BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Environmental Cost Recovery Clause	DOCKET NO. 20180007-EI
_____/	FILED: November 16, 2018

CITIZENS' POST-HEARING BRIEF

The Citizens of the State of Florida, through the Office of Public Counsel ("Citizens" or "OPC"), pursuant to the Order Establishing Procedure in this docket, Order No. PSC-2018-0090-PCO-EI, issued February 19, 2018, Order No. PSC-2018-0248-PCO-PU, issued May 14, 2018, and PSC-2018-0515-PHO-EI issued October 31, 2018, hereby submit this Post-Hearing Brief.

STATEMENT OF BASIC POSITION

The Citizens have raised issues, concerns and objections regarding the method of evaluation and consideration and approval of projects related to Issues 10A and 10B in this year's Environmental Cost Recovery ("ECRC") docket. Concerns about the actual cost recovery associated with the Manatee Thermal Heating System expenditures at Plant Ft. Myers are secondary to the requested consideration of the project as a modification to or a component of a larger "project" that is putatively part of an earlier approval of similarly purposed, but distinct projects at other FPL facilities. The Plant Scherer National Pollution Discharge Elimination System ("NPDES") permit renewal process in Georgia poses similar concerns. The fact that FPL is proposing to make the actual recovery of the asserted $9 million in estimated compliance costs contingent upon the actual materialization of the speculated future PDES permit requirement allays the OPC's concern somewhat, but still begs the question as to whether Section 366.8255, Fla.Stat. ("ECRC Statute") allows approval for future recovery of a cost to comply with a non-existent environmental regulation. Of greater concern is the fact that FPL is seeking to shoehorn the

Georgia "compliance" costs into an alleged Florida "NPDES Permit Renewal Requirement Project," that, if it exists at all as a prior Commission-approved project, does not contemplate even actual requirements for a Georgia state environmental rule that does not enforce the specific elements of the Federal Clean Water Act ("CWA") that the 2011 Commission order specifically addresses. In any event, the Citizens request that the Commission evaluate the two 2018 expenditures at issue on a purely stand-alone basis and make its decision without reference to any existing "project" that may or may not have been assumedly preapproved.

This brief only addressed issues 10A and 10B.

ISSUES
FLORIDA POWER & LIGHT

ISSUE 10A: **Should FPL be allowed to recover, through the ECRC, prudently incurred costs associated with its proposed modifications to its Manatee Temporary Heating System project?**

OPC: *Maybe. The Commission must, nevertheless independently determine that each cost submitted for recovery meets each element of the statutory requirements for recovery through this clause as set out in Section 366.8255, Florida Statutes. FPL has not proven that these costs fully meet the statutory test to the extent it relies on prior approvals of similar types of projects for meeting the Company's burden of proof.*

ARGUMENT:

The Citizens have raised a concern regarding the Company's burden of proof on this issue. The OPC readily concedes that given the specific facts and circumstances of the expenditure for the environmental compliance efforts related to the Manatee Thermal Heating System ("MTHS") at Plant Ft. Myers, FPL has introduced evidence that is of the type that meets all the criteria of the statute for recovery through the ECRC, on a standalone basis. The firm objection that the Citizens lodge against the Company's case on this project is that it appears to rely on the Commission

approving the project as a part of a larger umbrella project that FPL erroneously contends was approved at some point in the past.

FPL offered the testimony of NextEra Vice President for Environmental Services. Mike Sole to support its request and petition. TR 308; EX 50. He testified on each element that the ECRC Statute necessary for a utility to recover the costs of an eligible project through the ECRC. In doing so, he laid the predicate for the Commission to make a determination about the current project without regard to whether there was some over-arching "project" that included similar types of expenditures. TR 301-319.

In its petition filed in support of the Ft. Myers MTHS, FPL stated that:

> FPL is requesting to modify its existing, approved MTHS Project to include an MTHS at FPL's Fort Myers Plant site ("PFM").

EX 50, at 1. However, Mr. Sole could not point to a single order cited to in the petition that identified a single MTHS project to which the Ft. Myers project would constitute an amendment. He even acknowledged that there is no generic Commission policy on approval of the MTHS. TR 300. He further stated:

> The -- FPL is, at this point, seeking specific Commission approval of this project.

TR. 300. He further conceded that there was no reason why the Ft. Myers MTHS endeavor couldn't be considered on a stand-alone basis. In fact he further conceded that:

> Individually, we have come to the Commission each time to address the need to do a specific plant project, and that may be the terminology that we are crossing on.

TR 309-310.

The Citizens submit that under cross-examination, Mr. Sole provided sufficient evidence to justify the Ft. Myers MTHS cost under the ECRC. TR 301-319. He also testified that the cost of the requirement was not recovered elsewhere in rates. TR 292-293. By all measures the Ft. Myers MTHS can and should be evaluated, considered and either approved or not on its own merits in this docket and without reference to a non-existent "project" that cannot be established in a single order or Commission Rule.

To the extent the Commission finds the Ft. Myers MTHS costs recoverable on a stand-alone basis, the Citizens will not challenge the decision on appeal. Any other basis would invite a challenge that the Commission exceeded its authority under the ECRC statute by pre-approving or presumptively approving a project solely by way of the use of jargon or nomenclature that does not substitute for the clear elements of the ECRC statute.

ISSUE 10B: **Should FPL be allowed to recover, through the ECRC, prudently incurred costs associated with its proposed modifications to its National Pollution Discharge Elimination System Permit Renewal Requirements project?**

OPC: *No. The Commission must, nevertheless independently determine that each cost submitted for recovery meets each element of the statutory requirements for recovery through this clause as set out in Section 366.8255, Florida Statutes. FPL has not proven that these costs fully meet the statutory test to the extent it relies on prior approvals of similar types of projects for meeting the Company's burden of proof. This project may not be ripe for approval.*

ARGUMENT:

The Citizens have also raised a concern regarding the Company's burden of proof on this issue. FPL seeks Commission approval of an expenditure at Plant Scherer, for which its share of the cost will be $9 million. The company believes that it will need to undertake a replacement of cooling tower packing that its analysis indicates is contributing to an increase in copper discharges

from the outfall(s) from the plant's cooling tower. Further, FPL says it anticipates that such an increase would place it out of compliance with a yet-to-be established copper effluent limitation – unless the expenditures are undertaken. TR 254. FPL further submits that the increase in copper in the discharges will trigger monitoring requirements and a speculated anticipated effluent limitation related to copper. TR 410-411.

The Citizens concerns with this expenditure are several-fold. First, the contingent nature of the need for environmental regulation compliance is a concern because the specific permit renewal condition is not exactly spelled out in an existing regulation (NPDES permit condition). TR 262; 279. Mr. Sole testifies that conversations with the Georgia EPD indicate that the permit renewal process could impose additional conditions but there is no concrete documentation of this. TR 352, 411. The OPC's concern on this point is partially ameliorated by FPL's proposal to defer the cost for recovery only after the permit condition is actually imposed. TR 18-19, 294, 331-332; EX 50, p. 12-13. It is not, however, clear why Commission approval is even necessary at this time as the project is either underway or complete at this time and is not dependent upon the Commission blessing it in any way. TR 283, 405; EX 50, p.12.

The second and more critical concern – as also found in Issue 10A -- is that FPL is seeking to have the Commission essentially approve this expenditure in the guise of a modification to what it characterizes as an existing set of prior approvals for NPDES permit renewals applicable to (what it contends are) all of its Florida plants. This is a concern for two reasons.

Initially, the Citizens object to the use of blanket future approval of any environmental expenditure as an element of proof for recovery of the cost of a stand-alone project – especially when the blanket approval is based on the mere labeling of certain endeavors as a "Project." As characterized in the petitions (EX 50, p. 10) supported by Mr. Sole's testimony:

> In 2011, this Commission approved the NPDES Permit Renewal Requirement Project to allow recovery of costs incurred to meet NPDES permit requirements for all of FPL's Florida plants. FPL requests a modification to the NPDES Permit Renewal Requirement Project to allow recovery of costs incurred to meet anticipated NPDES permit conditions and compliance schedules to be imposed on Plant Scherer by the Environmental Protection Division ("EPD") of Georgia's Department of Natural Resources. It is therefore reasonable to move forward with these steps now to provide EPD assurance that Plant Scherer's discharge will be protective of the WQS under its renewed NPDES permit.

This linkage or superficial grouping based on naming conventions or facial similarity undermines the analysis required by the statute and can cause discrete expenditures to be bootstrapped (for prudence approval) to projects that have only superficial – if any – connection.

Additionally, Plant Scherer is a Georgia plant and the claimed attributes of the contingent potential NPDES condition requirement is not the same element of environmental regulation (through the NPDES conditions that the supposed blanket Florida plant covers). TR 329. Effectively, FPL's requested modification is two-steps removed from fitting into the conditions of the Order No. PSC-20111-0553-FOF-EI ("2011 Order") cited by FPL – since that order applies to Florida environmental regulations and specifically to two CWA provisions which are not applicable to the possible copper exceedances at the Georgia plant. TR 329. [1]

[1] Order No. PSC-20111-0553-FOF-EI at 8 contains a stipulation (apparently "type 2" where the OPC did not participate but did not object) that reads:

> Yes. This project is designed to comply with the Federal Clean Water Act, which requires all point source discharges to navigable waters from industrial facilities to obtain permits under the National Pollutant Discharge Elimination System (NPDES) program. (33 U.S.C. Section 1342) NPDES permits must be renewed every five years. The FDEP has been delegated authority by the EPA to implement the NPDES program in Florida. The FDEP has amended Rule 62-620.620 (3), F.A.C., to require that all new or renewed wastewater discharge permits for major facilities, including power plants, contain whole effluent toxicity (WET) limits. Additionally, the FDEP has required that facilities prepare a Storm Water Pollution Prevention Plan (SWPPP) that conforms to Rule 62-620.100 (m), F.A.C., and 40

At this time, the Citizens further object to the Commission giving the Georgia expenditures even preliminary approval under the modification proposed in the March 5, 2018 petition. The projects are completed. The only issue is where they are recovered – through existing base rates or as specific compliance measure required by an existing environmental requirement. The project has been completed or substantially completed. TR 405; EX 50, p.12.There is no urgency to have approval occur now as the speculated-upon NPDES renewal requirements are not precisely known or demonstrated to the Commission.

If the Commission nevertheless makes a finding and decides to give preliminary approval to the expenditures, it should only do so based on evaluation and consideration of the testimony and evidence submitted in this docket based on a plain reading of the ECRC Statute. The Citizens believe that a stand-alone, record basis for this type of finding would be preferable to reliance on a prior supposed policy from the 2011 Order. Any reliance on the 2011 Order as a part of a previously approved "project" (or modification thereof) as a substitute for an element of proof required by the ECRC Statute would invite a challenge that the Commission exceeded its authority under the ECRC statute as it would constitute pre-approving or presumptively approving a project

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> CFR Part 122.44(k) when their NDPES permits are renewed. **The proposed project is associated with these new requirements for WET monitoring and reporting, as well as for preparing Storm Water Pollution Prevention Plans that are or will be contained in the latest renewals for FPL's NPDES permits**. The WET testing requirements of the project will be on-going. The estimated 2011 and 2012 O&M cost for compliance with the new WET testing requirement is approximately $77,000. The SWPPP activities of the proposed project are expected to be c9mpleted by 2014 and the current estimates of the total expenditures are $100,000 in O&M costs. The estimated 2011 and 2012 O&M costs for the development of SWPPPs at FPL's facilities are approximately $30,000. FPL's proposed project meets the criteria for cost recovery established by the Commission in Order No. PSC-94-0044-FOF-EI. In addition, FPL's compliance with the NPDES permit is legally mandated under a governmentally imposed environmental regulation. (Emphasis added).

solely by way of the use of jargon or nomenclature that does not substitute for the clear elements of the ECRC statute.

To the extent the Commission finds the Plant Scherer cooling tower packing replacement to be recoverable on a stand-alone basis, the Citizens would be less likely to challenge the outcome on appeal to the extent the Commission clearly makes the requisite findings required by the ECRC Statute based on the evidence in the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Citizen's Post-Hearing Brief has been furnished by electronic mail on this 16th day of November, 2018, to the following:

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