

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear cost recovery clause
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Docket No. 080009-EI

Date: August 25, 2008

OPC'S MEMORANDUM ON ISSUES 6F AND 7H

Background

On July 30, 2008, as permitted by Order No. PSC-08-0211-PCO-EI, OPC submitted the testimony of William Jacobs, Ph.D. Among other things, Dr. Jacobs testifies that the requesting utilities should be required to demonstrate that their requests for authority to recover costs related to "uprate" projects are incremental in nature; that is, the costs included in the requests would not have been incurred to maintain service from the existing nuclear unit in the absence of the uprate project.

On August 13, 2008, OPC distributed to Staff and parties the two issues (now identified as 6F and 7H) that it intended to add during the Issue ID meeting of August 14, 2008.

During the meeting of August 14, 2008, counsel for FPL stated that he wished to revisit the wording of the issues. Counsel for FPL stated specifically that he was troubled by the reference to FPL's extension of its operating license in OPC's wording of the issue. Counsel for OPC replied that OPC was not wedded to the particular wording, and would consider alternative wording suggested by FPL. Staff asked the parties to confer on the matter and to submit any alternative wording by noon on the following Wednesday, August 20, 2008.

On August 20, 2008, OPC notified Staff Counsel that OPC had not heard from FPL, and so intended to utilize the language that had been distributed during the Issue ID meeting.

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?


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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.

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