

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement with
Respect to use of Decommissioning Trust
Fund Dollars for Spent Fuel and Other
Non-Radiological Decommissioning Costs
for its Crystal River 3 Nuclear Plant

DOCKET NO. 130207-EI
Submitted for Filing: July 30, 2013

**DUKE ENERGY FLORIDA, INC.'S
PETITION FOR DECLARATORY STATEMENT BEFORE THE FLORIDA PUBLIC
SERVICE COMMISSION WITH RESPECT TO USE OF DECOMMISSIONING TRUST
FUND DOLLARS FOR SPENT FUEL AND OTHER NON-RADIOLOGICAL
DECOMMISSIONING COSTS FOR
ITS CRYSTAL RIVER 3 NUCLEAR PLANT**

Duke Energy Florida, Inc. (“DEF” or the “Company”), pursuant to Section 120.565, Florida Statutes, and Rule 28-105.002, F.A.C., respectfully petitions the Florida Public Service Commission (“FPSC” or the “Commission”) to issue a declaratory statement with respect to the intended use of decommissioning trust fund dollars for spent fuel and other non-radiological decommissioning costs for its Crystal River 3 (“CR3”) Nuclear Plant as authorized by previous Commission Orders approving DEF’s nuclear decommission studies entered pursuant to Rule 25-6.04365, F.A.C.

Briefly, Rule 25-6.04365, F.A.C. and the previous Commission orders approving DEF’s nuclear decommissioning studies provide that the funds collected from DEF customers to fund the nuclear decommissioning trust fund (“NDT”) cover activities that fall into one of the following three categories: NRC License Termination, Spent Fuel Management, and Site Restoration. Despite the foregoing, the Nuclear Regulatory Commission (“NRC”) instructed DEF to report the full balance of the DEF NDT in order to comply with certain NRC decommissioning funding reporting obligations. As a result, the NRC considers the full balance

of the DEF NDT to be available for NRC License Termination; therefore, the funds collected from DEF customers for Spent Fuel Management and Site Restoration cannot be used for their intended purpose without permission from the NRC. However, the NRC has issued guidance relevant to DEF's situation that describes how, and under what circumstances, licensees may self-allocate radiological (*i.e.*, NRC Termination) and non-radiological (*i.e.*, Spent Fuel Management and Site Restoration) decommissioning funds that are commingled in a single NDT.

In order to comply with the NRC guidance, DEF is requesting a declaratory statement from the Commission setting out its intentions with respect to DEF's NDT as memorialized in the Commission's Orders issued pursuant to Rule 25-6.04365, F.A.C., authorizing DEF to establish and maintain the NDT.

In further support of this petition, DEF states:

I. PRELIMINARY INFORMATION.

1. The Petitioner's name and address are:

Duke Energy Florida, Inc.
299 1st Avenue North
St. Petersburg, FL 33701

2. Any pleading, motion, notice, order, or other document required to be served upon DEF or filed by any party to this proceeding should be served upon the following individuals:

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II. PRIMARILY AFFECTED UTILITY.

3. DEF is the utility primarily affected by the proposed request. DEF is an investor-owned electric utility, regulated by the Commission pursuant to chapter 366, Florida Statutes, and is an indirectly, wholly owned subsidiary of Duke Energy Corporation. The Company's principal place of business is located at 299 1st Avenue North, St. Petersburg, Florida 33701.

4. DEF serves approximately 1.6 million retail customers in Florida. Its service area comprises approximately 20,000 square miles in 35 of the State's 67 counties, encompassing the densely populated areas of Pinellas and western Pasco Counties and the greater Orlando area in Orange, Osceola, and Seminole Counties. DEF supplies electricity at retail to approximately 350 communities and at wholesale to Florida municipalities, utilities, and power agencies in the State of Florida.

III. COMMISSION ORDERS ON WHICH THE DECLARATORY STATEMENT IS SOUGHT.

5. DEF is seeking a declaratory statement regarding the correct application of the Commission's Orders approving DEF's Nuclear Decommissioning Studies to the particular facts described below. More specifically the Orders at issue are the following Orders collectively referred to herein as the "DEF NDT Orders": Docket No. 870098-EI, Order No. 21928 (Sept. 21, 1989); Docket No. 910981-EI, Order No. PSC-92-0573-FOF-EI (June 26, 1992); Docket No. 941352-EI, Order Nos. PSC-95-0477-FOF-EI (Apr. 12 1995) and PSC-95-1531-FOF-EI (Dec.

12, 1995); Docket No. 001835-EI, Order No. PSC-02-0055-PAA-EI (Jan. 7, 2002); Docket No. 050078-EI, Order No. PSC-05-0945-S-EI (Sept. 28, 2005); and Docket No. 100461-EI, Order No. PSC-12-0225-PAA-EI (Apr. 30, 2012).¹

IV. BACKGROUND AND GOVERNING REGULATIONS.

6. The Commission first authorized the creation of a nuclear decommissioning trust fund for DEF in Docket No. 810100-EU. At issue in that docket was how to fund the nuclear decommissioning costs for the nuclear units owned by DEF and Florida Power and Light (“FPL”). In Order No. 10987 (July 13, 1982), the FPSC noted that decommissioning “involves the process of dismantling or discharge and removal from the plant site of materials and equipment that are not [sic] longer used and useful, including the radioactive materials, which remain following retirement of the generating unit.” The FPSC also approved the use of an internally funded reserve to account for these decommissioning costs. Finally, the Commission noted that the cost estimates to decommission should be reviewed by the FPSC every five years.

7. Pursuant to Commission policy, as codified in Rule 25-6.04365, F.A.C., DEF has filed several updated Nuclear Decommissioning Studies with the Commission. The purpose of Rule 25-6.04365 is “to codify the Commission’s policy of requiring each utility that owns a nuclear generating plant to ensure there are sufficient funds on hand at the time of decommissioning to meet all required expenses by establishing appropriate decommissioning accruals.” The term “decommissioning” is defined as “the process of safely managing, dismantling, removing, or converting for reuse the materials and equipment that remain at the

¹ DEF submitted an updated Nuclear Decommission Cost Study in Docket 090079-EI but the Commission deferred consideration of the issue until later to coincide with FPL’s updated study filing. The FPSC ordered DEF to submit another study for approval in December 2010 but permitted DEF to update the 2008 cost study rather than complete a new study. Order No. PSC-10-0131-FOF-EI (Mar. 5, 2010). That updated cost study was approved in Docket 100461-EI.

nuclear generating unit following its retirement...” *Id.* at (2)(b). The rule also requires that a Nuclear Decommissioning Study include information about plans to manage spent fuel and the estimated costs for on-site dry storage of the fuel. *Id.* at (3)(c).

8. The Commission approved DEF’s² updated Nuclear Decommissioning Studies when it issued the DEF NDT Orders at issue.

9. In the most recent docket in which the FPSC considered DEF’s updated nuclear decommissioning cost estimates, the Company submitted an update to the 2008 site specific decommissioning cost study prepared by TLG Services, Inc. (the “TLG Update”).³ There are three categories to which TLG assigns the cost elements: NRC License Termination, Spent Fuel Management, and Site Restoration. NRC License Termination is for costs consistent with “decommissioning” as defined by the NRC.⁴ Spent Fuel Management contains costs associated with the storage of spent fuel after a plant permanently ceases operation, either in the spent fuel pool within the plant or in dry storage casks as part of an independent spent fuel storage installation (“ISFSI”). Site Restoration captures costs associated with the dismantling and demolition of buildings and structures free from contamination, removal of non-radiological contaminants if any, and grading and revegetation of the site.

10. DEF’s NDT is held in trust with State Street Bank and Trust Company as trustee. Due to federal tax considerations, DEF, like many other nuclear power reactor licensees, has all of its decommissioning funds (*i.e.*, funds for NRC License Termination, Spent Fuel Management, and Site Restoration) commingled in DEF’s NDT. This commingling has been

² These previous filings were made under DEF’s previous name(s), Florida Power Corporation or Progress Energy Florida, Inc.

³ See Document Number 09954-10 (Dec. 15, 2010), filed in Docket No. 100461-EI.

⁴ “Decommission”, per 10 C.F.R. § 50.2, means “to remove a facility or site safely from service and reduce residual radioactivity to a level that permits (1) Release of the property for unrestricted use and termination of the license; or (2) Release of the property under restricted conditions and termination of the license.”

necessitated in large measure by Internal Revenue Service (“IRS”) regulations which allow favorable tax treatment regarding the contributions to and income of a “qualified fund,” but allow the taxpayer to maintain only one qualified nuclear decommissioning trust for each nuclear plant that it owns. IRS Reg. § 1.468A-5(a)(1)(iii).

11. The NRC’s decommissioning rules were established in 1988 and require the licensed operator and owners of a nuclear plant to provide financial assurance for decommissioning funding. *See* 10 C.F.R. § 50.75. The NRC rules make it clear that they do not preempt State decommissioning funding requirements. As those rules provide,

Funding for the decommissioning of power reactors may also be subject to the regulation of Federal or State Government agencies (e.g., Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) that have jurisdiction over rate regulation. The requirements of this section, in particular paragraph (c) of this section, are in addition to, and not substitution for, other requirements, and are not intended to be used by themselves or by other agencies to establish rates.

Id. at (a).

12. With respect to licensees that recover their costs through cost-of-service rates, the NRC allows such funding assurance to be provided by establishing an external sinking fund, consisting of a segregated trust into which funds are periodically set aside so that the total will be sufficient to pay for decommissioning at the time permanent termination of operations is expected. *Id.* at (e). NRC rules and guidance, however, indicate that the NRC’s definition of decommissioning does not include spent fuel management, or the removal and disposal of non-radioactive structures and materials beyond those necessary to terminate the license. *See, e.g., id.* at (c) n.1; Regulatory Guide 1.202, Standard Format and Content of Decommissioning Cost

Estimates for Nuclear Reactors (Feb. 2005) at 1.202-2 (“The NRC’s definition of decommissioning does not include other activities related to facility deactivation and site closure, including operation of the spent fuel storage pool, construction and/or operation of an independent spent fuel storage installation . . .”). A separate NRC rule at 10 C.F.R. § 50.54(bb) requires each licensee to submit, either five years before license expiration or two years after permanent cessation of operations (whichever occurs first) a plan on how it will provide funding assurance for spent fuel management.

13. In 1996, the NRC amended its decommissioning rules, promulgating *inter alia* a new provision providing that decommissioning funds may only be used if the withdrawals are for legitimate decommissioning activities consistent with the NRC’s definition of this term. 10 C.F.R. § 50.82(a)(8). In response to comments expressing concern that this provision might be too restrictive, the NRC stated that “[t]he final rule does not prohibit licensees from having separate subaccounts for other activities in the decommissioning trust if minimum amounts specified in the rules are maintained for radiological decommissioning.” 61 Fed. Reg. 39,278, 39,295 (July 29, 1996).

14. The NRC amended its decommissioning rules again in 2002 to require decommissioning trust agreements to provide that disbursements or payments from a decommissioning trust, other than for ordinary administrative costs and other incidental expenses of the fund, are restricted to decommissioning expenses (or transfer to other decommissioning methods) until final decommissioning has been completed. 10 C.F.R. § 50.75(h)(2). Once more, in response to concerns regarding such restrictions, the NRC explained:

The NRC does not object to licensees mingling funds for decommissioning activities as defined by the NRC and for other activities outside the NRC’s definition. However, if

funds are mingled in this way, licensees need to ensure that separate sub-accounts are established so funds for each type of activity are appropriately identified.

As to the statement made by commenters that restrictions should not apply to funds held in trust for purposes other than radiological decommissioning, the Commission's position is that withdrawals for nonradioactive decommissioning expenses that do not affect the amount of funds remaining for radiation decommissioning costs are not covered by this rule. However, the Commission is not proposing that licensees institute separate trusts to account for the different types of activity. The Commission appreciates the benefits that some licensees may derive from their use of a single trust fund for all of their decommissioning costs, both radiological and not; but, as stated above, a licensee must be able to identify the individual amounts contained within its single trust.

67 Fed. Reg. 78,332, 78,340 (Dec. 24, 2002).

15. The NRC's rules also include a requirement set forth in 10 C.F.R. § 50.75 that a power reactor licensee must submit a decommissioning funding status report at least once every two years or annually if within five years of license expiration (the "DFS Report"). The DFS Report must include, among other things, (i) the amount of decommissioning funds estimated to be required pursuant to minimum formula amounts set forth in 10 C.F.R. § 50.75⁵ and (ii) the amount of decommissioning funds accumulated to the end of the calendar year preceding the date of the report.

⁵ The minimum formula amounts are based on activities related to the definition of "Decommission" in 10 C.F.R. § 50.2 and, per a footnote in 10 C.F.R. § 50.75, do not include the cost of removal and disposal of spent fuel or of nonradioactive structures and materials beyond that necessary to terminate the license.

16. On January 8, 2009, the NRC issued guidance on this reporting requirement, in the form of “NRC Regulatory Issue Summary 2001-07, Rev. 1 10 CFR 50.75 Reporting and Recordkeeping for Decommissioning Planning” (the “RIS”). The RIS states:

The NRC has not precluded the commingling in a single account of funds accumulated to comply with NRC radiological decommissioning requirements and funds accumulated to address State site restoration costs (State costs) and spent fuel management costs, as long as the licensee is able to identify and account for the NRC radiological decommissioning funds that are contained within its single account. However, NRC staff has learned that some licensees, in response to the requirement that they report the amount of decommissioning funds accumulated to the end of the calendar year preceding the date of the report, have reported as part of that amount funds accumulated to address State costs and spent fuel management costs. Accordingly, NRC staff is clarifying for licensees the need to report radiological decommissioning fund balances that are distinct from amounts accumulated for other purposes, such as paying for State costs and spent fuel management.

17. On March 25, 2009, DEF submitted a DFS Report to the NRC for the calendar year ending December 31, 2008 (the “2009 DFS Report”) limiting its report to financial assurance for radiological decommissioning.

18. During a spot-check conducted by the NRC with respect to the CR3 Nuclear Plant in January 2010, the NRC noted that the December 31, 2008 trust fund balance was greater than the amount reported to the NRC in the 2009 DFS Report. On May 21, 2010, the NRC submitted a Request for Additional Information (“RAI”) to DEF, and DEF responded to the RAI on July 1, 2010. The NRC asked whether the funds for decommissioning are commingled with other

funds, and if so, how the funds are divided into subfunds or subaccounts. DEF responded that the trust funds themselves are not divided into subfunds or subaccounts. The NRC also requested “documentation from the state regulatory authority that authorized collections for decommissioning, particularly with respect to the purposes for which the funds were collected (such as NRC decommissioning requirements, spent fuel management, site restoration, and others as recognized by the state authority) and the amounts authorized for each of those purposes.” In response, DEF provided to the NRC all of the DEF NDT Orders (with the exception of the 2012 order), as well as Docket No. 810100-EU, Order No. 10987 (July 13, 1982); Docket No. 991617-EI, Order No. PSC-99-2491-PAA-EI (Dec. 20, 1999); Docket No. 000543-EI, Order No. PSC-01-0096-FOF-EI (Jan. 11, 2001); Docket No. 001835-EI, Order No. PSC-02-0136-CO-EI (Jan. 30, 2002); Docket No. 000824-EI, Order PSC-02-0655-AS-EI (May 14, 2002); and Docket No. 090079-EI, Order No. PSC-10-0131-FOF-EI (Mar. 5, 2010).

19. On March 14, 2011, the NRC issued a minor violation to DEF for a failure to accurately report the amount accumulated as of December 31, 2008 and instructed DEF, with respect to any future DFS Report, to report the amount accumulated to the end of the calendar year preceding the date of such DFS Report (*i.e.*, the full balance of the DEF NDT). Based on this violation, it appears that the NRC did not consider the DEF NDT Orders (together with the additional orders identified in paragraph 18) sufficient to support allocating portions of the NDT to non-radiological decommissioning (*i.e.*, Spent Fuel Management and Site Restoration). Unless corrected, DEF’s inability to allocate a portion of the DEF NDT to Spent Fuel Management and Site Restoration will prevent DEF from using DEF NDT funds that were collected from DEF customers for those purposes, as determined by the DEF NDT Orders approving the Nuclear Decommissioning Cost Studies on which those collections were based.

20. Since the issuance of the minor violation, DEF has filed a DFS Report in 2011, 2012 and 2013 and, in each case, DEF reported the full balance of the DEF NDT as of December 31 of the calendar year preceding the date of the DFS Report. By reporting the full balance of the DEF NDT, as instructed by the NRC, the NRC considers the full balance of the DEF NDT to be available only for radiological decommissioning (*i.e.*, NRC License Termination). As a result, DEF cannot use any portion of the DEF NDT collected from DEF customers for other intended purposes (*i.e.*, Spent Fuel Management and Site Restoration) without first obtaining the NRC's permission, which the NRC might not grant.

21. NRC correspondence to FPL in the same time frame further illuminates the NRC's actions and their potential impact on Florida ratepayers. FPL maintained internal accounting allocating portions of its decommissioning funds to license termination costs (radiological costs), spent fuel management costs, and non-nuclear demolition and restoration costs based on the decommissioning studies required by Florida law. Letter from FPL to NRC (Jan. 29, 2008). In a November 26, 2008 letter back to FPL, the NRC stated:

[FPL's] funds include the following nonsegregated components: license termination costs (radiological costs), spent fuel management costs, and non-nuclear demolition and restoration costs. Under NRC guidance, FPL may commingle their funds within the DTF, but must properly earmark each component. Because FPL does not earmark the three cost components, FPL should be reporting all funds within the external trust to the NRC as radiological decommissioning (license termination costs) unless the state regulatory authority will not allow the use of certain funds for radiological decommissioning.

If FPL decides to create subaccounts in the future, funds within the current external trust may not be moved to nonradiological subaccounts unless the *FPL provides the NRC with sufficient documentation that the state regulator specifically authorized collections for those nonradiological purposes in certain amounts that are not to be used for radiological decommissioning.*

22. Thus, despite NRC assurances during its rulemaking proceedings that NRC restrictions would not reach funds collected from ratepayers and set aside for other purposes, it appears that, with respect to the issue of commingled funds, the NRC is now insisting on much stricter regulatory accounting. In particular, the NRC is insisting on FPSC orders specifically earmarking amounts that may be used for Spent Fuel Management and Site Restoration. Indeed, the NRC letter to FPL goes even further than this and insists on Orders earmarking portions of the fund *exclusively* for these purposes (although the regulatory basis for this demand is not apparent). As a result, the NRC is not deferring to the FPSC's intent due to the lack of specific language in the NDT Orders.

23. In order to ensure that DEF NDT funds collected from DEF's customers to fund Spent Fuel Management and Site Restoration are available for these purposes, DEF is petitioning this Commission for a declaratory statement making clear that the DEF NDT authorized and maintained pursuant to the DEF NDT Orders includes amounts intended to fund Spent Fuel Management and Site Restoration.

IV. REQUESTED RELIEF.

24. Pursuant to Section 120.565(1), Florida Statutes, "[a]ny substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of

a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.” Furthermore, Rule 28-105.001, F.A.C., provides that

[a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

25. Florida courts recognize that “the purpose of the declaratory statement [is] ‘to enable members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs or in the planning of their future affairs and to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts.’” *Exxon Mobil Oil Corp. v. State, Dep’t of Agriculture & Consumer Servs.*, 50 So. 3d 755, 757 (Fla. 1st DCA 2010) (quoting *Fla. Dep’t of Bus. & Prof’l Regulation v. Inv. Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999) (quoting Patricia A. Dore, *Access to Fla. Admin. Proceedings*, 13 Fla. St. U. L. Rev. 965 (1986))).

26. In light of the NRC’s recent actions that render DEF unable to allocate a portion of the funds in the DEF NDT to Spent Fuel Management and Site Restoration, the Company is in doubt as to the application of the DEF NDT Orders to the accumulated funds in the DEF NDT. Because of the retirement of the CR3 Nuclear Plant, DEF needs the Commission’s guidance regarding the proper allocation of the funds in the DEF NDT under the DEF NDT Orders.

27. On February 5, 2013, DEF announced its intention to retire the CR3 Nuclear Plant and on February 20, 2013, pursuant to 10 C.F.R. § 50.82(a)(1)(i) and (ii), DEF certified to the

NRC that fuel has been permanently removed from the reactor vessel. The Company is in the process of transitioning work responsibilities and employees at the CR3 Nuclear Plant in order to support the decommissioning process. Pursuant to 10 C.F.R. § 50.82(4)(i), DEF must submit a Post-Shutdown Decommissioning Activities Report (“PSDAR”) within two years following permanent cessation of operations.

28. Currently, DEF may withdraw three percent of the formula amount specified in 10 C.F.R. § 50.75 for decommissioning planning from the DEF NDT. Once DEF files its site-specific decommissioning cost estimate with the NRC, DEF will have access to the rest of the DEF NDT within ninety days of the filing if the NRC finds the estimate acceptable.

Notwithstanding such access, DEF still will not have the right to use any portion of the DEF NDT collected from DEF customers for Spent Fuel Management and Site Restoration without first obtaining permission from the NRC.

29. To preserve the FPSC’s intent with respect to the use of funds collected from DEF customers for Spent Fuel Management and Site Restoration and to allow DEF to allocate the commingled funds in the DEF NDT in accordance with the Decommissioning Cost Studies on which collections from DEF customers were based, as memorialized in the DEF NDT Orders issued pursuant to Rule 25-6.04365, F.A.C., DEF respectfully requests that the FPSC issue a declaratory statement clearly stating the following:

a. The funds accumulated in the DEF NDT shall be allocated among NRC License Termination, Spent Fuel Management, and Site Restoration pursuant to, and in accordance with, the percentage assigned to each category in the most current Nuclear Decommissioning Study, or update thereto, filed with and approved by the Commission pursuant to Rule 25-6.04365, F.A.C.

b. No funds accumulated to pay for Spent Fuel Management and Site Restoration, as authorized in the DEF NDT Orders and in any ensuing Commission order approving DEF's subsequent Nuclear Decommissioning Studies, or updates thereto, are available to pay for NRC License Termination costs without prior approval by the Commission and the availability of such funds for NRC License Termination costs is subject to disapproval by the Commission.

WHEREFORE, DEF respectfully requests that the FPSC issue an order containing the specific findings provided in paragraph 29 above.

Respectfully submitted this 30th day of July, 2013.

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