

Ruth Nettles

From: WELLS, KATHY [KATHY.WELLS@fpl.com] on behalf of Butler, John [John.Butler@fpl.com]
Sent: Monday, November 10, 2008 2:33 PM
To: Filings@psc.state.fl.us
Cc: 'miketwomey@talstar.com'; 'jbeasley@ausley.com'; 'lwillis@ausley.com'; 'jas@beggslane.com'; 'rab@beggslane.com'; 'srg@beggslane.com'; 'jbrew@bbrslaw.com'; 'jmcwhirter@mac-law.com'; 'nhorton@lawfla.com'; 'Cecilia.Bradley@myfloridalegal.com'; 'Kelly.jr@leg.state.fl.us'; 'burgess.steve@leg.state.fl.us'; Charles Beck; 'john.burnett@pgnmail.com'; Lisa Bennett; Keino Young; Jean Hartman; 'swright@yvlaw.net'; 'javia@yvlaw.net'; 'shayla.mcneill@tyndall.af.mil'
Subject: Electronic Filing - Dkt #080001 / FPL's Brief on Issues 5, 28 and 30A & Appendix
Attachments: Brief on issues 5 28 and 30A FINAL.doc; Brief on issues 5 28 and 30A FINAL.pdf; Appendix 1 - 10.14.08 Vote Sheet.pdf

Electronic Filing

a. Person responsible for this electronic filing:

John T. Butler, Esq.
700 Universe Boulevard
Juno Beach, FL 33408
561-304-5639
John.Butler@fpl.com

- b. Docket No. 080001 - EI
In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor
- c. The Document is being filed on behalf of Florida Power & Light Company.
- d. There are a total of 31 pages
- e. The document attached for electronic filing is the Brief of Florida Power & Light Company on issues 5, 28 and 30A with Appendix

John T. Butler
Senior Attorney
Florida Power & Light Company
(561) 304-5639
(561) 691-7135 Fax
John.Butler@fpl.com

DOCUMENT NUMBER-DATE

10479 NOV 10 8

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Fuel and Purchase Power Cost) Docket No. 080001-EI
Recovery Clause and Generating)
Performance Incentive Factor.) Filed: November 10, 2008

**BRIEF OF FLORIDA POWER & LIGHT COMPANY
ON ISSUES 5, 28 AND 30A**

Pursuant to direction given by the Commission on November 6, 2008 at the hearing in this docket, Florida Power & Light Company ("FPL") hereby submits its brief on Issues 5, 28 and 30A.

Issue 5: What are the appropriate projected net fuel and purchased power cost recovery amounts to be included in the recovery factor for the period January 2009 through December 2009?

FPL: Based on recent forecasts of natural gas and heavy oil prices for the remainder of 2008 and for 2009, FPL has determined that its projected fuel costs would vary by more than 10% from the fuel costs reflected in its September 2, 2008 petition. Accordingly, FPL proposes to file revised 2009 fuel factors as a mid-course correction by November 20, 2008 and asks that the Commission defer its decision to the December 2, 2008 agenda conference, where the Commission can first approve the September 2 factors and then approve the revised fuel factors as a mid-course correction thereto.

The fuel factors that FPL filed on September 2, 2008 reflected then-current fuel forecast information. In fact, a substantial portion of the decline in natural gas and heavy oil prices that has occurred since early summer peaks was captured by the August 4, 2008 fuel forecast that FPL used for its September 2 filing. Tr. 517 (Yupp). Nonetheless, FPL has continued to monitor weekly the changes in forward market prices for those fuels. Tr. 527 (Yupp). FPL has committed that, if that monitoring were to show that FPL's actual and projected fuel costs are likely to result in a projected true-up amount at the end of 2009 that exceeds 10% of the

projected fuel revenues that it would collect under the extant fuel factors, then FPL would promptly notify the Commission and propose whether to make a mid-course correction and, if so, the amount and timing of the correction. Tr. 528 (Yupp). This is the procedure approved by the Commission in Order No. PSC-07-0333-PAA-EI, issued in Docket No. 070001-EI on April 16, 2007.

Consistent with the foregoing, FPL has evaluated the variance from the fuel costs in its September 2 filing which is projected to result from the forward fuel prices published on Thursday, November 6, 2008. Based on that evaluation -- which used both single-day forward prices as well as trend data ending with that date -- FPL has concluded that FPL would exceed the 10% threshold for mid-course notification described in Order No. PSC-07-0333-PAA-EI. FPL intends to file formal notice of this variance with the Commission tomorrow.¹

FPL proposes the following procedure and timetable for implementing reduced fuel factors based on the current fuel forecast information. The Commission should defer ruling on Issue 5 and, accordingly, on FPL's 2009 fuel factors (Issues 6 and 8) when it re-convenes proceedings in this docket on Wednesday, November 12. FPL will file reduced 2009 fuel factors and all supporting schedules by Thursday, November 20, based on the forward fuel prices as of November 6. Those reduced fuel factors will be accompanied by a petition requesting Commission approval of the reduced fuel factors as a mid-course correction to the September 2 filing. FPL notes that the Commission has a regular agenda conference scheduled on December 2, 2008 and proposes that approval of the reduced fuel factors occur at that agenda conference.

FPL recognizes that approval of the reduced fuel factors at the December 2 agenda conference would occur slightly less than thirty days before those factors become effective at the

¹ FPL recognizes that Tuesday, November 11, 2008, is an official holiday and that the Commission Clerk's office will be closed that day. FPL intends to file and serve its formal notification electronically tomorrow, with the understanding that it will be treated as filed on the next business day -- Wednesday, November 12 -- under the Commission's procedures on electronic filing.

beginning of January 2009 and hence FPL that would not be able to provide a full thirty (30) days' notice of the new factors to customers. However, the Commission has previously found that providing thirty (30) days' notice of a mid-course correction is not mandatory. *See, e.g.,* PSC-03-0381-PCO-EI, Docket No. 030001-EI, dated March 19, 2003. FPL believes that a minor deviation from the practice of providing thirty (30) days' notice is appropriate here, particularly where the fuel factors resulting from the mid-course correction will reduce customers' bills.²

Although it is unusual for a utility to request a mid-course correction to fuel factors shortly before those factors even go into effect, FPL believes that such a measure is warranted under the circumstances. Indeed, this situation only highlights the extreme volatility that characterizes today's fuel markets, especially for natural gas which comprises approximately 65% of FPL's total projected fuel costs. FPL believes that the procedure described above is the best way to respond in the short term to the impact of that extreme volatility on FPL and to provide relief to customers in the near term. However, FPL and the Commission may need to consider looking prospectively at methodologies and the frequency with which utilities should adjust their fuel factors to address under-recovery or over-recovery conditions.

Issue 28: What are the appropriate capacity cost recovery factors for the period January 2009 through December 2009?

FPL: For FPL, the appropriate capacity cost recovery factors for the period January 2009 through December 2009 are as stated in Order NO. PSC-08-0726-PHO-EI, dated October 31, 2008, the prehearing order in this docket.

Issue 30A: Has FPL included in the capacity cost recovery clause, the nuclear cost recovery amount ordered by the Commission in Docket No. 080009-EI?

² The purpose of providing thirty days' notice is to allow customers to be aware of changes in their electric rates and to budget and adjust their usage accordingly. This is clearly much more of an issue when revised fuel factors will result in customers paying more than when they result in customers paying less. *See* Order No. PSC-03-0381-PCO-EI at 10.

FPL: Yes. Consistent with the Commission's vote on October 14, 2008, FPL has included \$220,529,243 as the nuclear cost recovery amount to be recovered through the 2009 capacity cost recovery factors.

There should not be an open issue in this docket about the timing of FPL's collection of the nuclear cost recovery ("NCR") amount ordered by the Commission in Docket No. 080001-EI, as the Commission has already definitively determined – consistent with its NCR rule and the statute authorizing the NCR – that \$220,529,243 is the NCR amount that is to be recovered in 2009 through the capacity cost recovery clause.

Both the precise NCR dollar amount and the timing of its collection were addressed and decided recently in Docket No. 080009-EI. The prehearing order in that docket identified for determination the following "summary issue" after setting out a series of issues covering the details of FPL's recoverable NCR amounts for 2007, 2008 and 2009:

ISSUE 12: What total amount should the Commission approve for the Nuclear Cost Recovery Clause to be included in establishing FPL's 2009 Capacity Cost Recovery Clause factor?

Order No. PSC-08-0581-PHO-EI, Docket No. 080009, dated September 8, 2008, at p. 47. On October 14, 2008, following two days of hearing in which several parties including FIPUG and AARP participated, the Commission voted on the issues that had been identified for resolution, including Issue 12. The Commission approved the following Staff recommendation with respect to Issue 12:

The Commission should approve \$220,529,243 as the total amount to be included in establishing FPL's 2009 Capacity Cost Recovery Clause factor. A determination of prudence should be deferred until the 2009 nuclear cost recovery cycle consistent with the parties' stipulation.

See October 14, 2008 vote sheet, attached hereto as Appendix 1. Thus, the Commission definitively determined the NCR amount to be recovered -- \$220,529,243 -- and the mechanism and timing of its recovery -- FPL's 2009 Capacity Cost Recovery Clause factor. FIPUG's and

AARP's belated request that the Commission defer some portion of this NCR amount for recovery later is nothing more than a collateral attack on a Commission decision made less than a month ago in a docket where they actively participated. Their request would run rough shod over well-established principles of administrative finality and should be rejected. *See, e.g., Peoples Gas System, Inc. v. Mason*, 187 So.2d 335 (Fla. 1966).

FIPUG's and AARP's request also would require the Commission to act in direct contradiction to its own rule on how and when NCR amounts are to be recovered. The Commission's NCR rule provides for utilities to recover the following through the capacity cost recovery clause (subject to true-up on all projected costs): prudently incurred actual pre-construction costs and carrying charges on construction costs for the prior year; reasonable estimated/actual pre-construction costs and carrying charges on construction costs for the current year; and reasonable projected pre-construction costs and carrying charges on construction costs for the upcoming year. *See* Rule 25-6.0423 (5)(c), F.A.C. That is exactly what the Commission approved in Docket No. 080009-EI, and this proceeding is precisely where the NCR rule provides for such costs to be recovered. *See* October 14 vote sheet; Rule 25-6.0423(5)(c)(3), F.A.C. For the Commission to decide to impose a different form or timing of recovery for FPL's approved NCR amount would constitute agency action in contradiction of the agency's (*i.e.*, this Commission's) own valid rule, which is prohibited under the Florida Administrative Procedure Act. *See, e.g., Vantage Healthcare Corp. v. Agency for Health Care Administration*, 687 So.2d 306 (Fla. 1st DCA 1997).

Finally, the Commission's actions in approving recovery of \$220,529,243 through FPL's 2009 Capacity Cost Recovery Clause factor are fully consistent with Section 366.093, Florida Statutes, which directs the Commission to "... establish, by rule, alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of

a nuclear power plant.” §366.93(2), Fla. Stat. (2008). FIPUG and AARP have tried to argue that the term “incurred” does not refer to recovery of projected costs. However, as Staff pointed out, “incurred” is commonly defined as becoming “liable for.” *See, e.g., American Heritage Dictionary of the English Language, Fourth Edition (2006).* During 2009, FPL is or will become “liable for” all of the 2007-2009 NCR costs and carrying charges that the Commission has authorized FPL to recover through the 2009 capacity cost recovery factor, at the time those costs are incurred. Moreover, the use of the term “incurred” is not new in describing costs that the Commission authorizes utilities to recover on a projected basis. Section 366.8255 (1)(d) of the Florida Statutes defines environmental costs that utilities may recover as follows:

“Environmental compliance costs” includes all costs or expenses *incurred* by an electric utility in complying with environmental laws or regulations

(Emphasis added). As the Commission is well aware, utilities have used projections to determine the environmental costs to be recovered, subject to true-up, through the Commission’s Environmental Cost Recovery Clause for over fifteen years pursuant to Section 366.8255. Clearly, the Legislature would have been aware of the statutory environmental cost recovery mechanism -- and the Commission’s implementation of that mechanism -- when it enacted Section 366.93 in 2006. *See, e.g., Knowles v. Beverly Enterprises-Florida, Inc., 898 So.2d 1 (Fla. 2004); Cannella v. Auto-Owners Ins. Co., 801 So.2d 94 (Fla. 2001)*

For all of these reasons, FPUG’s and AARP’s suggestion that the Commission can and should decide now to defer part of the approved NCR amount for recovery after 2009 should be firmly and unambiguously rejected. This is the first year of nuclear cost recovery under Section 366.93. The Commission’s actions are being watched closely by the investment community, which remains only cautiously optimistic about utilities embarking on a new wave of nuclear construction. Much of that wariness stems from what was perceived as shifting regulatory standards and commitments the last time around. Nothing would send a worse signal at the

outset of these new construction projects than an abrupt, unjustified and improper reversal of course on a recovery decision that the Commission has already made. This is especially true in light of the current volatile and uncertain state of the financial markets. Whatever the short-term attractiveness of deferring costs until later, Florida would be ill-served by doing so. The deferred amounts would just compound the impact on customers of recovering more substantial nuclear project costs in later years, and at the same time increase the challenges -- and cost -- of accessing the capital markets that will be essential to those projects. In short, whatever its superficial appeal, FIPUG's and AARP's proposal is truly a "lose-lose" proposition that cannot and should not be taken seriously.

Conclusion

In conclusion, for the reasons discussed above, FPL requests that the Commission defer a decision on Issues 5, 6 and 8 (*i.e.*, the appropriate projected net fuel and purchased power costs to be recovered in 2009 and the resulting 2009 fuel factors) to the December 2, 2008 agenda conference, where the Commission should first approve FPL's September 2 fuel factors and then approve FPL's revised fuel factors as a mid-course correction thereto. In order to make a final determination on Issues 5, 6 and 8 at the December 2 agenda conference, the Commission also needs to decide Issue 13C (*i.e.*, recovery of replacement power costs associated with the 2006 extended outage at Turkey Point Unit 3 as a result of a drilled hole in the pressurizer piping) at or before that agenda conference. The hearing on Issue 13C is to be concluded on Wednesday, November 12, 2008, and the Commission should either rule on Issue 13C by a bench decision at that time or set an accelerated briefing schedule that will permit the issue to be resolved at the December 2 agenda conference. Finally, FPL requests that the Commission rule on Wednesday, November 12, in support of FPL's position on Issues 28 and 30A related to recovery of the

previously approved nuclear cost recovery amount through the 2009 capacity cost recovery factors.

Respectfully submitted,

R. Wade Litchfield
John T. Butler
Attorneys for
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420
Telephone: (561) 304-5639
Facsimile: (561) 691-7135

By: /s/ John T. Butler
John T. Butler
Fla. Bar No. 283479

CERTIFICATE OF SERVICE
Docket No. 080001-EI

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Brief on Issues 5, 28 and 30A has been furnished by electronic delivery on this 10th day of November 2008, to the following:

Lisa Bennett, Esq.(*)
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

J. R. Kelly, Esq.
Steve Burgess, Esq.
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399

Lee L. Willis, Esq.
James D. Beasley, Esq.
Ausley & McMullen
Attorneys for Tampa Electric
P.O. Box 391
Tallahassee, Florida 32302

John T. Burnett, Esq.
Progress Energy Service Company, LLC
P.O. Box 14042
St. Petersburg, Florida 33733-4042

John W. McWhirter, Jr., Esq.
McWhirter Reeves
Attorneys for FIPUG
P.O. Box 3350
Tampa, Florida 33601

Norman H. Horton, Jr., Esq.
Floyd R. Self, Esq.
Messer, Caparello & Self
Attorneys for FPUC
P.O. Box 1876
Tallahassee, Florida 32302-1876

Jeffrey A. Stone, Esq.
Russell A. Badders, Esq.
Beggs & Lane
Attorneys for Gulf Power
P.O. Box 12950
Pensacola, Florida 32576-2950

Michael B. Twomey, Esq.
Attorney for AARP
Post Office Box 5256
Tallahassee, Florida 32314-5256

Office of Attorney General
Cecilia Bradley
Capitol-PL 01
Tallahassee, FL 32399-1050

James W. Brew
Brickfield, Burchette, Ritts & Stone, The P.C
1025 Thomas Jefferson Street, NW
Eight Floor, West Tower
Washington, DC 2007-5201

R Scheffel Wright/ John Lavia
Florida Retail Federation
225 South Adams Street # 200
Tallahassee, FL 32301

Shayla L. McNeill, Capt. USAF
Karen S. White
AFLSA/JACL-ULT
Atty for the Federal Executive Agencies
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319

By: /s/ John T. Butler
John T. Butler
Fla. Bar No. 283479