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Subject: Electronic Filing - Docket No. 120009-EI / FPL's Memorandum of Law in Opposition to Issues 1, 28A, and 29A

Attachments: FPL's Memorandum of Law in Opposition to Issues 1, 28A, and 29A.pdf

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 120009-EI

In Re: Nuclear Power Plant Cost Recovery Clause

c. The document is being filed on behalf of Florida Power & Light Company.

d. There are a total of seven (7) pages.

e. The document attached for electronic filing is: Florida Power & Light Company's Memorandum of Law in Opposition to Issues 1, 28A, and 29A.

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DOCUMENT NUMBER-DATE

05495 AUG 10 09

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Nuclear Power Plant)
Cost Recovery Clause)

Docket No. 120009-EI
Filed: August 10, 2012

**FLORIDA POWER & LIGHT COMPANY'S
MEMORANDUM OF LAW IN OPPOSITION TO ISSUES 1, 28A, AND 29A**

Pursuant to the Prehearing Officer's authorization communicated to parties in this docket on August 9, 2012, Florida Power & Light Company ("FPL") hereby files its Memorandum of Law in Opposition to Issues 1, 28A, and 29A. Issue 1 is improper and unnecessary because the resolution of the issue is dictated by statute. Issues 28A and 29A are improper and unnecessary because they are subsumed in other, properly framed issues for determination in this docket. Accordingly, these issues should be excluded from this proceeding.

Issue 1: Does Section 366.93, Florida Statutes, authorize the Commission to disallow recovery of all, or a portion of, the carrying costs prescribed by Section 366.93(2)(b), Florida Statutes?

FPL disputes that this is an appropriate issue because the answer to the question posed – whether the Commission has the authority to disallow carrying costs prescribed by Statute – is clearly answered in the negative in the statute itself. Section 366.93(2)(b) states in relevant part as follows:

To encourage investment and provide certainty, for nuclear or integrated gasification combined cycle power plant need petitions submitted on or before December 31, 2010, associated carrying costs **shall be equal to** the pretax AFUDC in effect upon this act becoming law.

(emphasis added). The Allowance for Funds Used During Construction ("AFUDC") rate as of the date the act became law contained both a debt and an equity component which are each an integral part of the AFUDC rate. The referenced pretax AFUDC rate is required by statute, as made clear by the Legislature's use of the word "shall." As explained by the Florida Supreme

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05495 AUG 10 2012

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Court, it is an elementary principle of statutory construction that significance and effect must be given to every word of a statute – and words in a statute should not be construed as mere surplusage. *School Board of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009), citing *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006).

The Commission, like other administrative agencies, is a creature of statute, and its powers, duties, and authority are only those that are conferred by statute. *Southern States Utilities v. Florida Public Serv. Comm'n*, 714 So. 2d 1046, 1051 (Fla. 1st DCA 1998), citing *Rolling Oaks Utils. v. Florida Public Serv. Comm'n*, 533 So. 2d 770, 773 (Fla. 1st DCA 1988). Neither Section 366.93, Florida Statutes, nor any other Florida statute, provides the Commission discretion or authority to change the AFUDC rate. Nor can anyone convincingly argue that there is a legitimate question of law given the Commission's authority to fix "fair, just and reasonable rates" pursuant to Section 366.06, Florida Statutes. It has long been settled that when a general statute and a specific statute cover the same subject area, the specific statute controls. *See School Board of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009), citing *Maggio v. Fla. Dep't of Labor & Empl. Sec.*, 899 So. 2d 1074, 1079 (Fla. 2005). Section 366.93, Florida Statutes, governing nuclear power plant cost recovery and establishing the one and only AFUDC rate for this proceeding, controls the outcome of this issue – not the Commission's general authority to fix fair, just, and reasonable rates.

Finally, the very suggestion that the issue should be considered undermines the stated intent of the articulated AFUDC rate, which is to encourage investment **and provide certainty** in a utility's recovery of carrying charges. Inclusion of the issue would therefore not only be a waste of the Commission's and all parties' time (given the fact that the outcome is dictated by

law), but would also introduce uncertainty into the process in violation of the stated intent of the statute. For all these reasons, Issue 1 should be excluded from this proceeding.

Issue 28A: Based on the evidence, under current circumstances, should the Commission evaluate the economic feasibility of the Turkey Point and St. Lucie Extended Power Uprate activities separately?

FPL disputes that this is an appropriate issue because it is entirely subsumed within, and OPC can make all of its arguments under, Issue 28. Issue 28 states:

Should the Commission approve what FPL has submitted as its 2012 annual detailed analysis of the long-term feasibility of completing FPL's 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?

Exclusion of Issue 28A would streamline the process and avoid unnecessary duplication. No party would be harmed by its exclusion, as any arguments intended to be made with respect to Issue 28A can be made under Issue 28. Accordingly, this issue should be excluded.

Issue 29A: Should the Commission find that FPL managed the extended power uprate activities at Turkey Point in a reasonable and prudent manner? If not, what action should the Commission take?

FPL disputes that this is an appropriate issue because it is entirely subsumed within, and OPC can make all of its arguments under, Issue 29. Issue 29 states:

Should the Commission find that FPL's 2011 project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Extended Power Uprate project?

Exclusion of Issue 29A would streamline the process and avoid unnecessary duplication. No party would be harmed by its exclusion, as any arguments intended to be made with respect to Issue 29A can be made under Issue 29. Accordingly, this issue should be excluded.

To the extent Issue 29A is included over Staff's objection (noted in its prehearing statement) and over FPL's objection (noted in its prehearing statement and this memorandum), it must be revised to include a year to which the issue is intended to apply. Pursuant to Rule 25-

6.0423(5), Fla. Admin. Code, only the previous year, current year, and subsequent year (in this case, years 2011, 2012, and 2013) are subject to Commission review in the Nuclear Cost Recovery docket. Consideration of project management in a year prior to 2011, if that is the intent of the proposed issue, would be in direct violation of the Nuclear Cost Recovery Rule. Rule 25-6.0423(5)(c)3, Fla. Admin. Code, states that after being found prudent and approved for inclusion in the Capacity Cost Recovery Clause factor, “prior year actual costs...shall not be subject to disallowance or further prudence review...”

The Rule’s limitation on the years under review in each year’s Nuclear Cost Recovery docket was acknowledged by several Commissioners during last year’s Nuclear Cost Recovery hearing in Docket No. 110009-EI.¹ *See* Tr. 60 (“It’s the actions that occurred during the year in question and the specific costs incurred on what is prudent or imprudent.”) (Commissioner Balbis); Tr. 61 (“I think that we need to be limited to the 2009 – 2009, 2010 costs.”) (Commissioner Brown); Tr. 72 (“...we’re not talking about ’07. That decision is made and we’ve moved forward from that.”) (Chairman Graham); Tr. 1063 (“The reason I asked that question is because we’re, we’re looking at 2009 and 2010.”) (Commissioner Brisé); Tr. 1112. Accordingly, to the extent Issue 29A is included, it should be revised to state “Should the Commission find that in 2011 FPL managed the extended power uprate activities at Turkey Point in a reasonable and prudent manner? If not, what action should the Commission take?” Only upon revision would it present an issue (albeit a redundant and unnecessary issue) that could legally be considered by the Commission.

¹ During 2011, the years under review included 2010, 2011, and 2012. Due to a stipulation by FPL and other parties, approved by the Commission, the 2011 proceeding also reviewed 2009 project management and costs.

WHEREFORE, FPL respectfully requests that Issues 1, 28A, and 29A be excluded from this proceeding.

Respectfully submitted this 10th day of August, 2012.

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**CERTIFICATE OF SERVICE
DOCKET NO. 120009-EI**

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law in Opposition to Issues 1, 28A, and 29A was served via electronic mail this 10th day of August, 2012 to the following:

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