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In re: Nuclear Cost Recovery Clause.

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

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e. The document attached for electronic filing is Citizens' Post-Hearing Statement of Positions and Post-Hearing Brief (Florida Power & Light Company). (See attached file: 110009.Brief.FINAL.pdf)

Thank you for your attention and cooperation to this request.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause.	DOCKET NO.: 110009-EI FILED: September 8, 2011

CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF (FLORIDA POWER & LIGHT COMPANY)

Pursuant to Order No. PSC-11-0535-PHO-EI, issued August 10, 2011, the Citizens of the State of Florida, by and through the Office of Public Counsel ("OPC"), hereby submit their Post-Hearing Statement of Positions and Post-Hearing Brief.

PRELIMINARY STATEMENT

Florida Power & Light Company will frequently be referred to as "FPL." The Citizens of the State of Florida, represented by the Office of Public Counsel, will be referred to as "OPC." FPL's Extended Power Uprate will be called "EPU" or "uprate."

At the outset of the hearing, the Commission, after hearing oral argument, considered FPL's motion to strike portions of OPC's prefiled testimony. FPL's motion to strike was based largely on FPL's contention that the Commission's determination of need order in Docket No. 070602-EI was dispositive of certain matters raised by OPC. Advised by its legal staff that its determination of need order did not rule on and therefore did not preclude the issues raised by OPC, the Commission denied FPL's motion to strike and ruled it would give OPC's testimony the weight to which it is entitled. Included in OPC's testimony and this brief are factual statements and legal arguments that bear on the weight the Commission should give to OPC's evidentiary presentation, the resolution of the parties' dispute over the import of the Commission's determination of need order, and the appropriate remedy the Commission should fashion in this case.

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OPC'S STATEMENT OF BASIC POSITION

*Rule 25-6.0423, F.A.C. authorizes FPL to seek to collect nuclear costs in advance, however, neither the rule nor the Commission's EPU determination of need order provides FPL "immunity in advance" from the consequences of its imprudent decision to fast track its uprate activities.

Because FPL's feasibility methodology is incapable of detecting dissipating economic feasibility in an uprate project experiencing significant capital cost increases, separate breakeven analyses of St. Lucie and Turkey Point uprates are needed to quantify the maximum cost-effective EPU investment.

Fundamental tenets of construction imbue the Commission rule's requirements of capital cost estimates and feasibility analyses with implicit legal standards of forthrightness and currency, which FPL violated in 2009 when it sponsored information that had been effectively superseded.*

STATEMENT OF THE CASE AND OF THE FACTS

In 2006, the Florida Legislature enacted Section 366.93, Florida Statutes. This statute directed the Commission to adopt an alternative cost recovery mechanism to be applicable to nuclear power projects. In 2007, the Commission implemented Section 366.93, F.S. by adopting Rule 25-6.0423, F.A.C. The rule enables a utility to recover reasonable and prudent site selection costs, preconstruction costs, and the carrying costs of construction expenditures in advance of the in-service date of nuclear projects. Sections (5)(c)(5) and (8)(f) of the rule require a utility to submit an estimate of the overall costs of constructing a project and an analysis of the long term feasibility of its project, respectively, by May of each year. Under the

Commission's practice, the estimate and the feasibility study are encompassed within testimony that witnesses prefile in written form in May and then sponsor "live," after identifying any changes, additions and/or corrections to the content of the May documents necessary to render them truthful and accurate at the time testimony is given, during the evidentiary hearing that the Commission conducts in the August-September time frame of each year.

Sections 403.501 et. seq., F.S., require a utility that proposes to construct nuclear generating capacity that exceeds a specified threshold to first obtain a "determination of need" from the Commission. The "determination of need" is an essential step in the certification process of the Florida Electrical Power Plant Siting Act that is a prerequisite to the construction and operation of the unit. In Docket No. 070602-EI, FPL asked the FPSC to issue an affirmative "determination of need" for its proposal to add approximately 400 MW of additional generating capacity by increasing the output of its four existing nuclear generating units at Turkey Point and St. Lucie ("Extended Power Uprate," or "EPU"). During the 2007 proceeding, FPL estimated the uprate activities at the St. Lucie and Turkey Point sites would require capital costs totaling $1.7 billion. The Commission ruled on FPL's request for a determination of need in Order No.PSC-08-0021-EI. In its order, the Commission stated that it had been presented stipulations on all issues it had been asked to adjudicate. The Commission proceeded to approve the stipulations and found (1) FPL's proposal would meet needs for electric system reliability and integrity, fuel diversity; baseload generating capacity, and adequate electricity at a reasonable coast; (2) no mitigating renewable or conservation measures were available to meet these needs; (3) the proposal represented the most cost-effective source of power; (4) the proposal was exempt from the Commission's Bid Rule; and (5) the nuclear cost recovery rule would be applicable to the uprates. In the order, but separately from the matters it adjudicated by

approving stipulations, the Commission observed that FPL intended to expedite the construction of the Extended Power Uprates.

In 2008, the Commission conducted its first proceeding on requests of FPL and PEF to recover costs of nuclear projects through the nuclear cost recovery clause. FPL stated in testimony that its estimate of $1.7 billion, first presented in the determination of need case, had not changed. In May of 2009, Rajiv Kundalkar, then FPL's Vice President-Uprates and its witness on estimated capital costs, submitted prefiled testimony in which he again sponsored FPL's original estimate of $1.7 billion as FPL's then current view of the project.

During the July-August 2009 time frame, FPL's EPU project managers increased their estimates of the capital costs that the EPU would require by $300 million in July and another $144 million during August, or a total of $444 million above the amount in Mr. Kundalkar's testimony.

During the evidentiary hearing of September 8, 2009, FPL's witness stated that no basis existed for modifying his prefiled testimony containing the original estimate of $1.7 billion. His testimony was the result of a conscious decision by the witness and FPL's senior management not to update the May 2009 prefiled testimony. (Ex. 112, page 27 of 30). FPL witness Dr. Sim, who prepared the annual analysis of the long term feasibility of the EPU project (and who had not been informed of either the intervening increases in estimates or a revised feasibility analysis conducted by FPL), used the $1.7 billion estimate as the input to his analysis. The Commission authorized FPL to collect $59,620,246 through the cost recovery clause. It determined that $2,614,082 that FPL had collected for 2008 was prudent. Order No. PSC-09-0783-EI, issued in Docket No. 090009-EI on November 19, 2009.

In February 2010, FPL received an "employee complaint letter," in which the author asserted that during the early portion of 2009 EPU project managers, through mismanagement, ignored indications that the costs of the uprate projects were increasing significantly. The author also expressed the concern that FPL would not properly report the significantly higher cost estimates to the Commission. FPL engaged John Reed of Concentric Energy Advisors to investigate the allegations of the employee complaint letter. Assured by FPL that he could act independently and would have unimpeded access to documents and personnel, Mr. Reed interviewed thirteen persons who had knowledge of the details of the uprate activities, and numerous documents related to the period in question. He submitted his findings in a report ("the Concentric Report") dated June 21, 2010, which FPL subsequently was required to disclose during the discovery process of the 2010 hearing cycle. In the report, Mr. Reed concluded that, because EPU project managers had revised their estimate upwards by $300 million in July 2009, had increased it again a month later, and as of July 2009 were regarding and using the higher estimates as reflective of their current expectations, FPL should have revised its May 2009 estimate of total capital costs and related testimony prior to or during the hearing. Instead of doing so, said Mr. Reed in his Concentric Report, FPL sponsored a total capital cost estimate during the hearing of September 8, 2009, that was not the best information available at the time. (Exhibit 197, at pages 15-16 of 23).

In May 2010, FPL's capital cost witness, Terry Jones, the new Vice President responsible for the EPU projects, submitted prefiled testimony in which he increased the prior estimate of overall EPU-related capital costs from $1.7 billion to a range of $2.0 to $2.3 billion. (TR-737). FPL's witness on the long term feasibility of the EPU project, Dr. Sim, used the higher estimate as an input, but subtracted $347 million of "sunk costs" and used only the net "to go costs" in his

comparison with the non-EPU alternative scenario. (Ex. 99, page 40 of 46). Two months later, OPC witness Dr. William Jacobs asserted in prefiled written testimony that FPL's practice of excluding past spent amounts from its feasibility study, while appropriate to more typical projects in which the total costs are known and stable, creates distortions when applied to a project, such as FPL's EPU, in which the estimated costs of completion are escalating abruptly and significantly. (TR-1015).

In August 2010, the Commission approved a stipulation that resulted in a deferral of all FPL-related issues in Docket No. 100009-EI – including the prudence of 2009 costs – to the next hearing cycle. FPL was allowed to collect approximately $31 million subject to refund, pending the disposition of all issues in Docket No. 100009-EI.

During the 2011 prehearing issue identification process, as a result of discovery OPC raised, and FPL objected to, the following issues:

Issue 10A: **Should the Commission accept the quantitative methodology that FPL employed to assess the long-term feasibility of the EPU project?**

Issue 10B: **Should the Commission require FPL to perform separate long-term feasibility analyses for the Turkey Point and St. Lucie uprate activities?**

Issue 16: **Was it prudent for FPL to undertake the EPU projects at Turkey Point and St. Lucie on a "fast track" basis?**

Issue 17: **Was it prudent for FPL to undertake the EPU projects at Turkey Point and St. Lucie in the absence of a break-even calculation?**

Issue 18: **If the Commission finds FPL was imprudent in Issues 16 or 17, what action can and should the Commission take?** [1]

[1] OPC also raised Issues 15A, 15B, and 15C, relating to FPL's failure to modify its prefiled capital cost estimate during the September 2009 hearing. FPL did not object to those issues.

FPL also moved to strike the testimony of OPC's witnesses that addressed these issues. At the outset of the evidentiary hearing, the Commission denied FPL's motion to strike OPC's testimony, but required OPC to address its proposed Issues 10A and 10B in response to more broadly worded Issue 10, and to roll its Issues 16, 17, and 18 (relating to the imprudence of "fast tracking" the EPU) into its briefing of Issue 11.

EXECUTIVE SUMMARY OF ARGUMENT

The Commission could not and did not engage in "anticipatory prospective absolution" of future management imprudence when it awarded FPL a determination of need for its uprate projects. FPL was imprudent when it decided to abandon its normal management practices and procedures and "fast track" the EPU project. When an organization "fast tracks" a project as immense and highly complex as the EPU before gaining a grasp on the capital costs that will be required, it exposes the project to the risk of cost increases. This is because the decision to "fast track" involves more than merely "expediting" a project. "Fast tracking" involves abandoning the usual sequence of design engineering, bidding, price-assured contracts, and construction activities, and proceeding "outside" of established protocols, thereby surrendering the ability to accurately estimate and control costs that this normal sequence affords.

The impact of FPL's imprudence has become evident. In the space of two hearing cycles (2010 and 2011), FPL has increased by $700 million, or roughly the same amount it has spent on the projects, its estimate of the total capital costs that the EPU will require. However, the ultimate effect of the dramatically increasing cost estimates on customers is being obscured by the methodology with which FPL is asking the Commission to measure the long term feasibility of the EPU projects. FPL compares the present value of the costs of a portfolio including the EPU over time with the corresponding present value of the costs of an alternative portfolio that

does not contain the EPU. Each year, FPL excludes the amounts already spent from the calculation. This means the most recent feasibility calculation removed about $700 million of EPU costs from the comparison of the EPU with FPL's alternative, even though FPL will request the Commission to allow it to include the total amount it has spent in the ratemaking formula when the EPU is placed into service.

Excluding past spent amounts from a decision to proceed or not proceed is an accepted and appropriate practice in situations in which the ultimate cost is well defined and stable. However, in FPL's case, the practice introduces distortions. The exercise asks only, "After excluding 'sunk costs,' are remaining 'to go' costs less than the full costs of pursuing the alternative?" This means that, as long as the annual "spend" approximates the annual increase in the overall estimate, the project will appear to be feasible in each individual, annual calculation within a multi-year project, even if the cumulative total costs for all years would be disastrous for customers. It also means that, absent adjustments to protect customers, the end result would be to reward FPL for its imprudent decision. Had FPL performed design work and used a realistic estimate of capital costs in the original feasibility analysis, the EPU may well have been shown to be prohibitively expensive; had the estimate indicated economic feasibility and FPL proceeded in a normal fashion, the process would have disciplined the costs. However, because "fast tracking" severely affected FPL's ability to quantify the capital costs accurately or control those costs, absent adjustments to protect customers, it appears FPL is en route to asking the Commission to make customers pay for an outsized rate base investment.

FPL's escalating projections of capital costs threaten to saddle customers with a project that is not cost-effective for them. FPL's method for assessing the long term feasibility of its EPU is inadequate to warn whether this is the case. A different tool is needed. The Commission

should direct FPL to calculate the maximum amount that it can invest in the EPU, expressed in $/kW, and remain cost-effective (the "breakeven amount"). As FPL proceeds with the EPU, this "breakeven calculation" will serve as an early warning system that will detect whether and when FPL's capital spending reaches the point at which continuing the project would be deleterious to customers' interests. The breakeven analysis performed at the time the project is completed can also serve to help quantify any amount the Commission should disallow on the basis of the imprudent decision to "fast-track."

When FPL performs its feasibility analysis for the EPU projects, it consolidates the data of the St. Lucie and Turkey Point units and expresses the result in a single value. For a project that proves feasible by a wide margin, this approach would be acceptable. However, the Turkey Point units involve higher capital costs than the St. Lucie units, and the Turkey Point units have 14 fewer operational years remaining than the St. Lucie units. With any nuclear uprate, the essential economic issue is whether the uprate will generate fuel savings over the remaining life of the unit sufficient to overcome the initial capital cost "hurdle" and realize net savings to the customer. Accordingly, as EPU-related capital costs increase, the uprate activities for the Turkey Point units will become marginal or less than economically feasible prior to those of the St. Lucie units. It follows that FPL should perform the breakeven analyses separately for the Turkey Point and St. Lucie units. Otherwise, the consolidated feasibility analysis may be masking a situation in which continuing with the Turkey Point uprate would be injurious to customers' interests.

FPL's arguments based on "administrative finality" are misplaced. Essentially, FPL wants the Commission to rule that anticipatory, prospective immunization from responsibility for consequences of imprudence flowed from the "determination of need." FPL engages in wishful

thinking. By mentioning FPL's intent to expedite its EPU, the Commission did not anticipate and prejudge future issues of imprudence in FPL's determination of need case. Because no ruling could have been entered regarding the prudence of future management activities, there was no determination that could be "administratively final." *Gulf Coast Electric Cooperative v. Johnson,* 727 So.2d 259 (Fla. 1999).

With respect to OPC's proposal of a different feasibility methodology, the law of "administrative finality," as established in the case of *Peoples Gas v. Mason,* is that an agency may modify a past decision if warranted by changed circumstances and the modification is needed to protect the public interest. The *Garcia* case, which the Supreme Court of Florida decided after *Mason,* and on which FPL has relied heavily along the way, did not alter this principle. In *Garcia,* the Commission ruled on a pure issue of law regarding subject matter jurisdiction. The Commission and the Supreme Court of Florida (for good reasons discussed in the main body of this brief) simply viewed the petitioner's subsequent effort to demonstrate a change in (jurisdictional) circumstances as erroneous and ineffectual. By contrast, in this case the relevant *factual circumstances* — i.e., the estimated cost of FPL's EPU projects — have indeed changed (increased) by $700 million since FPL's EPU determination of need case. Significantly, both the Commission (in a 2008 order) and FPL (through testimony during the recent hearing) acknowledged that the choice of feasibility methodologies applicable to FPL's EPU project may change with changes in circumstances.

Because FPL chose to "fast track" the EPU activities, it is impossible to reconstruct with precision what the costs of the EPU would have been had FPL proceeded prudently. Similarly, it is not possible to review individual costs incurred in a given year and state "the impact of the decision to fast track on this item or activity is X dollars." Accordingly, to assess the impact of

FPL's imprudent decision on customers, a proxy calculation is needed. What we do know is that the objective was and is to develop a project that would be more economical than FPL's alternative portfolio. The same breakeven analysis that provides the Commission a tool with which to detect trends toward a project that is not cost-effective can also serve as a proxy for the maximum capital costs FPL would have incurred had it not imprudently "fast tracked" the uprates. The Commission should direct FPL to perform a breakeven analysis at the time it completes the project. Inasmuch as the breakeven amount represents the most FPL could spend and remain below the cost of the non-EPU alternative, the Commission should deem costs above the final breakeven point to be imprudent and excessive.

With respect to FPL's decision not to update its May 2009 prefiled capital cost estimate, FPL's own consultant, whom FPL employed specifically to investigate the matter, concluded that FPL failed to provide the best, most current information concerning overall capital costs of the EPU. OPC witness Dr. Jacobs independently concluded that the May 2009 estimate was out of date by the time of the September 2009 hearing. TR-1047. FPL's excuse that it "had not completed its process" for revising the estimate attempts to elevate form over substance, because as of July 2009 its project managers actively regarded the May 2009 figure as obsolete and the revised estimates as operative. (Exhibit 197, at page 16 of 23).

Although Mr. Olivera tried to excuse withholding the number from the Commission to ongoing vendor negotiations with Bechtel, FPL witness Stall acknowledged that the Commission's confidentiality process could be used to protect sensitive information. TR-1247. Staff's audit report concludes that FPL missed a "valuable opportunity" to fully inform the Commission, and urged FPL to become more transparent. (Exhibit 115). OPC witness Dr. Jacobs also characterized FPL's failure as less than forthright.

Rule 25-6.0423(8)(f) requires a utility to submit its estimate of capital costs annually. Rule 25-6.0423(5)(c)5 requires it to perform annually a detailed analysis of the long-term feasibility of completing the power plant. The terms communicate FPL's obligation effectively. A fundamental principle of construction is that a rule will not be construed in a manner that renders it meaningless. A rule that a utility can ignore, or to which a utility can respond with outdated or superseded information, is no rule at all. Necessarily, then, the rule contains implicit requirements of forthrightness. A utility's failure to comply affects the ability of the Commission to perform its oversight function. FPL consciously and deliberately chose to withhold information necessary to comply with the rule.

ISSUE 1: Should any FPL 2010 Nuclear Cost Recovery Clause rate-case type expenses be disallowed from recovery?

OPC's understanding is that this issue is intended to address the same factual situation that is encompassed by Issue no. 15. As its response to Issue 1, OPC adopts and incorporates by reference its position on Issue No. 15(A-C).

ISSUE 2 (*Legal*): Do FPL's activities through 2010 related to Turkey Point Units 6 & 7 qualify as "siting, design, licensing, and construction" of a nuclear power plant as contemplated by Section 366.93, F.S.?

No position.

ISSUE 3: Should the Commission approve what FPL has submitted as its 2010 and 2011 annual detailed analyses of the long-term feasibility of completing the Turkey Point 6 & 7 project, as provided for in Rule 25-6.0423, F.A.C? If not, what action, if any, should the Commission take?

No position.

ISSUE 3A: **Was FPL's 2010 decision to continue pursuing a Combined Operating License from the Nuclear Regulatory Commission for Turkey Point Units 6 & 7 reasonable? If not, what action, if any, should the Commission take?**

No position.

***ISSUE 4:** **What is the current total estimated all-inclusive cost (including AFUDC and sunk costs) of the proposed Turkey Point Units 6 & 7 nuclear project and is that reasonable?**

No position.

***ISSUE 5:** **What is the current estimated planned commercial operation date of the planned Turkey Point Units 6 & 7 nuclear facility and is that reasonable?**

No position.

ISSUE 6: **Should the Commission find that for years 2009 and 2010 FPL's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Turkey Point Units 6 & 7 project?**

No position.

ISSUE 7: **What system and jurisdictional amounts should the Commission approve as FPL's final 2009 and 2010 prudently incurred costs and final true-up amounts for the Turkey Point Units 6 & 7 project?**

No position.

ISSUE 8: **What system and jurisdictional amounts should the Commission approve as reasonably estimated 2011 costs and estimated true-up amounts for FPL's Turkey Point Units 6 & 7 project?**

No position.

ISSUE 9: **What system and jurisdictional amounts should the Commission approve as reasonably projected 2012 costs for FPL's Turkey Point Units 6 & 7 project?**

No position.

ISSUE 10: **Should the Commission approve what FPL has submitted as its 2010 and 2011 annual detailed analyses of the long-term feasibility of completing the Extended Power Uprate project, as provided for in Rule 25-6.0423, F.A.C? If not, what action, if any, should the Commission take?**

* No. Because the past spent amounts that FPL excludes offset the dramatic increases in FPL's projected costs, its "to go" costs will appear feasible compared to the full costs of the alternative when examined annually, even if total EPU costs accumulated over the years are excessive. FPL should calculate a breakeven analysis to establish the maximum amount per kW that FPL can spend on its uprates and remain cost-effective for customers. Because Turkey Point units have 14 fewer operational years within which to generate fuel savings sufficient to justify higher site-specific capital costs, rendering the feasibility of Turkey Point more vulnerable to capital cost increases, the breakeven analysis should be performed separately for the St. Lucie and Turkey Point sites.*

ARGUMENT

FPL uses a comparison of the cumulative present value of revenue requirements ("CPVRR") of two different generation portfolios to assess the feasibility of its EPU projects. One portfolio includes the EPU; the hypothetical alternative meets FPL's generation needs without the EPU. When FPL performs the annual comparison, it excludes as "sunk costs" all of the capital costs that it has expended on the EPU to that point. The rationale for the exclusion is that the decision to proceed or not proceed is governed by a comparison of the remaining ("to go") costs with the full costs of the alternative. OPC's Dr. Jacobs testified that, while this approach is acceptable in situations in which the full costs of the project are known at the outset,

it introduces distortions when applied to a project — such as FPL's EPU — for which estimates of overall capital costs are increasing significantly.[2]

In the past two years, FPL has increased its estimate of total needed capital cost expenditures by $700 million. Yet, because over time FPL has also removed about $700 million of spent costs from the cost of the EPU in the feasibility comparison, the "to go" costs have remained below the full costs of undertaking and completing the alternative generation portfolio. While the projects may appear feasible when examined in this fashion on an annual basis, the calculation does not take into account the impact of increases in the cost of a multi-year project over time.

Such an impact can be illustrated by borrowing a hypothetical situation that FPL's Dr. Sim described in rebuttal testimony. Dr. Sim gave the example of a homeowner faced with a decision to remodel an existing home or build a new one. (TR-1265). In his example, the homeowner elected to remodel, based on the initial comparison that showed the total cost of remodeling would be lower than the total cost of the new home. Thereafter, each year the homeowner incurred costs that were higher than anticipated, but each year the "to go" costs remained lower than the full cost of the new home. Dr. Sim asserted that each time the homeowner was presented with "to go" costs lower than the full costs of a new home, the rational choice was to continue with the remodeling project.

Dr. Sim's illustration explains well the rationale for FPL's approach. However, his premise constitutes both the allure and the fallacy of FPL's methodology. Missing from Dr.

[2] FPL witness Reed agreed that the EPU project differs from the typical situation in which "sunk costs" are excluded from a feasibility analysis. Typically, he said, the remaining "to go" costs diminish as "sunk costs" are incurred. However, during cross-examination he acknowledged that, in the case of FPL's EPU, the increases in capital cost estimates have kept the "to go" costs at the same level—despite the fact that FPL has excluded past spent amounts from the feasibility calculation. (TR-1189). Mr. Reed's observation reinforces Dr. Jacobs' testimony: Logically, the feasibility of a project must be suspect if the "to go" costs that typically decrease as money is spent instead remain virtually unchanged as the project progresses.

Sim's hypothetical, and necessary to render his example applicable to FPL's EPU project, were (1) an imprudent decision to launch the rebuilding project without developing the specifications that would make a contractor willing to enter price-assured contracts, and (2) a consideration of the ultimate impact of this imprudence, in the form of the cumulative costs of "annual rational decisions" on the homeowner's financial circumstances. As long as the "to go" cost is less than the full cost of the alternative, FPL's methodology will signal "feasible" regardless of the larger picture. If the "to go" costs in Dr. Sim's example each year are $350,000 and the alternative would cost $500,000, FPL's test would say "continue on," whether this comparative posture is seen for one year, or four years, or nine years, or – fill in the blank with as long a duration as you wish to hypothesize. However, using three years as an example, the cost would *total* expenditures of $1,050,000 rather than the full $500,000 cost of the alternative. In that scenario, the knowledge that he made the "rational decision" each year would be of little solace to the homeowner, who, saddled with — not the annual to-go cost — but the full, cumulative costs of the bloated project, may no longer be able to afford to pay college tuition, or replace an aging car, or pay his utility bill. How much better it would have been for the then "rational" but now hapless homeowner to have engaged an architect, costed out the remodeling, and hired a contractor under terms that would have protected against disastrous overruns (or realized that the new home was the better choice at the outset). (TR-1302-1304).

This example – which keeps intact the annual "rational choice" that is the basis for FPL's analysis – illustrates the shortcoming of FPL's methodology when applied to a situation involving significantly increasing estimates of total costs. Having pointed out the flaw in FPL's approach, Dr. Jacobs recommended that the Commission require FPL to perform a "breakeven analysis." This calculation quantifies the maximum amount that FPL could spend, measured in

dollars per installed kilowatt, and remain below the cost of the alternative. It is a tool that can serve as an "early warning system" in the event the utility's costs are approaching the point at which the project would no longer be cost-effective for customers (TR-1024) — a role that the CPVRR comparison is not able to perform.

The "breakeven analysis" uses the same type of information that FPL employs in its CPVRR calculations. To calculate the breakeven analysis, the analyst begins by developing the full revenue requirements of the alternative, non-project-including portfolio. The analyst then prepares the corresponding data set for the project's scenario, and enters "zero" as the capital cost of the project under study. In an iterative process, the analyst increases the capital cost of the project being analyzed until the present value of the project-containing portfolio exactly equals the present value of the alternative portfolio. The capital cost of the project at which this equality of revenue requirements occurs is the maximum amount that the utility can spend on the project and remain below the cost of the alternative. (TR-958).

FPL is capable of performing a breakeven calculation for the EPU project. (TR-960). This methodology was known and available at the inception of the project. In fact, FPL elected the breakeven analysis as the most appropriate method of gauging the long term feasibility of its planned new nuclear units. (TR-916). FPL supported the selection of the breakeven analysis for its new units on the grounds that the breakeven analysis is better suited to a project having considerable uncertainty. Dr. Jacobs testified that FPL's EPU project similarly is highly uncertain, and so warrants the application of a breakeven calculation. (TR-1017). FPL denies the validity of the comparison, but FPL's denial is refuted by its own testimony — see the impressive list of highly complex undertakings that FPL witness Terry Jones provided in testimony (TR-735 & 766), and Dr. Sim's acknowledgement that, had FPL followed a normal

sequence of activities, the EPU would have required ten years (six more than now contemplated under fast tracking) or more to complete. (TR-1279).

In rebuttal testimony, FPL witness Dr. Sim asserted that Dr. Jacobs' testimony on the subject of excluding "sunk costs" from FPL's feasibility calculations is inconsistent with a statement made by a witness with whom Dr. Jacobs participated in a panel during a hearing conducted by the Georgia Public Service Commission in 2009. The witness, a Mr. Hayet, referred to the practice of excluding "sunk costs" as the industry standard. Dr. Sim contended that because Dr. Jacobs did not protest his fellow panel member's statement, his position in this case is inconsistent. (TR-1269-1270). However, putting to one side (as difficult as it may be) the question of whether it is legitimate to ascribe to one person's view the statement of another (particularly when the respective roles and responsibilities of the individuals on the panel were not established by the person making the claim)[3], Dr. Jacobs did *not* testify in this case that the practice of excluding past spent amounts from a feasibility analysis is a poor one in all situations. He testified that it distorts the calculation in a situation in which the project costs are increasing significantly, as is the case with FPL's EPU project. (TR-1015).

During cross-examination, it became clear that Dr. Sim did not know whether the project that was the subject of the Georgia proceeding shares this characteristic with FPL's project, or whether instead it falls into the category for which Dr. Jacobs deems the approach to be appropriate. (TR-1299). Because FPL did not put its claim of inconsistency to Dr. Jacobs during cross-examination, Dr. Jacobs had no opportunity to address it. However, orders of the Georgia Public Service Commission issued well after the 2009 hearing cited by Dr. Sim establish that Georgia Power Company has requested no changes in either the budget or the schedule of the project involved, and in early 2011 its total costs were in fact "tracking under" the overall

[3] Dr. Jacobs described his role as the Georgia Commission's "Independent Construction Monitor." (Ex. 102).

certificated amount approved for the project. See *Order On The Third Semi-Annual Construction Monitoring Report For The Period January 1, 2010-June 30, 2010,* issued by the Georgia Public Service Commission in its Docket No. 29849 on February 21, 2011, at page 4, and *Order on the Fourth Semi-Annual Construction Monitoring Report for the Period July 1, 2010 through December 31, 2010,* issued in the same docket on August 16, 2011, at page 4.

In conjunction with his recommendation that FPL perform a breakeven analysis, Dr. Jacobs advocated that the breakeven analysis should differentiate between the St. Lucie uprate activities and the Turkey Point uprate activities. FPL presented a single feasibility study that measures the economic feasibility of the Turkey Point and St. Lucie EPU activities on a composite basis. The projects differ with respect to the estimated capital costs involved in accomplishing their respective uprates, the quantity of megawatts that the EPU activities will add, and, critically, the length of time the expanded facilities will operate prior to the expiration of their licenses. In particular, the units at Turkey Point will operate 14 *fewer* "unit-years" than the units at St. Lucie and cost $250 million more. (TR-1031). Since the economic feasibility of an uprate project is dependent upon the amount of fuel savings that can be generated over time to offset the initial capital costs, and since following the entry of the determination of need order FPL has been experiencing significant increases in the estimates of costs of completing the EPU projects, logically the St. Lucie and Turkey Point EPU projects should be analyzed on a stand-alone basis. In that manner, in the event its shorter operational time frame renders the Turkey Point EPU project marginal or economically infeasible, that fact will appear as a result of the feasibility studies.

FPL first resisted Dr. Jacobs' recommendation of a breakeven analysis on the grounds that the choice of feasibility methodologies was decided in the determination of need docket, and

cannot be changed. The argument has no credibility, in light of the fact that both the Commission and FPL have acknowledged, on the record, their belief that the choice of the appropriate feasibility methodology depends on current circumstances, which can change over time. In 2009, the Commission rejected SACE's challenge to the use of a breakeven analysis to assess the feasibility of new Turkey Point Units 6 & 7. The Commission noted that the breakeven analysis was accepted in the TP67 project need determination. The Commission added that "such an approach is reasonable today" — indicating the Commission's belief that it may not be reasonable if and when circumstances change. (Order No. PSC-09-0783-FOF-EI, dated November 19, 2009, at page 15).

Even more compelling is the testimony of FPL witness Dr. Steve Sim in this docket. Regarding the continued use of the breakeven analysis for the new units, Dr. Sim said, "In later years, as information becomes available regarding the cost and other aspects of the new nuclear units, another analytical approach may emerge as more appropriate...". (TR-916). FPL cannot credibly contend that the choice of feasibility methodologies is "off limits" as a result of the determination of need order, when FPL has staked out its own ability to modify its choice as changes in circumstances warrant.

However, inasmuch as FPL raised its argument of "administrative finality" during the prehearing process, and renewed it throughout the hearing, one may anticipate that FPL will argue it again in its brief. When applicable case law is examined, FPL's contention does not hold up. When citing such cases as *Austin Tupler Trucking v. Hawkins*, 377 So.2d 679, 681 (Fla. 1979) and *Peoples Gas System Inc. v. Mason*, 187 So.2d 335 (Fla. 1966) in its Motion to Strike, FPL summarized the doctrine as follows: "Administrative orders must eventually pass out of the agency's control and, *absent exceptions not applicable here*, become final and no longer subject

to change or modification." Motion, at page 11. (Emphasis provided). However, an examination of the cases quickly establishes that the exceptions are definitely "applicable here." Specifically, in the *Mason* case, the Supreme Court of Florida stated:

> "We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated. For one thing, although courts seldom, if ever, initiate proceedings on their own motion, regulatory agencies such as the commission often do so. Further, whereas courts usually decide cases on relatively fixed principles of law for the principal purpose of settling the rights of the parties litigant, *the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time*. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order." (Emphasis provided).

The case of *Florida Power v. Garcia*, 780 So.2d 34 (Fla. 2001), which FPL cited, does not help FPL's cause. *Garcia* involved an effort by Florida Power Corporation to persuade the Commission to exercise subject matter jurisdiction over an issue of contract interpretation that had arisen between Florida Power Corporation and a cogenerator with whom it had entered a purchased power agreement. (The cogenerator was pursuing a claim in state court on the same question.) Involved in the case were jurisdictional questions regarding the allocation of authority between state and federal law (i.e., the extent of the Commission's role in contract formation under PURPA), as well as the respective jurisdictional spheres of the Commission and the judiciary with respect to contractual disputes. In the initial case, the Commission saw through Florida Power Corporation's effort to disguise a dispute over the interpretation of a contract as a request for declaratory statement as to conformity with a Commission rule. It ruled that it did not have jurisdiction over the subject matter (contract interpretation) of Florida Power's request and dismissed Florida Power's petition.

Several years later, Florida Power tried again. It argued that intervening case law (both state and federal) had clarified the jurisdiction of the Commission to address the subject matter of Florida Power's request. The Commission again dismissed, citing the effect of *res judicata* on the second request of Florida Power to determine its subject matter jurisdiction over the same claim, as well as the Commission's concern for fairness to the litigant who had pursued the claim in a different (judicial) forum.[4] Florida Power appealed.

The Supreme Court of Florida affirmed the Commission's order. The Court observed that Florida Power was mistaken when it asserted the legal proposition it cited as a "changed circumstance" that arose after the first decision:

> Even assuming *arguendo* (as appellant urges) that a change in law could qualify as "changed circumstances" for purposes of this analysis, the theory does not apply. At the time FPC filed its first petition, there was *already* an out-of-state ruling reflecting that it was properly within the ambit of a public service commission's authority to interpret the scope of its contract approval... .
>
> The distinction stated by the *Indeck-Yerkes* court ...is the same basis upon which FPL relies to differentiate its 1998 petition from its 1994 petition ...
>
> Thus, it is clear that FPC could have pursued this theory of jurisdiction throughout the proceedings involving its 1994 petition.
>
> *Garcia, supra,* at pages 11-12.

In other words, Florida Power's effort to establish a change in circumstances (in the form of a change in the law) that warranted a departure from the result of the first case was feeble, erroneous, and therefore unavailing. In *Garcia*, the Court most definitely did *not* distance itself from its principle that an agency may modify a decision if there is a significant change in circumstances or if modification is required in the public interest. Rather, the Court reiterated and affirmed the standard, adding that it would continue to avoid "too doctrinaire" (citing

[4] The cogenerator was awarded a partial summary judgment in the state court proceeding.

Mason) an application of the rule (of administrative finality). Referring twice to the "unique circumstances" of the situation before it (at pages 35 and 45), the Court concluded "... the circumstances here do not compel a different result."

In contrast to the *Garcia* case that FPL cites, this case is similar to the case of *McCaw Communications v. Clark*, 679 S.2d 1177 (Fla. 1996). In *McCaw*, the Commission acted to terminate the historical linkage between the access charges paid by IXCs to LECs and the rates paid by mobile service carriers for switching services. McCaw, a mobile provider affected by the decision, appealed the Commission's order and argued, among other things, that the order violated the doctrine of administrative finality. The Supreme Court of Florida affirmed the Commission's order, stating:

> "The setting of MSP interconnection rates is not a one-time adjudication of rights but rather a process that must take into account a multiplicity of factors affecting the telecommunications industry and its customers. Administrative finality was not meant to preclude the Commission from revisiting its 1988 order. The record reflects a plethora of changed circumstances that justify the Commission's decision."
>
> *McCaw, supra*, at 3.

As was the case in *McCaw*, the situation before the Commission in this docket exhibits dramatically changed circumstances that warrant modification of the analytical framework for the feasibility analysis that the Commission accepted for purposes of its findings in the EPU Determination of Need Order.

The facts of this docket present both an overriding public interest and significantly changed circumstances — both of which *do* compel a different result. The overriding public interest is that of ensuring that FPL's customers are not saddled with either an uprate project that no longer is economically feasible or with excessive costs growing out of imprudent decisions.

With respect to changes in circumstances, far more information is available now, as compared to the time of the 2007 determination of need docket, regarding the costs and other aspects of the EPU projects. OPC addressed those aspects through the testimony of its witnesses, Dr. Jacobs and Mr. Smith, who testified that FPL's practice of excluding past spent amounts from the feasibility calculation, coupled with the steep increases in FPL's estimates of the costs of completing the projects (that have occurred since the 2007 proceeding), have the effect of distorting FPL's indication of cost-effectiveness under its current methodology. OPC's expert, Dr. Jacobs, made this point regarding the inappropriateness of FPL's feasibility methodology a year ago in Docket No. 100009-EI, prior to the time that the Commission voted to defer all FPL-related issues to the present hearing cycle. Docket No. 100009-EI was also the proceeding in which FPL raised its estimate of the cost of completing the EPU projects for the first time – from $1.7 billion to a range of $ 2.0-2.3 billion. (FPL has increased its estimate again in this hearing cycle). In this proceeding, Dr. Jacobs stated, "If there was ever a valid basis for using the comparison of revenue requirements as the means of evaluating the feasibility of the uprate projects, it has eroded in light of FPL's experience with estimating the costs of the project." (TR-1011).

"Changed circumstances" – specifically, the significant increase in estimates of capital costs – also justify Dr. Jacobs' recommendation that the Commission direct FPL to perform separate feasibility studies on the St. Lucie and Turkey Point plant sites. The Turkey Point and St. Lucie activities involve separate and distinct units. In Order No. PSC-08-0221-FOF-EI, the Commission treated the EPUs on a combined basis, as FPL presented them. However, just as the "additional information" to which Dr. Sim alluded in his testimony in this docket could justify a change in the feasibility methodology applicable to the new nuclear units (TR-916), the

additional information regarding significantly and rapidly increasing costs that OPC's witness addresses supports the separate analyses he advocates.

Since the time of the determination of need order, FPL's estimates of the costs of completing the EPU projects have increased beyond the original $1.7 billion estimate by approximately $700 million. In his testimony, OPC's Dr. Jacobs points to reasons why he expects the costs will increase again. In particular, the dramatic increases in estimates have occurred because the process of design engineering has revealed additional plant modifications that will be required (increased scope), and presently FPL has completed only about 70% of the design engineering that is needed to establish the ultimate scope and related costs with any degree of certainty.

When supporting the continuation of its consolidated approach, FPL stressed the history of the project as having been conceived and undertaken on a consolidated basis. FPL's emphasis on preserving the status quo serves an interest in keeping an overall investment program intact more than it serves customers' interest in bearing only projects that are cost-effective for them. In addition, to the extent that FPL's claims of economies of scale have lowered the investment costs at St. Lucie and Turkey Point, those savings will inure to the individual projects when they are examined under separate feasibility analyses. (TR-1219-1220).

Under the changed circumstances, it is logical and sensible to scrutinize the plant sites separately. Although the Turkey Point project may have been cost-effective at the time of FPL's original estimate, because of its shorter operational period and significantly higher capital costs than St. Lucie, the Turkey Point project may become marginal or less than cost-effective as capital costs increase. As long as FPL folds both plant sites into a single, composite feasibility score, the annual study of long term feasibility that FPL submits to the Commission will not

monitor, detect or report on the possibility that Turkey Point could approach or exceed the point at which it becomes uneconomic to customers.

ISSUE 11: Should the Commission find that for the years 2009 and 2010 FPL's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Extended Power Uprate project?

Given the massive complexity and extreme uncertainty of FPL's EPU, the absence of design engineering, and the corresponding dearth of reliable costing information, FPL was imprudent when FPL decided to forgo the protections inherent in the normal sequencing of design engineering, contracting, and construction and instead proceed with the project outside protocols designed to control costs ("fast tracking"). FPL's decision to "fast track" the EPU imprudently exposed FPL and its customers to the risk of substantial increases in FPL's capital cost estimates that are materializing now (40+ % in two years). FPL's subsequent efforts in 2009-2010 to quantify costs do not reverse the impact of its imprudence and do not serve to avoid FPL's accountability to its customers.

ARGUMENT

FPL's "fast tracking" of the 400+ MW, $2+billion EPU project was and is imprudent.

"Fast tracking" is a term of art in the engineering and construction communities. (TR-1019). Fast tracking involves a decision to abandon the usual sequence of complete design work and full specifications, followed by competitive bidding, followed by price-certain contracts, followed by the actual construction. When an organization fast tracks a project, these sequential time frames are collapsed into a single period, the reasons for and advantages of the normal sequence are forgone, and the various activities are performed in parallel – another way of saying "at the same time." Because the owner has no definitive specifications to provide to contractors and vendors, the vendors are unwilling to enter into contracts that provide price assurance. (TR-1020).

Applied to a project that is complex and undefined, fast tracking imposes substantial price risk on the owner. (TR-1020). OPC witness Dr. Jacobs testified that the decision to fast track a project as enormous and hugely complex as the EPU, at a time when FPL had no grasp on

its ultimate cost, was imprudent. (TR-1029). The imprudence is manifesting itself in the form of a $700 million increase in the estimate of completing the EPU, or more than 40%, in the space of two years. (TR-1300). Considerable design work remains to be done, leading Dr. Jacobs to predict additional increases in costs and to advocate measures with which to identify and head off a project that becomes no longer feasible and/or protect customers from imprudent costs. (TR-1029).

The Commission did not "preapprove" FPL's imprudence in its "determination of need" order. FPL's repeated claims that OPC is precluded by the "determination of need" order from criticizing the decision to "fast track" the EPU became a company mantra in this case. FPL is wrong. Docket No. 070602-EI, in which the Commission granted FPL's petition for a determination of need for its EPU project, was a stipulated case. The Commission's ruling could not, and did not, extend beyond the four corners of the stipulations that were presented to it for approval. The stipulations did not encompass a decision to "fast track" the EPU. Even if the docket had not been stipulated, the Commission could not have anticipated — much less blessed – imprudent actions before they occurred. In recommending against FPL's Motion to Strike, the Staff clearly noted that the need determination order decided only the need for the project. It did not decide the issue of "fast tracking" or even discuss this approach. The Staff advised that the OPC issues are not a relitigation of FPL's decision to fast track the EPU project.

When attempting to obtain unwarranted leverage from the decision in the determination of need docket, FPL alludes to its intent, stated at the time, to "expedite" the construction of the EPU projects. (TR-1203). However, "expedite" is not synonymous with "fast track," despite FPL's self-serving efforts to blur the distinctions and equate the two. Just as 'quick' is not interchangeable with 'WARP speed,' 'expedite' is not interchangeable with 'fast track.'

The distinction involves more than mere semantics. In the determination of need case, FPL did *not* disclose that it would enter contracting and implementation without first accomplishing a substantial level of design work, or that it would forgo contracts containing price assurances by vendors. Vague references to "expedite" and the "earliest feasible date" were not adequate to place the Commission on notice of FPL's intent to fast-track. Moreover, it is fundamental that a prudence review must take place after the fact, not before (or else it would not be a "review"). Simply stated, where the Commission has not formally resolved a litigated issue, the principle of "administrative finality" has no application. *Gulf Coast Electric Cooperative v. Johnson,* 727 So.2d 259 (Fla. 1999).

At the time of the determination of need case, FPL said that its willingness to undertake the EPU project on an expedited basis was dependent on the finding that the EPU qualified for the alternative cost recovery mechanism of Rule 25-6.0423, F.A.C. If FPL either then or later believed the applicability of the nuclear cost recovery mechanism is tantamount to forgiveness of imprudence and the determination of need constituted the issuance of a blank check, FPL was mistaken. While Section 403.519(4), F.S., requires a disallowance of nuclear-related costs incurred after the awarding of a determination of need to be based on a "preponderance of evidence" – which, incidentally, is *not* "interchangeable" with "the party that calls the most witnesses" – it nonetheless subjects the utility's request to a prudence review that is to be conducted in a hearing governed by the Florida Administrative Procedure Act.

FPL mischaracterizes OPC's position. FPL witness Deason claimed that Dr. Jacobs' criticism of its decision to "fast track" the EPU project constitutes "hindsight." (TR-1141). FPL is wrong. In its testimony, FPL describes in considerable detail the scope, complexity, and challenges of remaining work. Significantly, everything that FPL described in the August 2011

hearing – including the need to devise a rigging plan to handle moving large equipment, consider structural integrity problems, deal with limited work space restrictions, work in an operating plant environment and utilize work order planning and integration with routine outage activities (TR-766) – are matters of which it had knowledge (or should have had knowledge) at the outset of the project. Just as FPL is not using hindsight when it describes these highly challenging tasks, Dr. Jacobs is not using hindsight when he states FPL was imprudent to fast track the project in light of them, for these are the very complexities on which Dr. Jacobs bases his opinion that the decision to "fast track" the project was imprudent – and risky. (TR-1030).

FPL's description of the consequences of proceeding in the normal sequence is selective and self-serving. FPL witness Jones asserts that, had FPL proceeded in the normal sequence of designing, bidding, contracting, and constructing the EPU, the projects would have taken an additional six years to complete. (TR-1024). Said differently, FPL acknowledges that, absent fast-tracking, the EPU would constitute a 10 year project—which is "new nuclear unit" territory. With this testimony, FPL effectively demolishes its own contention that the EPU should not be the subject of a breakeven analysis because it is not as complex as a new nuclear unit.

FPL witness Dr. Sim stated that, had FPL proceeded in the normal manner, customers would have missed fuel savings of $840 million during the additional six years of development. (TR-1259). If an early in-service date were the only criterion, *all* projects would be "fast tracked." However, the experience of the last wave of nuclear construction reveals the fallacy of that proposition. Utilities around the country rushed their nuclear projects, with the result that they ran up enormous cost overruns. The respective reactions of regulatory agencies and utilities are revealing. Utility commissions established risk sharing mechanisms and disallowed portions

of overruns to protect customers from the utilities' failure to control costs. Utilities viewed these regulatory actions as disincentives. However, for the most part the industry learned from the experience, declared "never again," and is approaching the next generation of nuclear projects deliberately and with due regard for the need to control costs. (TR-1023).

An exception is FPL's approach to its EPU projects. A closer look at Dr. Sim's contention reveals his treatment of the $840 million is selective and one-sided. Putting aside for a moment that the $840 million in fuel savings that Dr. Sim mentions appears to be expressed in nominal numbers, so as to inflate the appearance of the savings when presented in the context of other parameters (such as those in FPL's own CPVRR comparison) expressed in present value terms, the difference in fuel costs is only part of the picture. Conspicuously absent in Dr. Sim's depiction is the capital cost portion of the comparison. Had FPL accomplished enough of the design engineering to enable it to assess EPU capital costs accurately, the far higher capital costs would have been evident at an earlier point in the project, and would have been fully incorporated in the feasibility analysis.

Bear in mind that FPL has never presented a cost-effectiveness analysis that incorporates the most recent full estimate of capital costs as an input, and has declined to perform a "breakeven analysis" for the project that takes the full costs of the project into account. However, OPC witness Brian Smith performed an analysis that expresses past spent capital costs in present value terms and compares those costs apples-to-apples with total benefits (derived from a comparison of the EPU with FPL's alternative expansion plan), *including fuel savings*, claimed by FPL. Mr. Smith's exhibit (Ex. 101) indicates that, if all capital costs are included in the comparison between the system as it would appear with and without the EPU, already the

costs of the EPU project likely exceed the benefits, *including fuel savings,* that FPL attributes to it.[5]

When FPL's selective depiction is replaced by this broader perspective, it becomes apparent that the only evidence that attempts to portray the project on an overall basis indicates that the normal procedure would have spared them from paying for a project that currently registers "positive" on the feasibility scale only because past spent amounts are excluded from the analysis at the same time the high project costs are being disclosed through the ongoing design process. When it "fast tracked" the EPU without having a grasp on the overall costs of the project, FPL essentially gambled (with customers' money) that the costs would turn out to be within feasible range. The available evidence indicates that FPL's gamble is likely failing with respect to the overall cost, and Dr. Jacobs' and Mr. Brian Smith's testimony has revealed the shortcoming of FPL's feasibility methodology that to date has obscured the reality of the situation.

The Commission should implement a mechanism to protect customers from any excessive costs flowing from FPL's imprudent actions. The nature of the decision to fast track is such that its impact cannot be captured in a given activity – or a given year. The decision to fast track set in motion a trajectory for the EPU that will not end until the projects have been completed. Further, the impact of that trajectory on customers cannot be measured without reference to the manner in which the project would have proceeded in the absence of FPL's imprudent course. Measures taken by FPL in 2009-2010 to quantify better the overall capital costs and otherwise contend with the implications of fast tracking may have been prudent in and of themselves (TR-1059-1060) — in the same manner in which "damage control" is prudent —

[5] Mr. Smith examined a point at which FPL says only 70% of design engineering has been completed, and many implementation costs remain to be incurred.

but their impact, in terms of mitigating the decision to fast track, can be measured only by comparing the actual costs of the EPU against the costs that would have been incurred had FPL not fast tracked the uprates. Of course, it is impossible to reconstruct the progress so as to inject timely design and price-protected contracts. Therefore, it is desirable to develop the best possible proxy for that information.

Clearly, FPL's objective from the outset has been, appropriately, to construct a project that would have been no more expensive than FPL's alternative generation portfolio. Absent the ability to reconstruct the costs that FPL would have incurred had FPL not fast tracked the EPU, the Commission should regard as imprudent any costs that exceed that benchmark. Dr. Jacobs recommended the use of a breakeven analysis performed at the time the project is completed to measure the impact of FPL's imprudent decision on overall project costs.

FPL will argue that the Commission has no ability to apply this standard. FPL will assert the Commission must confine its review to explicit "buckets of dollars" that FPL incurs during annual periods. FPL will further argue that OPC is attempting to relitigate the decision in which the Commission declined to adopt a risk-sharing mechanism. See Order No. PSC-11-0095-FOF-EI, issued on February 2, 2011.

With respect to the order on risk sharing, FPL's argument misses the point. FPL witness Terry Deason took issue with a program that would disallow costs that otherwise would be deemed prudent. (TR-1148). However, the "risk sharing" order was entered prior to the current litigation over the imprudence of the decision to fast track the EPU. OPC contends FPL was imprudent, and the purpose of the breakeven analysis is to quantify imprudent costs. There is no conflict between the order on risk sharing and OPC's proposal, because only imprudent costs would be disallowed.

FPL contends the Commission must review the prudence of "buckets" of costs incurred in 2009 and 2010. The Commission should reject FPL's effort to require it to ignore the forest for the trees. Just as one cannot reconstruct the costs that FPL would have incurred had it not fast tracked the EPU, one cannot review the prudence of individual costs or tasks in isolation of an overall approach to the assessment of the impact of FPL's decision. However, there is an approach that is consistent with both the wording of Section 403.519(4), F.S., and the overriding responsibility of the Commission to protect customers from the effects of imprudence. Specifically, the Commission should interpret the "certain costs" that the Commission may disallow as imprudent as being the difference between the actual cost and the final breakeven value[6]. See Section 403.519(4), F.S.

ISSUE 12: What system and jurisdictional amounts should the Commission approve as FPL's final 2009 and 2010 prudently incurred costs and final true-up amounts for the Extended Power Uprate project?

The Commission should find that FPL was imprudent when it decided to forgo the protections against excessive costs inherent in the normal processes, procedures, and sequences of design engineering, bidding, and construction and instead "fast track" the EPU projects to meet an otherwise unattainable in-service date. The costs subject to disallowance as a consequence of FPL's imprudence should be measured on the basis of a breakeven analysis performed at the time the full costs of the EPU projects are known.

ISSUE 13: What system and jurisdictional amounts should the Commission approve as reasonably estimated 2011 costs and estimated true-up amounts for FPL's Extended Power Uprate project?

[6] The argument has been made that the final breakeven analysis may be affected by such factors as swings in fuel costs that are beyond the utility's control. There would be nothing to prevent FPL from preparing the analysis using more than one fuel cost scenario to account for any such development. However, the excess investment above the breakeven amount would serve as a basis for quantifying disallowance of imprudent costs, absent a showing by FPL that other factors should offset or diminish the differential.

OPC takes no position, except to note that any amounts approved as reasonably estimated 2011 costs and estimated true-ups should be subject to the determination described in OPC's position on Issue 18.

ISSUE 14: What system and jurisdictional amounts should the Commission approve as reasonably projected 2012 costs for FPL's Extended Power Uprate project?

*OPC expresses no position, except to note that any amounts approved as reasonably projected 2012 costs for FPL's Extended Power Uprate projects should be subject to the determination described in OPC's position on Issue 18.

ISSUE 15A: Did FPL willfully withhold information concerning the estimated capital costs of its EPU uprate projects and its related long-term study of the feasibility of the EPU uprates that is required by rule 25-6.0423, F.A.C., and that the Commission needed to make an informed decision at the time of the September 2009 hearing in Docket No. 090009-EI?

* Yes. FPL's outside investigator and OPC's consultant separately have concluded that the estimate of capital costs contained in May 2009 testimony was effectively superseded by significantly higher estimates before the September hearing. FPL's witness and senior management jointly, consciously decided not to update the estimate, which is also an essential input to the feasibility analysis. FPL's claim that it had not completed the process for changing the estimate places form over substance, as its investigator found EPU managers were treating the more recent estimates as operative. Finalizing design work was not essential to a revised estimate; otherwise, FPL would not revise the original estimate until its project is complete. Confidentiality procedures in place would have guarded sensitive information..*

ARGUMENT

FPL withheld the most current information regarding capital cost estimates during the September 2009 evidentiary hearing.

Between May 1, 2009, the date on which the FPL witness Mr. Kundalkar submitted prefiled testimony on FPL's estimate of capital costs, and September 8, 2009, the date of the hearing in which he sponsored FPL's original estimate without change, FPL's project managers (of whom the witness was the supervisor) increased the estimate by $444 million — roughly 30% higher than the May estimate. OPC established, through a deposition of Mr. Kundalkar, that the failure to revise the estimate prior to or during the hearing was not due to a mistake by a

novice witness or miscommunication between witness and corporate management; rather, the witness and FPL's senior management together made a conscious decision not to update the estimate. (Ex. 112, at page 27).

FPL's various attempts to downplay or explain away the failure fail to justify its decision. FPL claimed that it could not revise the estimate until it finished design engineering; however, at the time FPL revised the estimate in May 2010, only a fraction of design engineering had been accomplished. (TR-1039). FPL said the estimates of EPC contractor Bechtel were unvetted; however, by the time of the July 2009 meeting of the Executive Steering Committee, Bechtel had reduced its estimates materially. (TR-1041). Moreover, the Bechtel contract constitutes only about 25% of the total project cost—and, since Bechtel is to be compensated on the basis of time and materials, estimates at this stage of the project will be revised when actual time needs are established. (TR-1042).

FPL alludes to opportunities to "reduce scope," but such opportunities were identified, quantified, and taken into account in the July 2009 presentation in which project managers determined a net increase of $300 million. (Ex. 109, page 5; Ex. 110, page 8). FPL said that the July presentation led it to "push back" against Bechtel, but in August 2009 and again in April 2010 its estimate of the capital cost increased – not decreased – relative to the July value. FPL claims that to have revised the estimates from the stand would have violated its procedure for changing the estimate. However, according to Mr. Reed's Concentric Report, by July 2009 the EPU project managers were treating the May 2009 estimate as obsolete, and regarded the July estimate as reflective of their then current expectations. (Exhibit 197 at page 16 of 23). FPL's complaint that it had not finished the procedure for formally revising the estimate at the time of the hearing attempts to elevate form over substance. FPL contends that reporting the higher

estimate would have undermined its ability to negotiate with Bechtel; however, FPL witness Stall conceded that confidentiality procedures would have guarded against that possibility. (TR-1247-1248).

Rule 25-6.0423, F.A.C., requires FPL to submit a capital cost estimate and an analysis of the long term feasibility of the uprate project in May of each year. FPL maintains it did so, and had no obligation to address the matter until the following May. This argument attempts to ignore the fact that the reports that the utilities submit in May become the subject of sworn testimony in August or September, when the Commission takes evidence on the status of projects. Witnesses are asked explicitly to state whether there have been any changes, additions, or corrections that require modification of the May testimony to be accurate.

FPL witness John Reed testified, through his report (Exhibit 197), that FPL presented a capital cost estimate that was out of date. OPC witness Dr. Jacobs independently reviewed the matter, and concurred in Mr. Reed's conclusion, adding that FPL was not forthright with the Commission. The Commission should find that FPL willfully withheld information needed for an accurate and meaningful estimate of capital costs and the related long-term feasibility analysis.

ISSUE 15B: If the answer is yes, does the Commission possess statutory and regulatory authority with which to address FPL's withholding of information?

* Yes. Section 366.095, F.S., empowers the Commission to impose a fine of not more than $5,000 per day for each day that a violation continues on a regulated utility that refuses to comply with or willfully violates the requirements of a Commission rule or Commission order. In that regard, OPC notes that FPL failed to inform the Commission of the then current information during the presentation of September 9,2009, and did not update its estimate of capital costs until May 3, 2010-a period of some 236 days.*

ARGUMENT

Commission Rule 25-6.0423(8)(t), F.A.C., requires a utility to submit annually an estimate of capital costs, revised as necessary to reflect changes from the amount presented during the proceeding on the "determination of need" for the project. Additionally, Rule 25-6.0423(5)(c)(5) requires the utility to submit annually a study of the long term feasibility of the project for which it seeks authority to collect costs. The utility meets these requirements officially when it sponsors the information during the evidentiary hearing that the Commission conducts in the proceeding on the nuclear cost recovery clause each year. If these provisions have any meaning at all, they require the utility to provide the best, most current information available at the time the utility presents it during the hearing. FPL deliberately did not do so.

FPL witness John Reed (through the "Concentric Report") and OPC witness Dr. Jacobs established that FPL, showing an absence of forthrightness, withheld current information regarding capital costs and instead submitted information that was obsolete, inaccurate, and not the best available at the time FPL's witness testified in September 2009. While neither of these witnesses is an attorney, and therefore could not offer a legal opinion, the testimony concerning inaccuracy, obsoleteness, and lack of forthrightness provides the means for evaluating whether FPL violated the requirements governing the estimate and feasibility analysis.

There is no issue of vagueness: the terms "capital cost estimate" and "economic feasibility" are adequate to communicate to entities governed by the cost recovery rule the requirements of the reports described in the rule. *Southwest Florida Water Management District v. Charlotte County,* 774 So.2d 903 (Fla, 2d DCA, 2001); *Cole Vision Corporation v. Department of Business and Professional Regulation, Board of Optometry,* 688 So.2d 404 (Fla. 1st DCA, 1997). A basic tenet of statutory construction – the principles of which apply also to

agency rules – is that one shall not assume the entity adopting the requirement intended to engage in a useless or meaningless act. *Smith v. Piezo Tech. & Prof'l Adm'ers,* 427 So.2d 182, 184 (Fla. 1983). Further, standards of legislation or agency rules can be implicit as well as explicit. *In re Martinez,* 266 B.R. 523 (U.S. Bankruptcy Court, S.D. Fla, 2001) at 535; *Franklin Ambulance Service v. Department of Health and Rehabilitative Services,* 450 So.2d 580 (Fla. App. 1st DCA, 1989). Implicitly, the Commission's rule imposes a requirement of forthrightness and timeliness on FPL and other utilities to which it may be applicable. If utilities are free to choose the timing and quality of their submissions, there is effectively no rule at all, and in adopting the requirements the Commission would have engaged in a meaningless act – which is an impermissible interpretation under the fundamental rules of construction.

Issue 15C: **In light of the determinations in Issues 15A and 15B, what action, if any, should the Commission take?**

Pursuant to Section 366.095, F.S., the Commission has authority under the circumstances to impose a fine of up to $1,180,000 (236 days X $5,000 per day) for FPL's violation of Rule 25-6.0423, F.A.C. OPC urges the Commission to exercise its discretion and authority in a way that will communicate its insistence that utilities subject to its jurisdiction be forthright and transparent in their dealings with the Commission.

ARGUMENT

Despite its numerous efforts to downplay or explain away its failure to provide the Commission with the best, most current capital costs estimate and feasibility analysis, FPL's inaction still speaks louder than its words. FPL's violation of the Commission's rule carries implications that are larger than its noncompliance. FPL's failure to provide the most current and accurate information impinge upon the Commission's ability to exercise its oversight function. *Sierra Club v. Martin,* 168 F.3d 1 (11th Cir., 1999), at pp. 4-5. The Commission should

communicate the seriousness of FPL's failure by imposing a fine at or near the maximum amount authorized under the circumstances.

Issue 19: **What is the total jurisdictional amount to be included in establishing FPL's 2012 Capacity Cost Recovery Clause factor?**

No position, except that OPC notes the amount should be subject to the mechanism for potential disallowance that OPC advocates in its position on Issue 11.

CONCLUSION

For the reasons stated in this Brief, the Commission should approve and adopt OPC's positions on Issues 10, 11, 15A, 15B, and 15C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **CITIZENS' POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF (FLORIDA POWER & LIGHT)** has been furnished by electronic mail and U.S. Mail on this 8th day of September, 2011, to the following:

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