

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition by Progress Energy Florida, Inc.  
to recovery costs of Crystal River Unit 3 uprate  
through fuel clause.

DOCKET NO. 070052-EI  
ORDER NO. PSC-07-0334-PCO-EI  
ISSUED: April 17, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman  
MATTHEW M. CARTER II  
KATRINA J. McMURRIAN

ORDER DENYING OFFICE OF PUBLIC COUNSEL'S MOTION FOR ABATEMENT

BY THE COMMISSION:

On September 22, 2006, Progress Energy Florida (PEF) filed a Petition for Determination of Need for Expansion of an Electrical Power Plant, for Exemption from Rule 25-22.082, Florida Administrative Code (F.A.C.), and for Cost Recovery through the Fuel Cost Recovery Clause, which was assigned Docket No. 060642-EI. On December 22, 2006, the prehearing officer bifurcated the proceeding and a separate docket, Docket Number 070052-EI, was opened to consider the cost recovery aspect of PEF's petition.

The electrical power plant, which is the subject of both proceedings, is Crystal River Unit 3 (CR3), a nuclear power plant at PEF's Crystal River site. PEF proposes to expand the existing nuclear power plant to increase generating capacity from 900 megawatts (MW) to 1080 MW. An increase of 180 MWs triggers the application of Chapter 403, Florida Statutes, and PEF must obtain approval of its expansion from the Governor and Cabinet, sitting as the Electrical Power Plant Siting Board. As part of the Electrical Power Plant Siting Act, we must determine the need for the expansion and file a report with the Department of Environmental Protection. On February 8, 2007, we issued Order No. PSC-07-0119-FOF-EI, finding a need for the expansion of CR3. The report was forwarded to the Department of Environmental Protection as required by statute.

On February 2, 2007, the Office of Public Counsel (OPC), AARP, Florida Industrial Power Users Group (FIPUG), and Florida Retail Federation (FRF) filed a Joint Motion to Abate the Petition for Cost Recovery in Docket No. 070052-EI (this was a renewal of the motion to sever and abate previously filed in Docket No. 060642-EI).

We have jurisdiction over this subject matter pursuant to Chapter 366, Florida Statutes, including Sections 366.04, 366.05, and 366.06, Florida Statutes, and Section 403.519, Florida Statutes.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

*OPC's Motion*

OPC, AARP, FIPUG and FRF (jointly referred to as the movants) request that we abate PEF's cost recovery proceeding until a conclusion is reached in one or both of two separate proceedings. The first is the proceeding before the Electrical Power Plant Siting Board (Siting Board). OPC states "Unless and until the Board approves PEF's application for certification of the project, there can be no expenditures for increasing the capacity of CR3, which means that currently there simply is no approved project for which to consider means of cost recovery." The second is a general policy determination by us regarding the correct application of the fuel clause. That policy decision will be made, according to the movants, based upon a petition that OPC plans to file soon.

*PEF's Response*

PEF responds that a motion for abatement is generally warranted when there is some defect in the application for relief, when the relief requested will be resolved without the need for further proceedings, or that the relief requested will be decided in a separate pending proceeding. PEF argues that none of the circumstances applies to its Petition before us. According to PEF, there is no defect in the petition, there are no proceedings before us that will resolve the current request, and there is no other resolution (such as a settlement between parties) that resolves the issues between the parties.

PEF further argues that the Siting Board process has nothing to do with a decision by us regarding the recovery of costs for the expansion. Moreover, the power plant process will not be lengthy because the request before the Siting Board is for the expansion of an existing power plant. PEF contends that the true reason the movants wish us to abate the proceeding is for the purpose of allowing us to make a broad policy determination concerning the application of fuel clause recovery to capital and operation and maintenance expenses like the ones at issue in this proceeding. PEF argues that such a policy decision should be applied prospectively and that the precedence and policy of the Commission allows the recovery of the expenses associated with the expansion of CR3 through the fuel clause.

Analysis

A motion to abate is equivalent to either a suspension of the proceeding or a dismissal of the proceeding without prejudice. Miller v. Hayman, 766 So. 2d 1116, (Fla. 4th DCA 2000). An order abating the proceeding is generally used to stop or terminate one proceeding until the other proceeding has concluded. Moreover, a motion to abate is warranted under the law when there is some defect in the application for relief, the relief requested will be resolved without the need for further proceeding, or the relief requested will be decided in a separate, pending proceeding. In re: The Estate of Peck v. Van Sweden, 336 So. 2d 1230 (Fla. 2d DCA 1976). Like a motion to dismiss, abatement should not be readily granted unless the facts alleged clearly warrant the abatement. Horter v. Commercial Bank & Trust Co., 126 So. 909 (Fla. 1930).

While we find that the movants are not entitled to abatement, our staff noted that we have discretionary authority to stay the proceeding, especially during the pendency of another

proceeding. Allstate Insurance Company v. Titusville Total Health Care, 848 So. 2d 1166 (Fla. 5<sup>th</sup> DCA 2003); REWJB Gas Investments v. Land O' Sun Realty, Ltd., 643 So. 2d 1107 (Fla. 4<sup>th</sup> DCA 1994). Courts have recognized that motions to stay proceedings are appropriate to avoid wasting the court's time. Likewise, we may use our discretionary authority to stay a proceeding to avoid making a decision on a project which has yet to be approved. However, our ratemaking authority is very broad and we do have the authority to consider the appropriate mechanism for cost recovery prior to the Siting Board's decision. As a Commission, we have, in the past, considered projects for cost recovery prior to the project being constructed.

We find that the Movants' motion for abatement of PEF's petition fails because they have not presented a justifiable reason or reasons to warrant such action. It is efficient government to hear the cost recovery arguments at this time. Therefore, we will consider PEF's CR3 uprate project prior to the Siting Board's final decision.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Movants' motion for abatement of PEF's petition is denied. It is further

ORDERED that this docket shall remain open for the purpose of conducting an evidentiary proceeding as soon as practicable.

By ORDER of the Florida Public Service Commission this 17th day of April, 2007.

  
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ANN COLE  
Commission Clerk

( S E A L )

LCB

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.