BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: PEF's Petition to recover costs of Crystal River Unit 3 uprate through the fuel clause	)	Docket No.: 070052
	)	Submitted for Filing: February 9, 2007

PROGRESS ENERGY FLORIDA, INC.'S RESPONSE IN OPPOSITION TO JOINT MOTION TO ABATE PEF'S REQUEST FOR AUTHORITY TO COLLECT CAPITAL AND O&M COSTS OF ITS PROPOSED CAPACITY UPGRADE TO ITS NUCLEAR GENERATING FACILITY THROUGH THE FUEL COST RECOVERY CLAUSE

Progress Energy Florida, Inc. ("PEF") files its Response in Opposition to the Joint Motion to Abate PEF's Request for Authority to Collect Capital and O&M costs of its Proposed Capacity Upgrade to its Nuclear Generating Facility through the Fuel Cost Recovery Clause ("Joint Motion"), pursuant to Rule 28-106.204, F.A.C.

SUMMARY OF ARGUMENT

The Joint Motion does not satisfy the requirements under the law to obtain abatement of an existing proceeding. In fact, Intervenors pay no attention at all to these legal requirements. As we explain below, the Joint Motion accordingly should be denied.

Intervenors instead improperly assert arguments more appropriately raised in a separate, general proceeding to determine if the 26 years of Commission precedent regarding the types of costs that may be recovered under the fuel clause should be changed *prospectively,* rather than addressing PEF's pending request that the types of costs incurred as a result of the Crystal River Unit 3 power uprate project ("CR3 Uprate") can be recovered through the fuel clause under *existing* Commission precedent.[1] Intervenors concede the *existing* policy under Commission

[1] Intervenors, in this Joint Motion, raise the same arguments they asserted in the Joint Motion to Sever and Abate, filed in the previous docket, Docket Number 060642, in support of a change in existing Commission policy. They now accept, however, PEF's response that their arguments should be raised in a separate docket in which all interested parties can participate, because they

precedent allows utilities to "recover the costs of certain programs and projects through the cost recovery clause upon the showing of a nexus between the particular expense and fuel savings." (Joint Motion, p. 6, ¶ 9). Under that *existing* policy and precedent the CR3 Uprate costs clearly are the types of costs that are recoverable through the Fuel Clause because they are not included in PEF's base rates and they will be recovered only to the extent of the fuel savings generated, which as estimated at net present value, exceed the CR3 Uprate costs.

Intervenors persist that, nevertheless, the CR3 Uprate costs are the types of costs that should be recovered through base rates and not the fuel clause, even to the point of mischaracterizing the CR3 Uprate project. They miss the very point of the Commission's existing policy and precedent, however, that the cost savings of innovative projects like the CR3 Uprate should be immediately captured for the benefit of customers.

PEF will only recover the CR3 Uprate costs to the extent fuel savings are realized. Allowing cost recovery through the fuel clause rather than base rates, therefore, means the Commission guarantees customers will pay no more for the project than the fuel savings that are generated by the project. The CR3 Uprate costs customers nothing because all costs are offset by fuel savings. The same cannot be said if the CR3 Uprate is recovered through base rates. There, the Company is entitled to recover its reasonable and prudent project costs regardless of the fuel savings that are actually realized. The point is, recovery of the CR3 Uprate costs through the fuel clause is a "win-win" for the customer and the utility, and this may not be the case if the CR3 Uprate costs are recovered through base rates.

For all of these reasons, as more fully explained below, PEF respectfully requests that the Commission deny the Joint Motion.

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assert that they plan to initiate such a proceeding. PEF will, accordingly, address their arguments in this separate proceeding, if and when it is filed.

ARGUMENT

There is no basis for abatement on the grounds asserted in the Joint Motion. Abatement is generally 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 proceedings, or the relief requested will be decided in a separate, pending proceeding. See In re the Estate of Peck v. Van Sweden, 336 So. 2d 1230 (Fla. 2d DCA 1976) (motion to abate granted where petitioner failed to join an indispensable party); In Re: Review of Progress Energy Florida, Inc.'s Benchmark for Waterborne Transportation Transactions with Progress Fuels, Docket No. 031057-EI, Order No. PSC-04-0451-PCO-EI, 2004 WL 1073372 (Apr. 30, 2004) (proceeding abated where parties had reached settlement on terms); Bergman v. Kaplan, 922 So. 2d 982 (Fla. 4th DCA 2005) (lawsuit pending in circuit court that involved same issues and parties as a probate proceeding should have been dismissed to avoid conflicting decisions).

None of these circumstances exist here. There is no defect in PEF's request for cost recovery under the statutes and Commission precedent. Also, no other pending proceeding exists that will resolve PEF's request that the types of costs incurred for the CR3 Uprate can be recovered through the fuel clause under existing Commission precedent, nor can PEF's request be resolved without the need for this proceeding. Rather, PEF's request is consistent with more than 26 years of Commission precedent allowing the recovery of certain fuel costs through the fuel cost recovery clause, where those costs were not anticipated in base rates and will generate fuel savings to customers.[2] Intervenors acknowledge this Commission precedent in the Joint Motion. (Joint Motion, p. 6, ¶ 9).[3]

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[2] See, e.g., Order No. 9957, Docket No. 810001-EU, 1981 Fla. PUC LEXIS 531, at *7 (April 20, 1981) (in which the Commission noted that "... [w]e wish to indicate that the underlying principle governing our decision --- that utilities must be encouraged to take innovative actions designed to benefit customers and to lower overall costs --- has application elsewhere.") (emphasis added). See also Order No. 9224, Dockets Nos. 790898-EU and 74680-CI, 1980 Fla.

The issue in this docket is whether, under that existing precedent and policy, the costs of the CR3 Uprate may be recovered through the fuel clause. The CR3 Uprate, as set forth more fully in PEF's Petition and testimony, was not anticipated in PEF's last base rate proceeding and will generate substantial fuel savings for the benefit of PEF's customers. Intervenors nowhere claim in their Joint Motion that PEF has not shown the required nexus between the expense of the CR3 Uprate and the fuel savings it will generate. Indeed, this is the very reason the Company undertook this project, just as the Commission intended utilities to do in Order No. 9957 and Order No. 14546, and its progeny.

Importantly, in Order No. 961172, the Commission granted Florida Power & Light Company's ("FPL") request for the recovery of FPL's costs for a thermal power uprate to its Turkey Point nuclear facility through the fuel clause because FPL's nuclear uprate project was expected to generate fuel savings in excess of the project costs and the costs were not otherwise recoverable through base rates. There is no rational distinction between the application of Commission policy to FPL's prior request and PEF's current request for cost recovery through the fuel clause for nuclear uprate project costs. The only differences between the two uprate projects are that the CR3 Uprate costs more and generates substantially more fuel savings for customers. The certain and consistent application of regulatory policy requires the similar

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PUC LEXIS 519 (Jan. 30, 1980); Order No. PSC-98-0412-FOF-EI, Docket No. 980001-EI, 1998 WL 173332 (March 20, 1998); Order No. PSC-97-0359-FOF-EI, Docket No. 970001-EI, 1997 WL 199376 (March 31, 1997); Order No. PSC-95-0450-FOF-EI, Docket No. 950001-EI, 1995 WL 220901 (April 6, 1995); and Order No. PSC-94-1106-FOF-EI, Docket No. 940391-EI, 1994 Fla. PUC LEXIS 1126 (Sept. 7, 1994).

[3] Intervenors also erroneously quote Order No. 14546 that "only" prudently incurred fossil fuel-related expenses which are subject to volatile changes should be recovered through an electric utility's fuel adjustment clause. (Joint Motion, p. 6, n. 4). The Commission, however, never said that volatile expenses were the "only" recoverable costs under the fuel clause. In fact, in Order No. 14546 the Commission expressly recognized that costs recoverable through the fuel clause include: "Fossil fuel-related costs normally recovered through base rates but which were not recognized or anticipated in the cost levels used to determine current base rates and which, if expended, will result in fuel savings to customers."

treatment of the two requests for cost recovery. PEF's request for cost recovery for the CR3 Uprate through the fuel clause, accordingly, should be granted.[4]

Intervenors, nevertheless, argue that abatement is appropriate until either the conclusion of the administrative hearing before the Siting Board, or until the resolution of a separate, potential future docket addressing the general policy issues behind recovery of costs through the fuel clause. Neither of these other proceedings, however, address PEF's request, which is a request made pursuant to and in reliance on *already-existing* Commission policy regarding recovery of certain fuel costs through the fuel clause.

Intervenors further argue that PEF's request for determination of cost recovery is premature because the Siting Board has not issued a final approval of the CR3 Uprate. This argument lacks merit and does not satisfy the abatement standard. The proceeding before the Florida Department of Environmental Protection (DEP) has nothing to do with how the costs for the CR3 Uprate should be recovered. In addition, Intervenors exaggerate the nature of the "lengthy" proceedings in a case like this, which involves a power uprate at an *existing, already-sited* power plant. Because the CR3 Uprate involves an existing plant, operating today under all required licenses and permits, the likelihood that approval will be granted by the Siting Board, in a relatively short amount of time, is high. Therefore it would not be "inefficient," as Intervenors claim, to consider the method of cost recovery before the Siting Board has approved the project, given the likelihood that the project will be approved. In any event, DEP and the Siting Board will not decide PEF's request in its petition. There are, therefore, no grounds for abatement.

Intervenors' real argument is that the existing Commission policy and precedent should be changed. They do not want the Commission to decide PEF's pending request under that

[4] Intervenors also rely on Section 403.519(4), Florida Statutes, to support recovery through base rates, but this statutory amendment applies to new nuclear power plants, not the expansion of an existing nuclear power plant. In addition, Intervenors agree that this section may not apply if PEF is not seeking cost recovery specifically pursuant to the statute. (Joint Motion, p. 5).

existing precedent and policy until they can address this precedent in a future generic docket they now acknowledge must be opened. They hope to convince the Commission to alter its long-standing existing policy and precedent and then have the Commission retroactively apply whatever new policy may come out of that separate docket to PEF's request. The attempt by Intervenors to potentially alter Commission policy and precedent and then apply that to events that have already been set in motion, of course, is fundamentally unfair and unsound regulatory policy.[5]

PEF deliberately considered the CR3 Uprate project and proceeded with it consistent with PEF's understanding of the controlling existing precedent allowing the recovery of such costs through the fuel clause to the extent of the fuel savings. In other words, PEF was able to make business decisions regarding this project involving the prioritization of the substantial time and Company resources demanded by a project of this size and scope because the regulatory policies upon which these decisions were made were clear and certain. If, as the Intervenors suggest, existing precedent upon which a Company relies in making decisions can be altered and new precedent and policy applied retroactively, regulatory clarity and certainty are undermined. Indeed, all regulatory policy will be rendered unclear and uncertain. Uncertainty and a lack of clarity in regulatory policy increase regulatory risk with a resulting increase in cost. If the

[5] See York v. State ex.rel. Schwaid, 10 So. 2d 813, 815 (Fla. 1943) (administrative regulations may not be used in an ex post facto manner); Jordan v. Dept. of Professional Regulation, 522 So. 2d 450, 453 (Fla. 1st DCA 1988) (administrative rules are presumed to operate prospectively because the administrative agency acts in a quasi-legislative role when promulgating rules); Environmental Trust v. State, Dept. of Environmental Protection, 714 So. 2d 493, 500 (Fla. 1st DCA 1998) (administrative rules generally have prospective application unless new rule is a clarification of an existing rule and does not establish new requirements).

Commission abates this proceeding the Commission will create uncertainty and inconsistency in the application of regulatory policy to the detriment of the utility and the customer.[6]

Intervenors want to change the existing Commission precedent and policy because they assert the CR3 Uprate costs should be recovered in base rates and not through the fuel clause. Intervenors fundamentally misunderstand or mischaracterize the CR3 Uprate project. As a result, they miss the point that the customers are guaranteed benefits, if the CR3 Uprate costs are recovered through the fuel clause, by the fact that those costs will only be recovered through the clause to the extent fuel savings can be demonstrated.

To begin with, the CR3 Uprate project does not include the steam generator replacement for the CR3 license extension, as Intervenors allege on page 2 of the Joint Motion. The steam generator replacement project was planned far in advance of the CR3 Uprate and can be completed with or without the CR3 Uprate. All costs associated with the CR3 Uprate are incremental to the steam generator replacement project and all changes that are part of the CR3 Uprate go beyond the steam generator replacement. The CR3 Uprate, therefore, is not dependent on the steam generator replacement project. Rather, the CR3 Uprate is a separate, independent project from the steam generator replacement.

Additionally, the CR3 Uprate is not needed to meet customer or demand growth on PEF's system. The need for the CR3 Uprate is an economic, not a capacity, need. Indeed, this

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[6] Indeed, the Commission has recognized the importance of regulatory certainty. See, e.g. In Re: Establishment of Additional Filing Requirements in the Fuel and Purchased Power Cost Recovery Clause when Certain Threshold Levels are Met, Docket No. 971513-EI, Order No. PSC-98-0049-FOF-EI, 1998 WL 29753, at *3 (Jan. 7, 1998) (Commission held that standard for determining threshold level required for additional proof of fuel expenditures needed to be numeric rather than ambiguous, "to provide certainty and equality of administration and enforcement of such a policy"); Re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor, Docket No. 030001-EI, Order No. PSC-03-1461-FOF-EI, 2003 WL 23104812 (Dec. 22, 2003) (Commission, in rejecting the argument that PEF's proxy for waterborne transportation should be eliminated for costs already incurred, recognized that the proxy had provided regulatory certainty to PEF, its customers, and its investors as to the amount of costs that would be recoverable).

Commission recognized this when it granted the need determination for the CR3 Uprate. See Order No. PSC-07-0119-FOF-EI, Docket No. 060642-EI (Feb. 8, 2007) (Commission granted PEF's need petition for CR3 because the project "fills an economic need," and noted that "[a]lthough it is not needed for reliability it does meet the need for fuel diversity and supply reliability."). The CR3 Uprate, accordingly, *will not generate additional revenue and will not be supported by any new revenue*. Rather, the CR3 Uprate will displace existing generation supported by current revenues but at a lower cost to the customer. Intervenors' argument --- that the CR3 Uprate costs should be included in a base rate proceeding so that the "full dynamics and potentially offsetting effects of revenue stemming from customer growth, growth in demand, cost savings resulting from efficiencies, the retirement of plant, etc. can be taken into account when reviewing a claim of an individual increased expense or new investment," (Joint Motion, pp. 5-6) --- is simply wrong. Base rate recovery does not exist and is inappropriate; instead, for projects like the CR3 Uprate the Commission has recognized the recovery of the project expenditures to create fuel savings through the fuel clause.

This is the point of the Commission precedent allowing the recovery of such costs to the extent of fuel savings through the fuel clause. It is a guaranteed "win-win" for customers and the utility. The costs of project are recovered through the fuel clause only to the extent that there are fuel savings, therefore, the customers will not pay for any project costs that are not offset by fuel savings. In the alternative, if the costs of this project are addressed in base rates, as Intervenors argue, then there is no such guaranty. Customers will have to foot the bill for the costs of the project regardless of whether the project actually generates fuel savings.

This is a real benefit to customers and the Commission has a chance *now* to guarantee that the customers get this benefit by granting PEF's request. Intervenors' claim that there is an incentive to push costs through clauses and that this alleged incentive harms customers is simply

wrong when it comes to PEF's petition. To the contrary, by guaranteeing the customer pays the costs of the CR3 Uprate through the fuel clause only to the extent there are fuel savings, PEF's petition benefits, not harms, customers.

CONCLUSION

PEF respectfully requests that the Commission (1) deny the Joint Motion for abatement; and (2) proceed with the consideration of PEF's Request to Recover the CR3 Uprate Costs through the Fuel Clause.

Respectfully submitted this 9th day of February, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record and interested parties as listed below via electronic mail where indicated by * and U.S. Mail this 9th day of February, 2007.

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