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Subject: Electronic Filing for Docket No. 080083-EI - FPL's Response to OPC's Statement of Position and Request for Hearing
Attachments: FPL Response to OPC Statement of Opposition - 2008 03-14.doc

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 080083-EI

In re: Petition for Declaratory Statement Regarding Applicability of Rule 25-6.0423, F.A.C., by Florida Power & Light Company

c. This document is being filed on behalf of Florida Power & Light Company.

d. There are a total of nine (9) pages in the document, including attachments.

e. The document attached for electronic filing is Florida Power & Light Company's Response to Office of Public Counsel's Statement of Position and Request for Hearing.

(See attached file: FPL Response to OPC Statement of Opposition - 2008 03-14.doc)

Thank you for your attention and cooperation to this request.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Declaratory Statement)
Regarding Applicability of Rule 25-6.0423,) Docket No. 080083-EI
F.A.C., by Florida Power & Light Company.)
_____) Dated: March 14, 2008

**FLORIDA POWER & LIGHT COMPANY'S
RESPONSE TO OFFICE OF PUBLIC COUNSEL'S
STATEMENT OF POSITION AND REQUEST FOR HEARING**

Florida Power & Light Company ("FPL" or the "Company"), in response to the Office of Public Counsel's ("OPC") Notice of Intervention, Statement of Position in Opposition to Petition for Declaratory Statement and Request for Hearing (the "Notice"), states as follows.

In this proceeding, FPL requests that the Commission issue a declaratory statement that advance payments made after site selection and prior to the completion of the Turkey Point 6 & 7 site clearing work are "pre-construction costs," as defined in Rule 25-6.0423(2)(g), Fla. Admin. Code, to be recovered pursuant to the mechanism provided in the Nuclear Plant Cost Recovery Rule, Rule 25-6.0423, Fla. Admin. Code (the "Nuclear Plant Cost Recovery Rule" or the "Rule").

FPL does not object to OPC's intervention in this proceeding. However, as discussed below, OPC's opposition to issuing a declaratory statement completely overlooks the clear time period-based definition of "pre-construction costs" stated in Section 366.93, Fla. Stat., and Rule 25-6.0423(2)(g). Accordingly, OPC's legal objection lacks merit and should be rejected, and the requested declaratory statement should be issued.

In addition, OPC's Notice asks the Commission to hold an evidentiary hearing more in the nature of one properly conducted in annual Rule cost review proceedings,

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which may begin as early as May 1, 2008 – not in this declaratory statement proceeding. Taking detailed cost evidence is not needed in this case in order to determine the application of law to the statements of fact contained in FPL’s petition. The whole purpose of a declaratory statement action is for the Commission to consider the facts stated in the petition and apply the law to the facts. While more extensive pre-trial procedures and evidentiary hearings are available in Rule and other proceedings to decide contested issues of fact, they are neither appropriate nor necessary in a declaratory statement proceeding focused on the application of law.

The purpose of Section 366.93, Fla. Stat., and the Rule is to “promote utility investment in nuclear ... power plants and allow for recovery in rates of all prudently incurred costs,” including but not limited to “pre-construction costs,” which are to be recovered through the capacity cost recovery clause. Section 366.93(2), Fla. Stat.; Rule 25-6.0423(1), Fla. Admin. Code. The early recovery of pre-construction costs provided for in Section 366.93 and the Rule, including advance payments, encourages FPL to make investments in nuclear power plants, and also benefits customers. From a customer’s perspective, recovery of pre-construction costs, including advance payments, through the capacity cost recovery clause will have both a cost-reducing and rate-smoothing effect over time. Costs will be reduced because early cost recovery results in fewer total costs being capitalized in the final cost of the nuclear plants placed into rate base, thereby reducing the amounts paid by customers in rates during the decades that a nuclear plant is in service. Rates will be smoothed because early cost recovery shifts some cost recovery to the development and construction period of the plant, such that the early recoveries offset some cost recovery that would occur after a plant is in service.

Simply stated, in this proceeding FPL is requesting that the Commission decide the application of the Legislature's and Commission's clear statutory and Rule directives concerning pre-construction costs to advance payments made during the pre-construction period. Issuing the declaratory statement will be an important step forward in encouraging FPL's investment in new nuclear generation.

I. The Rule's Pre-Construction Cost Definition Clearly Supports Issuance of a Declaratory Statement.

Pursuant to Section 366.93, Fla. Stat., and the Rule, nuclear plant costs incurred after nuclear plant site selection and before completion of site clearing are "pre-construction costs" to be recovered annually through the capacity cost recovery clause. *See* Section 366.93(1)(f) (defining "pre-construction" period); Rule 25-6.0423(2)(g) (defining "pre-construction costs"); and Section 366.93(2)(a) and Rule 25-6.0423(5)(a) (pre-construction costs are to be recovered through capacity cost recovery clause). Advance payments incurred within this time period plainly should be treated as pre-construction costs, and the declaratory statement requested by FPL should be issued. *See*, FPL's Petition for Declaratory Statement, pars. 12-14.

The Rule's definition of pre-construction costs as those occurring between site selection and site clearing completion could not be more clear:

(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.

Rule 25-6.0423(2)(g). Accordingly, advance payments occurring in the period defined by Rule 25-6.0423(2)(g) should be ruled "pre-construction costs."

The Rule's definition of "pre-construction costs" based upon time periods is confirmed by the Staff's recommendation provided to the Commission in support of adopting the Rule. In discussing the definition of costs – specifically the definition of "pre-construction costs" – Staff stated that the Rule defines costs based upon when they occur. Staff's recommendation in relevant part states:

"Site Selection" and "Pre-Construction" Definitions. [citation omitted] FPL and PEF ("the utilities") raised the concern that the definitions contained in subsection (2) of the rule could be misleading, as several of the examples listed in both "site selection costs" and "pre-construction costs" were identical. The utilities proposed refining the definitions to make it clear that "site selection" and "pre-construction" are discrete time periods, and that the same on-going activity might begin as site selection and conclude as pre-construction. *Accordingly, the language was revised to more clearly reflect that the terms "site selection" and "pre-construction" are intended to be definitions of specific time periods, used for recovery of costs through different mechanisms, and that both types of costs might include the same activities or projects.*

Staff Recommendation, Docket No. 060508-EI – Proposed adoption of new rule regarding nuclear power plant cost recovery, issued February 1, 2007, pp. 4-5. OPC participated in the rule-making, *Id.* at p. 2.

In contrast, OPC's Notice does not mention the definition of "pre-construction costs" contained in Rule 25-6.0423(2)(g) at all. Rather, OPC's Notice paraphrases other portions of the Rule providing non-exclusive lists of different costs included among site selection costs, pre-construction costs and construction costs. *See* Notice at pp. 2-3. This is just the point that FPL and Progress Energy Florida cautioned against in the above-referenced rulemaking, and which was successfully addressed by Staff in its recommendation, above, supporting cost definitions based upon time periods. For all of these reasons, Section 366.93, Fla. Stat., and the Rule clearly support FPL's request for a

declaratory statement. OPC's interpretation of the Rule is incorrect, and a declaratory statement should be issued.

II. OPC's Request for an Evidentiary Hearing is Misplaced in this Proceeding, But Will Be Amply Satisfied In Annual Rule Cost Review Proceedings.

OPC's request for a hearing in the present docket (Notice at pp. 4-6) to develop an evidentiary record concerning future rate effects of advance payments is misplaced. Under applicable rules, the sole issue presented for decision in this declaratory statement proceeding is the application of law to the facts stated in FPL's petition. *See* Rule 28-105.003, Fla. Admin. Code ("The agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts. Within 90 days of the filing of the petition, the agency shall render a final order denying the petition or issuing a declaratory statement.")

OPC seems to contemplate that a declaratory statement proceeding would include an evidentiary hearing addressing the total amount of pre-construction costs FPL anticipates incurring, and what the expected bill impacts of the costs are. FPL has already provided a great deal of information in its nuclear plant need determination case for Turkey Point 6 & 7, and will soon file its first nuclear plant cost recovery Rule proceeding with considerable project and financial information. The annual Rule proceedings, in which the record will soon open (assuming a favorable Turkey Point 6 & 7 need determination), provide the right forum and hearing for the kinds of factual questions being asked by OPC in their Notice.

However, there is no provision for litigation of such factual questions, which are irrelevant to the information needed to decide the present declaratory statement, in the rules applicable to this declaratory statement proceeding. Unlike cases involving

contested issues of material fact for which extensive discovery, pre-hearing and evidentiary rules are provided under Florida law, no such rules are provided for declaratory statement proceedings. This is because the focus of such matters, including the present proceeding, is solely upon the application of law. Indeed, the only fact necessary for the Commission to reference in considering FPL's request for a declaratory statement is that there will be advance payments made during the pre-construction period.

Notably, the rules for declaratory statement proceedings, unlike those involving decision of contested issues of fact, contain no provisions for discovery or pre-hearing procedure, consistent with a declaratory statement proceeding being focused on application of law and subject to strict time constraint. *Compare* Chapter 28-105, Fla. Admin. Code, Declaratory Statement, and Chapter 28-106, Fla. Admin. Code, Decisions Determining Substantial Interests.

The Commission has stated that evidentiary hearings are discretionary in declaratory statement cases, "and appropriate only when there is a disputed factual issue which must be determined in order to provide the legal interpretation requested." In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, Docket No. 860725-EU; Order No. 16581, Issued September 11, 1986 (1986 Fla. PUC LEXIS 351*4), citing Sans Souci v. Division of Florida Land Sales, 448 So. 2d 1116, 119-20 (Fla. 1st DCA 1984). In the present matter, as was the case with the prospective intervenor in Monsanto, OPC has not alleged any disputed factual issues integral to the issuance of FPL's requested declaratory statement. See Monsanto at *4. Accordingly, OPC's request for an evidentiary hearing in this

proceeding to quantify the bill impact of the advance payments (Notice at p. 5) should be rejected.

Although not appropriate for this 90-day declaratory statement proceeding, amounts of costs and future bill effects will be the subject of evidentiary proceedings beginning soon. The Rule provides for ongoing information-gathering and hearing opportunities for all nuclear project costs. Assuming that the Commission grants an affirmative need determination for Turkey Point 6 & 7 during March 2008, FPL will make its first annual filing under the Rule for the project by May 1, 2008. Rule 25-6.0423(5)(c)(1)(b).

In these annual Rule proceedings, actual and projected pre-construction costs including any advance payments known of at the time of the filing will be presented for review. Rule 25-6.0423(5)(c)(2). One of the key purposes of these proceedings is to examine and quantify nuclear plant pre-construction costs for recovery, and the proceedings will result in determination of bill factors for recovery through the Capacity Cost Recovery Clause. Rule 25-6.0423(5)(c)(3). Thus OPC may be assured that thorough and appropriate quantification and review of advance payments and other nuclear plant costs will occur.

Finally, OPC's hearing request generally expresses OPC's interest in the rate effects of nuclear construction. Notice at pp. 5-6. For the reasons described above, the specifics of these considerations will be addressed in annual Nuclear Cost Recovery Rule proceedings, but are not properly within the scope of the present declaratory statement proceeding.

FPL observes, however, that pre-construction cost recovery should tend overall to have both a rate lowering and leveling effect for nuclear project costs. Pre-construction cost recovery (and recovery of carrying costs on construction) pursuant to the Rule reduces the total amount of plant costs ultimately placed into base rates and upon which a return is paid over the life of a plant, lowering costs to customers. In addition, recovery of some costs during development and construction that would otherwise be capitalized negates the need to recover such costs after the plant is in service, thus helping levelize rates associated with new nuclear plants. Finally, FPL is committed to making only reasonable and prudent decisions concerning costs that need to be incurred for Turkey Point 6 & 7 – of course including decisions concerning advance payments – all of which decisions will be subject to Commission review in the appropriate Rule proceedings.

WHEREFORE, for all the foregoing reasons, Florida Power & Light Company requests that the Florida Public Service Commission issue a declaratory statement as requested in the petition in this matter, and deny the Office of Public Counsel's request for a hearing.

Respectfully submitted this 14th day of March, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to Office of Public Counsel's Statement of Position and Request for Hearing has been furnished electronically and by United States mail this 14th day of March, 2008, to the following:

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