

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement with respect to use of decommissioning trust fund dollars for spent fuel and other non-radiological decommissioning costs for Crystal River 3 Nuclear Plant.

DOCKET NO. 130207-EI
ORDER NO. PSC-13-0452-FOF-EI
ISSUED: October 9, 2013

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman
LISA POLAK EDGAR
ART GRAHAM
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER GRANTING, IN PART, AND DENYING, IN PART, PETITION FOR
DECLARATORY STATEMENT

BY THE COMMISSION:

BACKGROUND

On July 30, 2013, pursuant to Section 120.565, Florida Statutes (F.S.), and Rule 28-105.002, Florida Administrative Code (F.A.C.), Duke Energy Florida, Inc. (DEF) filed a Petition for Declaratory Statement (Petition) regarding the application of Rule 25-6.04365, F.A.C., and a number of our orders addressing decommissioning of DEF's Crystal River 3 nuclear plant: Order No. 21928,¹ Order No. PSC-92-0573-FOF-EI,² Order No. PSC-95-0477-FOF-EI,³ Order No. PSC-95-1531-FOF-EI,⁴ Order No. PSC-02-0055-PAA-EI,⁵ Order No. PSC-05-0945-S-EI,⁶ and Order No. PSC-12-0225-PAA-EI.⁷

¹ Issued September 21, 1989, in Docket No. 870098, *In re: Petitions for approval of an increase in the accrual of nuclear decommissioning costs by Florida Power Corporation and Florida Power & Light Company.*

² Issued June 26, 1992, in Docket No. 910981-EI, *In re: Nuclear Decommissioning Cost Studies by Florida Power & Light Company and Florida Power Corporation.*

³ Issued April 12, 1995, in Docket Nos. 941343-EI and 941350-EI, 94352-EI, *In re: Petition for Approval of Increase in Accrual for Nuclear Decommissioning Costs by Florida Power Corporation.*

⁴ Order No. PSC-95-1531-FOF-EI, issued December 12 1995, in Docket Nos. 941350-EI and 941352-EI, *In re: Petition for Approval of Increase in Accrual for Nuclear Decommissioning Costs by Florida Power Corporation.*

⁵ Issued January 7, 2002, in Docket Nos. 981246-EI, 001835-EI, 990324-EI, 991931-EI, *In re: Petition for Approval of Revised Annual Accrual for Nuclear Decommissioning Costs by Florida Power Corporation.*

⁶ Issued September 28, 2005, in Docket No. 050078, *In re: Petition for Rate Increase by Progress Energy Florida, Inc.*

⁷ Issued April 30, 2012, in Docket No. 100461-EI, *In re: Petition for Approval of nuclear decommission cost study by Progress Energy Florida, Inc.*

Decommissioning is the dismantlement and removal of materials and equipment that are no longer used or useful after a nuclear generating unit is retired. According to DEF, the orders approving DEF's nuclear decommissioning studies provide that the funds collected from DEF customers to fund the nuclear decommissioning trust fund cover activities that fall into one of the following three categories: NRC License Termination, Spent Fuel Management, and Site Restoration. However, the NRC instructed DEF to report the full balance of the DEF nuclear decommissioning trust fund in order to comply with certain NRC decommissioning funding reporting obligations. As a result, DEF argues the NRC may consider the full balance of the DEF Nuclear Decommissioning Trust Fund to be available for NRC License Termination. DEF requests we issue a declaratory statement stating the following:

- a. The funds accumulated in the DEF Nuclear Decommissioning Trust Fund shall be allocated among NRC License Termination, Spent Fuel Management, and Site Restoration pursuant to, and in accordance with, the percentage assigned to each category in the most current Nuclear Decommissioning Study, or update thereto, filed with and approved by the Commission pursuant to Rule 25-6.04365, F.A.C.
- b. No funds accumulated to pay for Spent Fuel Management and Site Restoration, as authorized in the DEF nuclear decommissioning trust fund Orders and in any ensuing Commission order approving DEF's subsequent Nuclear Decommissioning Studies, or updates thereto, are available to pay for NRC License Termination costs without prior approval by the Commission and the availability of such funds for NRC License Termination costs is subject to disapproval by the Commission.

Pursuant to Rule 28-105.0024, F.A.C., a Notice of Declaratory Statement was published in the August 5, 2013, edition of the Florida Administrative Register, informing interested persons of the Petition. On August 2, 2013, the Office of Public Counsel (OPC) filed a Notice of Intervention pursuant to Section 350.0611, F.S. Order No. PSC-13-0299-PCO-EI, acknowledging OPC's intervention was issued August 6, 2013.

This Order addresses DEF's Petition for Declaratory Statement. We have jurisdiction pursuant to Section 120.565 and Chapter 366, F.S.

STATUTES AND RULES GOVERNING DECLARATORY STATEMENTS

Section 120.565, F.S., governs the issuance of a declaratory statement by an agency. In pertinent part it provides that:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides that:

[a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to a petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.002, F.A.C., requires a petition for declaratory statement to include a description of how the orders on which a declaratory statement is sought may substantially affect the petitioner in the petitioner's particular set of circumstances. The petition must demonstrate a present, ascertained state of facts and may not be merely a hypothetical situation.⁸ The Courts and this Commission have recognized that a purpose of the declaratory statement procedure is to resolve an ambiguity in the law and to enable the petitioner to select a proper course of action in advance, thus avoiding costly administrative litigation. Pursuant to Rule 28-105.003, F.A.C., an agency may rely on the statements of facts contained in the petition for declaratory statement without taking a position on the validity of the facts.

DEF'S PETITION FOR DECLARATORY STATEMENT

In accordance with Rule 28-104.003, F.A.C., we rely on the specific statement of facts set forth in DEF's Petition without taking a position on the validity of the facts. This declaratory statement is controlling as to those alleged facts, and not as to other, different or additional facts.

DEF'S Statement of Facts

In its Petition, DEF states that, due to federal tax considerations, DEF has all of its decommissioning funds (i.e., funds for NRC License Termination, Spent Fuel Management, and Site Restoration) commingled in DEF's Nuclear Decommissioning Fund. DEF argues that this commingling has been necessitated in large measure by Internal Revenue Service Regulations, IRS Reg. § 1.468-5(a)(1)(iii), which allow favorable tax treatment regarding the contributions to and income of a qualified fund, but allow the taxpayer to maintain only one qualified nuclear decommissioning trust for each nuclear plant that it owns.

DEF states that the NRC's decommissioning rule 10 C.F.R. § 50.75 requires the licensed operator and owners of a nuclear plant to provide assurance for decommissioning funding. The rule acknowledges state commission jurisdiction over rate regulation. It states that funding for

⁸ *Santa Rosa County, v. Dep't of Admin Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995); Order No. PSC-01-1611-FOF-SU, issued August 3, 2001, Docket No. 010704-SU, *In re: Petition for declaratory statement by S. Johns County* (petition for declaratory statement denied as constituting a mere hypothetical situation).

the decommissioning of power reactors may also be subject to regulation of Federal or State government agencies and specifically refers to state public utility commissions that have jurisdiction over rate regulation.

DEF states that the NRC rules allow the funding assurance to be provided by establishing an external sinking fund, consisting of a segregated trust fund into which funds are periodically set aside so that the total will be sufficient to pay for decommissioning at the time permanent termination of operation is expected. NRC rules and guidance, however, indicate that the NRC definition of decommissioning does not include spent fuel management, or the removal and disposal of nonradioactive structures and materials.

DEF states that a separate NRC rule, 10 C.F.R. § 50.54(bb), requires each licensee to submit, either five years before license expiration or two years after the permanent cessation of operations (whichever occurs first), a plan on how it will provide assurance for spent fuel management.

DEF also notes that the NRC amended its decommissioning rules in 1996 and added a provision, 10 C.F.R. § 50.82(c)(8), requiring that decommissioning funds may only be used if the withdrawals are for legitimate decommissioning activities consistent with the NRC's definition. DEF contends in the petition that the NRC stated that the final rule, 61 Fed. Reg. 39,278, 39,295 (July 29, 1996), "does not prohibit licensees from having separate subaccounts for other activities in the decommissioning trust if minimum amounts specified in the rules are maintained for radiological decommissioning."

According to DEF, the NRC amended its rules again in 2002 to require decommissioning trust agreements to provide in 10 C.F.R. § 50.75(h)(2) that disbursements or payments from a decommissioning trust, other than for ordinary administrative costs and other incidental expenses of the fund, are restricted to decommissioning expenses until final decommissioning has been completed. However, in response to concerns raised about such restrictions, DEF contends that the NRC stated in 67 Fed. Reg. 78,332, 78,340:

The NRC does not object to licensees mingling funds for decommissioning activities as defined by the NRC and for other activities outside the NRC's definition. However, if the funds are mingled in this way, licensees need to ensure that separate sub-accounts are established so funds for each type of activity are appropriately identified.

DEF asserts that the NRC also stated in 67 Fed. Reg. 78,332, 78,340 (Dec. 24, 2002), that withdrawals for nonradioactive decommissioning expenses that do not affect the amount of funds remaining for radiation decommissioning costs are permissible; however, a licensee must be able to identify the individual amounts contained within its single trust. DEF states that NRC rule 10 C.F.R. § 50.75 also requires the licensee to submit a decommissioning funding status report (status report) at least once every two years or annually if within five years of license expiration.

DEF further states that, on January 8, 2009, the NRC clarified for licensees the need to report radiological decommissioning fund balances that are distinct from amounts accumulated

for other purposes, such as paying for state site restoration costs and spent fuel management in the NRC Regulatory Issue Summary, 2001-2007, Rev. 1 10 CFR § 50.75, Reporting and Recordkeeping for Decommissioning Planning.

DEF states that, on March 25, 2009, it submitted its report to the NRC, limiting its report to financial assurance for radiological decommissioning. During a spot-check conducted by the NRC with respect to the CR3 Nuclear Plant in 2010, the NRC noted that the December 30, 2008, trust fund balance of DEF was greater than the amount reported to the NRC in the 2009 DEF status report. The NRC, on May 21, 2010, submitted an additional request for information. The NRC asked whether the funds for decommissioning are commingled with other funds, and if so, how the funds are divided into subfunds or subaccounts. DEF responded that they are not divided. The NRC also requested from DEF documentation of the state regulatory authority's authorization of collections for decommissioning, particularly with respect to the purposes for which the funds were collected (such as NRC decommissioning requirements, spent fuel management, site restoration, and others as recognized by the state authority) and the amounts authorized for each of those purposes. DEF provided all of the Commission orders on decommissioning up to that time.

DEF states that, on March 14, 2011, the NRC issued a minor violation to DEF for failure to accurately report the amount accumulated as of December 31, 2008, and instructed DEF, with respect to any future status report, to report the amount accumulated to the end of the calendar year preceding the date of such status report (i.e. the full balance of the DEF nuclear decommissioning trust fund). According to the Petition, it appears that the NRC did not consider the Commission Orders "sufficient to support allocating portions of the [nuclear decommissioning trust fund] to non-radiological decommissioning (i.e., Spent Fuel Management and Site Restoration)." DEF adds that, unless corrected, DEF's inability to allocate a portion of the DEF nuclear decommissioning trust fund to Spent Fuel Management and Site Restoration will prevent DEF from using DEF nuclear decommissioning funds that were collected from DEF customers for those purposes, as determined by the Commission DEF Orders approving the Nuclear Decommissioning Cost Studies on which those collections were based.

DEF states that after the issuance of the minor violation, it has filed status reports in 2011, 2012 and 2013, and, in each case, reported the full balance as the NRC instructed. DEF is concerned that NRC may consider the full balance of the nuclear decommissioning trust fund to be available only for radiological decommissioning (i.e., License termination). As a result, DEF is concerned it cannot use any portion of the DEF nuclear decommissioning trust fund collected from DEF customers for other intended purposes (i.e., Spent Fuel Management and Site Restoration) without first obtaining NRC permission.

The Petition also describes a similar determination made with respect to FPL citing the November 26, 2008, letter to FPL from the NRC. DEF stated that FPL maintained internal accounting allocating portions of its decommissioning funds to license termination costs, spent fuel management costs and non-nuclear demolition and restoration costs based on decommissioning studies required by Florida law. The letter, according to DEF, stated:

[B]ecause FPL does not earmark the three cost components, FPL should be reporting all funds within the external trust to the NRC as radiological decommissioning (license termination costs) *unless the state regulatory authority will not allow the use of certain funds for radiological decommissioning.*"

(Emphasis added). The NRC 2008 letter to FPL added:

If FPL decides to create subaccounts in the future, funds within the current external trust may not be moved to nonradiological subaccounts unless FPL provides the NRC with *sufficient documentation that the state regulator specifically authorized collections for these nonradiological purposes in certain amounts that are not to be used for radiological decommissioning.*

(Emphasis added). Thus, DEF contends that the NRC, in the cases of commingled funds, is stating that Commission Orders must specifically earmark accounts that may be used for Spent Fuel Management and Site Restoration.

In light of the NRC's recent actions, DEF states it is in doubt as to the application of the Commission Orders to the accumulated funds in the DEF trust fund. Thus, DEF seeks our guidance regarding the proper allocation of the funds under our orders. On February 2, 2013, DEF certified to the NRC that fuel has been permanently removed from the reactor vessel. DEF must submit a Post-Shutdown Decommissioning Activities Report (PSDAR) within two years following permanent cessation of operations.

Orders and Rules for Which DEF Requests Declaratory Statement

Rule 25-6.04365, F.A.C., on Nuclear Decommissioning was adopted in 2001 and addresses our policy of requiring each utility that owns a nuclear generating plant to ensure that there are sufficient funds on hand at the time of decommissioning to meet all required expenses by establishing appropriate decommissioning accruals. The rule requires each utility to file a Nuclear Decommissioning Study on a regular basis. The requirements include a nuclear decommissioning study, which in turn requires the annual revenue requirement of the proposed decommissioning cost estimates. A utility shall not change its annual nuclear decommissioning accruals without our prior approval.

The applicable orders, as stated by DEF, are: Order No. 21928, Order No. PSC-92-0573-FOF-EI, Order No. PSC-95-0477-FOF-EI, Order No. PSC-95-1531-FOF-EI, Order No. PSC-02-0055-EO, Order No. PSC-05-0945-S-EI, and Order No. PSC-12-0225-PAA-EI. These orders address accruals needed to fund nuclear decommissioning. The most recent orders address categories of the costs. In Order No. PSC-02-0055-PAA-EI, we noted that the NRC and this Commission have come to recognize the desirability of performing site-specific cost studies. In the 2012 Order, Order No. PSC-12-0225-PAA-EI, we addressed the different aspects of nuclear decommissioning and grappled with the spent fuel management element, in light of the Department of Energy's withdrawal of its application for the Yucca Mountain repository. We also addressed the revisions to DEF's annual decommissioning accruals through the years in that order. In the 2012 Order, we also relied heavily on the decommissioning cost study prepared by

TLG Services, Inc., for DEF's predecessor Progress Energy Florida. We noted that the cost study analyzed the decommissioning process based on several categories. These categories fit within the broader categories set out in DEF's petition.

FINDINGS AND CONCLUSIONS

Through Rule 25-6.04365, F.A.C., on Nuclear Decommissioning and through our orders since 1989, we have been reviewing nuclear decommissioning cost estimates and setting DEF's decommissioning accrual amounts based on those cost estimates. Rule 25-6.04365, F.A.C., states that the purpose of the rule is to codify our policy of requiring each utility that owns a nuclear generating plant to ensure there are sufficient funds on hand at the time of decommissioning to meet all required expenses by establishing appropriate decommissioning accruals. The rule requires each utility to file a Nuclear Decommissioning Study, the purpose of which is to obtain sufficient information to update cost estimates based on new developments, additional information, technological improvements, and forecasts; to reevaluate alternative methodologies; and to review the annual accrual needed to recover the costs.

The orders approved accrual amounts for decommissioning and did not explicitly order separate percentage allocations (license termination, nuclear spent fuel, and site restoration). The overall dollar amount encompasses these allocations as presented most recently in the 2010 update to the 2008 decommissioning cost study. In Order No. PSC-12-0225-PAA-EI, we relied on the study and looked to the separate areas of decommissioning, as defined by us.⁹ The cost study was prepared by TLG Services, Inc., for DEF's predecessor Progress Energy Florida.

There are essentially three areas of categories for which recovery was ordered: License Termination, Spent Nuclear Fuel and Site Restoration. We have rate setting authority over those areas. The NRC has authority, except for rate setting authority, over License Termination, including radiological decommissioning. Other agencies also have authority over activities that must be completed to decommission the nuclear power plant site. While Order No. PSC-12-0225-PAA-EI states that the total amount of funds in the Decommissioning Trust Fund are theoretically available for Radiological Decommissioning (NRC license termination), if needed, the percentages are important and should be recognized because they are the result of a close review through the decommissioning cost study. Moreover, the actual funding levels associated with the amount approved for inclusion in the customer rates are based on adequately funding all three categories. Thus, the separate percentages for each of the three categories implicitly recognized in Order No. PSC-12-0225-PAA-EI should be acknowledged for their identified purposes.

⁹ The NRC and this Commission define "decommissioning" differently, with the NRC definition being a narrower definition. Rule 25-6.04365, F.A.C., defines decommissioning as "the process of safely managing, dismantling, removing or converting for reuse the materials and equipment that remain at the nuclear generating unit following its retirement that results in an amendment to the licensing status of a nuclear power plant from operational to possession-only and possibly unrestricted use." The NRC defines "decommission" in NRC Rule § 50.2 to mean to remove a facility or site safely from service and reduce residual radioactivity to a level that permits: (1) Release of the property for unrestricted use and termination of the license; or (2) Release of the property under restricted conditions and termination of the license.

The categories listed in Order No. PSC-12-0224-PAA-EI at page 5 comport with the categories and allocations listed in the TLG base cost estimates and were considered by us. Regulatory requirements and project contingencies are a part of License Termination; low-level radioactive waste disposal practices and high-level radioactive waste management are a part of Spent Fuel; and site restoration is the Site Restoration category. While the percentages may differ in future reviews and for different decommissioning methods, the TLG Cost Study relied on for the 2012 order listed the following percentages for DECON¹⁰: License Termination—66.89%, Spent Fuel Management—27.24%, and Site Restoration—5.87%.

As the appropriate agency with rate setting authority, we conducted multiple close reviews of nuclear decommissioning costs. In Order No. PSC-95-1531-FOF-EI, we recognized that the estimated decommissioning costs might need revision periodically and required the companies to file updated decommissioning cost studies at least every five years. In Order No. PSC-02-0055-PAA-EI, we noted that the NRC and this Commission have come to recognize the desirability of performing site-specific cost studies. Furthermore, Rule 25-6.04365(3)(p), F.A.C., requires that the reconciliation show the fund balances by category. This requirement would not be in our rules if we did not consider it integral to our review and determination. Thus, we believe that the Orders and Rule 25-6.04365, F.A.C., taken as a whole, reflect our intent for separate categories and percentages. The funds accumulated in the DEF Nuclear Decommissioning Trust Fund shall be allocated among NRC License Termination, Spent Fuel Management, and Site Restoration pursuant to, and in accordance with the percentage assigned to each category in the most current Nuclear Decommissioning Study, or update thereto, filed with and approved by us pursuant to Rule 25-6.04365, F.A.C.

However, we decline to issue a declaratory statement on DEF's second question. DEF asked that we state that no funds accumulated to pay for Spent Fuel Management and Site Restoration, as approved in our orders or updates thereto, are available to pay for NRC License Termination costs without our prior approval, and that the availability of such funds is subject to our disapproval. This question is not proper for a declaratory statement. The petition must demonstrate a present, ascertained state of facts and may not be merely a hypothetical situation. In *Santa Rosa County v. Dept. of Administrative Hearings*, 661 So. 2d 1190 (Fla. 1995), the Florida Supreme Court, in a declaratory judgment case, emphasized that there must be a pending controversy. We have never relinquished our jurisdiction to that portion of the decommissioning fund concerning state-regulated activities. At this point, the NRC has not instructed DEF to take any action directly contrary to our existing orders.

We hereby grant, in part, and deny, in part, DEF's petition. Applying our Nuclear Decommissioning Orders and Rule 25-6.04365, F.A.C., Nuclear Decommissioning, we affirm that the funds accumulated in the DEF Nuclear Decommissioning Trust Fund must be allocated among NRC License Termination, Spent Fuel Management, and Site Restoration pursuant to the percentage assigned to each category in the most current Nuclear Decommissioning Study, or update, filed with and relied upon by us pursuant to Rule 25-6.04365, F.A.C. However, we deny the second question raised by DEF regarding a requirement that DEF obtain our prior approval

¹⁰ The NRC accepts the following three decommissioning methods: prompt removal/dismantling (DECON); entombment (ENTOMB); and mothballing with defined decontamination (SAFSTOR).

for payment of Spent Fuel Management and Site Restoration funds for NRC License Termination Costs as not proper for a declaratory statement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Duke Energy Florida, Inc.'s Petition for Declaratory Statement is granted, in part, and denied, in part, as set forth in the body of this order. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 9th day of October, 2013.



ANN COLE
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

CBM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an

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electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.