BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Environmental Cost Recovery Clause	Docket No. 140007-EI Filed: November 5, 2014

FLORIDA POWER & LIGHT COMPANY'S
POST-HEARING BRIEF REGARDING ISSUE 9A

Florida Power & Light Company ("FPL"), pursuant to the Public Service Commission's ("Commission") Order No. PSC-14-0585-PHO-EI hereby files its post-hearing brief. As directed by the Commission at the October 22, 2014 hearing for Docket No. 140007-EI, this brief is limited to Issue 9A.

BACKGROUND

At the hearing held in this docket on October 22, 2014, the Commission approved stipulations for FPL on all Environmental Cost Recovery Clause ("ECRC") issues except for Issue 9A, in which FPL requests approval of its Waters of the United States ("WOUS") Rulemaking Project. Tr. 13. The prefiled testimony and exhibits of FPL witness Terry J. Keith were entered into the record without objection. Tr. 13-14. Witness Keith was excused without cross-examination or questioning by the Commissioners. *Id*. FPL presented the live testimony of witness Randall R. LaBauve to address the factual issues remaining for Issue 9A. *See* Tr. 234. No other witness testified regarding Issue 9A. At the close of the hearing, the Commission asked the parties to submit a brief limited to Issue 9A. Tr. 311. FPL addresses Issue 9A below.

ISSUE 9A: **Should the Commission approve FPL's Waters of the United States Rulemaking Project such that the reasonable costs incurred by FPL in connection with the project may be recovered through the Environmental Cost Recovery Clause?**

FPL: *****Yes. The proposed change to the definition of the Waters of the United States would substantially increase compliance costs for utilities. FPL intends to engage in advocacy to limit the cost impact. FPL's estimated costs are reasonable, and recovery of such costs for such advocacy is consistent with Commission policy.*

A. FPL Proposes To Engage in Regulatory Advocacy To Limit Compliance Costs Associated with Proposed Changes to the Definition of Waters of the United States

On April 21, 2014, the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("USACE") published a proposed rule in the Federal Register defining the scope of waters protected under the Clean Water Act ("CWA") and revising the definition for WOUS. Tr. 237 (LaBauve). The purpose of the rulemaking is to clarify the characteristics of streams, wetlands and other waters to which all CWA programs will apply. *Id.*

The rulemaking proposes changes to the definition of WOUS that would result in the identification and protection of an increased number of new jurisdictional wetland and water bodies, which in turn would impact existing electric utility facilities and future electric utility projects. Tr. 237 (LaBauve). FPL believes the proposed rule revisions are overreaching and in conflict with U.S. Supreme Court decisions regarding WOUS. *Id.* If enacted, the CWA requirements would apply to existing and future power plant, transmission, distribution, pipeline and renewable generation related projects that currently are not subject to those requirements under the existing WOUS definition. *Id.*

As a result, FPL would be required to incur substantially higher permitting and operational costs associated with projects that would be made subject to CWA by the revised WOUS definition. *Id.* FPL also could be required to purchase additional costly mitigation credits for those projects. Tr. 237-38 (LaBauve). The proposed rule revisions could require FPL to install cumbersome and very expensive compliance technologies on the cooling ponds or cooling canal systems at four FPL power plants. Tr. 238 (LaBauve). By way of example, to meet federal and state water quality standards at the cooling ponds located at FPL's Martin, Turkey Point, Manatee and Sanford Plants, the Company may be required to install effluent treatment technologies such as clarifier and softener systems, multi-stage reverse osmosis

systems, sludge dewatering systems, evaporator systems, and crystallizer systems to achieve zero liquid discharge. Exhibit 2 (FPL's Answer to Staff's Second Set of Interrogatories No. 7). Additionally, if the cooling ponds are subject to impingement mortality reduction standards, FPL would be required to modify traveling screens with expensive fish return systems at the Martin, Manatee and Sanford Plants. *Id*.

Together, these effluent treatment systems and aquatic organism impingement controls could cost approximately $25 million to $30 million in capital expenditures and approximately $3 million to $6 million in annual O&M expenses for each plant. Tr. 308-309 (LaBauve); Exhibit 2 (FPL's Answer to Staff's Second Set of Interrogatories No. 10). FPL projected the costs for effluent system controls based on estimates received from Siemens Water Technologies for installation and operation of technologies required to achieve zero liquid discharge to a cooling pond from plant industrial wastewater processes. Exhibit 2 (FPL's Answer to Staff's Second Set of Interrogatories No. 10). The cost estimates to install and operate aquatic organism exclusion and return systems technologies are based on the costs that FPL incurs at plants where similar systems have been installed to meet other environmental regulations. *Id*.

FPL believes it is prudent to actively participate in the rulemaking process to limit the compliance cost impact of potential revisions (the "WOUS Rulemaking Project"). Tr. 238 (LaBauve). In response to the EPA's potentially costly proposal, FPL intends – and already has begun – to advocate that the revisions are both unnecessary to protect legitimate environmental interests and needlessly burdensome to licensees such as FPL. Tr. 238, 293 (LaBauve). If FPL is successful at working with EPA in coming up with an effective rule, it would benefit FPL and its customers. Tr. 259 (LaBauve).

FPL has retained the services of qualified consultants and legal counsel (referred to collectively herein as "consultants") to assist with its regulatory advocacy efforts. Tr. 265-66, 293 (LaBauve); Exhibit 2 (FPL's Answer to Staff's Second Set of Interrogatories No. 8). The short time frame within which it was necessary to submit comments, along with the amount of detail in the proposed rule, and the potentially large financial impact to FPL and its customers if the final rule is not favorable, warranted the engagement of consultants who specialize in industry advocacy. Tr. 238 (LaBauve); Exhibit 2 (FPL's Answer to Staff's Second Set of Interrogatories No. 8). The consultants will assist (and already have assisted) in developing comments and presenting FPL's positions on the proposed rule to state and federal government agencies. Tr. 238, 293 (LaBauve). Specifically, the consultants have performed, or are expected to perform, the following activities:

- Assist FPL in the identification of specific issues associated with proposed rule requirements and develop specific recommendations to facilitate more cost-effective compliance for each FPL facility that is impacted by the proposed rule.
- Develop more workable solutions.
- Develop a set of general comments on the proposed rule as it affects FPL facilities.
- Work with state and federal government agencies to advocate FPL's positions following the comment period, as the rule moves to finalization and, as necessary, thereafter.

Tr. 238-39 (LaBauve).

FPL's consultant engagements were designed to minimize costs and maximize efficiencies. For federal level advocacy activities, the Company engaged consultants associated with industry groups for review and advocacy of environmental regulations. The primary industry group that will be engaging the consultants is Clean Energy Group ("CEG"), which consists of approximately ten to twelve participants that will share the cost, thereby reducing

FPL's cost responsibility. Tr. 265-66 (LaBauve); Exhibit 2 (FPL's Answer to Staff's Second Set of Interrogatories No. 8). For state level advocacy activities, FPL intends to engage with a law firm and an engineering consulting firm independent of the industry groups. *Id*. Again, due to tight deadlines, FPL will select inquired with a law firm and an engineering consulting firm with extensive understanding of the proposed rule's requirements and a detailed understanding of most of the FPL facilities that would be affected by the proposed rule. *Id*. This avoids costs associated with the time it would take consultants with less direct experience to familiarize themselves with FPL's facilities as needed to address FPL's issues. *Id*.

FPL petitioned the Commission for approval of the WOUS Rulemaking Project on July 25, 2014, in conjunction with its 2014 estimated/actual true-up filing in this docket. Although FPL began incurring advocacy costs related to the rulemaking in late 2013, FPL seeks recovery only for advocacy activities conducted after the date of its July 25, 2014 petition. Tr. 239-40, 293-94 (LaBauve). FPL reasonably estimates that costs incurred from August 2014 through December 2015 for the anticipated advocacy activities will total approximately $228,500. Tr. 239 (LaBauve). The portion of the cost estimate attributable to federal-level advocacy is based on FPL's share of the expenditure estimates provided by the industry groups for activities specifically related to the federal WOUS rulemaking. The portion attributable to state-level advocacy is based on proposals submitted to FPL from the law firm and engineering consulting firm for activities that include site specific assessments, technical papers, reports and all activity attendant to meeting with regulatory agencies to advocate FPL's position regarding the rule. Tr. 302-03; Exhibit 2 (FPL's Answer to Staff's Second Set of Interrogatories No. 9). FPL will make available for Commission review the documentation supporting and confirming the costs incurred for the described activities. Tr. 304-05 (LaBauve).

FPL seeks ECRC recovery in 2015 of its projected $228,500 of expenditures in 2014-2015 for advocacy activities designed to limit the compliance cost impact of proposed changes to the definition of WOUS. If successful, these activities could avoid more than $100 million in compliance costs that would otherwise be borne by customers through the ECRC. Tr. 239, 257, 308-09 (LaBauve).

B. Substantial Commission Precedent Supports ECRC Cost Recovery for Compliance-Related Advocacy Activities

Section 366.8255(2), F.S. provides that the Commission "shall allow recovery of the utility's prudently incurred environmental compliance costs." In turn, "environmental compliance costs" is statutorily defined to "include[] all costs or expenses incurred by an electric utility in complying with environmental laws or regulations." Intervenor Florida Industrial Power Users Group ("FIPUG") takes the position that only the types of environmental compliance costs identified specifically in the statute qualify for ECRC recovery. Tr. 229, 273-75. The express language of the statute defeats FIPUG's myopic view, however. Section 366.8255(1)(d) unambiguously provides that the list is illustrative, not exhaustive.[1] Tr. 274, 307-08 (LaBauve). FIPUG further argued that Florida Statutes do not permit ECRC recovery of costs that the utility is not legally required to expend presently. Tr. 270-73. FIPUG's positions disregard entirely this Commission's long-standing interpretation of "environmental compliance costs" that qualify for ECRC recovery.

Almost a decade ago, the Commission recognized that the "costs of compliance with a rule and the cost of litigating the legitimacy of a rule are closely linked." Order No. PSC-05-1251-FOF-EI dated December 22, 2005 at p. 13. "Utilities are expected to take steps to control

[1] Section 366.8255(1)(d) states: "Environmental compliance costs" includes all costs or expenses incurred by an electric utility in complying with environmental laws or regulations, ***including, but not limited to*** . . ." (emphasis added).

the level of costs that must be incurred for environmental compliance." Order No. PSC-08-0775-FOF-EI dated November 24, 2008 at p. 7. "An effective way to control the costs for complying with a particular environmental law or regulation can be participation in the regulatory and legal processes involved in defining compliance." *Id*. at 7-8. Thus, costs associated with advocacy activities such as those proposed by FPL meet the requirements of Section 366.8255, F.S., for recovery through the ECRC. Order No. PSC-09-0759-FOF-EI dated November 18, 2009 at p. 18; *see also* Order No. PSC-08-0775-FOF-EI dated November 24, 2008 at p. 8. ("The definition of environmental compliance costs in Section 366.8255, Florida Statutes, includes the estimated prudently incurred litigation costs associated with FPL's complying with Section 316(b) of the Clean Water Act").

The Commission has consistently applied these principles in approving utilities' requests for ECRC recovery of advocacy costs. For example, as recently as 2012, the Commission approved recovery for FPL's Effluent Guidelines Revised Rule Project. Order No. PSC-12-0613-FOF-EI dated Nov. 16, 2012 at p. 12. That Project addressed proposed changes by the EPA to the standards for treatment of wastewater from steam electric power plants. FPL proposed to engage in, among other things, advocacy activities to convince the EPA that oil ash need not be regulated under the same strict requirements that apply to coal ash under power-plant effluent rule. *Id*. The Commission determined that the "proposed Effluent Guidelines Revised Rule Project meets the criteria for ECRC cost recovery . . . ." *Id*.

Likewise, in 2008, the Commission approved recovery through the ECRC of "costs associated with legal support to help limit the compliance cost impact of a [proposed] revision" to Section 316(b) of the CWA. Order No. PSC-08-0775-FOF-EI at p. 7. The rule changes the EPA had proposed at the time could have potentially required FPL to install cumbersome and

very expensive compliance technologies on the cooling water intake structures at eight FPL power plants. *Id*. The Commission approved FPL's ECRC recovery of the reasonable litigation and consulting costs associated with Section 316(b). *Id*. at p. 8.

Other examples include:

- In Order No. PSC-09-0759-FOF-EI, issued on November 18, 2009 in Docket No. 090007-EI, the Commission approved Duke Energy Florida's (then Progress Energy Florida) request to recover costs through the ECRC associated with its Total Maximum Daily Loads Hg Emission (TMDLs-Hg emissions) Program.

- In Order No. PSC-05-1251-FOF-EI issued on December 22, 2005 in Docket No. 050007-EI, the Commission approved FPL's request for ECRC recovery of costs associated with the technical analysis and legal challenges to the Clean Air Interstate Rule ("CAIR").[2] The Commission added that "[t]o comply with a rule, the utility must understand the rule, and whether the rule is consistent with the statute under which it was adopted." Order No. PSC-05-1251 at p. 13.[3]

- In Order No. PSC-96-1171-FOF-EI, issued September 18, 1996 in Docket No. 960007-EI, the Commission approved Gulf Power's request to recover through the ECRC legal expenses incurred to challenge a DEP proposal. In that order, the Commission permitted recovery for environmental compliance activities that are incurred in order to benefit the company's ratepayers. Order No. 96-1171 at p. 7.

In the absence of evidence to support deviation from precedent, the Commission must adhere to the policy established in these prior decisions. *See* § 120.68(7)(e)(3), Fla. Stat. (noting that remand is required when an agency's exercise of discretion was . . . [i]nconsistent with officially stated agency policy or a prior agency action, if deviation therefrom was not explained by the agency."). "[A]gency action which yields inconsistent results based upon similar facts, without reasonable explanation, is improper." *Southern States Util. v. Florida Public Service Commission*, 714 So. 2d 1046 (Fla. 1st DCA 1998); *see also* Order No. PSC-12-0102-FOF-WS

[2] FPL utilized the funds approved by the Commission in that docket to challenge CAIR in the U.S. Court of Appeals for the D.C. Circuit. Tr. 247-58 (LaBauve). FPL's challenge was successful and inured to the benefit of customers. *Id*.

[3] As FPL's counsel noted during the hearing, Tr. 277-78, the proceeding in which the Commission approved the CAIR Project was categorically contested. *See* Order No. PSC-05-1251 at p. 13 (identifying FPL's CAIR Project as a "contested" issue).

issued March 5, 2012 in Docket No. 100330-WS at p. 66 (noting, in the context of a water utility rate case, that "a utility should be able to rely on our approved U&U methodologies litigated and adjudicated in prior cases. Without such reliance, regulatory uncertainty results."). As the Commission has observed, any shift in ratemaking policy "must be supported by expert testimony, documentary evidence or other evidence appropriate to the nature of the issue involved." Order No. PSC-99-1912-FOF-SU dated September 27, 1999 at p. 12; *see also Southern States Util.*, 714 So. 2d at 1055 (remanding FPSC order "because this policy shift was essentially unsupported 'by expert testimony, documentary opinion or other evidence . . .'") (internal citations omitted).

Denying ECRC recovery of the costs incurred for WOUS advocacy activities would be inconsistent with the Commission's officially stated and well-established position on recovery of advocacy costs, would yield inconsistent results compared to decisions that were based upon similar facts, and thus would result in the sort of regulatory uncertainty that the Commission properly seeks to avoid. FPL's request to recover costs for advocacy activities designed to convince regulatory bodies to develop WOUS rules that limit the compliance cost impacts resulting from any revisions is factually indistinguishable from its earlier requests to recover advocacy costs for its Effluent Guidelines Revised Rule Project and 316(b) Project, which the Commission approved. As was the case with those approved projects, the rule in question here is not yet final,[4] and the proposed changes to the definition of WOUS potentially could require FPL to install expensive compliance technologies and equipment that are estimated to impose costs in excess of $100 million that would be borne by FPL's customers. Tr. 296, 308-09 (LaBauve);

[4] Counsel for FIPUG focused a portion of her cross-examination and opposition to FPL's WOUS Project on the notion that changes to the rule are not yet final. *See* Tr. 270-73. As demonstrated by the precedent described above, the finality of the rule is not dispositive. Indeed, the best way to reduce compliance costs is to advocate before the rule becomes final.

Exhibit 2 (FPL's Answer to Staff's Second Set of Interrogatories No. 10). FPL's WOUS Rulemaking Project unquestionably is consistent with the Commission's expectation that utilities should take steps to control environmental compliance costs.

FPL's proposed WOUS Rulemaking Project is also similar to the CAIR Project approved by the Commission in 2005. As was the case with CAIR, FPL here believes that the proposed changes to the definition of WOUS are overreaching and conflict with Supreme Court of the United States decisions. The astute observation made by the Commission in that docket – that "[t]o comply with a rule, the utility must understand the rule, and whether the rule is consistent with the statute under which it was adopted" — is equally applicable here.[5]

The Intervenors here presented no evidence to support a shift in policy. Nor has any Intervenor even attempted to show that the WOUS Rulemaking Project could be factually distinguished from the projects that formed the basis for the Commission's prior decisions. Accordingly, there is no evidence to support a policy shift here.

C. <u>Intervenors Opposition to FPL's Proposal as "Lobbying Costs" is Unsubstantiated</u>

Counsel for Intervenors FIPUG and Southern Alliance for Clean Energy ("SACE") have inaccurately characterized FPL's proposal as "lobbying." Tr. 229-33. However, no intervenor presented any evidence that FPL seeks recovery for lobbying cost, and FPL witness LaBauve explicitly refuted this assertion. Tr. 260-62, 295-96 (LaBauve). Account 426.4 of the Federal Energy Regulatory Commission's Uniform System of Accounts, which is adopted by the FPSC,[6] provides that lobbying costs exclude "expenditures which are directly related to appearances

[5] Order No. PSC-05-1251 at p. 13

[6] *See* Rule 25-6.014(1), F.A.C. ("Each investor-owned electric utility shall maintain its accounts and records in conformity with the Uniform System of Accounts (USOA) for Public Utilities and Licensees as found in the Code of Federal Regulations, Title 18, Subchapter C, Part 101, for Major Utilities as revised April 1, 2002, which is hereby incorporated by reference into this rule . . . .").

before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations." *See* 18 C.F.R. Part I § 426.4; Rule 25-6.014, F.A.C. Lobbying costs, by contrast, include "expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials. . . ." *Id*.

The advocacy costs that incurred for the WOUS Rulemaking Projects clearly fit within this exception, because they are "directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations." Mr. LaBauve confirmed that the advocacy activities for the WOUS Rulemaking Project will not include supporting particular political candidates. Tr. 298 (LaBauve). He also confirmed that FPL does not seek recovery of costs related to legislative activity. Tr. 298, 300 (LaBauve). To the extent FPL's WOUS advocacy reaches either the state or federal legislative level, FPL will absorb those costs below the line and will not seek recovery of those costs. Tr. 260, 288-89 (LaBauve).

Nor is there any basis to conclude that the advocacy activities are against the customers' interests, as SACE asserts. If FPL does not engage in this advocacy, FPL customers could be substantially impacted by the proposed rule to the tune of $100 million in increased compliance costs. Tr. 308-09 (LaBauve). FPL's efforts are therefore consistent with customers' interests in keeping bills low. Because customers pay environmental compliance costs through the ECRC, shareholders are financially indifferent as to the impact of proposed rule. Tr. 299-300, 306

(LaBauve). Thus, authorizing recovery for this type of advocacy costs sends the appropriate signal that encourages utilities to engage in activities designed solely for the benefit and protection of customers. *Id*.

Finally, SACE inaccurately asserts that FPL's WOUS advocacy efforts would somehow diminish the protection of wetlands. Tr. 291-92. To the contrary, FPL recognizes that wetlands very effectively protect the environment and restore ecosystems. Tr. 291-92 (LaBauve). As witness LaBauve explained, there is an existing comprehensive system of federal or state laws designed to protect wetlands, to which FPL takes no exception. Tr. 292 (LaBauve). The Company complies with all wetlands requirements, obtains all necessary permits and executes extensive mitigation. *Id*. FPL's advocacy efforts regarding the proposed change to the WOUS definition are focused on addressing the proposed encroachment of the federal government's jurisdiction into matters that are properly within the province of the states, contrary to U.S. Supreme Court decisions regarding the CWA. *Id*.

In sum, the proposed change to the definition of WOUS would substantially and unnecessarily increase environmental compliance costs for utilities, including FPL. In order to avoid these unnecessary costs, which would be borne by FPL customers, FPL has engaged – and will continue to engage – in advocacy activities designed to limit the compliance-cost impact of the proposed rule change. Such advocacy activities benefit customers, and recovery of the associated costs through the ECRC is consistent with Commission policy. Accordingly, the Commission should approve FPL's WOUS Rulemaking project and authorize ECRC recovery of the reasonable costs incurred by FPL.

WHEREFORE, FPL respectfully requests that the Commission approve FPL's WOUS Rulemaking project and authorize ECRC recovery of the reasonable costs incurred by FPL.

Respectfully submitted,

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CERTIFICATE OF SERVICE
Docket No. 140007-EI

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Post-Hearing Brief (Issue 9) has been furnished by electronic delivery on November 5, 2014 to the following:

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