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April 27, 2016

-VIA ELECTRONIC FILING-

Carlotta Stauffer, Director
Division of Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 160009-EI; Nuclear Cost Recovery Clause

Dear Ms. Stauffer:

Please find enclosed for filing in the above referenced docket Florida Power & Light Company's ("FPL's") Petition for Waiver of Rule 25-6.0423(6)(c)5, Florida Administrative Code.

If there are any questions regarding this filing, please contact me at 561-304-5226.

Sincerely,

s/ Jessica A. Cano
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Enclosure
cc: Counsel for Parties of Record (w/encl.)
Joint Administrative Procedures Committee

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Nuclear Cost)
Recovery Clause)

Docket No. 160009-EI
Filed: April 27, 2016

**FLORIDA POWER & LIGHT COMPANY’S
PETITION FOR WAIVER OF RULE 25-6.0423(6)(c)5, F.A.C.**

NOW BEFORE THIS COMMISSION, through undersigned counsel, comes Florida Power & Light Company (“FPL”), and pursuant to Section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code, hereby petitions this Commission for a waiver of Rule 25-6.0423(6)(c)5 of the Florida Administrative Code. This portion of the rule requires an annual feasibility analysis that would serve no meaningful purpose at this stage of the Turkey Point 6 & 7 project, in light of FPL’s plan to only incur costs associated with obtaining and then maintaining its license, permits, and certifications during the period 2017 to 2020. As described below, the purpose of the underlying statute – which does not require a feasibility analysis during the licensing phase of the project – is being achieved. Additionally, the performance of an extensive economic analysis that is not needed at this time for purposes of near-term or long-term project planning is itself a substantial hardship and violates principles of fairness. In further support of this Petition, FPL states as follows:

1. FPL is an investor-owned utility with headquarters at 700 Universe Boulevard, Juno Beach, Florida 33408, operating under the jurisdiction of the Commission pursuant to the provisions of Chapter 366, Florida Statutes.¹ FPL is a wholly-owned subsidiary of NextEra Energy, Inc., a registered holding company under the Federal Public Utility Holding Company

¹ All references to Florida Statutes are to the 2015 Florida Statutes.

Act and related regulations. FPL provides generation, transmission, and distribution service to more than 4.8 million retail customers.

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

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BACKGROUND AND SUMMARY

3. Section 366.93, Florida Statutes, was adopted by the Florida Legislature in 2006 to encourage investment in new nuclear power for the state. It establishes specific parameters for nuclear cost recovery, and requires the Commission to establish by rule a cost recovery mechanism that promotes utility investment in nuclear power plants and allows for the recovery in rates of all prudently incurred costs. § 366.93(2), Fla. Stat. In response to the direction provided in Section 366.93, the Commission promulgated Rule 25-6.0423, Florida Administrative Code (“the NCR Rule”). This rule states, among other things, that its purpose is to promote utility investment in nuclear generation and to allow for the recovery in rates of all such prudently incurred costs. *See* Rule 25-6.0423(1), Fla. Admin. Code.

4. In 2013, the Legislature amended Section 366.93, Florida Statutes, to insert additional, specific Commission reviews prior to commencement of certain phases of a new nuclear project, after a determination of need has been granted. Section 366.93(3)(c) states in

pertinent part that a utility cannot begin “preconstruction work beyond those activities necessary to obtain or maintain a license” absent Commission approval to begin such work. Additionally, a utility cannot begin the “construction phase” absent Commission approval. *See* § 366.93(3)(e), Fla. Stat. In order to approve a utility’s request to begin the preconstruction work and construction phases, the Commission must determine that the plant remains feasible and that projected costs are reasonable. *See* §§ 366.93(3)(c) and 366.93(3)(e), Fla. Stat. The statute, however, does *not* require a feasibility analysis to be submitted by a utility while undertaking those activities necessary to obtain or maintain a license, or indeed at any time prior to the filing of a request for Commission approval to begin preconstruction work.

5. On the other hand, the NCR Rule states that “each year a utility shall submit for Commission review and approval a detailed analysis of the long-term feasibility of completing the power plant.” Rule 25-6.0423(6)(c)5, Fla. Admin. Code. Accordingly, while not required by the Legislature per the statute, the NCR Rule has required a feasibility analysis regardless of whether a utility is petitioning to begin the preconstruction work or construction phases of the project, perhaps not anticipating that there there would be any pause between obtaining a license and commencement of preconstruction work.

6. FPL has been in the licensing phase of the Turkey Point 6 & 7 project since 2008, and each year it has submitted a feasibility analysis that supported its plan to undertake the multi-year licensing process. Now, FPL anticipates receiving its Combined License (“COL”) from the Nuclear Regulatory Commission (“NRC”) and its Section 404(b) wetland permits from the U.S. Army Corp of Engineers in 2017. By the time this docket goes to hearing in August, FPL will be about one year from achieving these key project licensing milestones.

7. Consistent with the careful, step-wise approach FPL has taken with regard to this project since its inception, FPL has decided that it will not move immediately into the “preconstruction work” phase after receiving its COL and other necessary approvals. Instead, FPL intends to undertake only those activities that are necessary to maintain compliance with its approvals and to maintain those approvals in a current state, ready to be acted upon. During this license-maintenance period, FPL will monitor nuclear construction industry progress and economic factors to determine when to petition to move into preconstruction work, and ultimately construction.

8. As explained below, FPL meets the criteria for obtaining a waiver of Rule 25-6.0423(6)(c)5, Florida Administrative Code. The purpose of Section 366.93, Florida Statutes is being achieved by FPL’s continued efforts on the Turkey Point 6 & 7 project in a deliberate, stepwise manner that preserves all statutorily-required Commission feasibility reviews. Additionally, performing a feasibility analysis at this stage of the project would require significant utility resources without serving any meaningful project-planning or regulatory purpose, especially in light of the dynamic nature of the inputs involved, thus imposing a substantial hardship on FPL and violating principles of fairness. As a result, this Petition for Waiver of Rule 25-6.0423(6)(c)5 should be approved.

STANDARD FOR GRANTING A PETITION FOR RULE WAIVER

9. Section 120.542(2) sets forth the standard for the Commission to apply when considering a request for a rule waiver. It states:

Variations and waivers shall be granted when the person subject to the rule demonstrates that **the purpose of the underlying statute** will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.

(emphasis added). “Substantial hardship” is defined as “a demonstrated economic,

technological, legal, or other type of hardship.” Section 120.542(2) also explains that principles of fairness are violated “when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.” *Id.*

10. Rule 28-104.002(2), Florida Administrative Code, lists the elements that must be pled in a petition for a rule waiver. In addition to a particular caption and the petitioner’s identifying information, the petition must include the applicable rule or portion of the rule (*see* ¶ 5 above) and the citation to the statute the rule is implementing (*see* ¶ 3 above).² The additional elements required by Rule 28-104.002(2) can be found in the body of this petition, below.

THE PURPOSE OF SECTION 366.96 IS BEING ACHIEVED

11. Section 120.542(2) requires a petitioner to demonstrate that “the purpose of the underlying statute will be or has been achieved by other means.” Rule 28-104.002(2)(h) requires a petition to include “[t]he reason why the variance or the waiver requested would serve the purposes of the underlying statute.” *See also*, § 120.542(5)(d), Fla. Stat. As described below, the purposes of Section 366.93, as amended, will continue to be achieved without the submittal of an annual feasibility analysis while the Turkey Point 6 & 7 project completes licensing and moves into a license-maintenance period.

12. The first stated purpose of Section 366.93 is to promote utility investment in nuclear power plants. This purpose can be found in subsection (2), where the Legislature directed the Commission to establish alternative cost recovery mechanisms for nuclear power plant projects, stating such mechanisms “must be designed to promote utility investment in nuclear . . . power plants[.]” This specific purpose supports the broader Legislative purpose of increasing the fuel diversity of the power supply in Florida. At the time the Legislature adopted

² *See* Rule 28-104.002, Fla. Admin. Code, subsections (2)(a) through (e).

Section 366.93, it also amended Section 403.519 to add specific criteria in the Commission's determination of need for a nuclear power plant. *See* § 403.519(4), Fla. Stat. "Fuel diversity" is addressed four different times within the context of a Commission's determination of need for a new nuclear power plant. *Id*; *see also*, *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 745-46 (Fla. 2013) (stating that Section 403.519(4)(e) was added to promote utility investment in nuclear power plants).

13. The second stated purpose of Section 366.93 is to allow for the utility to recover all prudently incurred costs. This is again found in subsection (2), where the Commission is directed to establish alternative cost recovery mechanisms for nuclear power plant projects, stating such mechanisms "must be designed to . . . allow for recovery in rates of all prudently incurred costs." The Legislature's intent to ensure cost recovery is also found in Section 403.519(4)(e), Fla. Stat., which states:

After a petition for a determination of need for a nuclear power plant has been granted, the **right of a utility to recover any costs incurred** prior to commercial operation, including, but not limited to, costs associated with the siting, design, licensing, or construction of the plant . . . **shall not be subject to challenge unless and only to the extent the commission finds, based on a preponderance of the evidence adduced at a hearing . . . that certain costs were imprudently incurred.**

(emphasis added). Section 403.519(4)(e) further specifies that proceeding with the construction of a nuclear power plant after a determination of need has been granted "shall not constitute or be evidence of imprudence."

14. The amendments adopted in 2013 to Section 366.93 indicate that pursuit of a nuclear power plant, and Commission approval for cost recovery purposes, should be undertaken in an incremental manner, largely consistent with how FPL had been approaching new nuclear from the outset of the Turkey Point 6 & 7 project. Certain amendments were adopted to

“establish[] a procedure and requirements for cost recovery based on preconstruction and construction phases.” Laws of Florida, Chapter 2013-148. Specifically, Sections 366.93(3)(c) and 366.93(3)(e) were added to require particular Commission approvals – including findings that the plant remains feasible – prior to the initiation of preconstruction work and prior to the initiation of the construction phase, respectively.³ Notably, *no feasibility finding* is required by the statute *before* a utility petitions to begin preconstruction work.

15. Taken as a whole, the purposes of the current statute are (a) to encourage investment in nuclear power plants, and (b) assure the recovery of prudently incurred costs, while (c) ensuring certain Commission reviews and approvals occur at the time a utility initiates the preconstruction work and construction phases of the project. These purposes will be achieved without a feasibility analysis in 2016, or during the license maintenance period that precedes a decision to seek approval to begin preconstruction work, as follows:

- a) FPL has stated that it would not pursue Turkey Point 6 & 7 absent the Nuclear Cost Recovery mechanism. FPL is continuing to pursue the project by obtaining all licenses, permits, and approvals; by maintaining compliance with those approvals; and by maintaining those approvals in a current state ready to be acted upon. Accordingly, the statute is continuing to encourage investment in nuclear power plants – and fuel diversity within the state – without a feasibility analysis submittal during FPL’s remaining licensing work and its license maintenance period.

³ Other Commission approvals added by Chapter 2013-148 include approval of any preconstruction materials or equipment purchases that exceed 1 percent of the total projected cost of the project (§ 366.93(3)(d)) and approval to “preserve the opportunity for future recovery” if construction on a project has not commenced 10 years after receiving a COL from the NRC (§ 366.93(3)(f)1.a).

- b) All other filing requirements found in Rule 25-6.0423(6)(c) and 25-6.0423(9) are being met.⁴ FPL has filed testimony and other evidence, including detailed cost schedules, demonstrating the prudence of its 2015 project costs.⁵ FPL also is filing concurrently with this petition the testimony and detailed cost schedules demonstrating the reasonableness of its 2016 and 2017 project costs. Accordingly, the Commission will have everything it needs to ensure FPL recovers its prudently incurred costs in this and any subsequent Nuclear Cost Recovery proceedings prior to FPL petitioning to commence preconstruction work.
- c) Certainly, FPL’s decision to “pause” after receiving its license, permits, and certifications and engage in license maintenance and industry observation only – instead of immediately beginning preconstruction work – is in keeping with the incremental project approach codified by the 2013 amendments. When nuclear industry and economic factors indicate it is appropriate to begin the preconstruction work phase, FPL will petition for Commission approval to do so and provide the feasibility analysis required by law for the Commission’s consideration. Accordingly, the purpose of the 2013 amendments requiring incremental Commission reviews are being, and will be, achieved.

16. In sum, FPL’s proposal to obtain and maintain its licenses and other approvals and file a feasibility analysis when it petitions to begin the preconstruction work phase of the

⁴ Subsection (9) requires the utility to “file a detailed statement of project costs sufficient to support a Commission determination of prudence.” There is no stated connection in Subsection (6)(c)5, the requirement for an annual feasibility analysis, between the feasibility analysis and a Commission finding of prudence or reasonableness, or cost recovery.

⁵ FPL filed its 2015 project cost information in this docket on March 1, 2016.

project aligns perfectly with, and achieves the purposes of, Section 366.93, Florida Statutes. Accordingly, FPL has met the first prong of the rule waiver test found in Section 120.542, Florida Statutes.

**PERFORMING AN ANNUAL FEASIBILITY ANALYSIS IS A SUBSTANTIAL
HARDSHIP AND VIOLATES PRINCIPLES OF FAIRNESS**

17. Section 120.542(2) requires a petitioner to demonstrate that application of the rule “would create a substantial hardship or would violate principles of fairness.” Rule 28-104.002(2)(g) requires a petition to include “[t]he specific facts that demonstrate a substantial hardship or a violation of principles of fairness that would justify a waiver.” *See also*, § 120.542(5)(c), Fla. Stat. As described below, the specific circumstances surrounding the Turkey Point 6 & 7 project at this time demonstrate that the significant time and effort necessary to perform a feasibility analysis would serve no legitimate project or regulatory purpose. As a result, performing the analysis would impose a substantial hardship upon FPL and violate principles of fairness, as those concepts have been interpreted and applied by this Commission in the past.

18. If FPL were to perform a feasibility analysis in 2016, it would not affect FPL’s decision to obtain its required approvals, including the COL and Section 404(b) permits which it expects to receive in 2017. Additionally, the incremental cost associated with completing the licensing process further challenges the value of a feasibility analysis for cost recovery purposes at this time. A feasibility analysis is no longer needed to know that it is appropriate – indeed, responsible and prudent – to complete the final steps necessary to obtain the COL, so that FPL will have the option of adding the fuel-diverse, emission-free baseload power of Turkey Point 6 & 7 to its fleet in the future. Nor would a feasibility analysis affect FPL’s decision to limit

project activities in the near term to license maintenance activities, after obtaining such approvals. A feasibility analysis, therefore, is unnecessary at this time.

19. Furthermore, any current feasibility analysis would use numerous forecasts and assumptions that are certain to be supplanted by newer forecasts and assumptions in the future, when FPL petitions to begin preconstruction work. That is the next point in time in which such an analysis will provide meaningful value to project decision making and the Commission's Nuclear Cost Recovery review.⁶ For example, the completion of Southern Company's Vogtle Electric Generating Plant and SCANA Corporation's Summer project (the "first wave" of new nuclear power plant construction using the same AP1000 design as FPL), will provide important information related to project schedule and cost for use in FPL's feasibility analysis to support moving into preconstruction work. Additionally, clarification will be available concerning the Clean Power Plan's implementation, providing better environmental compliance cost inputs. By the time FPL petitions to begin preconstruction work, FPL also will have updated fuel and load forecasts, as it does each year. FPL also will be in a position to better estimate the in-service dates of the Turkey Point 6 & 7 units, based upon when it decides to begin preconstruction work. These are all key inputs to the feasibility analysis. Therefore, a feasibility analysis at this stage of the project would not only be unnecessary, but potentially even misleading to the extent it is misunderstood as being the potential basis for future decision-making.

20. Within this context, one must then consider the time and effort necessary to perform a feasibility analysis. As discussed by Steven Sim in his testimony filed in Nuclear Cost Recovery dockets in prior years, the feasibility analysis is a complex undertaking. The analysis addresses two resource plans, one with and one without Turkey Point 6 & 7. For each resource

⁶ As discussed above, Section 366.93 does not require a feasibility analysis until a utility petitions to begin preconstruction work.

plan, multiple scenarios of forecasted fuel costs and environmental compliance costs are analyzed to develop annual system fuel and environmental compliance costs. The resulting system fuel and environmental compliance costs are then combined with projected annual capital costs, plus other fixed and variable costs for each resource plan. The analyses also examine two different assumptions regarding the operation lives of the new nuclear units. The results of all of these analyses must then be presented in prefiled testimony and exhibits that the utility must prepare. This feasibility analysis process takes approximately 250 man-hours.

21. The Commission has recognized that substantial hardship can be caused, and principles of fairness can be violated, when utility resources are required to be devoted to filing requirements that are unnecessary or meaningless based on current circumstances. For example, in *In Re: Request for Waiver of Rule 25-6.1353, F.A.C., Concerning 2002 Forecasted Earnings Surveillance Report, by Florida Power Corporation*, Docket No. 020112-EI, Order No. PSC-02-0782-PAA-EI (Fla. P.S.C. 2002), the Commission granted Florida Power Corporation's rule waiver request, finding that a requirement to file an earnings surveillance report that covered the same time frame as a projected rate case would be duplicative and "serve no legitimate regulatory purpose, and thus would constitute a hardship in and of itself," as was argued by the company. The Commission further found that assigning manpower "to a time consuming task" that did not provide useful information (the earning surveillance report would simply reformat information already provided) amounted to "a violation of principles of fairness and would consume valuable manpower of the utility needlessly." *Id.* p. 5. The Commission also has recognized that unnecessary strain on internal resources can constitute "substantial economic hardship." See *In re: Joint petition for waiver of depreciation study filing requirement of Rule 257.045(8)(a), F.A.C., by Florida Public Utilities, Indiantown Division and for extension of*

waiver of Rule 25-7.045(8)(a), by the Florida Division of Chesapeake Utilities Corporation, Docket No. 120178-GU, Order No. PSC-12-0532-PAA-GU, p. 4 (Fla. P.S.C. 2012).

22. As discussed above, a requirement to perform annual feasibility analyses while FPL is engaging only in the completion of licensing and license maintenance activities, the results of which will not be used to make either near-term or long-term project decisions, is itself a substantial hardship and violates principles of fairness. In addition, protracted litigation over feasibility analyses which would be both unduly speculative and of no immediate use or value to the Commission over the next several years would result in undue and unnecessary waste of the time and resources of the Commission, Commission staff, FPL, and intervenors. Accordingly, FPL has met the second prong of the rule waiver test found in Section 120.542, Florida Statutes.

THE REQUESTED WAIVER IS TEMPORARY

23. FPL is seeking a waiver of Rule 25-6.0423(6)(c)5 while FPL completes obtaining its COL and other approvals, and while FPL engages in project activities only related to license maintenance. Rule 28-104.002(2)(i), Florida Administrative Code, requires FPL to include the dates indicating the duration of the requested waiver. In compliance therewith, FPL requests that the waiver remain in effect until FPL files for Commission approval to commence preconstruction work – currently estimated for the period 2016 through 2020. This estimated duration before pursuing preconstruction work approval is based upon current construction schedules for the other AP1000 new nuclear projects in the U.S. As discussed in the direct testimony of Steven Scroggs filed concurrently with this petition, the completion of these other projects will provide important information for FPL to incorporate in a feasibility analysis to support moving into the preconstruction work phase.

WHEREFORE, for the above and foregoing reasons, FPL requests a temporary waiver of Rule 25-6.0423(6)(c)5, Florida Administrative Code.

Respectfully submitted this 27th day of April, 2016.

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By: s/ Jessica A. Cano
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CERTIFICATE OF SERVICE
DOCKET NO. 160009-EI

I HEREBY CERTIFY that a true and correct copy of FPL's Petition for Waiver of Rule 25-6.0423(6)(c)5 was served electronically this 27th day of April, 2016, to the following:

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