

State of Florida



**Public Service Commission**  
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** September 12, 2013

**TO:** Office of Commission Clerk (Cole)

**FROM:** Office of the General Counsel (Miller, Lawson) *CM*  
Office of Industry Development and Market Analysis (Laux) *P.M.C. mrc*  
Division of Economics (Higgins) *MA* *J.W.D.*

**RE:** Docket No. 130207-EI – Petition for declaratory statement with respect to use of decommissioning trust fund dollars for spent fuel and other non-radiological decommissioning costs for Crystal River 3 Nuclear Plant.

**AGENDA:** 09/25/13 – Regular Agenda – Decision on Declaratory Statement – Participation of Parties is at the Discretion of the Commission

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Administrative

**CRITICAL DATES:** 10/28/13 (Final Order must be issued by this date pursuant to Section 120.565(3), Florida Statutes)

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\IDM\WP\130207.RCM.DOC

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**Case Background**

On July 30, 2013, pursuant to Section 120.565, Florida Statutes (F.S.), and Rule 28-105.002, Florida Administrative Code (F.A.C.), Duke Energy Florida, Inc. (DEF) filed a Petition for Declaratory Statement (Petition) regarding the application of Rule 25-6.04365, F.A.C., on Nuclear Decommissioning and a number of Florida Public Service Commission (Commission) orders addressing decommissioning of DEF's Crystal River 3 nuclear plant: Order No. 21928 (Sept. 21, 1989), Order No. PSC-92-0573-FOF-EI (June 26, 1992), Order No. PSC-95-0477-FOF-EI (Apr 12, 1995), Order No. PSC-95-1531-FOF-EI (Dec. 12, 1995), Order No. PSC-02-

0055-PAA-EI (Jan. 7, 2002); Order No. PSC-05-0845-S-EI (Sept. 28, 2005); and Order No. PSC-12-0225-PAA-EI (Apr. 30, 2012).

Decommissioning is the dismantlement and removal of materials and equipment that are no longer used or useful, after a nuclear generating unit is retired. The Nuclear Regulatory Commission (NRC) accepts the following three decommissioning methods: prompt removal/dismantling (DECON); entombment (ENTOMB); and mothballing with defined decontamination (SAFSTOR). NRC Rule 50.75 establishes requirements for indicating to the NRC how a licensee will provide reasonable assurance that funds will be available for the decommissioning process.

According to DEF, the Commission orders approving DEF's nuclear decommissioning studies provide that the funds collected from DEF customers to fund the nuclear decommissioning trust fund cover activities that fall into one of the following three categories: NRC License Termination, Spent Fuel Management and Site Restoration. However, the NRC instructed DEF to report the full balance of the DEF nuclear decommissioning trust fund in order to comply with certain NRC decommissioning funding reporting obligations. As a result, the NRC may consider the full balance of the DEF Nuclear Decommissioning Trust Fund to be available for NRC License Termination. DEF requests the FPSC issue a declaratory statement stating the following:

- a. The funds accumulated in the DEF Nuclear Decommissioning Trust Fund 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 nuclear decommissioning trust fund 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.

Pursuant to Rule 28-105.0024, F.A.C., a Notice of Declaratory Statement was published in the August 5, 2013, edition of the Florida Administrative Register, informing interested persons of the Petition. On August 2, 2013, the Office of Public Counsel (OPC) filed a Notice of Intervention pursuant to Section 350.0611, F.S. Order No. PSC-13-0299-PCO-EI, acknowledging OPC's intervention was issued August 6, 2013.

This recommendation addresses DEF's Petition for Declaratory Statement. Pursuant to Section 120.565(3), F.S., and Rule 28-104.003, F.A.C., an agency must issue a declaratory statement or deny the petition within 90 days after the filing of the petition. Thus, the Commission must issue an order on the Petition by October 28, 2013. The Commission has jurisdiction pursuant to Section 120.565 and Chapter 366, F.S.



### **Discussion of Issues**

**Issue 1:** Should the Commission issue a declaratory statement in response to DEF's petition?

**Recommendation:** Yes, The Commission should issue a declaratory statement granting, in part, and denying, in part, DEF's petition. Applying the Commission's Nuclear Decommissioning Orders and Rule 25-6.04365, F.A.C., Nuclear Decommissioning, the Commission should affirm that funds accumulated in the DEF Nuclear Decommissioning Trust Fund must be allocated among NRC License Termination, Spent Fuel Management, and Site Restoration pursuant to the percentage assigned to each category in the most current Nuclear Decommissioning Study, or update, filed with and relied upon by the Commission pursuant to Rule 25-6.04365, F.A.C. However, the second issue raised by DEF regarding a requirement that DEF obtain prior approval by the Commission for payment of Spent Fuel Management and Site Restoration funds for NRC License Termination Costs is not proper for a declaratory statement and, thus, should be denied. (Miller, Lawson, Higgins, Laux)

**Staff Analysis:** Section 120.565, F.S., governs the issuance of a declaratory statement by an agency. In pertinent part it provides that:

- (1) Any 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.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, 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 a petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.002, F.A.C., requires a petition for declaratory statement to include a description of how the orders on which a declaratory statement is sought may substantially affect the petitioner in the petitioner's particular set of circumstances. The petition must demonstrate a present, ascertained state of facts and may not be merely a hypothetical situation.<sup>1</sup> The Courts and the Commission have recognized that a purpose of the declaratory statement procedure is to resolve an ambiguity in the law and to enable the petitioner to select a proper course of action in advance, thus avoiding costly administrative litigation.

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<sup>1</sup> *Santa Rosa County, v. Dep't of Admin Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995); Order No. PSC-01-1611-FOF-SU, issued August 3, 2001, Docket No. 010704-SU, In re: Petition for declaratory statement by S. Johns County (petition for declaratory statement denied as constituting a mere hypothetical situation).

Pursuant to Rule 28-105.003, F.A.C., an agency may rely on the statements of facts contained in the petition for declaratory statement without taking a position on the validity of the facts. Staff recommends that the Commission in this instance rely on the statement of facts contained in DEF's petition, in accordance with Rule 28-105.003, F.A.C. If the Commission issues a declaratory statement, the order will be controlling as to those facts, and not as to other, different or additional facts.

The authority of the Commission to issue a declaratory statement in this docket is limited by Section 120.565, F.S., to a determination of the application of the rule and Orders to the petitioner's particular set of circumstances.<sup>2</sup> The petitioner is required by Section 120.565(2), F.S., to "state with particularity the petitioner's set of circumstances" and "specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances." Staff believes that the Petition, in part, meets the requirements of Section 120.565, F.S., and Rule 25-105.002, F.A.C., because DEF requests a declaratory statement regarding the Commission's opinion as to the applicability of Rule 25-6.04365, F.A.C., and the Commission's nuclear decommissioning trust fund orders. However, DEF's second issue appears to be a hypothetical scenario, and staff believes the request on the second issue should be denied.

#### DEF's Statements of Fact

In its Petition DEF states that, due to federal tax considerations, DEF has all of its decommissioning funds (i.e., funds for NRC License Termination, Spent Fuel Management, and Site Restoration) commingled in DEF's Nuclear Decommissioning Fund. This commingling has been "necessitated in large measure by Internal Revenue Service 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. § 1.468-5(a)(1)(iii).

DEF states that the NRC's decommissioning rules require the licensed operator and owners of a nuclear plant to provide assurance for decommissioning funding. See 10 C.F.R. § 50.75. The rule acknowledges State Commission jurisdiction over rate regulation. It states that funding for the decommissioning of power reactors may also be subject to regulation of Federal or State government agencies and specifically refers to state public utility commissions that have jurisdiction over rate regulation.

DEF states that the NRC rules allow the funding assurance to be provided by establishing an external sinking fund, consisting of a segregated trust fund into which funds are periodically set aside so that the total will be sufficient to pay for decommissioning at the time permanent termination of operation is expected. NRC rules and guidance, however, indicate that the NRC definition of decommissioning does not include spent fuel management, or the removal and disposal of nonradioactive structures and materials.

DEF states that 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 the permanent cessation of

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<sup>2</sup> *Lenar Homes, Inc. v. Dep't of Bus. & Prof'l Reg., Div. of Fla. Land Sales, Condo's & Mobile Homes*, 888 So. 2d 50, 53 (Fla. 1<sup>st</sup> DCA 2004).



operations (whichever occurs first), a plan on how it will provide assurance for spent fuel management.

DEF also notes that the NRC amended its decommissioning rules in 1996 and added a provision, 10 C.F.R. § 50.82(c)(8), requiring that decommissioning funds may only be used if the withdrawals are for legitimate decommissioning activities consistent with the NRC's definition. DEF contends that the NRC stated that the final rule at 61 Fed. Reg. 39,278, 39,295 (July 29, 1996) "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."

According to DEF, the NRC amended its rules again in 2002 to require decommissioning trust agreements to provide in 10 C.F.R. § 50.75(h)(2) 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 until final decommissioning has been completed. However, in response to concerns raised about such restrictions, DEF contends that the NRC stated at 67 Fed. Reg. 78,332, 78,340:

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 the 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.

DEF asserts that the NRC also stated in 67 Fed. Reg. 78,332, 78,340 (Dec. 24, 2002), that withdrawals for nonradioactive decommissioning expenses that do not affect the amount of funds remaining for radiation decommissioning costs are permissible; however, a licensee must be able to identify the individual amounts contained within its single trust. DEF states that the NRC rule 10 C.F.R. § 50.75 also requires the licensee to submit a decommissioning funding status report (status report) at least once every two years or annually if within five years of license expiration, according to DEF.

DEF further states that, on January 8, 2009, the NRC clarified for licensees the need to report radiological decommissioning fund balances that are distinct from amounts accumulated for other purposes, such as paying for state site restoration costs and spent fuel management in the NRC Regulatory Issue Summary, 2001-2007, Rev. 1 10 CFR § 50.75 Reporting and Recordkeeping for Decommissioning Planning.

DEF states that, on March 25, 2009, it submitted its report to the NRC, limiting its report to financial assurance for radiological decommissioning. During a spot-check conducted by the NRC with respect to the CR3 Nuclear Plant in 2010, the NRC noted that the December 30, 2008, trust fund balance of DEF was greater than the amount reported to the NRC in the 2009 DEF status report. The NRC, on May 21, 2010, submitted an additional request for information. 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 they are not divided. The NRC also requested from DEF documentation of the state regulatory authority's authorization of 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. DEF provided all of the Commission orders on decommissioning up to that time.

DEF states that, on March 14, 2011, the NRC issued a minor violation to DEF for 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 nuclear decommissioning trust fund). According to the Petition, it appears that the NRC did not consider the FPSC Orders “sufficient to support allocating portions of the [nuclear decommissioning trust fund] to non-radiological decommissioning (i.e., Spent Fuel Management and Site Restoration).” DEF adds that “[u]nless corrected, the DEF’s inability to allocate a portion of the DEF [nuclear decommissioning trust fund] to Spent Fuel Management and Site Restoration will prevent DEF from using DEF [nuclear decommissioning] funds that were collected from DEF customers for those purposes, as determined by the [Commission] DEF [fund] Orders approving the Nuclear Decommissioning Cost Studies on which those collections were based.”

DEF states that after the issuance of the minor violation, it has filed status reports in 2011, 2012 and 2013, and in each case, reported the full balance as the NRC instructed. DEF is concerned that NRC may consider the full balance of the nuclear decommissioning trust fund to be available only for radiological decommissioning (i.e., License termination). As a result, DEF is concerned it cannot use any portion of the DEF nuclear decommissioning trust fund collected from DEF customers for their intended purposes (i.e., Spent Fuel Management and Site Restoration) without first obtaining NRC permission.

The Petition also describes a similar determination made with respect to FPL citing the November 26, 2008, letter to FPL from NRC. DEF stated that FPL maintained internal accounting allocating portions of its decommissioning funds to license termination costs, spent fuel management costs and non-nuclear demolition and restoration costs based on decommissioning studies required by Florida law. The letter, according to DEF, stated:

[B]ecause FPL does not earmark 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.” (Emphasis added).

The NRC 2008 letter to FPL added:

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



Thus, DEF contends that the NRC, in the cases of commingled funds, is stating that Commission Orders must specifically earmark accounts that may be used for Spent Fuel Management and Site Restoration.

In light of the NRC's recent actions, DEF states it is in doubt as to the application of the Commission Orders to the accumulated funds in the DEF trust fund. Thus, DEF seeks the Commission's guidance regarding the proper allocation of the funds under the Commission's orders. On February 2, 2013, DEF certified to the NRC that fuel has been permanently removed from the reactor vessel. DEF must submit a Post-Shutdown Decommissioning Activities Report (PSDAR) within two years following permanent cessation of operations.

#### Orders and Rules for Which DEF Requests Declaratory Statement

Rule 25-6.04356, F.A.C., on Nuclear Decommissioning was adopted in 2001 and addresses the Commission's policy of requiring each utility that owns a nuclear generating plant to ensure that there are sufficient funds on hand at the time of decommissioning to meet all required expenses by establishing appropriate decommissioning accruals. The rule requires each utility to file a Nuclear Decommissioning Study on a regular basis. The requirements include a nuclear decommissioning study, which in turn requires the annual revenue requirement of the proposed decommissioning cost estimates. A utility shall not change its annual nuclear decommissioning accruals without prior Commission approval.

The applicable Orders, as stated by DEF, are: Order No. 21928 (September 21, 1989), Order No. PSC-92-0573-FOF-EI (June 26, 1992), Order No. PSC-95-0477-FOF-EI (April 12, 1995), Order No. PSC-95-1531-FOF-EI (Dec. 12, 1995), Order No. PSC-02-0055-EO (Jan. 7, 2002), Order No. PSC-05-0845-S-EI (Sept. 28, 2005), and Order No. PSC-12-0225-PAA-EI (Apr. 30, 2012). These orders address accruals needed to fund nuclear decommissioning. The most recent orders address categories of the costs. In Order No. PSC-02-0055-PAA-EI, the Commission noted that the NRC and this Commission have come to recognize the desirability of performing site-specific cost studies. In the 2012 Order, Order No. PSC-12-0225-PAA-EI, the Commission addressed the different aspects of nuclear decommissioning and grappled with the spent fuel management element, in light of the Department of Energy's withdrawal of its application for the Yucca Mountain repository. The Commission also in that order addressed the revisions to DEF's annual decommissioning accruals through the years.

In the 2012 Order, the Commission also relied heavily on the decommissioning cost study prepared by TLG Services, Inc. for DEF's predecessor Progress Energy Florida. The Commission noted that the cost study analyzed the decommissioning process based on several categories. These categories fit within the broader categories set out in DEF's petition.

#### DEF's Questions for Which a Declaratory Statement is Sought

DEF requests the Commission issue a declaratory statement stating the following:

- a. The funds accumulated in the DEF Nuclear Decommissioning Trust Fund 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 nuclear decommissioning trust fund 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.

#### Application of Rule and Orders to DEF's Particular Set of Circumstances

Through Rule 25-6.04365, F.A.C., on Nuclear Decommissioning and through Commission Orders since 1989, the Commission has been reviewing nuclear decommissioning cost estimates and setting DEF's decommissioning accrual amounts based on those cost estimates. Rule 25-6.04365, F.A.C., states that the purpose of the rule 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 rule requires each utility to file a Nuclear Decommissioning Study, the purpose of which is to obtain sufficient information to update cost estimates based on new developments, additional information, technological improvements, and forecasts; to reevaluate alternative methodologies; and to review the annual accrual needed to recover the costs.

While the Commission orders never explicitly ordered separate cost allocations (license termination, nuclear spent fuel, and site restoration), the overall dollar amount encompasses these allocations as presented most recently in the 2010 update to the 2008 decommissioning cost study. In Order No. PSC-12-0225-PAA-EI, the Commission relied on the study and looked to the separate areas of decommissioning, as defined by the Commission.<sup>3</sup> The cost study was prepared by TLG Services, Inc. for DEF's predecessor Progress Energy Florida.

There are essentially three areas of categories for which recovery was ordered: License Termination, Spent Nuclear Fuel and Site Restoration. The Commission has rate setting authority over those areas. The NRC has authority, except for rate setting authority, over License Termination, including radiological decommissioning. Other agencies also have authority over activities that must be completed to decommission the nuclear power plant site. While Order No. PSC-12-0225-PAA-EI states that the total amount of funds in the Decommissioning Trust Fund are theoretically available for Radiological Decommissioning (NRC license termination), if needed, the percentages are important and should be recognized

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<sup>3</sup> The NRC and Commission define "decommissioning" differently, with the NRC definition being a narrower definition. Commission Rule 25-6.04365, F.A.C., defines decommissioning as the process of safely managing, dismantling, removing or converting for reuse the materials and equipment that remain at the nuclear generating unit following its retirement that results in an amendment to the licensing status of a nuclear power plant from operational to possession-only and possibly unrestricted use. The NRC defines decommission in NRC Rule § 50.2 to mean 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.



because they are the result of a close review through the decommissioning cost study. Moreover, the actual funding levels associated with the amount approved for inclusion in the customer rates are based on adequately funding all three categories. Thus, the separate percentages for each of the three categories implicitly recognized in Commission Order No. PSC-12-0225-PAA-EI should be acknowledged for their identified purposes.

Staff believes that the categories listed in Order No. PSC-12-0224-PAA-EI at page 5 comport with the categories and allocations listed in the TLG base cost estimates and were considered by the Commission. Regulatory requirements and project contingencies are a part of License Termination; low-level radioactive waste disposal practices, and high-level radioactive waste management are a part of Spent Fuel; and site restoration is the Site Restoration category. While the percentages may differ in future reviews and for different decommissioning methods, the TLG Cost Study relied on for the 2012 Commission order listed the following percentages for DECON: License Termination—66.89%, Spent Fuel Management—22.24%, and Site Restoration—5.8%

Historically, this Commission has conducted a close review of nuclear decommissioning costs. In Order No. PSC-95-1531-FOF-EI, the Commission recognized that the estimated decommissioning costs might need revision periodically; and required the companies to file updated decommissioning cost studies at least every five years. In Order No. PSC-02-0055-PAA-EI, the Commission noted that the NRC and this Commission have come to recognize the desirability of performing site-specific cost studies.

Furthermore, Rule 25-6.04365(3)(p), F.A.C., requires that the reconciliation show the fund balances by category. This requirement would not be in the Commission's rules if the Commission did not consider it integral to the Commission's review and determination.

Thus, staff believes that the Orders and Rule 25-6.04365, F.A.C., taken as a whole, reflect the Commission's intent for separate categories and percentages. Thus, staff recommends that the Commission declare that the funds accumulated in the DEF Nuclear Decommissioning Trust Fund 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 an approved by the Commission pursuant to Rule 25-6.04365, F.A.C.

Staff, however, recommends the Commission decline to issue a declaratory statement on DEF's second issue. DEF asked the Commission to state that no funds accumulated to pay for Spent Fuel Management and Site Restoration, as approved in Commission orders or updates thereto are available to pay for NRC License Termination costs without prior approval by the Commission, and that the availability of such funds is subject to disapproval by the Commission. This issue is not proper for a declaratory statement. The petition must demonstrate a present, ascertained state of facts and may not be merely a hypothetical situation. In *Santa Rosa County v. Dept. of Administrative Hearings*, 661 So. 2d 1190 (Fla. 1995), the Florida Supreme Court, in a declaratory judgment case, emphasized that there must be a pending controversy. This Commission has never relinquished its jurisdiction to that portion of the decommissioning fund concerning state-regulated activities. At this point, the NRC has not instructed DEF to take any action directly contrary to existing Commission Orders.

Docket No. 130207-EI  
Date: September 12, 2013

**Issue 2:** Should this docket be closed?

**Recommendation:** Yes. This docket should be closed. (Miller)

**Staff Analysis:** Whether the Commission acts either to grant or deny the Petition, in whole, or in part, a final order may be issued, no further action will be necessary, and docket should be closed.