BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause	Docket No. 150009-EI
In re: Fuel and Capacity Clause	Docket No. 150001-EI
	Submitted for Filing: March 24, 2015

DUKE ENERGY FLORIDA, INC.'S RESPONSE IN OPPOSITION TO FLORIDA INDUSTRIAL POWER USERS GROUP'S MOTION TO DISMISS DUKE ENERGY FLORIDA, INC.'S PETITION TO END THE FIXED LEVY NUCLEAR PROJECT RATE COMPONENT OF THE NUCLEAR COST RECOVERY CLAUSE CHARGES

Duke Energy Florida, Inc. ("DEF"), pursuant to Rule 28-106.204(1), Fla. Admin. Code ("F.A.C."), files its response and memorandum of law in opposition to the Florida Industrial Power Users Group's ("FIPUG") Motion to Dismiss DEF's Petition to End the Fixed Levy Nuclear Project Rate Component of the Nuclear Cost Recovery Clause Charges Consistent with the Revised and Restated Stipulation and Settlement Agreement, Section 366.93, Florida Statutes, and Rule 25-6.0423, F.A.C ("DEF's Petition").

FIPUG moves to dismiss DEF's Petition for what appears to be two misplaced reasons. First, FIPUG falsely contends DEF's Petition is unnecessary because the Florida Public Service Commission ("PSC" or the "Commission") already ordered DEF to stop collecting the fixed $3.45 Levy Nuclear Project ("LNP") charge. The Commission, in fact, did just the opposite and refused to terminate the LNP charge in Order No. PSC-14-0617-FOF-EI.

Second, FIPUG contends DEF's requested alternative treatment for the carrying costs on the $54 million LNP long lead equipment ("LLE") payments is inappropriate because FIPUG falsely claims that DEF "unsuccessfully" sought recovery for these LLE payments from DEF's customers and that the Commission considered this "issue" and found that DEF's customers

should not be charged for these LLE payments. These LLE payments were incurred prior to the 2014 Nuclear Cost Recovery Clause ("NCRC") docket, DEF sought recovery for these LLE payments in prior NCRC proceedings, the LLE payments were found prudent, and DEF was authorized to and did recover them from DEF's customers.

The Commission explicitly recognized in Order No. PSC-14-0617-FOF-EI that (i) the $54 million LLE payments occurred in 2008 and 2009; (ii) there was no dispute that DEF's original activities when it made these LLE payments were prudent; and, therefore, (iii) there was no reason for the Commission to modify its prior determination that these LLE payments were prudently incurred. As a result, DEF is entitled to carrying costs on amounts equivalent to the LLE payments at issue in DEF's litigation with Westinghouse Electric Company ("WEC") that the Commission deferred into a projected period in Order No. 14-0617 pending the expected outcome of that litigation and, accordingly, DEF requests in its Petition that the Commission rule on one of the two alternative methods for recovery of the statutory carrying costs on the deferred amounts.

FIPUG completely ignores Order No. 14-0617 and misconstrues the Commission's action at the 2014 NCRC Agenda Conference as being inconsistent with Order No. 14-0617. The Commission could not and did not deny DEF recovery of an amount in unrecovered LNP investment equivalent to the $54 million LLE payments that the Commission recognized were prudently made. FIPUG's assumption in its Motion that the Commission did this at the 2014 NCRC Agenda Conference is simply wrong.

For these reasons, as explained in more detail below, FIPUG's Motion to Dismiss DEF's Petition must be denied.

INCORPORATED MEMORANDUM OF LAW

I. FIPUG Falsely Claims in its Motion that the Commission has already Ordered an End to the fixed LNP component of the NCRC charge.

FIPUG's first contention is that the Commission already ordered DEF to stop the fixed Levy rate component of the nuclear charge in the 2014 NCRC docket. (FIPUG Motion, ¶¶ 1, 7, 8). This contention is overtly false. The Joint Intervenors (including FIPUG at that time) argued in their Post Hearing Brief in the 2014 NCRC Docket that the Commission should order DEF to end the fixed Levy component of the NCRC charge and the Commission rejected that argument. The Commission expressly stated that "we do not require the termination of the Levy Project NCRC fixed monthly charge" as requested by the Joint Intervenors. Order No. PSC-14-0617-FOF-EI, pp. 12-13. FIPUG fails to address this Commission holding in Order No. 14-0617 in its Motion --- in fact FIPUG fails to reference Order No. 14-0617 **at all.**

Even FIPUG must admit that, by asserting the argument that the Commission has already ordered DEF to stop collecting the fixed LNP component of the 2014 NCRC charge, there must in fact be a Commission Order requiring DEF to end this rate. Yet, FIPUG fails to cite any Order to support FIPUG's assertion that the Commission already ordered DEF to end the fixed LNP component of the NCRC charge. Moreover, the other Joint Intervenors with FIPUG in the 2014 NCRC docket --- the Office of Public Counsel ("OPC"), White Springs Agricultural Chemicals d/b/a PCS Phosphate ("PCS Phosphate"), and the Florida Retail Federation ("FRF") --- all agreed in their Response to DEF's Petition that Commission approval is required to end the fixed Levy rate component of the NCRC charge, as requested in DEF's Petition. (*See* Joint Intervenors' Response to DEF's Petition, ¶¶ 4-6). OPC, PCS Phosphate, and FRF do not agree that the Commission has already ordered DEF to end the fixed LNP component of the NCRC charge.

This ground for dismissal of DEF's Petition is demonstrably false, legally unsupported and, in fact, legally contradicted by Commission Order No. 14-0617. It must be rejected.

II. FIPUG Falsely Claims in its Motion that DEF "Unsuccessfully" sought Recovery of the $54 million LLE payments and that the Commission found that DEF's customers should not be charged for these payments.

FIPUG's contention in its Motion that DEF "previously sought, unsuccessfully, to recover from ratepayers $54 million dollars for certain equipment that [WEC] never produced," that the Commission considered "the issue" and found DEF's "ratepayers should not be charged for equipment never manufactured," and that, for this reason, DEF's customers "should receive a credit of $54 million dollars" is factually and legally incorrect. (*See* FIPUG Motion ¶¶ 2-3) (emphasis added). FIPUG's Motion, accordingly, must be denied.

First, the Commission recognized in Order No. 14-0617 that there is no dispute that the $54 million LLE payments were incurred by DEF for the LNP in the 2008-2009 timeframe and previously found by the Commission to be prudent. Order No. 14-0617, pp. 9-10. In fact, these payments were found prudent by the Commission in Order No. PSC-09-0783-FOF-EI and Order No. PSC-11-0095-FOF-EI. The Commission explained "there is no dispute regarding the prudence of DEF's original activities when it made the scheduled milestone payments in 2008 and 2009, totaling $54,127,100." *Id.* (emphasis added). The Commission further understood these LLE payments were already recovered from customers. The Commission called the $54 million LLE payments "sunk costs", noting that "[e]xpenses incurred in prior years are typically considered sunk costs or costs that are no longer retrievable or avoidable." *Id.* at pp. 9-10 (e.g., "DEF's Activities Associated with the $54,127,100 Sunk Cost Amount," at p. 10). FIPUG's assertion in its Motion that DEF was "unsuccessful" in seeking recovery of the $54 million LLE

payments from customers is patently false. The $54 million in LLE payments were determined prudent by the Commission and recovered from customers prior to the 2014 NCRC proceeding.

The Commission, then, did not consider this "issue" on October 2, 2014 and "find" that DEF's customers "should not be charged" for the $54 million LLE payments previously incurred, deemed prudent, and recovered from customers, as FIPUG asserts in its Motion. The Commission understood that it could not order DEF to reimburse or "refund" customers for LLE payments previously determined prudent simply because the same payments were later disputed in subsequent litigation between DEF and WEC. The Commission explained "for this Commission to modify our prior decision of prudence by relying on changed circumstances that resulted many years after the original determination was made would be inconsistent with Commission rules and practice." Order No. 14-0617, p. 10 (emphasis added). [1] The Commission expressly stated that it was not revisiting the prudence of these previously incurred LLE costs: "Our past practice dictates that prudence determinations are only revisited upon a showing of fraud, perjury, or intentional withholding of key information" and "[w]e find there has been no showing … that would require us to order DEF to make the credit" of a cash refund in an amount

[1] The Commission's NCRC rule and long-standing Commission precedent confirm that costs determined to be prudent and recovered from customers are not "subject to disallowance or further review." *See* Rule 25-6.0423(6)(a)2., (c)3., F. A. C. (costs determined to be prudently incurred "shall not be subject to disallowance or further prudence review.") and generally *In Re: Progress Energy Florida, Inc.,* Docket No. 060658-EI, Order No. PSC-07-0059-PCO-EI, 2007 WL 174063 (Fla. P.S.C. Jan. 22, 2007); *In re Aloha Utilities, Inc.*, Docket No. 950615-SU, Order No. PSC-97-0280-FOF-WS, 1997 148679 (Fla. P.S.C. March 12, 1997); *In Re Tampa Electric Co.*, Docket No. 031033-EI, Order No. PSC-05-0312-FOF-EI 2005 WL 733109 (Fla. P.S.C. March 21, 2005); *Richter v. Florida Power Corp.,* 366 So. 2d 798, 800 (Fla. 2d DCA 1979). Hindsight review involves applying facts as the Commission and parties know them today to Commission decisions made in the past. *See In Re: Progress Energy Florida, Inc.,* Order No. PSC-07-0059-PCO-EI. The Commission has appropriately rejected the application of hindsight review with respect to costs previously found to be prudently incurred and recoverable from customers. *Id.; In re Aloha Utilities, Inc.*, Order No. PSC-97-0280-FOF-WS; *In Re Tampa Electric Co.*, Order No. PSC-05-0312-FOF-EI; *see also Richter,* 366 So. 2d 798 at 800.

equivalent to the $54 million LLE payments requested by the Joint Intervenors. Order No. 14-0617, pp. 10-11.

a. DEF's Request in its Petition that the Commission rule on alternative recovery mechanisms for carrying charges on $54 million adjustment to projected expenses is consistent with what the Commission decided at the Agenda Conference as reflected in Order No. 14-0617.

What the Commission did recognize in Order No. 14-0617 is that DEF has a "contract-based opportunity" in the WEC litigation to seek recovery from WEC for the $54 million LLE "sunk cost" payments previously incurred by DEF and recovered from customers. The Commission explained "there are instances where contract terms and conditions provide the opportunity to seek refunds if one of the parties does not provide the services or goods that were under contract." Order No. 14-0617, p. 9. Notably, the Commission also found that there was no evidence that DEF's actions in this regard to "extract as much value as reasonably practical through reasonable means" were unreasonable. *Id.* at p. 10. Because this "contract-based opportunity" existed, the Commission found "a reasonable expectation" that DEF would recover the $54 million LLE "sunk cost" payments from WEC in the WEC litigation. The Commission, therefore, ordered DEF to make a downward adjustment to DEF's projected 2015 expenses in an amount equivalent to the $54 million LLE "sunk cost" payments. *Id.* at p. 12. The Commission did not, as FIPUG falsely asserts, find that DEF's customers "should not be charged" for these LLE payments and should "receive a credit" or refund of $54 million.

FIPUG never refers to Order No. 14-0617 in its Motion and FIPUG takes out of context statements made by Commissioners at the Agenda Conference in the 2014 NCRC docket to imply that the Commission did something that it did not do, i.e. order DEF to refund customers

$54 million in LLE "sunk cost" payments prior to a resolution of the WEC litigation.[2] The other Joint Intervenors make arguments against recovery of carrying charges on $54 million in "sunk costs" based on the same erroneous implication in their response to DEF's Petition. The Commission cannot countenance such arguments that place what the Commission did at odds with the nuclear cost recovery statute, rule, and long-standing Commission precedent when the Commission actually made a reasoned judgment to recognize DEF's efforts on behalf of customers in the WEC litigation consistent with that law.

Commissioner Brown made this point clear at the Agenda Conference when she asked Commission Staff if there was a "mechanical way" to provide customers the benefits associated with the contract claims surrounding the $54 million LLE payments raised by Intervenors "while also preserving our past decisions by the Commission on the prudency of those dollars." (Agenda Conference Transcript, pp. 19-20). Commission Staff responded with the exact same adjustment to projected 2015 expenses to account for the expectation of a future refund from WEC in that amount in the WEC litigation that is contained in Order No. 14-0617. (*Id.* at pp. 20-21). This adjustment to projected LNP costs to account for the assumed recovery of $54 million from WEC in the WEC litigation is what the Commission voted to approve at the Agenda Conference. (*Id.* at p. 33).

FIPUG quotes Commissioner Balbis for the proposal the Commission did not accept, because it is contrary to the nuclear cost recovery statute, Commission rule, and Commission precedent. Commissioner Balbis did urge the Commission to "make an immediate adjustment

[2] FIPUG and the other Joint Intervenors also rely on the Commission press release. The Commission press release obviously does not contain the explanation behind the Commission Order expressed at the Agenda Conference and, ultimately, in the Commission's final Order, which of course, is binding on all the parties. *In Re: Review of the Requirements Appropriate for Alternative Operator Services & Pub. Telephones,* Docket No. 871394-TP, Order No. 20489, 88 FPSC 12:347 (Dec. 21, 1988) ("[w]ithout question it [the order] shall be binding on all parties to the docket.").

either in the non-cash accrual portion … or simply reducing the total jurisdictional uncollected amount by $54 million." (*Id.* at pp. 25-26). Commissioner Balbis made clear though that his proposal was based on improper hindsight review of previously determined prudent costs. He agreed that "[i]n 2008 and 2009 this Commission deemed the costs associated with" the "$54 million as prudent." (*Id.* at p. 24, L. 24-25, p. 25, L. 1-2). He proceeded to describe the later termination of the LNP contract with WEC, with the result that customers necessarily will not receive the equipment for which the $54 million was paid, and then asserted that "if the customers will never receive this equipment, it is not prudent," just as FIPUG asserts in its Motion. (*Id*. at p. 25, L. 2-17).

The Commission rejected this proposal. Commission Staff explained that Commissioner Balbis' proposal was contrary to law: "Those payments were, back in 2008 and 2009, were deemed by this Commission to be prudently incurred. Without a showing of fraud, perjury, or willful withholding of information, you can't overturn that determination of prudence. The fact that circumstances have changed and the cancel – the project was canceled and that equipment will no longer be obtained by the company and used by the company doesn't change the determination of this Commission those costs prudently incurred back at the time that they were incurred without using hindsight" review. (*Id*. at p. 26, L. 17-25, p. 27, L. 1-2).

Commissioner Brown expressed that the Commission didn't "want to revisit decisions that have already been made" and that the Commission should not "go down that route" – the route proposed by Commission Balbis -- "at all." (*Id.* at p. 27, L. 25, p. 28, L. 1-5). Commissioner Brise' agreed, noting that the Commission had "made appropriate decisions along the way, identifying what was prudent," and the Commission should "find a way" to address the issue "that reflects our current statutory framework: One that doesn't set us up for improper

precedence, one that recognizes our former decisions, and one that recognizes that we have the authority to make adjustments as necessary." (*Id.* at pp. 28-29). He further expressed that "[a]n adjustment is not necessarily a disallowment of something." (*Id.* at p. 29, L. 15-16). The Commission then voted on the proposal laid out by the Commission Staff for a downward adjustment to projected LNP expenses to reflect the future, potential recovery of $54 million from WEC in the WEC litigation. (*Id.* at pp. 32-33).

Commission Staff explained at the time of the Commission vote that this adjustment "will reduce the balance of the uncollected capital investment" in the LNP. (*Id.* at p. 32, L. 11-12). Commission Staff further explained "there will not be an additional refund check that goes to customers" when asked if this was "in essence" a "credit." (*Id.* at p. 32, L. 9-19). The Commission understood, then, at the time of the vote that the "credit" adjustment to projected LNP expenses was not an immediate refund to customers. Indeed, Commissioner Brise' expressed the Commission understanding that any refund was at some point in the future when he expressed prior to the Commission vote that the adjustment to projected LNP expenses to reflect the potential, future recovery of the $54 million in the WEC litigation was "in his book" a "credit" because "if I had to pay X amount over two or three years and ultimately I'm paying less, I'm receiving a credit." (*Id.* at p. 32, L. 24-25, p. 33, L. 1-2) (emphasis added).

This adjustment to projected LNP expenses to reflect the future, potential recovery of $54 million by DEF in the WEC litigation is exactly what the Commission ordered in Order No. 14-0617. The Commission expressly ordered "a downward adjustment of $54,127,100 to [DEF's] projected 2015 expenses" based on a "reasonable expectation that DEF will receive a $54,127,100 award from WEC" in 2015. Order No. 14-0617, p. 12. The Commission further expressly held that it was not ordering an immediate refund to customers, finding that "a

$54,127,100 cash credit as recommended by the Joint Intervenors is not supported by the greater weight of the record evidence." *Id.* This decision, the Commission recognized, "must comply with the laws of this state as well as the rules established by this Commission." *Id.* at pp. 11-12 (emphasis supplied). The Commission, then, rejected any "credit" to customers that results in an immediate $54 million refund precluding DEF from recovering carrying charges on the $54 million as unsupported by any evidence and contrary to the nuclear cost recovery statute, Commission Rule 25-6.0423, F.A.C., and Commission precedent.

b. DEF is entitled to carrying charges on the $54 million adjustment to projected expenses as a matter of law and either alternative to the recovery of those carrying charges identified in DEF's Petition is appropriate.

DEF is entitled to carrying charges on the $54 million as a matter of law. DEF is indifferent to the method of recovery of these statutory carrying charges; DEF can recover carrying charges on the $54 million on an on-going basis in the NCRC docket until the resolution of the $54 million claim in the WEC litigation or DEF can accrue the carrying charges until the conclusion of the WEC litigation and a final true-up of the WEC litigation claims, including the $54 million LLE payment claims. DEF simply requests direction in its Petition for the preferred recovery method based on input from all stakeholders.

Section 366.93(6) provides that DEF is allowed to recover its prudent costs and further provides: "The utility shall recover such costs through the capacity cost recovery clause over a period equal to the period during which the costs were incurred or 5 years, whichever is greater. The unrecovered balance during the recovery period will accrue interest at the utility's weighted average cost of capital as reported in the commission's earnings surveillance reporting requirement for the prior year." §366.93(6*), Fla. Stat*. (emphasis supplied). As the Commission Staff explained, the Commission's decision to order a $54 million downward adjustment to

DEF's projected expenses results in a reduction in the balance of the uncollected capital investment in the LNP project until the conclusion of the WEC litigation. (Agenda Conference Transcript, p. 32, L. 11-12). As a result, there will be an "unrecovered balance" of $54 million until the resolution of the $54 million LLE claims in the WEC litigation. Pursuant to Section 366.93, DEF is entitled to recover carrying charges on the uncollected $54 million balance until the resolution of the WEC litigation and the ultimate true-up of LNP costs. Indeed, the Commission expressly held in Commission Order No. 14-0617 that "DEF will continue to account for this adjustment consistent with Section 366.93, F.S." Order No. 14-0617, p. 12. Thus, DEF is clearly entitled to recover carrying charges on the $54 million as authorized by Section 366.93, *Fla. Stat.*, and Commission Order No. 14-0617.

DEF suggests two alternative methods of recovery of the carrying charges on the $54 million. DEF proposes either collection on an annual basis of the carrying charges or accrual and deferral of the carrying charges until the final LNP true-up following the resolution of the WEC litigation. DEF's request is consistent with Florida law, Commission Orders, and the 2013 Settlement Agreement.[3]

[3] If not decided now, this issue will necessarily be raised in DEF's May 1, 2015 Petition in this Docket when DEF petitions to set the NCRC rate for 2016.

Moreover, it should be noted that Commission approval of statutorily authorized carrying charges on prudently incurred costs in no way impacts or affects the WEC litigation. Carrying charges on prudently incurred costs are set by Florida Statute. The claims in the WEC litigation will be resolved based on the contract between DEF and WEC and the North Carolina law applicable to that contract. For this reason, DEF cannot ask and is not asking this Commission to decide any issue in the WEC litigation, despite what FIPUG or the Joint Intervenors have asserted. Instead, upon approval of this Petition, DEF will end the fixed LNP rate component of the NCRC charges, as requested in the Petition, and DEF will continue to account for carrying charges and NCRC LNP costs in accordance with Section 366.93, Florida Statutes, and Rule 25-6.0423, F.A.C. in the NCRC docket until a final true-up once all costs or refunds resulting from the WEC litigation are known. The Commission's decision with respect to DEF's Petition has no impact on the WEC litigation at all.

CONCLUSION

For these reasons, DEF respectfully submits that the Commission should deny FIPUG's Motion to Dismiss and grant DEF's Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to counsel and parties of record as indicated below via electronic mail this 24th day of March, 2015.

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