BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Nuclear Cost Recovery Clause.	DOCKET NO.: 100009-EI FILED: September 10, 2010

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CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF

Pursuant to Order No. PSC-10-0538-PHO-EI, issued August 20, 2010, the Citizens of the State of Florida, by and through the Office of public ("OPC"), hereby submit their Post-Hearing Statement of Positions and Post-Hearing Brief.

PRELIMINARY STATEMENT

The OPC submits this brief asking the Commission to take the following actions in this 2010 phase of the ongoing NCRC docket:

1. Apportion risk to Progress Energy Florida, Inc. (PEF) by deferring recovery of $62.6 million of the $147.7 million in revenue requirements that PEF seeks to recover from customers in 2011. This would require PEF to provide further justification regarding the reasonableness and/or prudency of continuing to seek to have customers pay the for LNP project under the Company's approach of continuing the project such as it is in its currently suspended state.

2. Disallow $6 million of costs associated with the Company's inadequate efforts to prepare an acceptable LAR for the CR3 EPU project.

3. Make no finding in this round of proceedings regarding the prudency of 2009 EPU costs associated with an unexplained and unjustified $52.8 million increase in the project budget.

4. Open a separate docket or direct that a specific issue be included in this cost recovery docket addressing the reasonableness of the costs and the prudency of the Company's approach to the overall budgeting and adherence to the budget for the EPU project.

OPC'S STATEMENT OF BASIC POSITION

PEF is seeking recovery of costs for two large nuclear-related projects. Each project is being submitted for approved recovery of costs before any of the related electricity is ever generated. Each project has varying degrees of uncertainty that place ratepayer funds at increased risk.

The Levy Nuclear Plant (LNP) Project is now projected to be delayed for at least 5 years beyond the Commercial Operation Date (COD) identified in the Determination of Need order. See, Order No. PDC-08-0518-FOF-EI, Issued August 12, 2008 in Docket No 080148-EI, *In Re: Petition for determination of need for Levy Units 1 and 2 nuclear power plants, by Progress Energy Florida, Inc.* (Need Order). OPC has grave concerns about the impact on customers of the Company's chosen option of pursuing little more than the Combined License (COL) while essentially "mothballing" the rest of the previously planned construction component of the project. In light of the significant risks that PEF claims have caused the self-imposed five-year delay, the Commission should hold PEF to a heavy burden of demonstrating that additional customer funds can be prudently spent on a project with a highly uncertain future.

Cancellation of the project at this time –thought not advocated by the OPC- would cost the customers less than $300 million. Cancellation after three years (which the company says was not enough time to let the uncertainties surrounding the plant resolve themselves) would cost between $400 – 450 million. The Company has described these

incremental costs as clearly insignificant, yet has also testified that they will not willingly bear any of the risk of losing the value of those dollars and would not likely proceed with the project if they did not have the full benefit of the advance recovery statute.

Because a decision that could reasonably increase the cost of the original $17 billion project nearly 50% has only been publicly disclosed by PEF for less than four months as of the close of the record, the Commission should not act hastily or artificially bind its decision-making to the terms dictated by PEF's timing of its decision making and public announcement. The Commission should instead require PEF to further justify its chosen options, further explicate the risks facing the project and its own managements decisions and motivations for the five-year delay and also demonstrate that advance-paying ratepayers have been given the appropriate priority in the decision making process. Additionally, the Commission should conservatively defer cost recovery of at least $62.1 million into the 2012 billing cycle proceeding and thereby effectively place recovery of a material amount of near-term LNP-related costs at risk pending further analysis of the likelihood of continuing with the LNP.

With regard to the CR3 Extended Power Uprate (EPU), PEF will have spent over two-thirds of the total cost of the project before the License Amendment Request (LAR) will have been filed with the NRC. This introduces a significant degree of risk into the overall viability of the EPU project with regard to the projected increased power level of the plant. PEF should be held accountable for the decision that it made regarding the timing of the licensing relative to the expenditure of advance payment ratepayer funds.

The Commission should to remind PEF that its decision related to the timing of expenditures relative to the NRC decision on its yet-to-be-submitted (LAR) is still subject to a prudency review based on the facts and circumstances known to the company management at the time they decided to spend customer-provided funds. The OPC also believes that certain costs related to the preparation of the LAR and other increases in project cost may be imprudent and or inadequately justified and should be disallowed for advance recovery or subject to further scrutiny.

Issues 2, 3 and 7 relating to LNP will be briefed jointly as the issues are inextricably bound together. Issue 3A is also briefed with respect to both Florida Power & Light (FPL) and PEF. Issues 4 and 5 related to the CR3 EPU will also be briefed jointly as they are inextricably related.

ISSUE 2: **Do PEF's activities 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.?**

Possibly not. The LNP project may no longer meet Section 366.93, Florida Statutes, and requirements for advance recovery. The evidence shows that in contrast to prior assertions, PEF is reversing course and is not actively pursuing the construction of a nuclear power plant nor actively investing in nuclear generation. The Commission should further evaluate whether advance recoverability of costs incurred after the May 1, 2010, announcement to suspend the construction of LNP at least 5 years is appropriate

ISSUE 3A: **Does the Commission have the authority to require a "risk sharing" mechanism that would provide an incentive for a utility to complete a project within an appropriate, established cost threshold? If so, what action, if any, should the Commission take?**

Yes. The Commission has broad authority to insure that the purpose and intent of the rule and statute are met in order to protect customers from imprudence. The statute and rule allow the Commission to keep costs from escalating to unfair dimensions that would require customers to bear all of the risk when the existing projects face significant uncertainty. For LNP, the Commission can utilize the specific provisions of the rule implementing the statute to customers.

ISSUE 7: Is PEF's decision to continue pursuing a Combined Operating License from the Nuclear Regulatory Commission for Levy Units 1 & 2 reasonable? If not, what action, if any, should the Commission take?

PEF has not demonstrated that in choosing its proposed option, it has evaluated, with the customers' best interests in mind, all scenarios associated with the five year delay in the proposed commercial operation date of what remains of the LNP Project. The Commission should defer until at least the 2012 billing/recovery period, 75% or $62.6 million of the 2010 and 2011 costs at issue in this proceeding.

ARGUMENT

As an initial matter, Issue 3A presents the question of the authority of the Commission to design and implement a risk-sharing mechanism for the nuclear projects of FPL and PEF. With respect to FPL, no specific mechanism has yet been presented; only the issue of the Commission's authority to consider the concept. With respect to PEF, within this brief OPC will propose a specific risk-sharing mechanism based on Rule 25-6.0423, F.A.C. that, if adopted, could provide an incentive to PEF to control costs of, and make a more customer-focused decision regarding, its proposed new Levy nuclear units.

When assessing its authority to consider and implement a risk-sharing mechanism, the Commission must be mindful of the broad authority and discretion that appellate courts have seen in the statutory and regulatory framework in which this issue

arises. For instance, in the case of Storey v. Mayo, 217 So.2d 304(Florida, 1968), the Florida Supreme Court stated:

> The powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law.

And, in the case of Richter v. Florida Power Corporation, 366 S.2d 798 (Fla. 2d DCA, 1979), the court said:

> Chapter 366, Fla. Stat. . . .embraces the statutory regulation of public utilities. In s 366.01 the legislature has mandated that the regulation of public utilities "is declared to be in the public interest and this chapter. . .shall be liberally construed for the accomplishment of that purpose". . . . The decisional law of Florida attests to the comprehensive character of the PSC's authority in the field of utility regulation. (citing Storey v. Mayo, supra.)

To find support for the view that the Commission has broad authority and discretion in the manner in which it regulates the electric utilities subject to its jurisdiction, one need go no farther than the utilities' own acknowledgements—made whenever the broader view of the Comission's powers and authority suits their purposes. For example: In Order No. PSC-05-0187-PCO-EI, issued in Docket No. 041291-EI on February 17, 2005, (2005 WL 491359), the Commission noted the following about *FPL's* contentions regarding the extent of the Commission's authority:

> FPL contends that the Commission's ratemaking authority enables it to determine the rates and charges of public utilities and pursue public policy objectives . . . .
>
> FPL also argues that in establishing specific rules governing interim base rate relief, the Legislature cannot be presumed to have eviscerated the Commission's broad authority over rates and charges of jurisdictional utilities. One example cited is the fact that when the Legislature provided for the establishment of clause recovery for certain environmental costs, under Section 366.8255, Florida Statutes, it did not

> diminish the Commission's authority to institute other forms of cost recovery outside of base rates, including clauses and surcharges.

In this order the Commission determined, at FPL's urging and in the absence of explicit statutory authority on the subject, that it had the authority to permit the collection of monies subject to refund outside the limited context of base rate proceedings. Similarly, prior to any specific enactments by the Legislature on the subject, the utilities have invoked the Commission's "inherent authority" to approve territorial agreements City Gas Co. v. Peoples Gas System, Inc. 182 So. 2d (Fla. 1965) and interim rate increases in base rate proceedings Southern Bell v. Bevis, 279 So. 2d 285 (Fla. 1973.

Additional support for the view that the Commission is not precluded from considering a risk-sharing mechanism is found in the case of Gulf Power Company v. Bevis, 296 So.2d 482 (Fla. 1974). Following the enactment of Florida's first corporate income tax, the Commission developed a rule that provided that only the portion of the state corporate income tax necessary to prevent the utility from falling below the bottom of its authorized range would be treated as an operating expense. On appeal, the petitioning utilities argued that to prevent them from including all of the taxes as operating expenses would deprive them of an opportunity to earn a fair rate of return. The Court disagreed. It said:

> It is our view the claim of the Petitioners in this case that no'sharing' can be legally permitted is entirely too stringently Draconian and one-sided. There is no legal prohibition thereof in the absence of a clear showing of confiscation, i.e., a wholly inadequate return to the utility.

Similarly, OPC submits the position of the electric utilities on this case -- that is, that there can be no "sharing" of the risk of uncertainty regarding the hugely expensive nuclear projects -- is too stringently Draconian and one-sided. While the intent of the legislation directing the Commission to develop alternative ratemaking approaches to nuclear projects clearly was to encourage utilities to undertake such projects, OPC believes that intent may be implemented in a manner that ". . .seeks to balance the equities between the utility stockholders and the consumers. . ." See specially concurring opinion of Justice Boyd in Gulf Power, supra.

The OPC offers the above as support for the proposition that the Commission's powers are as broad to protect customers from runaway costs of nuclear construction. At the present time, the Commission need not consider invoking this authority since the FPL issues have been deferred and the OPC's requested relief can be grounded in the express language of Rule 25-6.0423, F. A. C. , as set out in the PEF-specific issues below.

In the 19th Century, Charles Dickens wrote A Tale of Two Cities. Between 2006 and 2010, PEF has presented "A Tale of Two Nuclear Plants" to this Commission for its consideration. No greater contrast between 2008 and 2010 regarding the likelihood of construction could be imagined short of outright cancellation. In 2008 PEF was urgently advocating accelerated Commission review so they could hurry up and get in line to buy the expertise and equipment and manpower needed to build a plant to meet what they then portrayed as looming deadlines. Today they are before this Commission with a project that is on hold, delayed five years, facing as much as a 50% increase in overall

costs, as well as mounting risks that the company has no control over and for which they cannot estimate an outcome or a timetable for resolution.

In 2008, PEF filed a "Need Determination Study" with the Commission. The final three pages portray an urgent and compelling sense of urgency about the need for the company to build two nuclear generating units to meet demand in 2016 and 2017. The Company pleaded with the Commission in the concluding paragraphs of the study to act upon what it characterized as "VI. ADVERSE CONSEQUENCES OF NOT BUILDING LEVY UNITS 1 AND 2," reading in part as follows:

***

> PEF must proceed with the need determination at this time to remain on schedule.
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> ***
>
> PEF must, therefore, obtain a need determination at this time to begin the site certification process and the procurement process for long lead items and engineering work to ensure that the nuclear units will be completed in time to meet the Company's reliability need in the summer of 2016 and the summer of 2017, respectively.
>
> ***
>
> A delay in approval of these units inevitably means higher costs if the Company proceeds with them but even more than that, the Company may lose its current place in the queue for the material and equipment necessary to place nuclear generation units in commercial operation in the time frame contemplated for Levy Units 1 and 2. The result may be a delay up to a decade or more beyond 2016 and 2017 before new nuclear generation can be added to the Company's generation system.
>
> There is considerable interest and thus demand in future nuclear generation in the United States and around the world but there are limited resources available to supply the material and equipment necessary to develop all planned future nuclear generation units. A utility with nuclear generation plans must therefore reserve and preserve its place in line for

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> the necessary material and equipment. A denial of PEF's need determination for Levy Units 1 and 2, or a delay in that need determination, may therefore displace PEF from being in position to place these units in operation in the time frame currently contemplated. This may delay new nuclear generation units for PEF up to or for more than a decade beyond 2016 and 2017.

Ex. 224, pp 100-102.

Even prior to that submission to the Commission, PEF had aggressively been moving toward construction of the plant. In 2007 PEF had already begun an effort to acquire thousands of acres upon which to build a nuclear power plant. Ex.227. This was obviously done in advance of even filing for the Commission's need determination. In 2007 PEF met with the Commission and interested parties to explain the LNP project, presumably in advance of the need filing. Ex. 223. In March 2008, PEF filed for a need determination from the PSC – a predicate for eligibility for advanced recovery under Section 366.093, Florida Statutes. Need Order at 2. During the hearing, the Company estimated that the average monthly residential ratepayer impact of the project would be approximately $54.00, based on a total project cost of $17.166 billion. T. 103; Ex. 190, (unnumbered pages 20, 22).

As further evidence of the aggressive nature of the effort to actually build two nuclear power plants, in March 2008, PEF signed a Letter of Intent, legally obligating them to pay for and acquire over [redacted] of Long Lead Materials (LLM) before even knowing if the Commission was going to grant the need determination. Ex. 77, p. 9. On July 30, 2008, PEF filed its Combined Operating and Licensing Application (COLA) with the NRC seeking authorization to build the LNP. Order No. PSC-09-0783-FOF-EI,

Issued November19, 2009 in Docket No. 090009-EI, *In re: Nuclear cost recovery clause,* (2009 NCRC Order), at 28. On August 12, 2008, the Commission issued its order finding a need for the LNP. On September 5, 2008, PEF approved an Integrated Project Plan (IPP) for the LNP, that [redacted] joint ownership and also indicated therein that efforts to begin "substantial construction" of the plant were anticipated pursuant to notice to the contactor in 3Q 2009. Ex. 229, (unnumbered p. 2). On December 31, 2008, PEF signed an Engineering, Procurement and Construction (EPC) contract for construction of the plant. 2009 NCRC Order at 28.

On January 23, 2009, the NRC informed PEF in a phone call that their construction timeline could not be met. *Id.* In April 2009, PEF suspended substantially all non licensing-related work and put the project on hold pending further decision about how and whether to proceed. Ex. 21, Ex. 77, p. 7. All work except for pursuit of the COLA and some strategic land acquisition and licensing and permitting work was halted at PEF's direction to the EPC contractor and the Consortium. Ex. 239, pp. 30-33. PEF announced in May 2009 that it would delay the inservice date of the LNP by at least 20 months due to the NRC action. Ex. 77, p. 7. The project remains on hold today. Ex. 209, (unnumbered pp 4-6).

During the pendency of the 2009 NCRC hearings PEF evaluated a 24 and 36 month delay scenario. Ex. 217, Ex. 220, Ex. 231, Ex. 77 (pp. 7-8). In September 2009, as the NCRC hearings and live testimony was concluding, PEF was preparing for a September 17-18, 2009 PGN Board determination about the delay scenarios. Ex. 236. In

the September - October 2009 timeframe, the PGN senior management and the PGN Board determined that even a minimum 36 month delay was insufficient. Ex 217, p.6.

In March 2010 PEF negotiated Amendment 3 to the EPC as described generally in the testimony of Jeffrey Lyash and John Elnitsky. PEF did not announce the decision on the 5 year minimum delay until April 30, 2010, less than four months before the annual hearing.

Extensive testimony was provided by Company and Intervernor witnesses on the enterprise risks – risks outside the Company's control – that drove the decision to delay an additional two years beyond the 36 month timeframe that seemed likely a few months earlier in the summer of 2009. The PGN Board and senior management reviewed extensive information about protecting company capital and reducing near term cash flow and preserving corporate goals regarding financial metrics. Ex. 220; Ex. 30. Notably, PEF also placed an accountant in charge of the day-to-day administration of the project instead of the nuclear engineer that was in charge when the project was in a construction mode. T. 575-576; Ex. 208, 212. She testified that she would not be overseeing any construction at the site. T. 576. No PEF witness could testify that the LNP project would be built.

Today, the project is on hold for at least 5 years and any safety related construction cannot be undertaken until at least three steps occur: (1) the NRC must issues the COL (Combined Construction and Operating License) (believed likely to be no sooner than January 2013 by PEF management); (2) The PGN Board must vote to

authorize management to give notice to the EPC contractor to restart the work, and (3) the notice then must be given to the contractor. PEF has testified that this process will not likely take place until 2013 at the earliest, if at all. T. 1179, Ex. 239, p. 106.

At the present time, PEF has estimated that the project will cost $22 billion due to 5-year delay (T. 1180; Ex. 6, p. 4) which would yield a typical residential ratepayer impact of $67.71 (Ex. 188, T. 104) compared to the impact that the Commission was told just two years earlier would be $54.00. The Company has acknowledged that the estimate of costs could increase to as much as $25 billion (T. 1180) which mathematically would yield a monthly bill to the typical residential customer of $77.00 (67.71 x 1.136 = $76.91) T. 1181; Ex. 214.

Perhaps most significantly, in the face of enormous cost escalation, enterprise risks and overall uncertainty, the project has no joint owners. There is extensive evidence in the record that joint ownership was and remains critical to the viability of the LNP project. Ex. 190 (unnumbered pages 44-54); Ex.227 (joint ownership percentage to be determined in December 2007); Ex. 225 (conditions to proceed include "appropriate level of joint ownership"); Ex. 226 (describing aggressive joint ownership activities that are at a near standstill after the delays announced in 2009 and 2010); Ex.228; Ex. 229 joint ownership expected to be as high as $7 billion); Ex. 230 (December 2008 LINC Committee document showing that joint ownership commitments were expected in January 2009); Ex. 231 (March 23, 2009 Senior Management Committee (SMC) presentation [redacted]); Ex. 232 (March 23, 2009 SMC presentation – [redacted]

[redacted]); Ex. 233; Ex. 234; Ex. 236 (PGN Board noted in September 17-18 meeting that [redacted] are a [redacted]; Ex. 237 (June 17, 2009, SMC presentation [redacted] p. 13); Ex. 238.

Clearly, in PEF's mind, joint ownership was and is ***critical*** to the viability of the plant. PEF witness Lyash conceded at hearing that the current level of joint ownership activity has lessened. T. 1182. Meanwhile, the only two American nuclear reactors under construction – Vogtle in Georgia and Summer in South Carolina – have joint ownership levels approaching 50% or more. T. 741-742. Georgia Power expects that Vogtle will yield a monthly residential average bill impact of around $9. *Id.*

OPC witness, Dr. Jacobs notes that PEF witness Lyash spends 30 pages describing in his testimony enterprise risks other than joint ownership. Dr. Jacobs and the Company witnesses are in general agreement regarding the enterprise risks that threaten the viability of the project. T. 710-714. Mr. Lyash described (T. 1039 - 1077) and acknowledged that these risks are relatively unchanged since he filed his testimony. Ex. 239, pp. 47-75. He also acknowledged that they played a crucial role in the board decision to order the project delayed by 5 years. Ex. 239, pp 49-50.

Dr. Jacobs testifies that by 2013 there will be no more clarity and certainty that the enterprise risks are acceptable to re-start the project. T. 711. He points out PEF has

not demonstrated that an additional 2-3 years will provide the degree of certainty necessary for the company to reach a decision to proceed with the Levy project even if and when the COL is issued. T. 711. Significantly, PEF witness Elnitsky agrees with Dr. Jacobs' assessment that the Company "cannot demonstrate at this time that there will in fact be more certainty with respect to these risks by the time PEF obtains the COL for the LNP and that it is equally likely today that these risks will increase as opposed to decrease by that future date." T. 893.

Dr. Jacobs points out that this level of uncertainty means that the Company should have more seriously considered the cost to customers in the potentially likely outcome where company would ultimately cancel the project after obtaining the COL. The Company ultimately provided this analysis and showed that customers could be required to spend between $400 - 450 million. T. 932-933; Ex. 86. The Company essentially scoffs at the importance this cost to the customer to keep the project alive, referring to it as "clearly insignificant." T. 1120. Nevertheless, PEF declines to share in these insignificant costs even in light of the risks that have caused them to place a self-imposed 5 year minimum hold on the project. Ex. 239, p.125. Witnesses Gunderson and Cooper point out similar concerns about the risk, lack of certainty and unfairness to customers being required to pay for merely having an option to build or holding a place in the licensing line. T. 635-641; 681-686.

PEF testified that if the project were to be cancelled as of October 1, 2010 the total additional cost to completely exit the project would be less than $300 million. T. 931; Ex. 216. The cost to continue under the chosen option of pursuing the COL while

putting the project on hold is between $400 and $450 million. The overall cost of the project could be as high as $25 billion, with a customer bill impact that could reach $77.00 per month for the average residential customer.

Against this background, two related issues arise in the view of the OPC. First, under the five year minimum "on–hold" status of the project, is PEF still eligible for recovery under the statute? Second, assuming PEF is still eligible, what remedy does the Commission have to minimize the impact on customers while the company makes its mind up whether to proceed as it evaluates the enterprise risks that have impacted the project?

The OPC concedes for purposes of this year's round of the ongoing NCRC proceedings that the commission may reasonably find at this time that the project may possibly remain eligible under the evidence presented so far. However, given the question about the applicability of the statute and the fact that the company has far less certainty about the eventual completion of the project, the Commission should look within the statute and its implemental rule for a mechanism to allocate the risks in a way that is fair since the Company's own actions now acknowledge that the risks are seriously affecting the schedule, potential success and cost of the project. The thrust of the Company's testimony is that it is unwilling to commit its own billions of dollars to the project in this next three years. T.961-964. Even so, PEF wants authorization to commit an amount approaching $450 million of the customers' money that it calls "clearly insignificant" to the continuation of a project that it may never re-start.

The Company also very frankly acknowledges that in the current environment the Commission could reach a different determination about the level of risk facing the project. T. 1187-1188, Ex. 239, 114-117. In fact, witness Lyash – a member of the SMC - bluntly concedes this:

> ... I recognize that the Commission could look at the fact, the same facts and reach a different conclusion. The project is not feasible, perhaps ought to be canceled. That would not be an unreasonable decision. I think a reasonable individual could come to a different place than I and the company come to. We don't view that it is the right decision to take, and we don't view it as the optimal decision for our customers in Florida. But I acknowledge it is a decision that could be reasonably made by the commission.

T. 1186-1188. See also, Ex. 239, pp. 114-117.

Under these circumstances the OPC simply requests that the Commission protect customers from further hasty expenditures of a stalled project that has such a tepid endorsement by senior management and utilize the mechanisms of the statute to allocate an increased level of the financial risk of the project to the Company, while all parties and the Commission gain further clarity on the enterprise risks and ultimate likely fate of the LNP project.

The OPC believes a review of the statute and Commission's rule demonstrates the close linkage between the legal issue regarding the applicability of advanced recovery to the unique circumstances of this project and the need to allocate risk of going forward more fairly.

Section 366.093(2), Florida Statutes provides for the establishment of the nuclear cost recovery clause by stating that it exists:

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> [F]or the recovery of costs incurred in the siting, design, licensing, ***and*** construction of a nuclear power plant...

The Legislature clearly wanted that the entire advance recovery effort to conclude in the tangible construction of a nuclear power plant. That section further declares that the clause

> [S]hall be designed ***to promote utility investment in nuclear*** or integrated gasification combined cycle ***power plants*** and allow for the recovery in rates of all prudently incurred costs and shall include, but not be limited to:
>
> (a) Recovery through the capacity cost recovery clause of any preconstruction costs.

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The Commission noted this legislative intent in the Need Order at 22. In the associated determination of need provisions of Section 403.519(4)(b), the Legislature further mandated that:

> (b) In making its determination, the commission shall take into account matters within its jurisdiction, which it deems relevant, including ***whether the nuclear*** or integrated gasification combined cycle power ***plant will***:
>
> 1. ***Provide*** needed base-load capacity.
>
> 2. ***Enhance*** the reliability of electric power production within the state by improving the balance of power plant fuel diversity and reducing Florida's dependence on fuel oil and natural gas.
>
> 3. ***Provide*** the most cost-effective source of power, taking into account the need to improve the balance of fuel diversity, ***reduce*** Florida's dependence on fuel oil and natural gas, ***reduce*** air emission compliance

costs, and ***contribute*** to the long-term stability and reliability of the electric grid.

Emphasis added. Tangible benefits, not mere options are the desired income

The Legislature purposefully departed from many decades of ratemaking precedent by allowing advance recovery of costs if they would result in construction of, and investment in, a nuclear power plant that would generate tangible benefits to Florida and utility customers. However, there is no language in the statute that would expressly allow for advance recovery of costs that merely provide an option for a utility to exercise in the future. The current LNP project is no than such an option.

The Legislature provided further that

(6) If the utility elects not to complete or is precluded from completing ***construction of the nuclear power plant***, including new, expanded, or relocated electrical transmission lines or facilities necessary thereto, or of the integrated gasification combined cycle power plant, the utility ***shall be allowed to recover*** all ***prudent preconstruction*** and construction costs incurred following the commission's issuance of a final order granting a determination of need for the nuclear power plant and electrical transmission lines and facilities necessary thereto or for the integrated gasification combined cycle power plant. The utility shall recover such costs through the capacity cost recovery clause over a period equal to the period during which the costs were incurred or 5 years, whichever is greater. The unrecovered balance during the recovery period will accrue interest at the utility's weighted average cost of capital as reported in the commission's earnings surveillance reporting requirement for the prior year.

Emphasis added.

This language strongly evinces a legislative intent that the entire effort should be dedicated towards actual construction of the nuclear power plant. The governing statutes (Sections 366.93 and 403.519, Fla. Stat.) are consistently phrased in the active language

of "construction" and "investment" and the creation of benefits. It follows from this that the recovery scheme's authorization for recovery is solidly rooted in utility efforts that are affirmatively designed to accomplish these tangible acts. The Commission's discretion to find a dormant or inert effort and the associated costs imprudent is broad, especially as unanticipated fact scenarios are encountered as in the case of the LNP project.

This prudence determination discretion intent is nowhere so starkly evident as in Section 403.519(4)(E), Florida Statutes which provides that

> Proceeding with ***the construction of the nuclear*** or integrated gasification combined cycle ***power plant*** following an order by the commission approving the need for the nuclear or integrated gasification combined cycle power plant under this act ***shall not constitute or be evidence of imprudence***.

Emphasis added.

What this language reasonably means is that so long as the company is actively engaged in an effort to construct the nuclear power plant, that act alone cannot ever be evidence of imprudence. The inverse would equally apply. If a company is incurring costs and not actively engaged in the construction of a nuclear power plant then its actions and associated costs incurred would be subject to disallowance as imprudent.

The Commission is authorized to determine whether a company's actions are designed or not to actually construct a nuclear power plant that the utility would have an investment in and yield benefits from. Nothing in the recently adopted statutes changed the well established precedent that authorizes the Commission to make an interpretation

of a brand new statute. Any such interpretation would be entitled to great weight. Level 3 Communications v. Jacobs, 841 So. 2d 447, 450 ("An agency's interpretation of the statute that it is charged with enforcing is entitled to great deference.") *See* BellSouth Telecommunications, Inc. v. Johnson, 708 So.2d 594, 596 (Fla.1998). ("This Court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is "clearly unauthorized or erroneous.")

The OPC submits that the Commission can either find that the entire project no longer qualifies for recovery or determine that it should seek to work within the statute to protect customers from incurring expenditures that may be wasted.

The evidence in this year's proceeding comes very close to demonstrating an absence of any pursuit of construction that underlies the statutory basis for cost recovery. When contrasted to with the all out, aggressive effort of PEF that began in 2006, to acquire land, engage a construction consortium and begin the procurement and licensing process, PEF's efforts in place today are anemic at best and show very little effort towards actual investment in or construction of a nuclear power plant or achievement of the tangible benefits called for by the statute. The Company's testimony speaks of maintaining an option to have a nuclear power plant versus actually constructing a nuclear plant. T. 870; 1034; 1088; 1095; Ex. 232 (SMC presentation of March 16, 2009: "Maintain Levy as a viable option") The strategic objective of the PGN senior management underlying the decision to place the construction on hold is stated on March 8, 2010 as :

> ***Strategic Intent and Objectives:*** Given uncertainties in licensing schedules and other factors influencing development, minimize near term cash flow requirements while maintaining long term flexibility to continue or pursue nuclear development projects.

Emphasis in the original. T.707; Ex 22, p. 2.

Multiple times, the direct testimony of PEF's witnesses and other evidence refer to the project as the "nuclear generation option." The contract has no joint owners and no evidence that any potential ones are interested. The project is now being directly program- managed by a CPA as a contract rather than a nuclear engineer as a construction project. The Company acknowledges that a reasonable utility manager or decision maker such as a utility regulator could reasonably conclude that the project may face an unacceptable level of risk (and thus should be cancelled, for example). By analogy, a utility regulator could conclude that the level of risk is so great that if the company wants to continue with the project on the terms it has defined, then that continuation should be on as much of a customer-beneficial basis that the statute and rule allow.

The Commission's NCRC Rule allows the estimated and projected (true-ed up) revenue requirements that are to be preliminarily billed to the customers based on a determination of reasonableness. To the extent that such a determination is based on the level of the expenditures for the stated purpose, the OPC does not object to the Commission making such a finding. We do not take issue with the extensively documented efforts that the company undertook to minimize near term costs under the circumstances facing the company. To this end PEF is to be complimented.

However, with respect to who should bear the risk of those costs of going forward, the OPC recommends that pursuant to Rule 25-60423(5)(a) recovery of 2010 and 2011 related costs should be recovered over 2 years.

Rules 25-6-0423(5)(a), F.A.C. provides that:

> (a) Pre-Construction Costs. A utility is entitled to recover, through the Capacity Cost Recovery Clause, its actual and projected pre-construction costs. The utility may also recover the related carrying charge for those costs not recovered on a projected basis. ***Such costs will be recovered within 1 year, unless the Commission approves a longer recovery period. Any party may, however, propose a longer period of recovery, not to exceed 2 years.***

Emphasis added.

Pre-construction costs and site selection costs are defined in Rule 25-6.0423 (2) (f),(g), and (h) as follows:

> (f) "Site selection costs" are costs that are expended prior to the selection of a site.
>
> (g) "Pre-construction costs" are costs that are expended after a site has been selected in preparation for the construction of a nuclear or integrated gasification combined cycle power plant, incurred up to and including the date the utility completes site clearing work.
>
> (h) Site selection costs and pre-construction costs include, but are not limited to: any and all costs associated with preparing, reviewing and defending a Combined Operating License (COL) application for a nuclear power plant; costs associated with site and technology selection; costs of engineering, designing, and permitting the nuclear or integrated gasification combined cycle power plant; costs of clearing, grading, and excavation; and costs of on-site construction facilities (i.e., construction offices, warehouses, etc.).

Further, Rule 25-6.0423(5)(c)2, provides that

> 2. The Commission shall, prior to October 1 of each year, conduct a hearing and determine the reasonableness of projected pre-construction expenditures and the prudence of actual pre-construction expenditures expended by the utility; or, once construction begins, to determine the reasonableness of projected construction expenditures and the prudence of actual construction expenditures expended by the utility, and the associated carrying costs.

Rules 25-6.0423(5)(C)3, further provides that:

> 3. The Commission shall include those costs it determines, pursuant to this subsection, to be reasonable or prudent in setting the Capacity Cost Recovery Clause factor in the annual Fuel and Purchased Power Cost Recovery proceedings. Such prior year actual costs associated with power plant construction subject to the annual proceeding shall not be subject to disallowance or further prudence review.
>
> 4. The final true-up for the previous year, actual/estimated true-up for the current year, and subsequent year's projected power plant costs as approved by the Commission pursuant to subparagraph (5)(c)2. will be included for cost recovery purposes as a component of the following year's capacity cost recovery factor in the Fuel and Purchased Power Cost Recovery. The utility must file all necessary revisions to the fuel and purchased power cost recovery filings no later than October 15 of the current year.

These are the relevant provisions that define the types of costs that are related to 2010 and 2011 costs submitted for customer payment in this year's docket. The definition also includes the costs that make up the nearly $450 million costs that are shown on Ex 86.

Consistent with the testimony of Dr. Jacobs regarding the allocation of risk and based on the overwhelming and un-contradicted evidence of the stalled status of the project and the risks facing the project, the OPC recommends that the Commission only permit PEF to recover in 2011 its non-2009 and earlier costs, plus 25% of the 2011 estimated costs and the 2010 true-up costs. This means that the Commission should

authorize for 2011 recovery only $85.1 million -- consisting of the $60 million previously approved deferred costs, $4.2 million of 2009 costs true-up and 25% or $20.85 million of the 83.4 million of costs related to 2010 and 2011. The balance of the $147.7 million of LNP-related costs submitted for recovery in this docket or $62.6 million should be eligible for consideration of recovery from customers no earlier than 2012 if the commission finds in 2011 that PEF has a realistic chance of completing the plant in a manner than is beneficial to customers.

ISSUE 4: Should the Commission find that for the year 2009, PEF's accounting and costs oversight controls were reasonable and prudent for the Levy Units 1 & 2 project and the Crystal River Unit 3 Uprate project?

* With respect to the uprate projects, OPC believes there are indications of inadequate management and contracting oversight controls.*

ISSUE 5: Should the Commission find that for the year 2009, PEF's project management, contracting, and oversight controls were reasonable and prudent for the Levy Units 1 & 2 project and the Crystal River Unit 3 Uprate project?

* No. The Commission should put PEF on notice that its decision related to the timing of expenditures relative to the impending LAR is still subject to a prudency review. PEF has yet to demonstrate that the costs of the preparing the LAR are prudent and reasonable. The evidence indicates that excessive costs were incurred due to inadequate oversight of the preparation of the LAR.*

ARGUMENT

The Commission does not have a basis to determine whether the accounting and cost oversight controls were reasonable with respect to the cost overruns incurred in this docket. Similarly the project management, contracting, and oversight controls appear to

have been inadequate to control the costs and insure the quality of the primary contractor's preparation of the draft License Report (LR) for the LAR.

The original estimate for the overall project approved by senior management and the PGN Board was for $439 million which included $287.5 million for the direct on-site costs of the uprate. Included in that estimate was approximately $100 million for transmission costs that were quickly determined not to be needed. The total cost of the project at this time now is now estimated at $512 million. T. 391-397; Ex.9, p.9. In the September 2009 timeframe, during the time of the 2009 NCRC hearings, the project was quietly increased by $52.8 million with no explanation in the testimony filed by the company in that proceeding or in the 2010 filings. T. 131-132. Ex. 192, pp. 26-27. The Staff notes that this increase alone was 12% over the budget that was approved earlier in 2009. Ex. 77, p. 44. This comparison by staff did not take into account whether the transmission costs -- that were never really needed -- constituted a proper benchmark for cost increase comparison. T. 763. An internal PEF audit noted that the second phase of the uprate project came in 50% over budget. T. 769-77; Ex. 199. This type of internal audit was touted as an effective tool of the company in controlling costs. T. 6970; 361.

In 2009, the Company had a near disastrous incident related to the sloppy preparation of the EPU LAR. A highly critical internal review noted that the deficient work product by AREVA would delay PEF's ability to submit a proper LAR and cost the company significant resources. Ex. 197 (unnumbered p. 1).

Clearly the in-place controls are not as effective in controlling costs as PEF wants the Commission to believe. Even though the company continues to tout the overall cost-effectiveness of the project, the customers deserve better. In an advance recovery environment, the process should not be used to allow free-spending and careless stewardship of funds that will be quickly and "in-advance" recovered from customers so long as some mythical, non-binding budget, cost estimate or authorization is maintained and/or the project remains feasible. The availability of the NCRC should not be a green light for the company to spend and increase the budget without adequate review.

The overall budget and cost increases as well as the cost controls of PEF related to the CR3 EPU deserve more attention. The OPC believes that the cost overruns in this stage of the docket are a result of the company proceeding without a clear picture of what would really be needed to engineer, construct and license what they knew would be an unprecedented uprate of this B&W reactor using an inexperienced contractor and inexperienced PEF project team – at the time the decision was made to proceed. T. 146; Ex. 197.

OPC witness Dr. Jacobs has emphasized that the decision to sequence most of the EPU expenditures prior to fully understanding the licensing and engineering challenges of the project has essentially exposed the customers to greater risk that could have been reduced if the NRC licensing issues had been resolved. T. 721. The issue of significant cost increase is at least in part a function of this "spend first, license later" approach which was a decision that the company made in 2006 and (it must be emphasized) is not

attributable to the existing CR3 EPU project management team. The prudence of that 2006 decision is still in question and hopefully will be a moot point and the company will be ultimately successful in licensing the full 140 MW of the extended uprate. This issue needs more scrutiny and the Commission should establish a separate docket or a discrete issue in the 2011 docket to review all costs from 2009 forward for prudency, including the overall budgeting process and the effectiveness of the controls.

With respect to the LAR expenses which are related to the overall change in the project scope and budget, the OPC recommends that the Commission either defer the issue of the total 2009 and 2010 costs related to the re-write of the LAR in order to conduct further review or disallow $6 million.

The fundamental issue is this: was the cost associated with the expert panel, the LAR re-write and company staff costs excessive or duplicative based on sloppy work that PEF did not properly oversee. The evidence seems to more than demonstrate that the company was inattentive to the work of a contractor that PEF knew to be inexperienced and as a result extraordinary efforts and costs were incurred in the effort to fix the problem. PEF made its decision to initiate the CR3 EPU in November/ December 2006 at a time when it did not have full appreciation of the scope of the project, the cost of the project, the engineering complexity of the project, the likely cost of the project, the licensing challenges, the ability of its prime engineering contractor and its own licensing and engineering staff. PEF knew at the outset that AREVA was inexperienced. T. 447-448. PEF knew at the outset that its own staff dedicated to the project was inexperienced.

PEF knew this was the first EPU for a B&W reactor. Ex.197. Even though it had knowledge of all of these issues, PEF, by its own admission, failed to properly oversee and mange both AREVA and its own staff. *Id.* Astonishingly, there are no project management and oversight costs or licensing costs proposed to be absorbed by the Company. Over $41 million was spent on project management and licensing efforts (T. 325) that should have yielded better project oversight results. Ex.197. Despite the near-disaster (that was only mitigated by a serious un-related 11 month outage at the plant), every penny of the monitoring and license preparation costs are asserted to be prudently incurred.

The Commission should not swallow the contention that such a thoroughly deficient work product retained 100% of the value that PEF paid for and that the re-write that AREVA supposedly absorbed the entire cost of fixed the problem. Clearly the PEF internal and external reviews did not agree with this. The PEF internal review was scathing in its criticism of the quality of the AREVA LR draft as well as PEF's oversight of the effort.

The internal review was also highly critical that PEF did not devote the right company resources to the oversight of the EPU. They further noted that CR3 management "did not sufficiently monitor the quality, completeness, and content of the LAR sections as they were developed by AREVA and licensing personnel assigned to the EPU project." This is different from saying that not enough money was spent. PEF expects its customers to pay even when mistakes are made and have to be corrected. This

defies logic and should not be countenanced by a regulator that is watching these nuclear construction projects in an industry segment with a history of cost overruns. A strong signal should be sent that the Commission expects better.

Despite claims to the contrary, there is no documented evidence that the company intended to have the expert panel review the LAR work product. The project timeline does not show it. T. 416-417, Ex. 194 (unnumbered p. 7). The staff auditors asked for documentation and the company was unable to produce it. T. 771; see also, T. 414. In April 2009, the Company did tell the NRC that they were "establishing" an expert panel (T. 772) however, that is different for having planned one all along. In the 2009 proceeding, Witness Franke testified that the expert panel was "added." Ex. 206, p.89. The verb "added" is more consistent with the lack of documentation that expert panel was planned. There was no testimony from the Company showing the prior period estimates and projections of costs for 2009 included an amount for the expert panel.

After the panel advised PEF that the draft LR was so sloppy that it would not even pass initial review by the NRC, the proposed LAR submittal date was moved from September 2009 to February or March 2010. A company internal review concluded that the content and quality problems of the draft LR would "require significant time and resources to resolve." Ex. 197, (unnumbered pp.1-2). The re-write that ensued required work by both AREVA and PEF personnel. Ex. 80, pp. 1-4. Despite the company's assertions to the contrary, the millions of dollars represented by the ARREVA contract amendment indicate that extensive work had to be done to untangle the mess that was the

original draft (see discussion on Ex. 80, p. 3) and that hundreds of thousands of dollars in "high-level" employees were needed to assist in additional expert panel reviews of the original sloppy work. The company made no adjustments to the request for any of these costs. Additional LAR re-write or recovery dollars are identified in Ex. 121. Also, the significant company resources that an internal review concluded would be needed to assist with the re-write do not appear to be identified. Nevertheless they are included in the request for recovery. T. 121.

The OPC recommends that if the issue is not continued, that the Commission disallow $6 million representing the rough aggregate of the [redacted] for the company costs to fix the mess. The OPC recommends the Commission develop a number based on Ex. 191 and Ex. 205 and double it to yield an amount of approximately $6 million to disallow the excess costs associated with the inadequate LR draft preparation. In the alternative, the Commission should allow the parties to address this in next years' docket and require the Company to provide more documentation and justification in light of the evidence in the record and the failure to produce requested documentation.

With respect to the overall EPU budget and expenditures, the Commission should allow the recovery on a preliminary basis of the remaining 2009, and the projected and estimated 2010 and 2011 costs but should not make a determination of prudence on any of the dollars pending further explanation and justification of: (1) the significant increase in overall project cost in 2009, (2) determination of total cost incurred by PEF

(contractor, affiliate, PEF charges and costs) associated with and caused by material inattention and oversight to the LAR preparation. This should be in addition to the disallowance of the excess costs associated with the re-write of the draft licensing report.

In considering this issue and the recommendation of the OPC, the Commission should be mindful that to date not a single contested (i.e. not agreed to in the audit process) dollar of cost submitted for recovery, has been disallowed. While the OPC does not seek disallowance for the sake of disallowance, it is untenable to suggest that PEF operates at a level that equates to regulatory perfection. There is abundant evidence that Progress made significant errors in its chosen method of preparation of the draft LR.

On the one hand, the Company contends that the expert panel was always contemplated. Assumedly this would be because of its inexperienced contractor. If, however, this is true (in spite of the lack of supporting documentation) then how could the same knowledge prescient that would call for an expert panel not also call for a greater level of oversight in the first instance? The overall level of monitoring and oversight dollars that make up the $41 million in 2009 should be examined more thoroughly. The Commission should not embrace the notion that customer funds are expended to embrace a shoddy work product and that the fact of the deficiency just means not enough money was thrown at the problem.

This mindset harkens back to the previous round of nuclear construction when "more money" was the solution. This folly leads to enormous cost overruns and

spectacular failures. Ex. 190, (unnumbered pages 25-41). At this early stage of the implementation of the advanced recovery statute, OPC urges the Commission to send a strong signal that customers' advance payments for generating capacity that will be available no sooner than perhaps the first part of 2013, should not be used for producing substandard work or for fixing that work.

In conclusion, the OPC recommends for the CR3 EPU that the Commission:

1. Disallow $6 million of costs associated with the company's efforts to prepare an acceptable LAR for the CR3 EPU project.

2. Make no finding in this round of proceedings regarding the prudency of 2009 EPU costs associated with an unexplained and unjustified $52.8 million increase in the project budget.

3. Open a separate docket or direct that a specific issue be included in this cost recovery docket addressing the reasonableness of the costs and the prudency of the company's approach to the overall budgeting and adherence to the budget for the EPU project.

These actions would be consistent with the Commission reviewing the overall project in the context of the licensing process in the next round as recommended by OPC witness Jacobs. T. 716-722.

ISSUE 6: Should the Commission approve what PEF has submitted as its 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?

* No. Due to the tenuous nature of the LNP project, the Commission should require additional analysis of the feasibility of the overall project in 2011 based on concerns raised by all witnesses in this docket.*

ISSUE 8: **Should the Commission approve what PEF has submitted as its 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?**

No. The Commission should require PEF to submit in 2011 a feasibility analysis that evaluates the project based on likely NRC-approved power levels.

ISSUE 9: **What system and jurisdictional amounts should the Commission approve as PEF's final 2009 prudently incurred costs and final true-up amounts for the Crystal River Unit 3 Uprate project?**

* PEF has not met the Rule 25-6.0423(8)(d) requirement of annual variance explanations. The Commission shouldn't make any prudence determination about 2009 EPU costs in 2010. PEF failed to demonstrate that the LAR preparation costs are prudent and reasonable. The Commission should disallow $6 million of excessive LAR preparation costs consistent with the discussion on Issues 4 and 5.*

ISSUE 10: **What system and jurisdictional amounts should the Commission approve as PEF's reasonably estimated 2010 costs and estimated true-up amounts for the Crystal River Unit 3 Uprate project?**

No position.

ISSUE 11: **What system and jurisdictional amounts should the Commission approve as PEF's reasonably projected 2011 costs for the Crystal River Unit 3 Uprate project?**

No position.

ISSUE 12: **What system and jurisdictional amounts should the Commission approve as PEF's final 2009 prudently incurred costs and final true-up amounts for the Levy Units 1 & 2 project?**

*PEF has represented that all the costs related to its non-LNP transmission needs have been appropriately removed from requested cost recovery in this docket. The Commission should make an affirmative finding as to this. Otherwise, the OPC takes no Position.

ISSUE 13: **What system and jurisdictional amounts should the Commission approve as reasonably estimated 2010 costs and estimated true-up amounts for PEF's Levy Units 1 & 2 project?**

No Position.

ISSUE 14: **What system and jurisdictional amounts should the Commission approve as reasonably projected 2011 costs for PEF's Levy Units 1 & 2 project?**

No Position.

ISSUE 15: **What is the total jurisdictional amount to be included in establishing PEF's 2011 Capacity Cost Recovery Clause factor?**

*The Commission should include in establishing PEF's 2011 Capacity Cost Recovery Clause factor no more than $85.1 million of the $147.7 million submitted for recovery an defer recovery of $62.6 million of the 2010 and 2011 revenue requirement pending a further determination of prudence. This allocates the risk within the parameters of the

Rule at least temporarily while the Commission better understands the nature of the Company's self-imposed hold on the LNP construction project*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **CITIZEN'S POST HEARING STATEMENT OF POSITIONS AND POST HEARING** has been furnished by electronic mail and U.S. Mail on this 10th day of September, 2010, to the following:

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