

Ruth Nettles

From: ROBERTS.BRENDA [ROBERTS.BRENDA@leg.state.fl.us]
Sent: Monday, August 25, 2008 4:52 PM
To: ROBERTS.BRENDA; Filings@psc.state.fl.us
Cc: bill_feaster@fpl.com; Bryan Anderson; Dianne Triplett; Jack Leon; James M. Walls; James W. Brew; Jennifer Brubaker; John Burnett; John McWhirter; John_Butler@fpl.com; Keino Young; Lisa Bennett; Mike Twomey; Natalie F. Smith (Nattie_Smith@fpl.com); Paul Lewis; R. Alexander Glenn; Tiffany Cordes; Wade Litchfield; McGLOTHLIN.JOSEPH
Subject: RE: e-filing, Dkt. No. 080009-EI
Attachments: SDOC0457.pdf

Electronic Filing

a. Person responsible for this electronic filing:

Joseph A. McGlothlin, Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
mcglothlin.joseph@leg.state.fl.us

b. Docket No. 080009-EI

In re: Nuclear Cost Recovery Clause.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of six pages.

e. The document attached for electronic filing is the OPC's Memorandum on Issues 6F and 7H

Thank you for your attention and cooperation to this request.

Brenda S. Roberts
Office of Public Counsel
Telephone: (850) 488-9330
Fax: (850) 488-4491

Brenda S. Roberts
Office of Public Counsel
850-488-9330

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Later in the afternoon of that day, FPL informed OPC by e-mail that FPL regards OPC's proposed issue as stating a new legal or regulatory consideration or requirement that is not provided for in statute or rule.

On August 21, 2008, the Prehearing Officer issued Order No. PSC-08-0554-PCO-EI, in which she encouraged parties to submit memoranda "setting forth the rationale for the inclusion, exclusion, or modification" of the additional issues that OPC distributed prior to the Issue Identification meeting of August 14, 2008.

Rationale for inclusion

This proceeding is being conducted pursuant to Commission Rule 25-6.0423, Florida Administrative Code, the purpose of which is to "establish alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of nuclear . . . power plants in order to promote electric utility investment in nuclear . . . power plants and allow for the recovery in rates of all such prudently incurred costs." In a prior order, the Commission determined that the alternative cost recovery mechanism applies to "uprate projects" to increase the electrical output of existing nuclear units as well as new nuclear units. However, OPC submits (and has reason to believe FPL and PEF agree) that the rule was *not* intended to apply the alternative ratemaking treatment to costs incurred as part of ongoing maintenance of existing nuclear units.

In his testimony, Dr. Jacobs observed that, while PEF had provided an example of a large asset that is unrelated to its uprate project and that PEF therefore had excluded from the costs encompassed by its petition, the utilities had not provided evidence of a comprehensive analysis designed to ensure that the costs presented are "incremental" to the costs that they otherwise would ordinarily incur.

With this testimony, Dr. Jacobs placed at issue the sufficiency of the utilities' presentations to demonstrate that the costs they seek authority to collect from customers through the alternative mechanism created by the rule are related solely to the uprate projects, and not to matters that are

properly the subject of ongoing base rate recovery. Significantly, in rebuttal testimony the utilities joined the issues.

Section 120.57(1)(b), Florida Statutes provides all parties with the “opportunity to respond, to present evidence and argument on all issues involved.” In Order Establishing Procedure No. PSC-8-0211-PCO-EI, issued on March 31, 2008, the Prehearing Officer directed parties to include in Prehearing Statements “A statement of each question of fact, question of law, and policy question that the party considers at issue, along with the party’s position on each issue. . .” OPC complied with this requirement. The issues it raised are germane to the utilities’ petitions, as they relate to whether the utilities have demonstrated that they have not included costs that are inappropriate for the alternative nuclear cost recovery mechanism of Rule 25-6.0423.

In summary, the right to raise and address issues is ensured by the Administrative Procedure Act; the issues added by OPC arise directly from the utilities’ requests; and OPC has raised its issues timely.

Rationale for not excluding issues

The only “opposition” of which OPC is aware is the statement by FPL to OPC that OPC’s issues state a new legal or regulatory consideration that is not provided for in the statute or the rule. Based on a conversation with counsel for FPL that took place this date, OPC believes that OPC and FPL may be closer with respect to their views on the proper scope and application of Rule 25-6.0423 than the disagreement over OPC’s issues to date might indicate. However, even if there is a difference with respect to the scope of the rule, that would *not* amount to a justification for excluding OPC’s issues as worded. Instead, it would be a reason to articulate the issue or issues to reflect there is disagreement regarding the costs that may permissibly be included under the rule. To exclude OPC’s issues on the basis that FPL contends they raise a new standard would be to accept FPL’s unilateral conclusion regarding the scope of the rule before entertaining OPC’s argument on the issue. This would be a violation of OPC’s rights under section 120.57, Florida Statutes. Further, the interpretation of a rule is a matter for the full Commission after each affected party has been afforded due process, *not* a procedural matter to be ruled on by the Prehearing Officer.

Rationale for modifying OPC's issues

As stated above, following a conversation with counsel for FPL, OPC believes that FPL and OPC are not as far apart with respect to their views on the scope of Rule 25-6.0423 as the issue identification activities to date might lead one to believe. While the parties were not able to find mutually acceptable language prior to the deadline for this memorandum, OPC is willing to work with FPL (and PEF, of course, though PEF has not objected to the language distributed earlier) to resolve the concerns. The objective of the prehearing procedures should not be to prevent a party from raising a legitimate issue. Instead, the objective should be to frame the issues legitimately raised by parties in a neutral manner that informs the decision makers and also allows each party to present its evidence and argument in an evenhanded way.

In consideration of the foregoing, OPC suggests this modification:

Does Rule 25-6.0423 prevent a utility seeking to recover costs of a nuclear uprate project from including in its request costs that it would incur to maintain reliable service from the existing unit in the absence of the uprate?

If the answer is yes, has (FPL) (PEF) demonstrated that its request for recovery conforms to this requirement of the rule?


Joseph A. McGlothlin
Associate Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

Attorney for the Citizens
of the State of Florida

DOCKET NO. 080009-EI
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF OPC'S MEMORANDUM ON ISSUES 6F AND 7H has been furnished by U.S. Mail and electronic mail to the following parties on this 25th day of August, 2008.

Keino Young, Esquire
Lisa Bennett, Esquire
Jennifer Brubaker, Esquire
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Paul Lewis, Jr.
Director, Regulatory
Progress Energy Florida, Inc.
106 E. College Ave., Suite 800
Tallahassee, FL 32301

J. Michael Walls, Esq.
Dianne M. Triplet, Esq.
Carlton Fields Law Firm
Post Office Box 3239
Tampa, FL 33601-3239

John McWhirter, Jr.
McWhirter, Reeves Law Firm
400 North Tampa St., Suite 2450
Tampa, FL 33602

Bill Feaster
Florida Power & Light Co.
215 S. Monroe St., Suite 810
Tallahassee, FL 32301-1859

R. Wade Litchfield, Esq.
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408-0420

John T. Butler, Esq.
Bryan Anderson, Esq.
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408-0420

John T. Burnett, Esq.
R. Alexander Glenn
Progress Energy Svc. Co., LLC
Pose Office Box 14042
St. Petersburg, FL 33733-4042

Michael B. Twomey
Post Office Box 5256
Tallahassee, FL 32314-5256

James Brew
Brickfield Law Firm
1025 Thomas Jefferson St. NW
West Tower, Eighth Floor
Washington, DC 20007

Natalie Smith
Florida Power & Light Company
215 S. Monroe Street, Suite 810
Tallahassee, FL 32301-1859


Joseph A. McGlothlin