



John T. Butler  
Senior Attorney  
Florida Power & Light Company  
700 Universe Boulevard  
Juno Beach, FL 33408-0420  
(561) 304-5639  
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March 28, 2008

**-VIA OVERNIGHT DELIVERY -**

Ms. Ann Cole  
Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

08 MAR 31 10 09 AM '08

**Re: Docket No. 080007-EI**

Dear Ms. Cole:

I am enclosing for filing in the above docket the original and seven (7) copies of Florida Power & Light Company's Petition to Modify the Scope of its CWA 316(b) Phase II Rule Project, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows XP, and the word processing software in which the document appears is Word 2003.

If there are any questions regarding this transmittal, please contact me at 561-304-5639.

Sincerely,

*John T. Butler*  
John T. Butler  
for JTB

CMP \_\_\_\_\_

COM \_\_\_\_\_

CTR \_\_\_\_\_

ECR \_\_\_\_\_

GCL \_\_\_\_\_ Enclosure

OPC 1 cc: Counsel for Parties of Record (w/encl.)

RCA 3 \_\_\_\_\_

SCR \_\_\_\_\_

SGA \_\_\_\_\_

SEC \_\_\_\_\_

OTH \_\_\_\_\_

\* CD to ECR

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FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Environmental Cost )  
Recovery Clause. )

Docket No. 080007-EI  
Filed: March 31, 2008

**PETITION OF FLORIDA POWER & LIGHT COMPANY FOR APPROVAL TO  
MODIFY THE SCOPE OF ITS CWA 316(b) PHASE II RULE PROJECT**

Florida Power & Light Company (“FPL”), pursuant to Section 366.8255, Florida Statutes and prior orders of the Commission, hereby petitions this Commission for approval to modify the scope of its CWA 316(b) Phase II Rule Project (the “Project”) to encompass the additional Project activities described herein, such that costs associated with those additional activities prudently incurred after the date of this Petition may be recovered as “environmental compliance costs” through the Environmental Cost Recovery Clause (“ECRC”). In support of this Petition, FPL states as follows:

1. FPL is a public utility subject to the regulatory jurisdiction of the Commission under Chapter 366, Florida Statutes. The Company’s principal offices are located at 700 Universe Boulevard, Juno Beach, Florida.
2. All notices, pleadings and other communications required to be served on the petitioner should be directed to:

John T. Butler, Esq.  
Senior Attorney  
Florida Power & Light Company  
700 Universe Boulevard  
Juno Beach, Florida 33408-0420  
Telephone: (561) 304-5639  
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e-mail: john\_butler@fpl.com

3. Section 366.8255 authorizes the Commission to review and approve recovery through the ECRC of prudently incurred “environmental compliance costs,” which are defined as “costs or expenses incurred by an electric utility in complying with environmental laws or

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regulations.” In turn, section 366.8255 defines “environmental laws or regulations” broadly to include “all federal, state, or local statutes, administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment.” The Commission has adopted the following test for determining whether costs qualify for ECRC recovery:

We find that the following policy is the most appropriate way to implement the intent of the environmental cost recovery statute:

Upon petition, we shall allow the recovery of costs associated with an environmental compliance activity through the environmental cost recovery factor if:

1. such costs were prudently incurred after April 13, 1993;
2. the activity is legally required to comply with a governmentally imposed environmental regulation enacted, became effective, or whose effect was triggered after the company's last test year upon which rates are based; and,
3. such costs are not recovered through some other cost recovery mechanism or through base rates.

Order No. PSC-94-0044-FOF-EI, Docket No. 930613-EI, dated January 12, 1994, at 6-7.

4. As explained in the affidavit of Randall R. LaBauve that is attached hereto as Exhibit 1 and incorporated by reference (the “LaBauve Affidavit”), on July 9, 2007, several key provisions of the rule adopted by the U.S. Environmental Protection Agency (“EPA”) on May 28, 2004, pursuant to Section 316(b) of the Clean Water Act (the “Phase II Rule”) were remanded to EPA by the U.S. Court of Appeals for the Second Circuit (“Second Circuit”) for further rulemaking. The Utility Water Act Group (“UWAG”), of which FPL is a member, has petitioned for a writ of certiorari seeking to have the United States Supreme Court review the Second Circuit’s ruling. At the same time, however, EPA has reinitiated rule making to address the areas of the Phase II Rule that were remanded by the Second Circuit.

5. Among the provisions of the Phase II Rule that were remanded were EPA's determinations that utilities could use restoration, and that utilities could apply a cost-benefit test to the evaluation of appropriate mitigation technologies. If these provisions were removed from EPA's revised Phase II rule, the potential that FPL would have to install cumbersome and very expensive compliance technologies on the cooling water intakes at eight FPL power plants would be dramatically increased. Initial estimates indicate that compliance costs for retrofitting all eight facilities with cooling towers would exceed \$1.5 billion.

6. FPL believes it is prudent at this time to take two actions to help limit the compliance cost impact of potential revision to the Phase II Rule on FPL and its customers. The first action is encourage various government agencies (both Florida and federal) to participate in support of UWAG's position before the Supreme Court, in the event that the Court grants certiorari with respect to the Second Circuit ruling. To do this, FPL would need to educate those agencies on the issues and their large potential impact on FPL and its customers, while achieving very little in additional environmental protection. The second action is targeted at the EPA's rule making effort to address the Second Circuit's remand. Again, FPL would need to educate various state and federal agencies in an attempt to have them support the rulemaking (and possibly legislative) process so that a balanced and equitable rule is achieved to minimize compliance costs.

7. In order to implement these actions, FPL believes it is prudent to contract with various law firms and consultants that would facilitate communication with the targeted authorities/agencies, assist in writing comments on any proposed rules, consider proposing necessary legislation and advise/assist in writing comments and briefs in any court actions.

8. The initial O&M estimate for funding the activities described above is \$700,000, to be incurred beginning in late March, 2008. FPL is attempting to arrange for other utilities to

share the cost of these activities, but has not yet reached any firm arrangements. To the extent that FPL is able to enter into cost-sharing arrangements, FPL's share of these costs would be reduced and FPL's cost-recovery request would be reduced accordingly.

WHEREFORE, Florida Power & Light Company respectfully requests the Commission to approve a modification of the scope of FPL's CWA 316(b) Phase II Rule Project to encompass the activities described above to help limit the cost impact of potential revision to the Phase II Rule on FPL and its customers; to determine that such activities are "environmental compliance activities"; and the that costs associated with such activities that are prudently incurred after the date of this Petition may be recovered through the ECRC.

Respectfully submitted,

R. Wade Litchfield, Esq.  
Vice President and  
Associate General Counsel  
John T. Butler, Esq.  
Senior Attorney  
Law Department  
Florida Power & Light Company  
700 Universe Boulevard  
Juno Beach, Florida 33408-0420  
Telephone: 561-304-5639  
Fax: 561-691-7135

By: Kevin M. Dahi for JTB  
John T. Butler  
Florida Bar No. 283479

**CERTIFICATE OF SERVICE**  
**Docket No. 080007-EI**

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Petition for Approval to Modify the Scope of its CWA 316(b) Phase II Rule Project has been furnished by overnight delivery (\*) or U.S. Mail on March 28, 2008 to the following:

Martha Brown, Esq. \*  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

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Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
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Russell A. Badders, Esq.  
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Attorneys for Gulf Power Company  
P.O. Box 12950  
Pensacola, Florida 32576-2950

By: John T. Butler for ATB  
John T. Butler

AFFIDAVIT

STATE OF FLORIDA  
COUNTY OF PALM BEACH

BEFORE ME, the undersigned authority, personally appeared Randall R. LaBauve, who being first duly sworn deposes and says:

1. My name is Randall R. LaBauve, and I occupy the position of Vice President of Environmental Services, Florida Power & Light Company, 700 Universe Boulevard, Juno, Florida. In this position I have knowledge of and have familiarity with the matters addressed in this affidavit.
2. I received a Bachelor of Arts degree in Psychology from Louisiana State University in 1983 and a Juris Doctor degree from Louisiana State University in 1986. I joined FPL in 1995 as an Environmental Lawyer and in 1996 assumed the responsibility of Director of Environmental Services. In July of 2002, I assumed the responsibility of Vice President of Environmental Services. Prior to joining FPL I was the Director of Environmental Affairs for Entergy Services, Incorporated located in Little Rock, Arkansas and prior to that practiced law with Milling, Benson, Woodward, Hilliard, Pierson and Miller in New Orleans, Louisiana.
3. I am responsible for directing the overall corporate environmental planning, programs, licensing, and permitting activities to ensure the basic objective of obtaining and maintaining the federal, state, regional and local government approvals necessary to site, construct and operate FPL's power plants, transmission lines, and fuel facilities and maintain compliance with environmental laws.
4. On June 21, 2004, FPL filed a petition with the Florida Public Service Commission (FPSC) for cost recovery through the Environmental Cost Recovery Clause (ECRC) of activities associated with its CWA 316(b) Phase II Project (the "Project".) The Project addressed rules adopted by the U.S. Environmental Protection Agency (EPA) pursuant to Section 316(b) of the Clean Water Act (Phase II Rule). The Phase II Rule established performance standards to reduce the mortality of aquatic organisms by cooling water intake structures at certain large electric generating plants and required Comprehensive Demonstration Studies (CDS), which serve to develop a baseline of impact and to provide necessary plant information to determine the most efficient and cost-effective manner to meet the new performance standards. The Phase II Rule was then challenged by parties with opposing interests and the challenge was pending before U.S. Court of Appeals for the Second Circuit (Second Circuit) at the time that the FPSC was considering FPL's petition for the Project. By Order No. PSC-04-0987-PAA-EI, dated October 11, 2004, the FPSC approved the Project, specifically finding that "the prudently incurred costs for the Comprehensive

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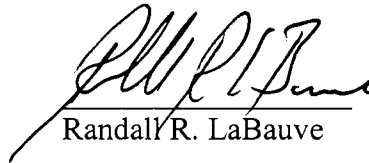
Demonstration Study are appropriate for recovery through the ECRC consistent with the offsetting policy established in Order No. PSC-00-1167-PAA-EI.”

5. On January 25, 2007, the Second Circuit remanded several key provisions of the Phase II Rule to EPA for further rulemaking. On March 20, 2007, the EPA issued a letter announcing its plan to suspend the Phase II Rule in light of the Second Circuit’s decision. On April 13, 2007, FPL notified the Commission of EPA’s decision to suspend the rule, FPL’s decision to continue its CDS and to continue to recover costs through the ECRC because the work would continue to be useful for purposes related to the Phase II Rule, irrespective of the ultimate outcome of EPA’s further rulemaking.
6. On July 9, 2007, EPA officially suspended the 316 (b) Phase II Rule. Since that time, EPA has reinitiated rule making to address the areas of the rule that were remanded to them by the Second Circuit. In tandem with the rule making effort, the Utility Water Act Group (UWAG), of which FPL is a member, has petitioned for a writ of certiorari seeking to have the United States Supreme Court review the Second Circuit’s ruling.
7. Among the provisions of the Phase II Rule that were remanded were EPA’s determinations that utilities could use restoration (i.e. mitigation for damages incurred by power plant once-through cooling system operation), and that utilities could apply a cost-benefit test to the evaluation of appropriate mitigation technologies (i.e. if the cost of technology needed to achieve prescribed reductions in impingement mortality and entrainment of fish and shellfish in power plant intakes was significantly greater than the benefit derived from the installation of a technology, a lesser reduction could be allowed). If those provisions were removed from EPA’s revised Phase II rule, the potential that FPL would have to install cumbersome and very expensive compliance technologies on the cooling water intakes at eight FPL power plants would be dramatically increased. Those technologies range from various screening devices and variable speed cooling water pumps to retrofitting the facilities with cooling towers. Initial estimates indicate that compliance costs for retrofitting all eight facilities with cooling towers would exceed \$1.5 billion.
8. FPL believes it is prudent at this time to take two actions to help limit the compliance cost impact of the Phase II Rule on FPL and its customers.
9. The first action is encourage various government agencies (both Florida and federal) to participate in support of UWAG’s position before the Supreme Court, in the event that the Court grants certiorari with respect to the Second Circuit ruling. To do this, FPL would need to educate those agencies on the issues and their large potential impact on FPL and its customers, while achieving very little in additional environmental protection.
10. The second action is targeted at the EPA’s rule making effort to address the Second Circuit’s remand. Again, FPL would need to educate various state and

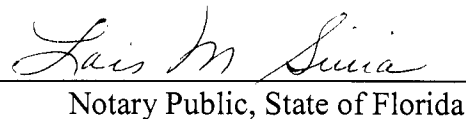


federal agencies in an attempt to have them support the rulemaking (and possibly legislative) process so that a balanced and equitable rule is achieved to minimize compliance costs.

11. In both of these actions, the governmental authorities to be targeted in Florida would be: the elected officials, FPSC, Department of Environmental Protection, Fresh Water Fish and Wildlife Conservation Commission, and the Water Management Districts. At the federal level, FPL would target elected officials, EPA, Department of Energy, Center for Environmental Quality, Office of Management and Budget, U.S. Fish and Wildlife Service, and possibly others.
12. In order to implement these actions, FPL believes it is prudent to contract with various law firms and consultants that would facilitate communication with the targeted authorities/agencies, assist in writing comments on any proposed rules, consider proposing necessary legislation and advise/assist in writing comments and briefs in any court actions.
13. The initial O&M estimate for funding the proposed actions is \$700,000, to be incurred beginning late March, 2008. In an attempt to minimize the cost of these legal/consulting services, FPL has contacted a few like-minded utilities throughout the United States to discuss participation and cost-sharing for those services. It is yet undermined how many utilities will be involved in the cost-sharing. When that number is finally determined, FPL's share of the overall cost will be reduced accordingly.
14. The Supreme Court is expected to rule on UWAG's petition for certiorari in the Spring of 2008. If certiorari were granted, a decision on review of the Second Circuit's decision would be expected sometime in 2009. At the same time, EPA has already begun its rulemaking to address the remand and has indicated that it expects to publish a draft rule in late 2008, with a final rule in late 2009.
15. Affiant says nothing further.

  
Randall R. LaBauve

**SWORN TO AND SUBSCRIBED** before me this 27<sup>th</sup> day of March 2008, by Randall R. LaBauve, who is personally known to me or who has produced \_\_\_\_\_ (type of identification) as identification and who did take an oath.

  
Notary Public, State of Florida

My Commission Expires:

