is the subject of a determination of need order, there would be no occasion for annual reviews. However, the same subsection provides for disallowance of imprudent costs, and it is the prudence (or lack thereof) with which FPL proceeded that OPC's witness addresses, *not* the "decision to proceed" in and of itself. Similarly, the reference to "events beyond the utility's control" does not preclude Dr. Jacobs' recommendation, because his point is that, by "fast tracking" the EPU projects, FPL imprudently sacrificed its ability to control events and costs.

When advancing its arguments regarding Section 403.519(4)(e), FPL fails to focus on the Legislature's reference to "evidence adduced at a hearing before the commission under s. 120.57. . ." A hearing under s. 120.57 must afford parties, including OPC, the right to present evidence and argument on all issues involved. Section 120.57(1), F.S. Through its premature and preemptive Motion to Strike, FPL is attempting to prevent OPC from participating in the 120.57 hearing that is mandated by the very statute that FPL invokes.

In summary, OPC's testimony regarding the imprudence of "fast tracking" the complex EPU projects is related to a core concern—the prudence and effectiveness of FPL's project management. It is as relevant and fundamental an issue as any that can arise from FPL's petition to collect the costs of its EPU projects from customers. It has not been precluded, either by the Commission's order in the related determination of need docket or by other operation of law. Rather, OPC's assertion regarding the imprudence of the "fast tracking" of the EPU projects, and FPL's disagreement with the assertion, present an issue of fact that OPC is entitled to present for the Commission's consideration and adjudication during the upcoming Section 120.57 evidentiary hearing pursuant to the due process provisions of the Florida Administrative Procedure Act.

VI. THE EPU DETERMINATION OF NEED ORDER DOES NOT PRECLUDE OPC FROM ADVOCATING DIFFERENT APPROACHES TO THE REQUIRED STUDIES OF THE LONG TERM FEASIBILITY OF THE EPU PROJECTS.

FPL contends that OPC's testimony on the subject of FPL's analysis of the long term feasibility of the EPU projects is a collateral attack on the EPU Determination of Need Order. Once again, FPL is wrong. In fact, both the Commission (in a past docket) *and FPL* (in the instant docket) have acknowledged that a party has the ability to propose different methodological approaches to the utility's analysis of the long term feasibility of a nuclear project required by Rule 25-6.0423(5)(c)(5), F.A.C.

In Docket No. 090009-EI, the Southern Alliance for Clean Energy ("SACE") opposed the "breakeven analysis" that FPL submitted as its study of the feasibility of the Turkey Point 6&7 units. SACE articulated its opposition in both its Statement of General Position and its position on the issue that was specific to FPL's feasibility studies in the Prehearing Order. See Order No. PSC-09-0604-PHO-EI, at pages 13, 18.

The Commission considered SACE's position in Order No. PSC-09-0783-FOF-EI:

> SACE contended that FPL's break-even analysis was not a common approach to making the comparison between alternatives. We recognize that the analysis is unique; however, we previously accepted this approach in the TP67 project need determination *and such an approach is reasonable today.* (Emphasis added).

FPL also has acknowledged the ability of a party (itself!) to propose feasibility methodologies that differ from the one the Commission approved in the EPU Determination of Need Order. Consider the prefiled testimony of FPL witness Dr. Steven Sim in the instant proceeding. With respect to the economic feasibility of FPL's planned new nuclear units, Turkey Point 6 and Turkey Point 7, FPL submitted in its determination of need docket the very type of "breakeven analysis" that OPC now contends is appropriate for the EPU projects. At page 10-11 of his testimony in this docket, Dr. Sim states:

> "In regard to the Turkey Point 6&7 project, the analytical approach used is the calculation of breakeven overnight capital costs (in terms of $/kw) for the new nuclear units. This same analytical approach was utilized in the 2007 Determination of Need filing, and in the 2008, 2009, and 2010 NCRC filings, for the Turkey Point 6&7 project. *In later years, as more information becomes available regarding the cost and other aspects of the new nuclear units, another analytical approach may emerge as more appropriate.*" (Emphasis provided).

Dr. Sim alludes to FPL's ability to propose a different analytical approach to the feasibility analysis when circumstances warrant, even though in the determination of need order relating to Turkey Point 6&7 the Commission directed FPL to provide a long-term feasibility analysis ". . .which, in this case, shall also include updated. . .break-even costs. . ." Order No. PSC-08-0237-FOF-EI, at page 29, quoted by Dr. Sim at page 5 of his prefiled testimony in this proceeding.[2] FPL's contention that OPC's testimony on feasibility methodologies "attacks" the EPU Determination of Need Order is contradicted by its own testimony concerning Turkey Point 6 and Turkey Point 7. FPL has recognized that the EPU Determination of Need Order did not rule that the methodology approved for purposes of the initial stipulation regarding cost-effectiveness would necessarily remain unchanged throughout all stages of the project, regardless of circumstances.

Whether or not one argues that the Commission's acceptance of the "CPVRR" methodology that OPC's witnesses, Dr. Jacobs and Mr. Smith, criticize was intended to have effect beyond the determination of need stage, the realization that a different methodology may be appropriate under changed circumstances—which the Commission and FPL have acknowledged "on the record"–is consistent with Florida's case law.

In its Motion to Strike, FPL attempts to invoke the "doctrine of administrative finality" to support its view that the feasibility methodology that the Commission accepted in the EPU

[2] Order No. PSC-08-0021-FOF-EI, in which the Commission granted a determination of need for FPL's EPU uprates, was far less prescriptive than the order entered in the Turkey Point 6&7 determination of need docket with respect to the guidance the Commission gave concerning future feasibility analyses.

Determination of Need Order is off limits now. In support of its argument, FPL cites such cases as *Austin Tupler Trucking v. Hawkins*, 377 So.2d 679, 681 (Fla. 1979) and *Peoples Gas System Inc. v. Mason*, 187 So.2d 335 (Fla. 1966). FPL summarizes the doctrine as follows: "Administrative orders must eventually pass out of the agency's control and, *absent exceptions not applicable here*, become final and no longer subject to change or modification." Motion, at page 11. (Emphasis provided). However, an examination of the cases establishes quickly that the exceptions—which FPL dismissed casually in five words, with no analysis--are definitely "applicable here." Specifically, in the *Mason* case, the Supreme Court of Florida stated:

> "We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated. For one thing, although courts seldom, if ever, initiate proceedings on their own motion, regulatory agencies such as the commission often do so. Further, whereas courts usually decide cases on relatively fixed principles of law for the principal purpose of settling the rights of the parties litigant, *the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time*. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order." (Emphasis provided).

The Commission has heeded and applied the exception established by the Court in proceedings before it. See, for example, the case of *McCaw Communications v. Clark*, 679 S.2d 1177 (Fla. 1996). In *McCaw*, the Commission acted to terminate the historical linkage between the access charges paid by IXCs to LECs and the rates paid by mobile service carriers for switching services. McCaw, a mobile provider affected by the decision, appealed the Commission's order and argued, among other things, that the order violated the doctrine of administrative finality. The Supreme Court of Florida affirmed the Commission's order, stating:

> "The setting of MSP interconnection rates is not a one-time adjudication of rights but rather a process that must take into account a multiplicity of factors

> affecting the telecommunications industry and its customers. Administrative finality was not meant to preclude the Commission from revisiting its 1988 order. The record reflects a plethora of changed circumstances that justify the Commission's decision." *McCaw, supra*, at 3.

As was the case in *McCaw*, the situation before the Commission exhibits dramatically changed circumstances that warrant modification of the analytical framework for the feasibility analysis that the Commission accepted for purposes of its findings in the EPU Determination of Need Order.

The case of *Florida Power v. Garcia*, 780 So.2d 34 (Fla. 2001), which FPL cites and discusses at some length, does not help its cause. *Garcia* involved an effort by Florida Power Corporation to persuade the Commission to exercise subject matter jurisdiction over an issue of contract interpretation that had arisen between Florida Power Corporation and a cogenerator with whom it had entered a purchased power agreement. (The cogenerator was pursuing a claim in state court on the same question.) Involved in the case were jurisdictional questions regarding the allocation of authority between state and federal law (i.e., the extent of the Commission's role in contract formation under PURPA), as well as the respective jurisdictional spheres of the Commission and the judiciary with respect to contractual disputes. In the initial case, the Commission ruled that it did not have jurisdiction over the subject matter (contract interpretation) of Florida Power's request and dismissed Florida Power's petition. Several years later, Florida Power tried again, arguing that intervening case law (both state and federal) had clarified the jurisdiction of the Commission to address the subject matter of Florida Power's request.

The Commission again dismissed, citing the effect of *res judicata*[3] on the second request

[3] The Commission's reference to *res judicata* indicates it viewed the fact that the same parties were involved in both proceedings as an important consideration.

of Florida Power to determine its subject matter jurisdiction over the same claim, as well as the Commission's concern for fairness to the litigant who had pursued the claim in a different (judicial) forum, and Florida Power appealed. The Supreme Court of Florida affirmed the Commission's order. Affecting the Court's decision were its findings that (1) Florida Power could have appealed the original jurisdictional determination, but did not, and (2) contrary to Florida Power's claim of new and intervening case law, one such precedent had been in place at the time of the original Commission decision.

Garcia is readily distinguishable from the instant case. The subject of *Garcia* was the question of the Commission's jurisdiction over matters of contract interpretation, in the context of efforts by litigants to pursue the same claim in different forums. Further, the Supreme Court of Florida regarded Florida Power's effort to invoke "changed circumstances" in the form of a change in law to be inaccurate and therefore inadequate: in other words, in its effort to justify a departure from "administrative finality," Florida Power made a weak showing. In *Garcia*, the Court did *not* distance itself from the principle that an agency may modify a decision if there is a significant change in circumstances or if modification is required in the public interest. Rather, the Court reiterated and affirmed the standard, adding that it would avoid "too doctrinaire" (citing *Mason*) an application of the rule (of administrative finality). Referring twice to the "unique circumstances" of the situation before it (at pages 35 and 45), the Court concluded "... the circumstances here do not compel a different result."

In sharp contrast to the byzantine path and issues of subject matter jurisdiction that the Court addressed in *Garcia*, OPC submits that the facts of this docket present both an overriding public interest and significantly changed circumstances—both of which *do* compel a different result. The overriding public interest is that of ensuring that FPL's customers are not saddled

with either an uprate project that no longer is economically feasible or with excessive costs growing out of imprudent decisions.

With respect to changes in circumstances, far "more information is available" now, as compared to the time of the 2007 determination of need docket, regarding the costs and other aspects of the EPU projects. OPC has addressed those aspects through the testimony of its witnesses, Dr. Jacobs and Mr. Smith, who testify that FPL's practice of excluding past spent amounts from the feasibility calculation, coupled with the steep increases in FPL's estimates of the costs of completing the projects (that have occurred since the 2007 proceeding), have the effect of distorting FPL's indication of cost-effectiveness under its current methodology.[4] OPC's expert, Dr. Jacobs, made this point regarding the inappropriateness of FPL's feasibility methodology a year ago in Docket No. 100009-EI, prior to the time that the Commission voted to defer all FPL-related issues to the present hearing cycle. Docket No. 100009-EI was also the proceeding in which FPL raised its estimate of the cost of completing the EPU projects for the first time – from $1.4 billion to a range of $1.8 billion-$2.0 billion (excluding AFUDC and transmission). (FPL has increased its estimate again in this hearing cycle.) In this proceeding, Dr. Jacobs states, "If there was ever a valid basis for using the comparison of revenue requirements as the means of evaluating the feasibility of the uprate projects, it has eroded in light of FPL's experience with estimating the costs of the project." Dr. Jacobs' prefiled testimony, at page 6. Dr. Jacobs and Mr. Smith urge the Commission to require FPL to perform a breakeven analysis (similar to that which FPL prepares for its Turkey Point Units 6&7) as the means of measuring the feasibility of the EPU projects. Not surprisingly, FPL disagrees with Dr.

[4] OPC's witnesses criticize FPL's practice of excluding past spent amounts from the capital costs that it incorporates in its feasibility analysis under circumstances of rapidly increasing cost estimates. At the time of the 2007 determination of need proceeding, neither FPL's witness nor the Commission's order granting a determination of need referred to this aspect of FPL's methodology. At the time, there had been no "past spent amounts" to exclude.

Jacobs and Mr. Smith; however, that disagreement properly gives rise to disputed facts to be ruled on by the Commission following the evidentiary hearing contemplated by the APA, *not* the striking of testimony addressing a legitimate issue.

The same analysis is dispositive of FPL's effort to strike Dr. Jacobs' testimony advocating that the Commission require FPL to analyze the economic feasibility of St. Lucie and Turkey Point uprate activities separately when FPL performs the breakeven analyses. FPL presented a single feasibility study that measures the economic feasibility of the Turkey Point and St. Lucie EPU activities on a composite basis. "Changed circumstances" – specifically, the significant increase in estimates of capital costs – also justify Dr. Jacobs' recommendation that the Commission direct FPL to perform separate feasibility studies on the St. Lucie and Turkey Point plant sites.[5] OPC's witness points out that the Turkey Point and St. Lucie activities involve separate and distinct units. The projects differ with respect to the estimated capital costs involved in accomplishing their respective uprates, the quantity of megawatts that the EPU activities will add, and, critically, the length of time the expanded facilities will operate prior to the expiration of their licenses. In particular, in his prefiled testimony, OPC's Dr. Jacobs observes that the units at Turkey Point will operate 14 *fewer* "unit-years" than the units at St. Lucie. Since the economic feasibility of an EPU projects is dependent upon the amount of fuel savings that can be generated over time to offset the initial capital costs, and since following the entry of the determination of need order FPL has been experiencing significant increases in the estimates of costs of completing the EPU projects, Dr. Jacobs contends that the St. Lucie and Turkey Point EPU projects should be analyzed on a stand-alone basis. In that manner, in the

[5] OPC articulated Issue 10B as the vehicle for consideration of this testimony. Issue 10B reads: "Should the Commission require FPL to perform separate long-term feasibility analyses for the Turkey Point and St. Lucie uprate activities?"

event its shorter operational time frame renders the Turkey Point EPU projects marginal or economically infeasible, that fact will appear as a result of the feasibility studies.

In Order No. PSC-08-0221-FOF-EI, the Commission treated the EPUs on a combined basis, as FPL presented them. However, just as the "additional information" to which Dr. Sim alluded in his prefiled testimony in this docket could justify a change in the feasibility methodology applicable to the new nuclear units, the additional information regarding significantly and rapidly increasing costs that OPC's witness addresses supports the separate analyses he advocates. Since the time of the determination of need order, FPL's estimates of the costs of completing the EPU projects have increased beyond the original $1.4 billion estimate by approximately $600 million. The total now stands at more than $2 billion. In his testimony OPC's Dr. Jacobs points to reasons why he expects the costs will increase again. In particular, the dramatic increases in estimates have occurred because the process of design engineering has revealed additional plant modifications that will be required (increased scope), and presently FPL has completed only about 50% of the design engineering that is needed to establish the ultimate scope and related costs with any degree of certainty. Under these changed circumstances, it is logical and sensible to scrutinize the plant sites separately. Although the Turkey Point project may have been cost-effective at the time of FPL's original estimate, because of its shorter operational period the Turkey Point EPU project may become marginal or less than cost-effective as capital costs increase. As long as FPL folds both plant sites into a single, composite feasibility score, the annual study of long term feasibility that FPL submits to the Commission will not monitor, detect or report on the possibility that Turkey Point could approach or exceed the point at which it becomes uneconomic to customers.

OPC's testimony bears directly on whether the Commission should approve FPL's feasibility analysis. It is clear that FPL disagrees with OPC's testimony; however, as is the case with Issue 10A, that disagreement gives rise to a factual dispute for the Commission to adjudicate. It is not a basis for striking OPC's testimony or eliminating the issue that is associated with that testimony.

VII. THE SUBSTANCE OF OPC'S ISSUE 17 BELONGS IN THE PREHEARING ORDER.

Issue 17 asks:

"Was it prudent for FPL to undertake the EPU projects at Turkey Point and St. Lucie in the absence of a break-even calculation?"

The question of the utility's prudence in its decisions and performance is at the heart of the Commission's inquiry in this proceeding, because the Florida Legislature directed the Commission to disallow imprudent costs from the amounts that the utilities collect from customers. Issue 17 relates both to the selection of the methodology for evaluating cost-effectiveness (Issues 10, 10A, and 10B) and the prudence of FPL's management (an aspect or subtopic of general issue 11). Specifically, OPC contends that the imprudence of the decision to "fast track" the EPU projects was exacerbated by FPL's failure to develop a "breakeven" value that would identify the maximum amount per kW that it could spend on the EPU and remain cost-effective.[6]

VIII. THE COMMISSION SHOULD NOT STRIKE THE ISSUE OF LAW POSED BY OPC'S ISSUE 18.

Issue 18 asks:

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[6]During the issue identification meeting of July 22, 2011 OPC acknowledged that there is some degree of overlap between Issue 17 and Issue 10A. OPC offered to delete Issue 17 if the Prehearing Officer rules in OPC's favor with respect to the inclusion of Issue 10A.

"If the Commission finds FPL was imprudent in Issues 16 or 17, what action can and should the Commission take?"

A necessary component of any decision finding imprudence is the identification of the appropriate mechanism for protecting customers in light of the finding. Issue 18 poses an issue of law. The issue is worded neutrally. It appropriately provides the opportunity for parties to present their views on the Commission's authority to address any imprudence that it finds as a result of the evidentiary hearing. It provides the opportunity for OPC to present and argue its interpretation of governing statutes and rules, and for FPL to do the same. Section 403.519(4)(e), F.S. empowers the Commission to disallow costs of a nuclear project that a utility seeks to recover prior to commercial operation ". . .only to the extent the commission finds, based on a preponderance of the evidence adduced at a hearing before the commission under s.120.57, that certain costs were imprudently incurred." One of the "issues involved" presented by Dr. Jacobs' testimony is this: In the event the Commission determines that a decision was imprudent, and the costs of that imprudence either will not be ascertainable until a future point or will impact more than a single annual period, what ability does the Commission have to address the situation to protect customers? Clearly, FPL's position is that the governing statute and rule handcuff the Commission, to the benefit of the utility. However, while FPL is free to advocate that position, the Commission should recognize when ruling on FPL's motion that FPL has articulated a position and supporting argument, *not* a basis for eliminating the issue from the hearing or precluding the exposition of a competing interpretation of the Commission's authority in post-hearing briefs.

OPC's position, consistent with the recommendation by Dr. Jacobs, is that the costs that exceed the amount by which FPL exceeds the cost of its non-EPU alternative as a consequence

of its imprudent decision to "fast track" its EPU projects can and do comprise "certain costs" within the meaning of the subsection.

Based upon a review of FPL's Motion to Strike, OPC anticipates that FPL will dispute this position and argue that "certain costs" means "particular costs" of individual items—to which OPC will reply that FPL again has attempted to base an argument on an equivalency that does not exist. However, an exposition of the parties' respective positions on what is clearly a legal issue of statutory interpretation is premature at this juncture. The point to be made now is that FPL's motion is an attempt to prevent OPC from having an opportunity to advance an interpretation with which FPL disagrees. As discussed above, such a measure would violate OPC's due process rights under the APA. OPC hereby adopts and incorporates by reference the discussion of Issue 18 contained in OPC's Memorandum of Law In Support of Issues 10A, 10B, 16, 17, and 18.

CONCLUSION

In its arguments relating to both the EPU Determination of Need Order and Section 403.519, F.S., FPL exhibits a sense of "entitlement" that was not intended by the Florida Legislature. FPL asserts that the EPU Determination of Need Order serves as armor against any and all subsequent challenges to its EPU projects. In FPL's view, any questions regarding the prudence of its actions or the appropriateness of its measurements of the current feasibility of the projects are both prohibited and "unfair" in light of prior proceedings and activities. (Motion, at page 14). Similarly, FPL sees in Section 403.519(4)(e), F.S. strictures that would confine the Commission to the type of tunnel vision that would prohibit the parties or Commission from protecting customers effectively against the consequences of management imprudence. OPC asserts that FPL is mistaken in these characterizations.

While the determination of need provided the authority that FPL needed to undertake the project, it was not the "end game," but the outset of a multi-year process during which the interests of the Commission and customers in assuring the project remains viable and prudently managed remain paramount—as is evidenced by the requirement that FPL submit a report on the long term feasibility of the project annually. And, while in Section 403.519(4)(e), F.S. the Florida Legislature codified a standard of review applicable to the utility's request to recover costs from an eligible project—that being a demonstration by the preponderance of the evidence that certain costs were imprudently incurred—the Legislature did not preclude parties or the Commission from examining the prudence of FPL's performance or protecting customers from the consequences of imprudence. Rather, the Legislature mandated the use of a Section 120.57, F.S. hearing through which issues would be contested, argued, and resolved. FPL's Motion to Strike is an effort to preclude OPC from exercising its rights during that proceeding.

For all of these reasons, the Commission should deny FPL's Motion to Strike in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **OPC'S RESPONSE TO FPL'S MOTION TO STRIKE TESTIMONY** has been furnished by electronic mail and U.S. Mail on this 28th day of July, 2011, to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for determination of need for expansion of Turkey Point and St. Lucie nuclear power plants, for exemption from Bid Rule 25-22.082, F.A.C., and for cost recovery through the Commission's Nuclear Power Plant Cost Recovery Rule, Rule 25-6.0423, F.A.C.	DOCKET NO. 070602-EI ORDER NO. PSC-08-0021-FOF-EI ISSUED: January 7, 2008

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

APPEARANCES:

BRYAN S. ANDERSON, ESQUIRE, R. WADE LITCHFIELD, ESQUIRE, MITCH ROSS, ESQUIRE, and JESSICA A. CANO, ESQUIRE, 700 Universe Boulevard, Juno Beach, Florida 33408-0420
On behalf of Florida Power & Light Company.

JENNIFER S. BRUBAKER, ESQUIRE, and KATHERINE E. FLEMING, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Florida Public Service Commission.

FINAL ORDER GRANTING PETITION FOR DETERMINATION OF NEED FOR PROPOSED EXPANSION OF NUCLEAR POWER PLANTS

BY THE COMMISSION:

Background

On September 17, 2007, Florida Power & Light Company (FPL) filed a petition for a determination of need for the proposed expansion of nuclear power plants in Dade and St. Lucie Counties. FPL filed its petition pursuant to Section 403.519, Florida Statutes (F.S.). FPL's proposal consists of the expansion ("uprate") of the electric generating capacity of its existing Turkey Point and St. Lucie nuclear power plants, in Dade and St. Lucie Counties, respectively. FPL's proposed uprate would increase the power output at Turkey Point, units 3 and 4, from approximately 700 megawatts (MW) to 804 MW per unit, for a two-unit total of about 208 MW. At St. Lucie, units 1 and 2, net electrical generation per unit is expected to increase from

EXHIBIT A

approximately 840 MW to 943 MW, for a two-unit total of 206 MW. FPL proposes to complete the uprate to all four nuclear units during separate outages beginning in 2011 and ending in 2012.

This matter was scheduled for a formal administrative hearing on December 10-13, 2007. No persons intervened in this docket, and no public testimony was presented at the hearing on December 10. At the hearing, after taking all evidence, we considered the proposed stipulations regarding the appropriate resolution of all issues identified for this proceeding. We approved the stipulated positions by a bench decision, thereby resolving all issues in this docket and granting FPL's petition for determination of need. This Order reflects our decision and serves as our report under the Power Plant Siting Act, as required by Section 403.507(4)(a), F.S.

Standard of Review

Section 403.519(4), Florida Statutes, sets forth those matters that we must consider in a proceeding to determine the need for the expansion of an existing electrical power plant, or the construction of a new nuclear power plant:

> In making its determination on a proposed electrical power plant using nuclear materials or synthesis gas produced by integrated gasification combined cycle power plant as fuel, the commission shall hold a hearing within 90 days after the filing of the petition to determine need and shall issue an order granting or denying the petition within 135 days after the date of the filing of the petition. The commission shall be the sole forum for the determination of this matter and the issues addressed in the petition, which accordingly shall not be reviewed in any other forum, or in the review of proceedings in such other forum. In making its determination to either grant or deny the petition, the commission shall consider the need for electric system reliability and integrity, including fuel diversity, the need for base-load generating capacity, the need for adequate electricity at a reasonable cost, and whether renewable energy sources and technologies, as well as conservation measures, are utilized to the extent reasonably available.

Findings

As discussed above, we were presented a series of stipulations which serve to address each of the issues that had been identified for hearing. We have reviewed the proposed stipulations, and find that they are appropriate based on the record development of this docket, and that they provide a reasonable resolution of the outstanding issues regarding FPL's petition. We, therefore, approve the stipulations set forth below.

Need for Electric System Reliability and Integrity

There is a need for the Turkey Point nuclear power plant ("PTN") and St. Lucie nuclear power plant ("PSL") uprates, taking into account the need for electric system reliability and integrity, as this criterion is used in Section 403.519(4), Florida Statutes. Without the uprates,

FPL's electric system reliability and integrity will be significantly reduced, and FPL will fail to meet its 20% reserve margin beginning in 2012, as shown in the table below.

Estimated Impact on FPL's Summer Reserve Margin		
Year	Reserve Margin w/o Uprates	Reserve Margin with Uprates
2010	22.6%	22.6%
2011	20.1%	20.1%
2012	17.8%	19.2%
2013	16.1%	17.9%
2014	14.2%	16.0%
2015	11.7%	13.4%

FPL has future resource needs of 490 MW of incremental capacity in 2012. All demand side management ("DSM") that is known to be cost-effective through 2013 is already reflected in FPL's 2006/2007 resource planning work, which identified this capacity need. Consequently, to meet FPL's summer reserve margin criterion of 20% through 2013, FPL needs new capacity in the form of power plant construction and/or purchases.

The data in the table above actually reflects an optimistic view by also including 287 MW of renewable energy purchases that are not yet certain. Three contracts for 143 MW from municipal solid waste facilities will expire in 2009-2010, but are assumed to be extendable. FPL is also analyzing three new proposals for a total of 144 MW of capacity beginning in 2011-2012. Even combined, the 287 MW of renewable generation does not significantly defer the need for additional capacity beyond the 2012 time frame.

As the table above shows, considering load projections today, the proposed uprates do not satisfy all reliability needs. Without the uprates, the gap between capacity and need becomes even larger.

Need for Fuel Diversity

There is a need for the PTN and PSL uprates, taking into account the need for fuel diversity, as this criterion is used in Section 403.519(4), Florida Statutes. Increasing nuclear generation through the nuclear uprates will enhance fuel diversity.

During 2006, about 21% of the energy produced by FPL was generated using nuclear fuel. Without the nuclear uprates, due to system growth, the percentage of nuclear-fueled production will decrease to about 17% by 2013 and decline thereafter. In contrast, FPL's analysis shows that the nuclear uprates would contribute to FPL's system supplying approximately 19% of its energy with nuclear-fueled energy by 2013. Likewise, with the uprates, natural gas-fueled production will decrease from 67% to 65%. Thus, the nuclear uprates contribute to improving and maintaining FPL's fuel diversity as well as decreasing reliance on natural gas as a fuel for electric generation. The diversification of fuel type, technology type and

transportation method provided by the uprates will enhance system reliability for FPL's customers.

Need for Baseload Generating Capacity

There is a need for the PTN and PSL uprates, taking into account the need for baseload generating capacity, as this criterion is used in Section 403.519(4), Florida Statutes. The uprates will add approximately 414 MW of nuclear-fueled baseload generating capacity, which is needed to keep pace with the increasing demand for reliable power and the steady growth that the state of Florida continues to experience.

Need for Adequate Electricity at a Reasonable Cost

There is a need for the PTN and PSL uprates, taking into account the need for adequate electricity at a reasonable cost, as this criterion is used in Section 403.519(4), Florida Statutes. The uprates will increase the amount of highly efficient nuclear-fueled generation on FPL's system, and will displace large amounts of higher-cost fossil fuel and purchase power generation, resulting in fuel savings that provide a net benefit (i.e., lower system cost) to customers. In addition, customers will benefit from reduced capacity costs due to the deferral effect of the nuclear uprates upon the timing of subsequent additional units in the 2014-2017 time period.

Furthermore, adding incremental capacity by uprating plants maximizes use of existing sites, as compared to constructing a generating plant of equivalent capacity at a new site. FPL already owns the necessary land at Turkey Point and St. Lucie, it is permitted for electric generation plants, and most of the necessary infrastructure is already in place. The proposed project precludes these costs at a new site.

No Mitigating Renewable Energy Sources and Technologies or Conservation Measures

There are no renewable energy sources and technologies or conservation measures taken by or reasonably available to FPL which might mitigate the need for the proposed expansion of the Turkey Point and St. Lucie nuclear power plants. FPL's forecasted need already accounts for all of the cost-effective DSM identified through the year 2014, plus a projection of continued DSM for the years 2015-2020. This DSM includes FPL's current Commission-approved DSM goals and a significant amount of additional DSM that FPL has identified as cost-effective, and we have since approved, since the current DSM goals were approved. Additional conservation measures cannot be implemented to eliminate the need for the PTN and PSL uprates.

For purposes of analysis, FPL's forecast assumed successful contracting for and delivery of 144 MW of renewable firm capacity bid in response to its 2007 request for proposals for renewable energy, and successful extension of 143 MW of renewable firm capacity from three expiring municipal waste-to-energy contracts. There are not sufficient additional renewable energy options to mitigate the need for the 414 MW of nuclear baseload capacity that will be provided by the uprates. The table previously shown in this Order shows the need for additional capacity even after including DSM and purchased power from renewable energy sources.

Most Cost-Effective Source of Power

The proposed uprates will provide the most cost-effective source of power, as this criterion is used in Section 403.519(4), Florida Statutes. The estimated nominal costs for the PTN and PSL uprates, not including construction carrying costs, are approximately $750 million and $651 million, respectively. The costs of changes to the transmission system that are needed to support the uprates are estimated at $45 million.

To fully evaluate the system impacts of the nuclear uprates, FPL developed a long-term resource plan that included the uprates ("the Plan with Nuclear Uprates") and an alternate resource plan not including the nuclear uprates ("the Plan without Nuclear Uprates"). The Plan without Nuclear Uprates represents the addition of combined-cycle (CC) units that could be sited and receive permitting approval in the relative near term. FPL also utilized three different fuel cost forecasts and four different environmental compliance cost forecasts in its economic analysis to address the impacts of uncertainty in future fuel and environmental compliance costs. Because 3 of these 12 scenarios represent a highly unlikely combination of low natural gas costs and high CO_2 environmental compliance cost, FPL used 9 scenarios in its economic analysis. FPL's analysis shows that in eight of the nine economic scenarios comparing the generating technology choices represented in the two plans, the Plan with Nuclear Uprates is the most cost effective option. The estimate is that total net savings realized by customers are expected to range from $222 million to $963 million on a cumulative present value revenue requirement basis.

Proposed Expansion is Exempt from Rule 25-22.082, F.A.C.

The PTN and PSL uprates are within the definition of electrical power plants utilizing nuclear materials as fuel (see Sections 403.513(13), 403.506(1), and 366.93, Florida Statutes). Accordingly, pursuant to Section 403.519.(4)(c), the proposed uprates are exempt from Rule 25-22.082, Florida Administrative Code.

Rule 25-6.0423, F.A.C., Applicable to the costs of the Proposed Expansion

Rule 25-6.0423, F.A.C., is applicable to the costs of the proposed expansion of the Turkey Point and St. Lucie Nuclear Power Plants after the issuance of our order granting this determination of need. For example, if FPL were to file for recovery by May 1, 2008, as called for in Rule 25-6.0423(5)(c)(1)(b), F.A.C., carrying costs on construction that we determine to be reasonable and prudent pursuant to the Rule would be included for cost recovery purposes as a component of the 2009 Capacity Cost Recovery Factor in the annual Fuel and Purchased Power Cost Recovery proceeding, pursuant to Rule 25-6.0423(5)(c)(4), F.A.C.

Conclusion

Based on the resolution of the foregoing issues, and as more fully developed in FPL's prefiled testimony and its petition, we hereby find it appropriate and in the public interest to approve the proposed stipulations set forth above, and grant FPL's petition to determine the need for the proposed expansion of the Turkey Point and St. Lucie Nuclear Power Plants.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's petition for determination of need for expansion of Turkey Point and St. Lucie nuclear power plants is hereby approved. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 7th day of January, 2008.

ANN COLE
Commission Clerk

(SEAL)

JSB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within five (5) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.