

Diamond Williams

From: Kim Hancock [khancock@kagmlaw.com]
Sent: Thursday, September 08, 2011 4:04 PM
To: Filings@psc.state.fl.us
Cc: Keino Young; Anna Norris; mwalls@carltonfields.com; bhuhta@carltonfields.com; mbernier@carltonfields.com; karen.white@tyndall.af.mil; jwb@bbrslaw.com; ataylor@bbrslaw.com; kelly.jr@leg.state.fl.us; rehwinkel.charles@leg.state.fl.us; sayler.erik@leg.state.fl.us; mcglothlin.joseph@leg.state.fl.us; john.burnett@pgnmail.com; alex.glenn@pgnmail.com; jessica.cano@fpl.com; bryan.anderson@fpl.com; jwhitlock@enviroattorney.com; gadavis@enviroattorney.com; Vicki Gordon Kaufman; Jon Moyle
Subject: Docket No. 110009-EI
Attachments: FIPUG Post-Hearing Brief 9.08.11.pdf

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

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

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

- b. This filing is made in Docket No. 110009-EI.
c. The document is filed on behalf of FLORIDA INDUSTRIAL POWER USERS GROUP.
d. The total pages in the document are 25 pages.
e. The attached document is THE FLORIDA INDUSTRIAL POWER USERS GROUP'S POST-HEARING STATEMENT OF ISSUES AND POSITIONS AND POST- HEARING BRIEF.

Kim Hancock
khancock@kagmlaw.com



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

The information contained in this e-mail is confidential and may be subject to the attorney client privilege or may constitute privileged work product. The information is intended only for the use of the individual or entity to whom it is addressed. If you are not the intended recipient, or the agent or employee responsible to deliver it to the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you receive this e-mail in error, please notify us by telephone or return e-mail immediately. Thank you.

DOCUMENT NUMBER DATE
06486 SEP -8 =
FPSC-COMMISSION CLERK

9/8/2011

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear cost recovery clause.

DOCKET NO. 110009-EI

FILED: September 8, 2011

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

The Florida Industrial Power Users Group (FIPUG), by and through its undersigned counsel, files this Post-Hearing Statement of Issues and Positions and Post-Hearing Brief. FIPUG reaffirmed its party status in this annual proceeding by filing notice with the Commission on January 7, 2011.

BASIC POSITION AND SUMMARY

FIPUG supports the development of cost effective, reasonable and prudent energy sources to serve Florida consumers. However, given the current state of the nuclear industry, including the recent nuclear disaster in Japan, as well as the high costs and numerous delays experienced by PEF and FPL in pursuit of nuclear projects that may never come to fruition, both utilities must be held to strict proof regarding their nuclear power activities. FPL and PEF have the burden to demonstrate that the nuclear projects that are the subject of this hearing are the most reasonable and cost-effective way to serve ratepayer needs. The Commission must bear in mind that at the end of the day, it is the consumers who bear the large cost burden of these projects.

DOCUMENT NUMBER-DATE

06486 SEP-8 =

FPSC-COMMISSION CLERK

FPL

EPU Uprate

FPL failed to advise the Commission of significant increases in its 2009 nuclear cost recovery request for its EPU uprate projects at St. Lucie and Turkey Point. In 2009, FPL permitted its witnesses to take the stand without updating their testimony to provide the most current and accurate information to the Commission, knowing that the testimony the witnesses presented was inaccurate and out-of-date. The Commission has the authority to, and should, take action regarding FPL's inaccurate presentation in the 2009 proceeding and send a clear signal that nothing less than accurate and up-to-date information will be acceptable.

Further, as to FPL's EPU analysis, FPL has failed to provide a break-even analysis of the project. In addition, the cumulative present value of revenue requirement (CPVRR) methodology that FPL has provided fails to properly evaluate the cost effectiveness of the EPU projects because it removes sunk costs from the analysis and thus greatly overstates the cost-effectiveness of the project. Finally, it was imprudent for FPL to "fast track" the EPU projects as demonstrated by the many cost overruns and uncertainties relating to the project.

Turkey Point 6 & 7

As to Turkey Point 6 & 7, FPL has not demonstrated its intent to move forward to completion with the project. Rather, it has asserted that it is keeping the nuclear "option" open. FPL's contention that it has the option to move forward to completion with the project if it so chooses does not fulfill the legislative requirement that the plant be completed pursuant to the nuclear cost recovery statute. FPL itself has recognized the many uncertainties associated with Turkey Point 6 & 7 and has not demonstrated the requisite attempt to move forward with the project to completion.

PEF

CR3 Uprate

Issues relating to the CR3 Uprate have been deferred pursuant to the Commission's ruling at the beginning of the hearing. PEF will collect no 2011 or 2012 costs for the CR3 Uprate.

Levy

PEF should not be permitted to collect any additional costs (other than costs to obtain the COL) from ratepayers for the Levy nuclear project. This project has been plagued by delays and excessive costs and it appears clear that the project will not be completed in the time frame PEF has projected. Further, given the current economic conditions, including slow customer growth, downward trend in natural gas prices, and no action on climate change legislation, the economic justification for moving forward with this project is tenuous at best. Further, PEF has been unable to secure any joint participation in the project, another indication of lack of viability at this time. It appears that the viability of this project is in grave doubt. Ratepayers should not be required to continue to sink money into a project which appears unlikely to ever materialize.

ISSUES AND POSITIONS

FPL

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

FIPUG: *Yes. All rate case type expenses should be disallowed.*

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.?

FIPUG: *No. FPL has not demonstrated that it intends to actually construct Turkey Point Units 6 & 7. Rather, FPL is simply attempting to maintain the option of moving forward or not, while customers pick up the tab.*

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?

FIPUG: *No. FPL has failed to account for important factors that may impact the construction of the project, including the Fukushima disaster, changing project economics, and declining cost-effectiveness.*

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?

FIPUG: *No. FPL has failed to demonstrate that it intends to actually proceed to construction.*

Discussion of Issues 2, 3 and 3A

At the time that FPL sought and received a determination of need for the Turkey Point 6 & 7 project, it told the Commission that Unit 6 would come on line in 2018 and Unit 7 would come on line in 2020. FPL now contends that Unit 6 will come on line in 2022 – 4 years late – and Unit 7 will come on line in 2023 – 3 years late. FPL's Mr. Scroggs admits that there is certainly potential for further delay, (Tr. 272), and that projected in-service dates might continue to slip. (Tr. 302).

FPL's own testimony demonstrates that the actual construction of the Turkey Point project is tentative and uncertain at best. Mr. Scroggs admitted as much when he testified that FPL has *not* made a final decision as to whether or not to construct the project. (Tr. 294). Mr. Scroggs testified that:

That decision [whether or not to construct] is going to be based on the economics and the events as they unfold over the next several years.

(Tr. 294). Mr. Scroggs further testified that FPL is in the “early uncertain periods” of the project. (Tr. 294).

Mr. Scroggs recognized the numerous uncertainties facing the Turkey Point 6 & 7 project. Those include national issues related to the economy, energy policy (at both the national and regional levels), and the progress of international and domestic projects. (Tr. 154). Issues related to certification of the AP1000 and the Southern Vogtle project will also impact the cost and predictability of the Turkey Point 6 & 7 project, as well as industry and regulatory responses to the nuclear disaster in Japan. (Tr. 269). As to the Fukushima disaster, the NRC Task Force has recommended interim action to enhance protection mitigation and preparedness while final rulemaking is in progress. Such interim action has not started and rulemaking itself can take several years. (Tr. 307). Nor has FPL been able to secure any partners to participate in the nuclear project. (Tr. 275).

Further, FPL witness Mr. Scroggs described FPL's current activities as keeping the "option" of nuclear generation open. While Mr. Scroggs attempted to define the well-understood term "option" as indicating *when* the project would go forward, (Tr. 274), Mr. Scroggs' claim is undermined by the definition of "option" as well as by his own testimony.

Merriam-Webster defines "option" as "an act of choosing."¹ That is the option to proceed indicates a choice as to whether to construct or not to construct. It does not relate to timing.

Mr. Scroggs' own testimony affirms this. He testified that:

The most important near term activity is creating the *option* [of completion] by obtaining the licenses and approvals necessary to construct and operate Turkey Point 6 & 7. Once approvals are obtained, FPL will be able to *review the economics and the experience of other new nuclear projects* as well as how state and federal energy policies have evolved.

(Tr. 204, emphasis added).

¹ <http://www.merriam-webster.com/dictionary/option>

Mr. Scroggs testified in his March testimony that:

. . . my testimony will describe the deliberate, stepwise process FPL is employing to create an *option* to provide new nuclear generation for our customers. . . .

(Tr. 146, emphasis added). In his May testimony, Mr. Scroggs said that:

The purpose of my testimony is to prove 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. . . .

(Tr. 218, emphasis added). In Exhibit No. 12 (SDS-11), a memorandum Mr. Scroggs authored regarding the project, he said:

The Turkey Point 6 and 7 project was developed to create the *option* for new nuclear generation. . . .

(Emphasis added). It appears that FPL, in its own words, is “uncertain” about the status of this project and is simply attempting to keep the nuclear option open rather than committing to moving forward with Turkey Point Units 6 & 7.

This uncertainty is further illustrated by the fact that FPL has not entered into an EP or EPC contract, (Tr. 295), has extended its forging reservation agreement four times, (Tr. 297), has not procured long-lead materials, (Tr. 298), and has withdrawn its Limited Work Authorization (LAR) at the NRC. (Tr. 299). *See also*, Exhibit No. 195, containing the recommendations of the NRC Task Force relating to changes needed after the Fukushima disaster which may result in additional delay.

Section 366.93, Florida Statutes, permits utilities to recover costs from customers in advance for the construction of nuclear power plants. However, section 366.93 was enacted in contemplation that nuclear power plants would actually be *constructed*. The statute envisions

that a utility will move from siting to ultimate construction. FPL's own testimony in this case makes it clear that FPL is not committed to construction of the Turkey Point 6 & 7 project but is hedging its bets at ratepayers' expense. Thus, its activities do not qualify as "siting, design, licensing, and construction" of a nuclear power plant as section 366.93 requires.

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?

FIPUG: *According to FPL, at the current time, the projected cost of the Turkey Point 6 & 7 project is between \$12.8 billion and \$18.7 billion. However, even this staggering amount is subject to continued escalation and the actual price is not known.*

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

FIPUG: *According to FPL, at the current time, the estimated in-service dates are 2022 for Turkey Point 6 and 2023 for Turkey Point 7. However, these dates are subject to revision and it is uncertain as to whether these plants will ever come on line.*

Discussion of Issues 4 and 5

These two issues relate to the staggering sums which ratepayers have paid and are being asked to pay for Turkey Point Units 6 & 7, as well as when the ratepayers can reasonably expect these projects to come on line to serve their needs. As the discussion of Issues 2, 3, and 3A demonstrate, the fate of Turkey Point Units 6 & 7 is highly uncertain. Even FPL admits that it has made no decision as to whether or not to construct these projects. Nonetheless, FPL continues to ask the ratepayers to contribute *billions* of dollars for projects that may never materialize. While the Legislature has sought to encourage the development of nuclear power, it has not given FPL a blank check to spend ratepayers' money endlessly for a project with no certainty attached to it.

Nuclear power can be an important part of a utility's portfolio, but only when the project is reasonable, cost-effective and timely built. FPL has failed to demonstrate that is the case with

Turkey Point Units 6 & 7. FIPUG has grave concerns about the continued delay in the project and the enormous cost of almost *\$19 billion*. For just 2012 alone, FPL is requesting to recover over *\$196 million* from consumers.

Because the utilities have annual cost recovery for monies spent on nuclear projects far in advance of such projects generating any power, they have little incentive to control costs. They know that they will receive dollar for dollar recovery for nuclear projects that may never be built. This puts ratepayers in the position of writing a “blank check” for such projects with the hope that they will benefit from such projects far in the future. As this docket demonstrates, costs for highly expensive nuclear projects can quickly escalate requiring massive funds from ratepayers with little firm commitment to bring a project to fruition.

Section 366.05(1), Florida Statutes, in describing the Commission’s powers, provides that:

In the exercise of such jurisdiction, the commission shall have the power to prescribe fair and reasonable rates and charges....

Similarly, section 366.06(1), Florida Statutes, describes the procedure for changing rates and states:

The commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service.

Based on these principles, which represent the core of the Commission’s responsibilities, the Commission has the authority to keep customers’ rates from increasing to a point where they are unfair, unjust and unreasonable. Exercise of the Commission’s power is especially apt in the case of nuclear matters, where the costs are often quite large and any benefits to be received far in the future.

The Commission should carefully scrutinize the information provided by FPL and ensure that consumers are protected from excessive expenditures for projects that may never produce any power.

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?

FIPUG: *No position.*

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?

FIPUG: *This is a fall out amount from the substantive issues.*

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

FIPUG: *This is a fall out amount from the substantive issues.*

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?

FIPUG: *This is a fall out amount from the substantive issues.*

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 EPU project, as provided for in Rule 25-6.0423, F.A.C.? If not, what action, if any, should the Commission take?

FIPUG: *No. The Commission should not approve what FPL has submitted as its long term feasibility report. Rather than using a break-even analysis to provide a cost-effectiveness analysis, FPL used CPVRR methodology to gauge cost-effectiveness. This is inappropriate because it excludes "sunk costs" for a project where costs are rapidly increasing. This has the effect of skewing the cost-effectiveness analysis and making a project appear cost-effective when it is not.*

Discussion of Issue 10

FPL has failed to use the appropriate methodology to gauge the long-term feasibility of the EPU projects. In addition, it has not performed separate analyses for the EPU projects which

have very different characteristics. Therefore, FPL's long-term feasibility report should be rejected.

As to the methodology to evaluate the EPU projects' cost-effectiveness, FPL has used a CPVRR methodology. This methodology excludes amounts already expended (sunk costs), (Tr. 1011), and looks only at costs to complete the project. (Tr. 1015). The CPVRR methodology is inappropriate because the costs of the EPU projects are far from fixed and have, in fact, been dramatically increasing.² Use of the CPVRR method under such circumstances results in misleading results. (Tr. 1011). Using only forward-looking costs, a project will continue to be shown to be feasible; however, when all costs are considered, the project may well be uneconomic. (Tr. 1011). In the instance of the EPU projects, consumers certainly have spent real dollars on this project and to disregard such costs (as though they have not been spent) is inappropriate. As Mr. Jacobs testified:

If the estimated total cost is increasing at a rate that approximates the expenditures on the project, the cost to complete will be unchanged while the total project cost is rapidly increasing. This masks the true picture of whether the project is economically feasible.

(Tr. 1015). This is exactly what is happening with the EPU projects. The EPU projects actually result in costs to ratepayers, not benefits, when total costs of the projects are compared to the alternative generation portfolio. (Tr. 1016).

It is more meaningful to use a break-even analysis to determine if the EPU projects are cost-effective. This analysis demonstrates the total cost that a project must come in at or below for the project to benefit ratepayers. (Tr. 1016). FPL has not conducted such an analysis in order to provide a true picture of project costs and benefits. The Commission should require FPL to conduct this analysis.

² The dramatically increasing costs are related to FPL's decision to fast track the project discussed in Issue 11.

Further, a separate feasibility analysis should be done for each project. There are numerous differences between the two projects which indicate that a separate analysis is appropriate. For example, the Turkey Point EPU project is currently estimated to cost \$250 million more than the St. Lucie EPU project. (Tr. 1031). The capacity increase for the Turkey Point EPU project is less than that for the St. Lucie project. (Tr. 1031). The operating licenses of the facilities have different expiration dates. (Tr. 1031). Differences between the two plants mask the feasibility of the separate projects and may indicate that St. Lucie has been “carrying” the Turkey Point project. (Tr. 1031). Thus, separate analyses should be performed to gauge each project’s cost-effectiveness.

FPL’s main objection to a break-even analysis and a separate analysis of the projects appears to be that such analyses were not performed in FPL’s determination of need docket and thus somehow the rules have been changed. (Tr. 1258). However, nowhere in the need determination order (Order No. PSC-08-0021-FOF-EI) does the Commission state that the analysis performed for determination of need purposes must be utilized in nuclear cost recovery proceedings. Nor would one expect to find such a statement because the determination of need process deals with the need for the plant, not cost recovery, which is the subject of this proceeding.

It is the Commission’s role to analyze the cost-effectiveness of FPL’s nuclear projects and to ensure that the projects provide benefit to consumers who are paying for them. To do so, the Commission must have the most relevant and meaningful information before it upon which to base a decision. Even FPL witness Deason agreed that the Commission should have available to it all the tools it deems appropriate when evaluating cost-effectiveness. (Tr. 1144).

The Commission need not be backed into a corner (as FPL suggests) and limit itself to only the analysis FPL prefers. Rather, the Commission should require all information necessary for it to make an informed decision. In this case, it has not been provided with such information and thus FPL's feasibility analysis should be rejected.

ISSUE 10A: Stricken. Subsumed in Issue 10.

ISSUE 10B: Stricken. Subsumed in Issue 10.

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 EPU project?

FIPUG: *No. The management decision to "fast track" the EPU projects was imprudent. Many standardized procedures that would have contained costs were omitted.*

Discussion of Issue 11

Rather than following the normal engineering and procurement procedures for complex projects of this size and magnitude, FPL decided to "fast track" the EPU projects. The term "fast track" means that activities which should have been performed sequentially are instead performed at the same time. (Tr. 1019-1020). For example, use of fast tracking results in proceeding with the project without having complete architectural and engineering drawings. This leads to increased project costs due to rework and changes. (Tr. 1020). As Mr. Jacobs testified:

[U]ntil the final design is complete, the true scope of the project is not known and the final cost is impossible to estimate with any degree of accuracy. Thus, the actual final cost may be significantly more than the original estimate because the scope of work included in the original estimate was incomplete. Finally, an engineering and construction contractor will not be able to provide a firm bid on a project based only on preliminary engineering. Since the scope is not known, the risk is too great. Therefore, to protect itself, an engineering and construction contractor will only provide a bid on a "time and materials" basis. This results in a high likelihood of increased costs.

(Tr. 1020). Increased project costs are exactly what FPL has incurred in this project.

FPL admits that it underestimated the risks and costs for fast tracking; that it looked at the project only from a high level risk assessment; that it should have done a more detailed risk assessment when establishing the budget; and that it did not assess the quality of original site staffing due to fast tracking. (Tr. 1024).

The Concentric Report makes the following conclusions as to the FPL risk management process:

- It “underestimated the risk and costs associated with the fast track project,”
- It “did not assess [the] capacity of [the] organization and costs,” and
- “Early warning on cost overruns and undefined scope depletion were not dealt with in a timely manner.”

(Exhibit No. 197, p. 20 of 23).

The EPU projects remain in the early stage and much work remains to be done. Costing for the projects is far from complete. (Tr. 1027). As witness Jacobs testified:

FPL has to spend almost \$2 billion (according to their soft numbers) over the next 18 months for work that is, as of today’s date, unplanned and unpriced. Based on what they know now, the almost \$2 billion can only be an uneducated guess.

(Tr. 1027-1028).

Again, FPL’s response is primarily that the Commission knew that the EPU projects would be fast-tracked and thus the Commission is barred from making any decision as to the prudence of FPL’s actions. FPL contends that its use of the term “expedited” in the need proceeding means the same thing as “fast track” and that its management process has been previously approved.

FPL is simply wrong. The two terms are not the same. Further, the term “fast track” appears nowhere in the determination of need case. FPL witness Deason admitted that in his review of the determination of need he did not see the term “fast track” used. (Tr. 1146). As discussed above, “fast track” means to perform activities in parallel that are usually performed sequentially; this process does not allow for careful analysis and review. “Expedited” simply means that activities are performed more quickly than usual – that is, rather than accomplishing a task in 14 days, the time is reduced to 10 days.

FPL’s attempt to now make two different terms synonymous must be rejected. In a need determination, the Commission decides whether a project is needed. It does not discuss or set parameters regarding the management of a project. Rather, that is done in this docket, where monies are actually recovered.

Fast tracking the EPU projects was imprudent and will result in more delays and cost increases. It is likely that the fast track decision will result in costs that significantly exceed the alternative. (Tr. 1029).

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 EPU project?

FIPUG: *The Commission should find that FPL was imprudent due to its decision to “fast track” the EPU projects rather than to use its normal processes. This decision has resulted in excessive costs to ratepayers. Thus, all imprudent costs from the “fast track” decision should be disallowed. See Issue 12.*

ISSUE 13: What system and jurisdictional amounts should the Commission approve as reasonably estimated 2011 costs and estimated true-up amounts for FPL’s EPU project?

FIPUG: *This is a fall out amount from the substantive issues.*

ISSUE 14: What system and jurisdictional amounts should the Commission approve as reasonably projected 2012 costs for FPL’s EPU project?

FIPUG: *This is a fall out amount from the substantive issues.*

ISSUE 15A: Did FPL willfully withhold information concerning the estimated capital costs of its EPU projects and its related long-term study of the feasibility of the EPU projects 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?

FIPUG: *Yes. It is clear from the evidence that at the time the FPL witness took the stand at the 2009 nuclear hearing and swore that his testimony was true and correct regarding the EPU project costs, the company knew that the information was inaccurate and willfully did not update its information to provide the Commission and parties with the information needed as to the EPU projects.*

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

FIPUG: *Yes. The Commission has jurisdiction to take action regarding a regulated utility who willfully withholds information. Section 366.095, Florida Statutes, provides the Commission with the power to impose penalties upon a utility which has willfully violated any rule or order of the Commission. Rule 25-6.0423(5)(c)5, Florida Administrative Code, requires FPL to submit a long-term feasibility analysis regarding a nuclear plant. The Commission explained in Order No. PSC-08-0237-FOF-EI that such requirement includes the provision of "capital cost estimates." Failure to provide true and correct testimony undermines the Commission's processes.*

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

FIPUG: *Pursuant to section 366.095, Florida Statutes, the Commission should impose a fine of \$1.18 million on FPL. This amount is based on the Commission's authority to impose a fine of \$5,000 per day.*

Discussion of Issues 15A, 15B, 15C

This series of issues concerns FPL's presentation of inaccurate information at the nuclear cost recovery hearing in 2009 concerning its EPU Uprate projects.

Failure to Provide Accurate Up-to-Date Information

At the time of the 2009 nuclear cost recovery hearing, FPL presented witnesses on the topic of the cost of the EPU projects. FPL knew, but intentionally withheld, information

demonstrating that the cost of the project had substantially increased. FPL failed to advise the Commission that the cost of the EPU Uprate had increased by \$300 million or 27%. (Exhibit No. 197, p. 16 of 23).

Instead of revealing this highly relevant information, through a witness update from the stand, or by some other means, FPL instead put a witness on the stand who swore his original testimony was true and correct and that there were no changes to that testimony. At the time this occurred, FPL management knew that this was not the case.

In FIPUG's view, it is absolutely critical that the Commission have the most accurate information upon which to base its decisions. FPL President Olivera agrees. (Tr. 519-520). However, this did not happen at the 2009 NCRC hearing.

Subsequent to the 2009 hearing, as the result of an employee complaint regarding nuclear cost concerns, FPL instituted an outside independent investigation to review, among other things, the issue of the September 2009 testimony. (Tr. 513-514). This investigation was conducted by Concentric Energy Advisors under the direction of John Reed. When FPL hired Mr. Reed and Concentric, FPL President Olivera had full confidence in its ability to conduct the investigation and to provide an accurate, thorough and independent report. (Tr. 519-520). Mr. Olivera believed Mr. Reed was well qualified to conduct the investigation. (Tr. 514). Mr. Olivera testified that FPL made all requested personnel and documents available to Concentric. (Tr. 516). Further, Mr. Reed testified that he had access to all the information and documents that he requested. (Tr. 640). The Concentric investigation included 13 interviews and the review or re-review of thousands of pages of documentation. (Exhibit No. 197).

Concentric's investigation resulted in the production of the Concentric Report. (Exhibit No. 197). One of the questions Concentric was asked to examine was:

Was the information provided to the FL PSC and the interveners in each of the NCRC dockets accurate, consistent, timely and reliable?

(Exhibit No. 197, p. 3 of 23). Concentric concluded that:

Certain information provided by FPL in the 2009 NCRC was out-of-date and did not represent the best information available at the time.

(Exhibit No. 197).³ At the hearing, Mr. Reed testified that the report was objective and that he stands by the conclusions in the report. (Tr. 640).

FPL contends that the huge increase in the cost of the EPU projects was only preliminary and thus it was not required to update its testimony at the 2009 hearing. This inventive excuse is belied by the independent Concentric Report. The Concentric Report finds that these new estimates were presented to and discussed by the high level Executive Steering Committee (ESC). The Concentric Report finds that:

As of September 8, 2009 [the hearing date] **DELETED** had participated in the development of highly detailed cost projections for the EPU Projects, and had presented these new estimates to several senior FPL and contractor personnel on July 25, 2009.... [T]he new values were clearly labeled as the "Current Forecast," and the statement was clearly made that the "Current Budget" (the May 2008 values) was being increased to the "Current Forecast." Concentric also notes that the ESC [Executive Steering Committee] was explicitly advised that the new cost estimates were inconsistent with May, 2008 and May, 2009 data that had been presented to the FL PSC and that several new economic feasibility analyses had been performed, which updated those analyses that had been submitted to the FL PSC eleven weeks earlier.⁴

(Exhibit No. 197, p. 15 of 22). Concentric also found that by the time the FPL witness took the stand on September 9, 2009, the information presented and the testimony was out-of-date.

³ OPC witness Jacobs concurred with Concentric's findings after conducting an independent review. (Tr. 1038).

⁴ Footnotes omitted. *See also*, Exhibit No. 42, Concentric Observations Regarding the EPU Projects' Activities in 2009, Observation 7, p. 5 of 5.

(Exhibit No. 197, p. 15 of 22). Most importantly, the EPU management team had begun relying on the revised cost estimates that FPL failed to present to the Commission. (Exhibit No. 197, p. 15 of 23).

FPL's claim that the increased EPU budget numbers had not been "vetted" and thus it need not have revealed them to the Commission is also without merit. As the Concentric Report notes, when the new, higher estimates were presented to the Executive Steering Committee (ESC), the new estimates were not preliminary nor done at lower levels in FPL. Rather,

The new estimates were the product of more than a dozen people working extended hours for a month and *had been reviewed by every level of management in the EPU organization.*

(Exhibit No. 197, p. 15 of 23, emphasis added).

Further, the ESC is composed of high level executives, such as the Chief Operating Officer of NextEra Energy, FPL President Olivera, Terry Jones, Vice President for the Extended Power Uprate Project, executives within the parent company and the utility, and senior members of the uprate team. (Tr. 641). It lacks credibility to suggest that these high level executives would waste their time reviewing estimates that had not been thoroughly analyzed. In fact, Mr. Reed testified that the information presented to the ESC "had gone through substantial review." (Tr. 642).

Thus, the independent analysis performed by Concentric demonstrates that updated information, of which FPL management was well aware, was not provided to the Commission at the September 2009 hearing.

**The Commission Possesses Statutory and Regulatory Authority
to Address FPL's Withholding of Information**

The Commission has clear authority to address the actions of a utility which has provided misleading or inaccurate information. Section 366.095, Florida Statutes, provides:

The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter that is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty for each offense of not more than \$5,000, which penalty shall be fixed, imposed, and collected by the commission. Each day that such refusal or violation continues shall constitute a separate offense.

This statute authorizes the Commission to fine a utility not more than \$5,000 per day for each day that a utility fails to comply with a Commission rule or order.

In this instance, the evidence discussed in Issue 15A above clearly demonstrates that FPL knowingly withheld information from the Commission when it sponsored inaccurate information at the September 2009 hearing and swore under oath that such information was true and correct. In doing so, FPL violated rule 25-6.0423(5)(c)5, Florida Administrative Code. This rule requires FPL to submit for Commission review “a detailed analysis of the long-term feasibility of completing the power plant.” This is the power plant for which the utility seeks to collect money from customers in the NCRC proceeding. Capital project costs are a key input to the feasibility analysis. (Tr. 1048). This rule’s requirement is met when the utility submits evidence and documents in this hearing. The best, most current information must be provided or the rule has no meaning.

FPL will no doubt argue that the statute requires a willful violation for the imposition of a fine and that the element of willfulness is not present. Such an argument is without merit. The Commission has often discussed the willful requirement. As recently as June 2011, the Commission described the meaning of willful violation:

A willful violation of a statute, rule or order is one done with an intentional disregard of, or a plain indifference to, the applicable statute or regulation. See, L. R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 667 n.1 (D.C. Cir. 1982). Utilities are charged with knowledge of the Commission’s orders, rules, and

statutes. The intent of Section 364.285(1) [analogous telecommunications provision] is to penalize those who affirmatively act in opposition to those orders, rules, or statutes. See, Florida State Racing Commission v. Ponce de Leon Trotting Association, 151 So.2d 633, 634 (Fla. 1963), and. Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992) (utilities are subject to the rules published in the Florida Administrative Code).⁵

Thus, utilities, like FPL, are charged with knowledge of the Commission's rules. Violation of a Commission rule constitutes a willful act.

The Commission Should Fine FPL

Even FPL President Olivera agreed that if a company provides misleading or inaccurate information to the Commission, it should be penalized. (Tr. 522-23). In this instance, the Commission should send a strong message to FPL, and to all companies it regulates, that up-to-date, accurate information is the cornerstone of the work the Commission does when it analyzes requests for rate increases and nothing less will be tolerated. Thus, FPL should be fined the maximum amount of \$5,000 per day for each day it failed to update the EPU data. This results in a fine of \$1.18 million.

ISSUE 16: Stricken. Subsumed in Issue 11.

ISSUE 17: Stricken. Subsumed in Issue 11.

ISSUE 18: Stricken. Subsumed in Issue 11.

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

FIPUG: *This is a fall out amount from the substantive issues.*

⁵ Order No. PSC-11-0259-AS-TP at 5-6.

PEF ISSUES

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?

FIPUG: *No. PEF has failed to demonstrate the long-term feasibility of completing Levy Units 1 & 2. Requested costs should be disallowed. Specifically, given the uncertainty associated with the project, its timing, whether or not the engineering, procurement and construction contract will be cancelled, and the lack of any partners who would share in the costs, risk and power allotment of the proposed Levy project, the project is not feasible at this point. Furthermore, the estimated cost of \$22.5 billion is too much for ratepayers to handle in this poor economic climate and is an improper intergenerational transfer, two additional factors that make the project unfeasible.*

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

FIPUG: *There is a lack of competent substantial evidence for the Commission to rely upon in determining the all-inclusive costs, given the uncertainty with the project, its timing, whether or not the engineering, procurement and construction contract will be cancelled, and the lack of any partners who would share in the costs, risk and power allotment of the proposed Levy project. The estimated cost of \$22.5 billion is too much for ratepayers to handle in this poor economic climate and is an improper intergenerational transfer. The current estimated all inclusive cost of Levy is not reasonable.*

ISSUE 22: What is the estimated planned commercial operation date of the planned Levy Units 1 & 2 nuclear facility?

FIPUG: *There is a lack of competent substantial evidence for the Commission to rely upon in determining the date of commercial operation of the project. The project continues to face significant obstacles that could affect the commercial operation date, including, but not limited to whether or not the engineering, procurement and construction contract will be cancelled, and the lack of any partners who would share in the costs, risk and power allotment of the proposed Levy project. The current estimated Levy commercial operation date is not reasonable.*

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.?

FIPUG: *Adopt the position of OPC.*

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?

FIPUG: *No. As a condition precedent to finding that certain 2010 costs were reasonable and prudent, the Levy project must be feasible. The following facts make the project not feasible: 1) no partners to share the risks, costs and electrical output of the Levy plant; 2) uncertainty attendant to the projects' costs and timing; 3) significant impact to ratepayers' bills; 4) improper intergenerational transfer of the costs of the project; and 5) change of Board of Directors' control of company following merger.*

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?

FIPUG: *This is a fall out amount from the substantive issues.*

ISSUE 26: Withdrawn.

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?

FIPUG: * No. PEF acknowledged that its plan of action is to obtain the COL, **then** assess the project. See SEC filings, Exhibit 206. The assessment could include deciding not to move forward with the project, something PEF witness Elnitsky acknowledged could occur at any Senior Management Committee meeting or Board of Directors meeting. No members of either group presented testimony in this case affirming the intent to complete the Levy project. Accordingly and logically, expenditures not related to receiving the COL should not be permitted.*

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?

FIPUG: *This is a fall out amount from the substantive issues.*

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

FIPUG: *No. PEF acknowledged that its plan of action is to obtain the COL, **then** assess the project. See SEC filings, Exhibit 206. The assessment could include deciding not to move forward with the project, something PEF witness Elnitsky

acknowledged could occur at any Senior Management Committee meeting or Board of Directors' meeting. No members of either group presented testimony in this case affirming the intent to complete the Levy project. Accordingly and logically, expenditures not related to receiving the COL should not be permitted.*

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

FIPUG: *This is a fall out amount from the substantive issues.*

ISSUE 29: Should the Commission approve what PEF has submitted as its 2011 annual detailed analysis of the long-term feasibility of completing the CR3 EPU project, as provided for in Rule 25-6.0423, F.A.C? If not, what action, if any, should the Commission take?

FIPUG: *This issue has been deferred to the 2012 nuclear cost recovery hearing.*

ISSUE 30: Stricken.

ISSUE 31: For the years 2009 and 2010, should the Commission find PEF reasonably and prudently managed its CR3 EPU license amendment request? If not, what dollar impact did these activities have on 2009 and 2010 incurred costs?

FIPUG: *Resolved by approval of the parties' stipulation.*

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 CR3 EPU project? If not, what action, if any, should the Commission take?

FIPUG: *Resolved by approval of the parties' stipulation.*

ISSUE 33: What system and jurisdictional amounts should the Commission approve as PEF's 2009 and 2010 prudently incurred costs and final true-up-amount for the CR3 EPU project?

FIPUG: *Resolved by approval of the parties' stipulation.*

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 CR3 EPU project?

FIPUG: *This issue has been deferred to the 2012 nuclear cost recovery hearing.*

ISSUE 35: What system and jurisdictional amounts should the Commission approve as reasonably projected 2012 costs for PEF's CR3 EPU project?

FIPUG: *This issue has been deferred to the 2012 nuclear cost recovery hearing.*

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?

FIPUG: *Support and adopt the positions of OPC and PCS Phosphate.*

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

FIPUG: *Support and adopt the positions of OPC and PCS Phosphate.*

s/ Vicki Gordon Kaufman

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

Attorneys for the Florida Industrial Users Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of The Florida Industrial Power Users Group's Post-Hearing Statement of Issues and Positions and Post-Hearing Brief has been furnished by Electronic Mail and United States Mail this 8th day of September, 2011, to the following:

Keino Young
Anna Norris
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

J. Michael Walls
Blaise N. Huhta
Matthew Bernier
Carlton Fields Law Firm
Post Office Box 3239
Tampa, Florida 33601-3239

Karen S. White
AFCESA-ULFSC
139 Barnes Drive, Suite 1
Tyndall AFB, Florida 32403-5319

James W. Brew
F. Alvin Taylor
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, NW
Eighth Floor, West Tower
Washington, DC 20007-5201

J. R. Kelly
Charles Rehwinkel
Joseph McGlothlin
Erik L. Saylor
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399

John T. Burnett
R. Alexander Glenn
Progress Energy Service Company, LLC
Post Office Box 14042
St. Petersburg, Florida 33733-4042

Bryan S. Anderson
Jessica A. Cano
Florida Power & Light Co.
700 Universe Boulevard
Juno Beach, Florida 33408-0420

Gary A. Davis
James S. Whitlock
Gary A. Davis & Associates
Post Office Box 649
Hot Springs, NC 28743

s/ Vicki Gordon Kaufman _____

Vicki Gordon Kaufman