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Subject: Docket 110009-EI - SACE's Post Hearing Statement and Brief

Attachments: Post-Hearing Statement and Brief (2011 NCRC).pdf

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

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b. This filing is made in Docket No. 110009-EI.

c. The document is filed on behalf of SACE.

d. The total Pages in the document are 30 pages.

e. The attached document is SACE's Post-Hearing Statement and Brief.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Plant Cost Recovery Clause	)	**DOCKET NO. 110009-EI**
	)	**FILED: September 8, 2011**

POST-HEARING STATEMENT AND BRIEF OF THE SOUTHERN ALLIANCE FOR CLEAN ENERGY ("SACE")

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Pursuant to the Second Order Revising Order Establishing Procedure, Order No. PSC-11-0308-PCO-EI, and Prehearing Order, Order No. PSC-11-0335-PHO-EI, issued in this docket, the Southern Alliance for Clean Energy ("SACE") respectfully submits its Post-Hearing Statement and Brief.

POST-HEARING STATEMENT

I. STATEMENT OF BASIC POSITION

Section 366.93, F.S., provides for advance cost recovery of certain costs for utilities engaged in the "siting, design, licensing, and construction" of nuclear power plants, including new nuclear power plants. In Order No. PSC-11-0095-FOF-EI, the Commission interpreted this statutory provision to require that a utility "must continue to demonstrate *its intent to build the nuclear power plant* for which it seeks advance recovery of costs to be in compliance with Section 366.93, F.S." Order at 9 (emphasis added). In the current docket, the testimony of PEF and FPL witnesses paying lip service to the Commission's intent requirement in regards to the LNP or the Turkey Point 6 & 7 units ("proposed new nuclear projects") is wholly undermined by the activities of both FPL and PEF over the past several years as well as the testimony presented at the evidentiary hearing in this docket. In fact, due to the great uncertainty and risk surrounding new nuclear development in the United States, which has been greatly exacerbated by, amongst other factors, the Fukushima nuclear disaster in Japan, PEF and FPL are both in 2011 continuing their "option creation" approach announced last year of delaying all construction related activities on these proposed new nuclear projects and focusing completely upon obtaining Combined Operating Licenses ("COL") from the Nuclear Regulatory Commission ("NRC"). This "option creation" approach on the part of both PEF and FPL fails to demonstrate the requisite intent to actually construct the new nuclear projects, and, as a result,

the utilities are not in compliance with Section 366.93, F.S. and thus are not eligible for any further advanced cost recovery under this statutory provision.

Furthermore, Rule 25-6.0423(5)(c)5, F.A.C., explicitly and unequivocally requires PEF and FPL to submit for Commission review and approval a detailed analysis demonstrating the long-term feasibility of completing these proposed new nuclear projects. The testimony by witnesses for the utilities, staff, and OPC in the current docket establishes that both PEF and FPL have failed to meet their burden to demonstrate the long-term feasibility of these proposed new projects. Therefore, burdening ratepayers with further costs for these projects would not be fair, just, or reasonable. In fact, in the 2009 Nuclear Cost Recovery hearing (Docket 090009-EI), SACE alerted the Commission to the great uncertainty and risk surrounding the feasibility of PEF's these proposed new nuclear projects. SACE warned the Commission that this uncertainty and risk would result in significant scheduling delays for the proposed reactors and significant increases in the total costs, and moreover would adversely affect the feasibility of these proposed new nuclear projects. However, PEF and FPL refused to acknowledge this uncertainty and risk and the resulting adverse impacts at the hearing.

In 2010, and now again in 2011, both PEF and FPL have belatedly acknowledged the great uncertainty and risk surrounding the feasibility of ever completing these proposed new nuclear reactors. In 2011, this uncertainty and risk have significantly increased as a result of, amongst other factors, the Fukushima nuclear disaster in Japan, and the resulting waning public support for construction of new nuclear generation. As a result, both PEF and FPL continue to endeavor on an "option creation" approach under the guise of keeping ratepayer rates as low as possible for the near term. Nevertheless, as a result of the utilities' failure to acknowledge what was already apparent at least as early as 2009, PEF and FPL ratepayers are on the hook for

hundreds of millions of dollars spent on reactors both utilities admit they have not made the final decision to actually construct.

It is the responsibility of the Commission to fix "fair, just and reasonable" rates for Florida ratepayers. Fla. Stat. § 366.06. In this docket, because FPL and PEF have failed to demonstrate the requisite intent to construct these proposed new nuclear projects, or the long-term feasibility of completing these new projects, the utilities have as a result failed to demonstrate that the costs for which they seek recovery for 2011 and 2012 are reasonable and/or prudent. As a result, the Commission should deny both FPL and PEF's requested cost recovery for 2011 and 2012, as the Commission should not allow the utilities to incur further expenses for these proposed new reactors, or to recover those expenses from Florida ratepayers, until PEF and FPL themselves demonstrate the requisite intent to actually build the proposed new reactors, as well as the feasibility of completing the proposed new reactors. It is simply unfair, unjust, and unreasonable to require PEF and FPL ratepayers to pay for the utilities to create an option to construct these proposed new reactors when the utilities themselves have no real commitment to actually constructing the reactors, and completion of the reactors is not feasible in the long-term.

II. STATEMENT OF ISSUES AND POSITIONS

FPL Specific Issues[1]

Issue 1: Should any FPL 2010 Nuclear Cost Recovery Clause rate-case type expenses be disallowed from recovery?

SACE Position: *Adopts OPC's Position.*

Issue 2: *(Legal)*: Do FPL's activities through 2010 related to Turkey Point Units 6 & 7 qualify as "siting, design, licensing, and construction" of a nuclear power plant as contemplated by Section 366.93, F.S.?

[1] SACE will not brief the issues relating to FPL's EPU project herein but will rely on the arguments made by OPC and other intervenors in regards to FPL's EPU project.

SACE Position: *No. FPL's activities through 2010 fail to demonstrate the requisite intent to actually construct the Turkey Point 6 & 7 Units. Rather, FPL's activities and filings through 2010, as well as its activities and filings to date, demonstrate that FPL was, and still is, merely engaged in an attempt to obtain the requisite federal, state, and local licenses for the Turkey Point 6 & 7 units in order to create an option for new nuclear development. No final decision to proceed with construction of the Turkey Point 6 & 7 Units has been made.*

Discussion:

In Order No. PSC-11-0095-FOF-EI, the Commission held that, in order to be eligible for advanced cost recovery under Section 366.93, F.S., a utility "must continue to *demonstrate its intent to build the nuclear power plant* for which it seeks advance recovery of costs to be in compliance with Section 366.93, F.S." Order at 9 (emphasis added). In so holding, the Commission clearly recognized the need to strike a balance between the legislative intent of Section 366.93, F.S., and the statutory mandate of the Commission set out in Section 366.06, F.S., to fix "fair, just, and reasonable" rates for Florida ratepayers. This is because ratepayers should not be obligated to pay for a project whose benefits are unlikely to ever be realized. In the current docket, the evidence presented at the hearing in this docket demonstrates that FPL's activities through 2010 (and up until the present) fail to demonstrate the intent to actually build TP 6 & 7. In sharp contrast, the evidence demonstrates that the only intent on the part of FPL is an intent to "create an option" to construct TP 6 & 7. Therefore, pursuant to its holding last year, the Commission must deny further cost recovery for FPL as it relates to TP 6 & 7, as FPL has failed to demonstrate the requisite intent to build these proposed new nuclear units.

In 2010, FPL, faced with increasing uncertainty and risk surrounding its proposed TP 6 & 7 project (and new nuclear generation in general), announced its decision to embark on its "option creation" approach relating to TP 6 & 7. Ex. 12. As conceded by FPL witness Scroggs at the hearing, FPL has not made a final decision as to whether or not it will actually build TP 6

& 7. TR 294. Due to this fact, FPL's activities through 2010, and up to the present, fail to demonstrate that FPL intends to build TP 6 & 7. FPL has not to date entered into an EPC or EP & C agreement, which will be necessary before any type of engineering, procurement, or construction related activities can even be commenced. TR 295. FPL has also deferred procurement of long lead construction materials, which are, according to FPL witness Scroggs, the "key components" to construction of the proposed new nuclear reactors. TR 295-296. Mr. Scroggs also testified that FPL will have to initiate procurement of these long lead materials "significantly in advance" of construction, but has not done so to date. TR 298. Similarly, FPL has negotiated no fewer than four extensions to the forging reservation agreement it has with Westinghouse, whereby it reserved manufacturing space for these key components of construction. TR 296. Additionally, in 2010, FPL withdrew its Limited Work Authorization ("LWA") request with the NRC, which, had it been granted, would have allowed for certain limited construction activity prior to receipt of a COL from the NRC. TR 299. Taken in totality, FPL's activities through 2010, and up to the present, simply do not demonstrate an intent to construct TP 6 & 7. To the contrary, FPL's activities and testimony demonstrate that FPL merely intends to attempt and obtain a COL from the NRC in order to "create an option" to build TP 6 & 7, should construction of the units become feasible and necessary.

Despite the overwhelming evidence demonstrating a lack of intent to build TP 6 & 7 on the part of FPL, FPL witness Scroggs did testify at the hearing that FPL intends to build TP 6 & 7. TR 273. However, the prefiled testimony of Mr. Scroggs in this docket is replete with references to the TP 6 & 7 project being intended to "create an option" for new nuclear generation. In his March 1, 2011, prefiled testimony, Mr. Scroggs testified, when asked about the purpose of his testimony:

> The purpose of my testimony is to describe the activities involved in the Turkey Point 6 & 7 project throughout 2009 and 2010. Specifically, my testimony will describe the ...process FPL is employing to create an option to provide new nuclear generation for our customers .... (emphasis added).

TR 146, 277. Similarly, in his May 2, 2011, prefiled testimony, Mr. Scroggs stated, when asked about the purpose of his testimony:

> The purpose of my testimony is to provide a description of how the Turkey Point 6 & 7 project is being developed, managed, and controlled to create the option for more reliable, cost-effective, and fuel diverse nuclear generation .... (emphasis added).

TR 218, 278. In fact, in the April 15, 2010, TP 6 & 7 Project Memorandum announcing FPL's "option creation" approach, Mr. Scroggs wrote that:

> The PTN 6 & project was developed to create the option for new nuclear generation so that FPL customers would benefit from unique economic, environmental, reliability, fuel diversity and energy security attributes offered by nuclear generation.

Ex. 12 (emphasis added). Thus, the purpose of the TP 6 & 7 project from its outset has been, and continues to be, nothing more than an attempt to create an option that may or may not be exercised in the future.

The above testimony notwithstanding, Mr. Scroggs did attempt at the hearing, for the first time, to characterize FPL's purported intent to construct TP 6 & 7 as a question of "when" as opposed to a question of "if." TR 279. However, on cross-examination this statement was shown to be wholly inconsistent with Mr. Scroggs' May 2, 2011, prefiled testimony.

> Q And if you would, starting on line 11, if you would just read the sentence following the sentence I just asked you to read, starting with "In doing."
> A "In doing so, FPL is creating a valuable option that can be exercised at the most opportune time for the benefit of FPL customers."
> Q And that says "that can be exercised." Correct?
> A. That's what is says.
> Q It doesn't say that it will be exercised, does it?
> A No. It says can.

TR 280. (emphasis added). Mr. Scroggs further conceded that the intent to create an option (*i.e.*, obtain a COL) is much different that the intent to actually exercise that option (*i.e.*, build TP 6 & 7). TR 316.

The testimony of Commission staff and other FPL witnesses further confirmed that FPL merely intends to create an option to build TP 6 & 7, and does not possess the requisite intent to actually build the proposed new reactors. The March 1, 2011, prefiled testimony of John Reed states that "PTN 6 & 7 is currently focused on obtaining the necessary licenses and permits so as to provide FPL and its customers the option to construct two nuclear units at the existing PTN site." TR 604, 645 (emphasis added). Moreover, Mr. Reed testified at the hearing on cross-examination:

> Q And I believe I heard you, and correct me if I'm wrong, in your summary also reference FPL's activities related to Turkey 6 & 7 as pursuing an option, is that correct?
> A Yes. At this time I think that's the best description.

TR 645. Thus, FPL's own consultant characterizes FPL's activities relating to TP 6 & 7 in terms of creating or pursuing an option. Similarly, in its July 2011 Review of FPL's nuclear projects, audit staff concluded that "...FPL is committed to pursuing an option to build two new AP1000 reactors ...." Ex. 115, at 3 (emphasis added). This "commitment" to pursuing an option simply does not meet the Commission's intent test, which requires that FPL continue to demonstrate the intent to actually construct TP 6 & 7.

The above notwithstanding, perhaps the most significant testimony was that of FPL CEO and President Armando Olivera. Mr. Olivera, when asked by Commissioner Edgar about FPL's intent to construct, testified:

> A .... And if I may just hit quickly this issue of, you know, what our intentions are. Our intentions are to go through the licensing process. When have the COLA application approved, I think we will look at, you know, what is

happening, what do we think is the most likely demand outlook for the state. You know, does this project – is the project needed?

TR 528 (emphasis added). Mr. Olivera is clear as to what FPL's intent is – FPL intends to go through the licensing process in the hopes of obtaining a COL from the NRC, and then re-evaluate the need for TP 6 & 7. It is extremely probative of FPL's intent with regard to TP 6 & 7 that Mr. Olivera, the President and CEO of the utility, when given the opportunity, did not testify that FPL intends to build TP 6 & 7, and the Commission cannot take this testimony lightly.

FPL's activities in regards to TP 6 & 7 simply do not meet the intent requirement set out by the Commission in its Order from Docket 100009-EI. All activities in any way related to construction have been cancelled and/or delayed, and FPL's testimony, as well as that of its own consultant and audit staff, repeatedly refers to FPL's activities relating to TP 6 & 7 as "creating an option" for new nuclear generation. While it is true that FPL does not have to simultaneously engage in the "siting, design, licensing, and construction" of TP 6 & 7 to qualify for advanced cost recovery, simply pursuing a COL from the NRC does not demonstrate an intent to actually construct. This is especially true when FPL witnesses admit that, assuming a COL is obtained, the utility will then reevaluate the need for TP 6 & 7, and that no final decision to construct has been made. Therefore, any further cost recovery for TP 6 & 7 must be denied by the Commission.

Issue 3: Should the Commission approve what FPL has submitted as its 2010 and 2011 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? If not, what action, if any, should the Commission take?

SACE Position: No. FPL has failed to complete, and properly analyze, a realistic feasibility assessment that properly takes into account important changes in key variables which have adversely impacted the feasibility of new nuclear reactors, including, but not limited to: declining natural gas costs; declining estimates of cost of carbon; other

enterprise risks; impacts of Fukushima nuclear disaster; impact of excluding sunk costs; and the true impact of efficiency and renewables.

The Commission should deny cost recovery for FPL's 2010, 2011, and 2012 costs.

Discussion:

As part of its annual consideration of a utility's Petition for cost recovery, the Commission is required to evaluate the long-term feasibility of completion of a proposed project. Rule 25-6.0423(5)(c)5 provides:

> 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.

This review forces utilities to regularly review whether their investment decisions borne by the ratepayers continue to be justified in light of changing economic, technological, and regulatory conditions. This review is part of the *quid pro quo* for the extraordinary financial incentive provided to the utility through the cost recovery clause, because the utilities are spending their ratepayers' money, with no real risk to their own bottom lines. FPL's 2010 and 2011 feasibility analyses simply fail to fully and properly take into account the growing uncertainty and risk surrounding new nuclear development in the United States, and thus fail to demonstrate that completion of these reactors is feasible in the long-term. Therefore, the Commission should deny FPL's requested 2010-2012 costs related to TP 6 & 7.

Since an affirmative determination of need was made by the Commission in 2008 for TP 6 & 7, the economic, technical and regulatory landscape surrounding the development of new nuclear generation has changed dramatically. From a quantitative perspective, FPL has provided an updated economic analysis to the Commission which purports to show that TP 6 & 7

continues to be economically feasible.[2] However, FPL witness Scroggs conceded that there is currently much uncertainty surrounding the economics of new nuclear generation. TR at 314. In regards to total project cost, which is a key component of any feasibility analysis, FPL witness Scroggs testified that the recent Fukushima nuclear disaster in Japan, and the corresponding response of the NRC in the United States (collectively "Fukushima disaster"), could increase the total project cost of TP 6 & 7. TR 312. Similarly, Mr. Scroggs testified that the Fukushima disaster could further push back the currently projected in-service dates for TP 6 & 7. TR 312. In fact, Mr. Scroggs testified that the current projected in-service dates for TP 6 & 7 are based on a "premise" that more predictability will be developed in any number of areas. TR 219-220. On cross-examination, Mr. Scroggs admitted that this premise might not happen, as was the case with FPL's earlier projected in-service dates. TR 301. This would have the effect of again pushing out the projected in-service dates even further. *Id.*

Moreover, as a result of the economic slowdown, Mr. Scroggs testified that there is reduced demand for electricity on the FPL system, as well as reduced consumption. TR 236, 313. In fact, FPL President and CEO Olivera stated that if FPL does in fact obtain a COL from the NRC for TP 6 & 7, it would then reevaluate conditions and see if TP 6 & 7 was even needed from a demand standpoint. TR 528. Mr. Scroggs also acknowledged that there is currently no cost of carbon, that natural gas prices are depressed, and that these are "influential drivers" to the cost-effectiveness for the economic feasibility of TP 6 & 7. TR 313. In fact, in regards to the price of natural gas, FPL witness Sim testified that natural gas prices were trending downward outward to the year 2040, which has the effect of making TP 6 & 7 less cost-effective as opposed to an all natural gas scenario. TR 970, 974. Thus, despite the fact that there is currently no cost

[2] FPL witness Sim, who prepared and sponsored the updated economic analysis, admitted that FPL, in preparing this analysis, is making any number of projections out into the future based on certain sources of information, and that others could come to different conclusions utilizing other, equally reliable, sources of information. TR 963-964.

of carbon, and no greenhouse gas legislation imposing any such cost on the horizon, as well as the fact that natural gas prices and trending downward for a period of at least 30 years, FPL's feasibility analysis still purports to show TP 6 & 7 as cost-effective. Moreover, and perhaps most telling, FPL witness Sim conceded that FPL's quantitative feasibility analysis showed that between 2010 and 2011, the projected fuel savings for FPL customers, assuming TP 6 & 7 ever comes online, have decreased by $20 billion dollars. TR 972-973; Ex. 88, Ex. 99, at 36. Thus, fuel savings, one of the major "benefits" of TP 6 & 7 that is repeatedly touted by FPL as a justification for the TP 6 & 7 project, has decreased by approximately 20% over the course of one year.

Also skewing the economic feasibility analysis is the fact that FPL excludes sunk costs from its annual quantitative feasibility analysis. In Order No. PSC-08-0237-FOF-EI, the Commission provided the following guidance to FPL in regards to long-term feasibility:

> FPL shall provide a long-term feasibility analysis as part of its annual cost recovery process which, in this case, shall also include updated fuel costs, environmental forecasts, break-even costs, and capital estimates. In addition, FPL should account for sunk costs.

[Emphasis added]. FPL witness Sim testified that FPL interprets the above guidance, as well as Rule 25-6.0423(5)(c)5, as meaning that FPL should *exclude* sunk costs from its annual quantitative feasibility analysis. TR 1296. It is difficult to comprehend that the Commission intended such a result, as the exclusion of over one hundred million dollars already spent clearly distorts the economic analysis, as there are no such sunk costs in the fuel scenarios against which FPL is comparing its potential nuclear scenario. In fact, Dr. Sim admitted that if FPL were to include sunk costs in the quantitative feasibility analysis, the nuclear portfolio would look less favorable. TR 968-969. Therefore, by excluding sunk costs, FPL is skewing the results of its

annual feasibility analysis to make new nuclear generation look more favorable than it really is compared to other fuel scenarios.[3]

Furthermore, from a qualitative perspective, FPL's feasibility analysis is extremely lacking. Mr. Scroggs devotes about two pages of his May 2, 2011 prefiled testimony to three "non-economic" factors that he testifies affect the long-term feasibility of TP 6 & 7 – the ability to obtain all approvals, the ability to obtain financing, and supportive state and federal energy policy. TR 255-257. However, Mr. Scroggs fails to conduct any type of analysis of these factors, much less a "detailed analysis" as required by the Rule. The failure to do any analysis whatsoever on the qualitative factors affecting the feasibility of TP 6 & 7, especially given the great uncertainty that currently surrounds new nuclear generation in the United States, in and of itself warrants disapproval of FPL's feasibility analysis.

Taken as a whole, FPL's feasibility analyses for 2010 and 2011 fail to demonstrate that completion of TP 6 & 7 remains feasible in the long-term, as the analyses simply fail to properly and fully account for all of the uncertain and risk currently surrounding new nuclear generation in the United States. As a result, the Commission should deny cost recovery for FPL's 2010-2012 costs.

Issue 3A: Was FPL's 2010 decision to continue pursuing a Combined Operating License from the Nuclear Regulatory Commission for Turkey Point Units 6 & 7 reasonable? If not, what action, if any, should the Commission take?

SACE Position: No. It was, and still is, unreasonable for FPL to continue to incur additional costs on the licensing of the proposed Turkey Point Units 6 & 7, and pass these costs on to its ratepayers, with no real demonstrated intent to actually construct the reactors and with no demonstration of the long-term feasibility of completing the reactors.

[3] Dr. Sim testified that if the Commission were to require FPL to "account" for sunk costs in a manner different than excluding them from the annual feasibility analysis, FPL would of course be willing to do so. TR 1297. The Commission should thus require FPL to do so.

Given this failure to demonstrate the requisite intent to build Turkey Point Units 6 & 7, as well as the feasibility of the same, the Commission should deny cost recovery for FPL's 2010, 2011, and 2012 costs.

Discussion:

See Discussion under Issues 2 and 3 *supra.*

Issue 4: What is the current total estimated all-inclusive cost (including AFUDC and sunk costs) of the proposed Turkey Point Units 6 & 7 nuclear project?

SACE Position: *No position.*

Issue 5: What is the current estimated planned commercial operation date of the planned Turkey Point Units 6 & 7 nuclear facility?

SACE Position: *No position.*

Issue 6: Should the Commission find that for years 2009 and 2010 FPL's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Turkey Point Units 6 & 7 project?

SACE Position: *No.*

Discussion:

See Discussion under Issues 2 and 3 *supra.*

Issue 7: What system and jurisdictional amounts should the Commission approve as FPL's final 2009 and 2010 prudently incurred costs and final true-up amounts for the Turkey Point Units 6 & 7 project?

SACE Position: *For 2010, none. FPL has not demonstrated the requisite intent to actually construct the Turkey Point 6 & 7 project, or that completion of the Turkey Point 6 & 7 project is feasible in the long-term as required by Rule 25-6.0423(5)(c)5, F.A.C. Therefore, no such costs could be prudently incurred. *

Discussion:

See Discussion under Issues 2 and 3 *supra.*

Issue 8: What system and jurisdictional amounts should the Commission approve as reasonably estimated 2011 costs and estimated true-up amounts for FPL's Turkey Point Units 6 & 7 project?

SACE Position: *None. FPL has not demonstrated the requisite intent to actually construct the Turkey Point 6 & 7 project, or that completion of the Turkey Point 6 & 7

project is feasible in the long-term as required by Rule 25-6.0423(5)(c)5, F.A.C. Therefore, no such costs could be reasonably estimated and/or incurred.*

Discussion:

See Discussion under Issues 2 and 3 *supra.*

Issue 9: What system and jurisdictional amounts should the Commission approve as reasonably projected 2012 costs for FPL's Turkey Point Units 6 & 7 project?

SACE Position: *None. FPL has not demonstrated the requisite intent to actually construct the Turkey Point 6 & 7 project, or that completion of the Turkey Point 6 & 7 project is feasible in the long-term as required by Rule 25-6.0423(5)(c)5, F.A.C. Therefore, no such costs could be reasonably projected and/or incurred.*

Discussion:

See Discussion under Issues 2 and 3 *supra.*

Issue 10: Should the Commission approve what FPL has submitted as its 2010 and 2011 annual detailed analyses of the long-term feasibility of completing the Extended Power Uprate project, as provided for in Rule 25-6.0423, F.A.C? If not, what action, if any, should the Commission take?

SACE Position: *Adopt OPC's Position.*

Issue 11: Should the Commission find that for the years 2009 and 2010 FPL's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Extended Power Uprate project?

SACE Position: *Adopts OPC's Position.*

Issue 12: What system and jurisdictional amounts should the Commission approve as FPL's final 2009 and 2010 prudently incurred costs and final true-up amounts for the Extended Power Uprate project?

SACE Position: *Adopts OPC's Position.*

Issue 13: What system and jurisdictional amounts should the Commission approve as reasonably estimated 2011 costs and estimated true-up amounts for FPL's Extended Power Uprate project?

SACE Position: *Adopts OPC's Position.*

Issue 14: What system and jurisdictional amounts should the Commission approve as reasonably projected 2012 costs for FPL's Extended Power Uprate project?

SACE Position: *Adopts OPC's Position.*

Issue 15A: Did FPL willfully withhold information concerning the estimated capital costs of its EPU uprate projects and its related long-term study of the feasibility of the EPU uprates that is required by rule 25-6.0423, F.A.C., and that the Commission needed to make an informed decision at the time of the September 2009 hearing in Docket No. 090009-EI?

SACE Position: *Adopts OPC's Position.*

Issue 15B: If the answer is yes, does the Commission possess statutory and regulatory authority with which to address FPL's withholding of information?

SACE Position: *Adopts OPC's Position.*

Issue 15C: In light of the determinations in Issues 15A and 15B, what action, if any, should the Commission take?

SACE Position: *Adopts OPC's Position.*

Issue 19: What is the total jurisdictional amount to be included in establishing FPL's 2012 Capacity Cost Recovery Clause factor?

SACE Position: *Adopts OPC's Position.*

PEF Specific Issues[4]

Issue 20: Should the Commission approve what PEF has submitted as its 2011 annual detailed analysis of the long-term feasibility of completing the Levy Units 1 & 2 project, as provided for in Rule 25-6.0423, F.A.C? If not, what action, if any, should the Commission take?

SACE Position: No. PEF has failed to complete, and properly analyze, a realistic feasibility assessment that properly takes into account important changes in key variables which have adversely impacted the feasibility of new nuclear reactors, including, but not limited to: declining natural gas costs; declining estimates of cost of carbon; other enterprise risks; impacts of Fukushima nuclear disaster; and the true impact of efficiency and renewables.

The Commission should deny cost recovery for PEF's 2011 and 2012 costs.

Discussion:

As part of its annual consideration of a utility's Petition for cost recovery, the Commission is required to evaluate the long-term feasibility of completion of a proposed project. Rule 25-6.0423(5)(c)5 provides:

> 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.

This review forces utilities to regularly review whether their investment decisions borne by the ratepayers continue to be justified in light of changing economic, technological, and regulatory conditions. This review is part of the *quid pro quo* for the extraordinary financial incentive provided to the utility through the cost recovery clause, because the utilities are spending their ratepayers' money, with no real risk to their own bottom lines. PEF's 2011 feasibility analysis, on its face, fails to demonstrate that completion of these reactors is feasible in the long-term. Therefore, the Commission should deny PEF's estimated 2011 and projected 2012 costs related to the LNP.

[4] SACE will not brief the issues relating to PEF's CR3 EPU project herein but will rely on the arguments made by OPC and other intervenors in regards to PEF's CR3 EPU project.

Qualitative Feasibility

From a qualitative perspective, PEF witness Elnitsky testified that PEF considers the technical and regulatory feasibility of completing the LNP, the enterprise risks facing the LNP, and the costs and benefits of completing the LNP. TR 1698. In 2011, this qualitative analysis demonstrates that completion of the LNP is simply not feasible. In regards to enterprise risks, Mr. Elnitsky testified:

> As a result of our qualitative analysis of the LNP enterprise risks last year we concluded that there was a noticeable increase in the amount of uncertainty associated with the enterprise risks impacting the LNP ....While we have noticed a few favorable or slightly favorable trends in the LNP enterprise risks, most enterprise risks remain neutral compared to our evaluation last year, and there are a couple of unfavorable trends that we are watching closely ...

TR 1704 (emphasis added). Mr. Elnitsky testified that there were two enterprise risks which PEF considered to be "favorable:" (1) PEF's access to capital due to the pending (but not completed) merger between Progress Energy, Inc. and Duke Energy, Inc.; and (2) the near term impact on PEF customer bills. TR 1705-1708. However, in regards to PEF's access to capital, Mr. Elnitsky admitted that he could not assure the Commission that the merger, assuming it closes, would have a positive impact on the LNP. TR 1894. Mr. Elnitsky also admitted that, assuming the merger closes, the new company could reprioritize capital investment plans, which could result in the cancellation of the LNP. TR 1895. Therefore, SACE fails to see how this is a "positive" enterprise risk for the LNP. Similarly, in regards to near term impacts on customer bills, Mr. Elnitsky admitted that a consequence of this near term reduction was that there would be a "significant" increase in customer bills after 2012. TR 1952. SACE fails to see the fact that customer bills are going to significantly increase, more than they would have had PEF not resorted to a COL-focused approach, as a "positive" enterprise risk. In conclusion, both of the

enterprise risks characterized as "positive" by PEF are more appropriately characterized as negative or, at best, neutral enterprise risks.

Mr. Elnitsky testified that PEF considered economic conditions in Florida to be a "neutral" enterprise risk, though he conceded that economic improvement in Florida is proceeding at a slower pace than the Company predicted last year. TR 1709-1710. Mr. Elnitsky further testified that the expectations for improvement in Florida are "low." TR 1710. Moreover, Mr. Elnitsky testified that the slow load growth in Florida is merely replacing growth lost during the recession and that this slow load growth reduces PEF's need for new base load generation. TR 1712. Moreover, Mr. Elnitsky admitted that the as a result of the recession PEF is not generating revenues sufficient to cover cost of service and to ensure future investment of capital to meet future capital needs. TR 1713. SACE fails to see this "neutral" enterprise risk as anything but negative.

In regards to negative enterprise risks, Mr. Elnitsky identified the lack of a cost of carbon and low natural gas prices. TR 1720, 1724. Mr. Elnitsky admitted that that these two unfavorable risks are the two "key drivers" in both the qualitative and quantitative feasibility analysis, because lower natural gas prices and no cost of carbon reduce the cost-effectiveness of new nuclear generation. TR 1724, 1873, 1953. Mr. Elnitsky further admitted that natural gas prices have been trending downward since the need determination for the LNP was made in 2008. TR, 1954. OPC witness Jacobs testified that:

> The two enterprise risks with unfavorable trends are related to the lack of legislation for greenhouse gas legislation and lower natural gas prices. Both of these risks are fundamental drivers in the economic feasibility of the LNP. In my opinion, given the importance of these two variables in the overall economics of nuclear power, the unfavorable trend in these two enterprise risks demonstrates an overall unfavorable trend in enterprise risks.

TR 2002 (emphasis added). The fact that PEF still maintains that the LNP is feasible when the

two most important variables are, and have been for several years, trending negatively, demonstrates that PEF would never concede that completion of the LNP is no longer feasible.

With the two most important variables showing that completion of the project is not feasible, coupled with the fact that all other enterprise risks cannot be characterized as anything but neutral at best, PEF's qualitative feasibility analysis fails to demonstrate that completion of the LNP is feasible in long-term. Therefore, PEF's requested 2011 estimated and 2012 projected costs should be denied.

Quantitative Feasibility

PEF submitted an updated CPVRR analysis which PEF claimed demonstrated that the LNP was still feasible from an economic perspective. However, on cross-examination, Mr. Elnitsky admitted that in the low fuel reference case, which would be representative of current conditions, the LNP is not economically feasible in 12 out of 15 cases. TR 1954-1955; Ex. 208, at 7. In fact, in this low fuel reference case, the only cases in which the LNP would be economically feasible are the cases where a high cost of carbon was assumed. TR 1954. Similarly, in the mid fuel reference case, the LNP is only economically feasible if you assume a cost of carbon. *Id.* Moreover, if there is no cost of carbon, as there isn't today, the LNP is not economically feasible in 24 out of 27 cases, and only feasible in the high fuel reference case. TR 1955. Thus, the updated CPVRR only shows the LNP as being economically feasible when assumptions are made that differ greatly from current reality.

PEF's updated CPVRR did nothing to cure the deficiencies of its qualitative economic feasibility analysis discussed above; in fact, it only solidified the fact that PEF has failed to meet its burden to demonstrate that completion of the LNP is feasible in the long-term. From both a qualitative and quantitative standpoint, completion of the LNP is simply not feasible when

properly analyzed. Therefore, the Commission should disapprove PEF's feasibility analysis, and deny recover of PEF's estimated 2011 and projected 2012 costs.

Issue 21: What is the total estimated all-inclusive cost (including AFUDC and sunk costs) of the proposed Levy Units 1 & 2 nuclear project?

SACE Position: *No position.*

Issue 22: What is the estimated planned commercial operation date of the planned Levy Units 1 & 2 nuclear facility and is this reasonable?

SACE Position: *No position.*

Issue 23: Do PEF's activities to date related to Levy Units 1 & 2 qualify as "siting, design, licensing, and construction" of a nuclear power plant as contemplated by Section 366.93, F.S.?

SACE Position: *No. PEF's activities to date fail to demonstrate the requisite intent to actually construct the LNP. Rather, PEF's activities and filings, as well as public statements made by PEF officials, demonstrate that PEF is merely engaged in an attempt to obtain the requisite federal, state, and local licenses for the LNP in order to create an option for new nuclear development. No final decision to proceed with construction of the LNP has been made.*

Discussion:

In Order No. PSC-11-0095-FOF-EI, the Commission held that, in order to be eligible for advanced cost recovery under Section 366.93, F.S., a utility "must continue to *demonstrate its intent to build the nuclear power plant* for which it seeks advance recovery of costs to be in compliance with Section 366.93, F.S." Order at 9 (emphasis added). In so holding, the Commission clearly recognized the need to strike a balance between the legislative intent of Section 366.93, F.S., and the statutory mandate of the Commission set out in Section 366.06, F.S., to fix "fair, just, and reasonable" rates for Florida ratepayers. This is because ratepayers should not be forced to pay for a project whose benefits are unlikely to ever be realized. In the current docket, the evidence presented at the hearing in this docket demonstrates that PEF's activities to date fail to demonstrate the intent to actually build the LNP. In sharp contrast, the evidence demonstrates that the only intent on the part of PEF is an intent to "create an option" to

construct the LNP. Therefore, pursuant to its holding last year, the Commission must deny further cost recovery for PEF as it relates to the LNP, as PEF has failed to demonstrate the requisite intent to build these proposed new nuclear units.

In 2010, PEF decided to proceed with the LNP on a slower pace and implemented what the utility refers to as the "COL-focused option," which is now the "program of record" in regard to the LNP. TR 1682, 1948. Under this approach, PEF is focusing all near term activities on obtaining a COL from the NRC. TR 1682. Due to this decision, the only 2011 activities that PEF could identify in its prefiled testimony relating to the LNP were: (1) activities needed to support environmental permitting; (2) continued disposition of long lead equipment purchase orders; (3) commencement of work on an updated transmission study; (4) preparations for a Final Notice to Proceed amendment to the EPC agreement; and (5) participation in industry work groups. TR 1683 (emphasis added). None of these activities can reasonably be said to demonstrate an intent to build the LNP; in contrast, these activities are more accurately characterized as activities being undertaken by PEF so that the NRC will continue to prioritize its COLA application request.[5]

Similarly, PEF's testimony fails to demonstrate that PEF possesses the requisite intent to build as required by the Commission to be eligible for advance cost recover. PEF has not made a final decision to proceed with construction of the LNP. TR 2088; Ex. 169. PEF stated in an SEC filing regarding its activities relating to the LNP, "[W]hile we have not made a final determination on new nuclear construction, we continue to take steps to keep open the option of building one or more nuclear plants." Ex. 206, at 16 (emphasis added). PEF witness Elnitsky admitted that there is a difference in intending to create an option and intending to exercise that

[5] PEF witness Elnitsky testified that If PEF fails to continue to demonstrate that it has a "plan" as to the LNP, the NRC might not continue to process its COLA. TR 1753-1754.

same option. TR 1947. It goes without saying that this is a crucial distinction given the Commission's decision last year on the intent required to be in compliance with Section 366.93, F.S., and thus eligible for advance cost recovery.

Despite the fact that PEF has not made a final decision to build the LNP, PEF witness Elnitsky testified that PEF does in fact intend to build the LNP. TR 2053. However, on cross-examination, Mr. Elnitsky admitted that this presents an illogical state of affairs:

> Q It would be illogical, would it not, to say that you intend to do something when you have not made the final decision to do that thing? That would be illogical, would it not?
> A Yes ....

TR 1946. As stated by OPC expert witness Jacobs:

> Specifically, I believe that they have an intent to pursue the COLA and receive the COL from the Nuclear Regulatory Commission. At that time its my understanding the company will make a decision as to whether or not to proceed with the project. So it's difficult to say they have an intent to proceed with the project when they have publicly admitted that they haven't decided to proceed with the project.

TR 2029 (emphasis added). Despite his admission that there has been no decision made by PEF to actually construct the LNP, Mr. Elnitsky still testified that it is not a matter of "if" PEF constructs the LNP, but rather it is a matter of "when." TR 1945. However, PEF's SEC filings clearly contradicted Mr. Elnitsky's testimony, stating that "[I]f the licensing schedule remains on track and if the decision to build is made...." Ex. 206, at 4 (emphasis added). Ultimately, Mr. Elnitsky's testimony in regards to PEF's intent was simply not credible to the extent he claimed that PEF intends to build the LNP.

Ultimately, despite Mr. Elnitsky's best efforts to convince the Commission otherwise, PEF's activities and testimony make it clear that while PEF may intend to create the option to build the LNP, it has failed to demonstrate that it intends to actually build the LNP. PEF's COL-

focused approach, by which it plans to create the option to construct the LNP by obtaining a COL from the NRC, simply does not meet the intent requirement set out by the Commission in its Order from Docket 100009-EI. While PEF does not have to simultaneously engage in the "siting, design, licensing, and construction" of TP 6 & 7 to qualify for advanced cost recovery, simply pursuing a COL from the NRC in order to create an option to construct does not demonstrate an intent to actually construct. Therefore, the Commission should deny PEF's request for further cost recovery for the LNP.

Issue 24: Should the Commission find that for the year 2010, PEF's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Levy Units 1 & 2 project? If not, what action, if any, should the Commission take?

SACE Position: *Adopts OPC's Position.*

Issue 25: What system and jurisdictional amounts should the Commission approve as PEF's final 2010 prudently incurred costs and final true-up amounts for the Levy Units 1 & 2 project?

SACE Position: *Adopts OPC's Position.*

Issue 27A: Is it reasonable for PEF to incur any estimated 2011 costs not necessary for receipt of the combined operating license (COL), and if not, what action, if any, should the Commission take?

SACE Position: *No. PEF's activities to date fail to demonstrate the requisite intent to actually construct the LNP. As such, PEF is not engaged in the "siting, design, licensing and construction" of a nuclear power plant. Given this failure to demonstrate the requisite intent to construct the LNP, as well as the failure to demonstrate the feasibility of the same, the Commission should not approve recovery of any estimated 2011 costs not necessary for receipt of the COL.*

Discussion:

See Discussion under Issues 20 and 23 *supra.* While SACE believes that PEF's failure to demonstrate its intent to build the LNP should preclude PEF from recovering any additional costs related to the LNP, this failure should, at the very least, preclude it from recovering any costs not necessary for receipt of a COL.

Issue 27B: What system and jurisdictional amounts should the Commission approve as reasonable actual/estimated 2011 costs and estimated true-up amounts for PEF's Levy Units 1 & 2 project?

SACE Position: *Given PEF's failure to demonstrate the requisite intent to actually construct the LNP, as well as the failure to demonstrate the feasibility of completing the LNP, the Commission should approve only those actual/estimated 2011 costs that are necessary for obtaining a COL. All other amounts should be denied.*

Discussion:

See Discussion under Issues 20 and 23 *supra.*

Issue 28A: Is it reasonable for PEF to incur any projected 2012 costs not necessary for receipt of the combined operating licenses (COL), and if not, what action, if any, should the Commission take?

SACE Position: *No. PEF's activities to date fail to demonstrate the requisite intent to actually construct the LNP. As such, PEF is not engaged in the "siting, design, licensing and construction" of a nuclear power plant. Given this failure to demonstrate the requisite intent to construct the LNP, as well as the failure to demonstrate the feasibility of the same, the Commission should not approve recovery of any projected 2012 costs not necessary for receipt of the COL.*

Discussion:

See Discussion under Issues 20 and 23 *supra.* While SACE believes that PEF's failure to demonstrate its intent to build the LNP should preclude PEF from recovering any additional costs related to the LNP, this failure should, at the very least, preclude it from recovering any costs not necessary for receipt of a COL.

Issue 28B: What system and jurisdictional amounts should the Commission approve as reasonably projected 2012 costs for PEF's Levy Units 1 & 2 project?

SACE Position: *Given PEF's failure to demonstrate the requisite intent to actually construct the LNP, as well as the failure to demonstrate the feasibility of completing the LNP, the Commission should approve only those projected 2012 costs that are necessary for obtaining a COL. All other amounts should be denied.*

Discussion:

See Discussion under Issues 20 and 23 *supra.*

Issue 29: Should the Commission approve what PEF has submitted as its 2011 annual detailed analysis of the long-term feasibility of completing the Crystal River Unit 3 Uprate project, as provided for in Rule 25-6.0423, F.A.C? If not, what action, if any, should the Commission take?

SACE Position: *Adopts OPC's Position.*

Issue 31: For the years 2009 and 2010, should the Commission find PEF reasonably and prudently managed its Crystal River Unit 3 Uprate license amendment request? If not, what dollar impact did these activities have on 2009 and 2010 incurred costs?

SACE Position: *Pursuant to the Stipulation entered August 15, 2011, as a compromise in settlement, PEF agrees to permanently forego collection of $500,000 in Project Management Costs to resolve Issue 31. This adjustment will be recognized in the order issued in Docket 110009-EI, but the full revenue requirement effect will be reflected as a true-up in the March 2012 NFRs. This agreement resolves this issue.

For 2009 and 2010 CR3 EPU project costs, the parties do not object to the Commission making a final prudence determination for those costs pursuant to Sections 366.93 and 403.519(4), F.S., in the 2011 NCRC docket. In so agreeing the parties maintain and do not waive, concede, or give up their right to offer any testimony in any other FPSC docket, nor do they waive, concede, or give up any remedy at law that may exist in any other docket.

Issue 32: Should the Commission find that for 2010, PEF's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Crystal River Unit 3 Uprate project? If not, what action, if any, should the Commission take?

SACE Position: *Pursuant to the stipulation entered August 15, 2011, no position.*

Issue 33: What system and jurisdictional amounts should the Commission approve as PEF's 2009 and 2010 prudently incurred costs for the Crystal River Unit 3 Uprate project?

SACE Position: *Pursuant to the stipulation entered August 15, 2011, the parties do not object to the Commission making a final prudence determination for 2009 and 2010 CR3 EPU costs pursuant to Sections 366.93 and 403.519(4), F.S., in the 2011 NCRC docket. In so agreeing the parties maintain and do not waive, concede, or give up their right to offer any testimony in any other FPSC docket, nor do they waive, concede, or give up any remedy at law that may exist in any other docket. *

Issue 34: What system and jurisdictional amounts should the Commission approve as reasonable actual/estimated 2011 costs and estimated true-up amounts for PEF's Crystal River Unit 3 Uprate project?

SACE Position: *Adopts OPC's Position.*

Issue 35: What system and jurisdictional amounts should the Commission approve as reasonably projected 2012 costs for PEF's Crystal River Unit 3 Uprate project?

SACE Position: *Adopts OPC's Position.*

Issue 36: What amount from the deferred balance of the Rate Management Plan approved in Order No. PSC-09-0783-FOF-EI should the Commission approve for recovery in 2012?

SACE Position: *Adopts OPC's Position.*

Issue 37: What is the total jurisdictional amount to be included in establishing PEF's 2012 Capacity Cost Recovery Clause factor?

SACE Position: *Adopts OPC's Position.*

CONCLUSION

For the reasons stated herein, SACE urges the Commission to, in order to protect Florida ratepayers:

1. Enter a finding that FPL's activities related to TP 6 & 7 do not qualify as "siting, design, licensing, and construction" of a nuclear power plant as contemplated by Section 366.93, F.S., as FPL has failed to demonstrate its intent to construct TP 6 & 7;
2. Deny all further cost recovery for FPL relating to TP 6 & 7 because FPL is no longer eligible for advanced cost recovery under Section 366.93, F.S.;
3. Disapprove FPL's long-term feasibility analyses submitted for 2010 and 2011 and find that FPL has failed to demonstrate the long-term feasibility of completion of TP 6 & 7;
4. Enter a finding that FPL's 2010, estimated 2011 and projected 2012 costs are not reasonable;
5. Deny cost recovery for FPL's 2010, estimated 2011 and projected 2012 costs for which recovery is sought in this docket;

6. Enter a finding that it was unreasonable for FPL to continue pursuit of a Combined Operating License from the Nuclear Regulatory Commission for TP 6 & 7 in 2010;
7. Enter a finding that FPL must account for sunk costs in its annual feasibility analysis in a meaningful manner that accurately reflects the economic reality of these costs;
8. Enter a finding that PEF's activities related to the LNP do not qualify as "siting, design, licensing, and construction" of a nuclear power plant as contemplated by Section 366.93, F.S., as PEF has failed to demonstrate an intent to construct the LNP;
9. Deny all further cost recovery for PEF relating to the LNP because PEF is no longer eligible for advanced cost recovery under Section 366.93, F.S.;
10. Disapprove PEF's long-term feasibility analysis submitted in this docket and find that PEF has failed to demonstrate the long-term feasibility of completion of the LNP;
11. Enter a finding that PEF's estimated 2011 and projected 2012 costs are not reasonable;
12. Deny cost recovery for PEF's estimated 2011 and projected 2012 costs for which recovery is sought in this docket.

Respectfully submitted this 8th day of September, 2011.

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CERTIFICATE OF SERVICE
Docket No. 110009-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing ***SACE'S POST-HEARING STATEMENT AND BRIEF*** has been furnished by electronic mail (e-mail) and/or U.S. Mail this the 8th day of September, 2011.

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