

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: March 27, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Bellak) *RCB/S.M.C.*
Division of Economic Regulation (Hinton) *GH 1/98*

RE: Docket No. 080083-EI – Petition for declaratory statement regarding applicability of Rule 25-6.0423, F.A.C., by Florida Power & Light Company.

AGENDA: 04/08/08 – Regular Agenda – Parties may participate at the Commission’s discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: May 5, 2008 (Final order must be issued by this date)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\080083.RCM.DOC

Case Background

On February 5, 2008, Florida Power & Light Company (FPL), pursuant to Section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, filed a Petition for Declaratory Statement (Petition) related to its planned Turkey Point Units 6 & 7 nuclear power plant. As discussed in the Petition, FPL, in effect, asks the Commission to state that:

If the Commission grants Florida Power & Light Company’s petition to determine the need for the proposed Turkey Point Units 6 & 7, advance payments made prior to the completion of site clearing work are properly characterized as “preconstruction costs” to be recovered pursuant to the mechanism provided in Rule 25-6.0423, F.A.C.

DOCUMENT NUMBER-DATE

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Petition, p. 6.

As background demonstrating the need for the declaratory statement, FPL describes the special circumstances relevant to constructing the proposed nuclear power plant:

One of the potential bottlenecks that could impede FPL's efforts to bring TP 6 & 7 into service in the 2018-2020 timeframe is the availability of "long-lead procurement items," which include but are not necessarily limited to heavy forgings like the reactor pressure vessel, steam generator shell, etc. Because there are only a very limited number of facilities in the world capable of supplying these long-lead procurement items and there is considerable worldwide interest in developing nuclear units, FPL anticipates that lengthy queues may form for their procurement. Therefore, assuming that the Commission grants an affirmative determination of need for TP 6 & 7, and in order to retain the potential for 2018-2020 in-service dates, FPL expects that it will have to make substantial advance payments associated with long-lead procurement items beginning soon, perhaps as early as summer 2008.

Petition, p. 4.

Because pre-construction costs are subject to favorable cost recovery treatment pursuant to Rule 25-6.0423(5)(a), F.A.C.,¹ and long-lead procurement items are not specifically identified as pre-construction costs in either Rule 25-6.0423 or Section 366.93, Florida Statutes, FPL seeks the declaratory statement at issue here in order to definitively establish the eligibility of long-lead procurement expenses for the capacity clause recovery treatment provided for in Rule 25-6.0423(5)(a).² FPL acknowledges that the prudence of specific payments for long-lead procurement items is not at issue here.

On March 11, 2008, the Office of Public Counsel (OPC or Citizens) filed a Notice of Intervention pursuant to Section 350.0611, Florida Statutes, a Position in Opposition to Petition for Declaratory Statement and a Request for Hearing. (Opposition)³ On March 14, 2008, FPL filed a Response to OPC's Statement of Position and Request for Hearing. (Response)

This recommendation addresses FPL's Petition, OPC's Opposition and Request for Hearing, and FPL's Response. This Commission has jurisdiction pursuant to Section 120.565, Florida Statutes.

¹ Rule 25-6.0423(5)(a) provides: "A utility is entitled to recover, through the Capacity Cost Recovery clause, its actual and projected pre-construction costs." Compare, Rule 25-6.0423(5)(b) which provides for recovery of the carrying costs on the annual projected construction cost balance associated with the power plant.

² FPL alleges it will be substantially affected by whether long lead items may be considered to be pre-construction costs subject to cost recovery pursuant to Rule 25-6.0423(5)(a). Pursuant to Section 120.565, Florida Statutes, "Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of . . . any rule . . . of the agency, as it applies to the petitioner's particular set of circumstances."

³ The Commission acknowledged OPC's intervention in Order No. PSC-08-0152-PCO-EI, issued March 14, 2008.

Discussion of Issues

Issue 1: Should the Commission grant OPC's Request for Hearing?

Recommendation: No, OPC's Request for Hearing should be denied. (Bellak)

Staff Analysis: Rule 28-105.003, F.A.C., states that an agency may hold a hearing to consider a petition for declaratory statement. The rule further states, however, that the agency may rely on the statement of facts set out in the petition without taking any position with regard to the validity of the facts.

OPC states that a record adequate to inform the Commission as to the impact of FPL's preferred interpretation on customers' bills must be developed:

FPL's petition is devoid of any quantification of the impact of its preferred interpretation on customer's bills Citizens assert the portions of long lead procurement items associated with Turkey Point 6 and 7 that FPL plans to expend prior to completion of site clearing and therefore are the subject of FPL's petition, could amount to \$100 million or more.

Opposition, p. 5.

Staff, however, does not believe a hearing is necessary in this instance. FPL's petition involves a legal interpretation of Rule 25-6.0423, F.A.C. The petition specifically states that the company is not asking the Commission to determine the prudence of specific payments for long-lead procurement items. As noted by FPL in its Response to OPC's Statement of Position and Request for Hearing, p. 7, "One of the key purposes of [the annual rule 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."

The Commission should rely on the statement of facts set out in FPL's petition without taking any position with regard to the validity of the facts, as authorized by Rule 25-105.003, F.A.C., and OPC's Request for Hearing should be denied.

Issue 2: Should the Commission issue a declaratory statement to the effect that long-lead procurement items requiring advance payment up to and including the date of site clearing for Turkey Point Units 6 & 7 are preconstruction costs subject to cost recovery as provided for by Rule 25-6.0423(5)(a)?

Recommendation: Yes, the Commission should issue the declaratory statement requested by FPL. (Bellak, Hinton)

Staff Analysis: The definition of “pre-construction costs” in Rule 25-6.0423(2)(g), as well as several other definitions within Rule 25-6.0423(2) set out below are relevant to the analysis of FPL’s petition, including the following:

(g) “Pre-construction costs” are costs that are expended after a site has been selected in preparation for the construction of a nuclear . . . power plant, incurred up to and including the date the utility completes site clearing work.

(h) Site selection costs and pre-construction costs include, but are not limited to: any and all costs associated with preparing, reviewing and defending a Combined Operating License (COL) application for a nuclear power plant; costs associated with site and technology selection; costs of engineering, designing, and permitting the nuclear . . . power plant; costs of clearing, grading, and excavation; and costs of on-site construction facilities (i.e., construction offices, warehouses, etc.).

(i) “Construction costs” are costs that are expended to construct the nuclear . . . power plant including, but not limited to, the costs of constructing power plant buildings and all associated permanent structures, equipment and systems.

Since FPL identified examples of long-lead procurement items as including, but not necessarily limited to, heavy forgings like the reactor pressure vessel, steam generator shell, etc., the difficulties and ambiguities involved in applying the rule are apparent. The items described by FPL sound more like the “construction costs,” i.e., “power plant buildings and all associated permanent structures, equipment and systems,” listed in Rule 25-6.0423(2)(i), than the “pre-construction costs” listed in Rule 25-6.0423(2)(h).

In support of its position that long-lead procurement items requiring advance payments up to and including the date of site clearing should be treated as “pre-construction costs,” FPL’s argument emphasizes the timeframe of the expense:

Assuming a favorable need determination is issued and other project requirements are met, FPL plans to complete site clearing work in 2011. Advance payments associated with long-lead procurement items are likely to be required before the completion of site clearing work for TP 6 & 7. Such payments if made prior to completion of site clearing work should clearly constitute “preconstruction costs” pursuant to Section 366.93 and the Rule and should thus be eligible for annual recovery. [emphasis supplied]

Petition, p. 5.

In opposing the petition, OPC's argument emphasizes the nature of the costs:

FPL states such long-lead procurement items "include, but are not limited to heavy forgings like the reactor pressure vessel, steam generator shell, etc."

...

[T]he nature of the costs identified by FPL places them squarely and indisputably within the definition of "construction costs," which under the rule include "the costs of constructing power plant buildings and all associated permanent structures, equipment and systems." [emphasis supplied]

Opposition, pp. 2-3. OPC further stated that

In essence, FPL proposes to expense these enormous capital investments in the years in which they are incurred, even though the alternative mechanism devised specifically for construction costs is limited to collecting associated carrying costs prior to the commercial in-service date. Under the method contemplated by both statute and rule, the investment itself would be reflected in base rates following the commercial in-service date and collected over the 30 or 40 year lives of the assets. Allowing FPL to roll through the capacity cost recovery clause the entire amounts expended on such long-lead construction items prior to completion of site clearing would result in dramatic increases in customers' bills that were not intended by the Legislature and that would contravene Rule 25-6.0423, Florida Administrative Code. [emphasis supplied]

Opposition, pp. 5-6.

In response, FPL observes that:

pre-construction cost recovery should tend overall to have both a rate lowering and leveling effect for nuclear project costs. Preconstruction cost recovery (and recovery of carrying costs on construction) pursuant to the Rule reduces the total amount of plant costs ultimately placed into rate base 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.

Response, p. 8.

In evaluating these contrasting positions, staff notes its agreement with OPC that heavy forgings like the reactor pressure vessel and steam generator shell sound more like the

“construction costs,” i.e., “power plant buildings and all associated structures, equipment and systems,” listed in Rule 25-6.0423(2)(i), than the “pre-construction costs” listed in Rule 25-6.0423(2)(h). However, the context provided by FPL indicates that the long lead costs at issue are advance payments on construction costs required to secure a place in the queue, without which the plant, yet to be constructed, cannot either be constructed or be operational at the planned in-service date. In other words, the long lead payment is a hybrid, certainly related to construction costs, but required by factual exigencies to be paid during the pre-construction phase if the project is to go forward at all.

Moreover, the definition of “construction costs” in Rule 25-6.0423(2)(i) is silent as to any explicit timeframe, whereas the timeframe referenced in Rule 25-6.0423(2)(g) is explicit and absolute:

“Pre-construction costs” are costs that are expended after a site has been selected . . . incurred up to and including the date the utility completes site clearing work. [emphasis supplied]

In contrast, the definition of pre-construction costs in Rule 25-6.0423 includes, but is not limited to, the items listed therein. In staff’s view this supplies the key to how the rule should apply to the “hybrid” which FPL refers to as advance payment on long-lead procurement items. Because the types of pre-construction costs in Rule 25-6.0423(2)(h) are flexible and not limited to those listed, but the timeframe in Rule 25-6.0423(2)(g) for pre-construction costs is explicit and absolute, the timeframe must be considered dispositive as to the correct characterization of these “queuing” costs under the rule. Thus, what would otherwise be related to “construction costs” based on the type of expenses involved, are “pre-construction costs” if advance payments thereof for queuing purposes are necessarily incurred within the timeframe described in Rule 25-6.0423(2)(g).

As stated on p. 5 of the Opposition, OPC is concerned that, if the petition is granted, the amounts that FPL will collect from customers will reflect the full amounts expended on permanent structures and equipment prior to the completion of site clearing. However, treating any construction-related cost, let alone the entirety of such costs, as long lead advance payments would have to be justified as prudent because such advance payments are necessitated by the facts and circumstances on a case-by-case basis.⁴ This harmonizes what would otherwise appear to be conflicting definitions between the rule subparts, so as to forward the intent of the rule to carry out the statutory scheme envisioned by the Legislature in Section 366.93, Florida Statutes:

2) . . . the commission shall establish by rule, alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of a nuclear . . . power plant. Such mechanisms shall be designed to promote utility involvement in nuclear . . . power plants and allow for the recovery of all prudently incurred costs, and shall include, but are not limited to:

⁴ See, Rule 25-6.0423(5)(c) providing for Commission review and approval of previous, current and projected pre-construction costs.

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(a) Recovery through the capacity cost recovery clause of any preconstruction costs. [emphasis supplied]

Staff believes that the foregoing interpretation of Rule 25-6.0423, F.A.C., and the rule subparts discussed above is reasonable and effectuates the purposes of the statute.

Conclusion

In view of the above, the Commission should grant FPL's Petition for Declaratory Statement. FPL is on notice that granting the petition does not determine the prudence of any specific payment for a long-lead procurement item.

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Issue 3: Should this docket be closed?

Recommendation: Yes, this docket should be closed. (Bellak)

Staff Analysis: If the Commission grants or denies the petition, the docket may be closed.

RCB