

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Nuclear cost recovery clause

DOCKET NO. 160009-EI  
FILED: May 16, 2016

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**CITIZENS' RESPONSE TO AND COMMENTS ON**  
**FPL'S PETITION FOR WAIVER OF RULE 25-6.0423(6)(c)5, FLORIDA**  
**ADMINISTRATIVE CODE**

Pursuant to Rule 28-104.003, Florida Administrative Code (F.A.C.), the Office of the Public Counsel (OPC or Citizens), through undersigned counsel, hereby responds to and comments on Florida Power and Light's (FPL's) Petition for Waiver of Rule 25-6.0423(6)(c)5, F.A.C., (Waiver Petition) of the nuclear cost recovery (NCRC) rule. OPC urges the Commission to deny FPL's Petition for Waiver of Rule 25-6.0423(6)(c)5, F.A.C., and as grounds therefore, states as follows:

1. FPL seeks a waiver of the requirement to file an annual long-term feasibility analysis pursuant to Rule 25-6.0423(6)(c)5, Florida Administrative Code, while it continues charging customers for work on a nuclear plant that is still in the planning stages. This annual feasibility analysis serves to safeguard customers from potentially paying millions of dollars over numerous years on a project when the long-term feasibility analysis may show that it is no longer viable going forward, and, accordingly, may be abandoned. At issue is a \$20 billion nuclear plant project, into which FPL's customers have already paid \$282 million dollars. OPC submits that FPL has failed to make the requisite showing that its waiver request conforms to the standards outlined in the Rules, or that a waiver is appropriate under the facts of this case.
2. By the Order Establishing Procedure (OEP), FPL's Annual Feasibility Analysis was due by April 27, 2016. On April 27, 2016 (suddenly and with no advance warning and on the same

day that all of the FPL and Duke NCRC testimony and the FPL feasibility study were due pursuant to the OEP), FPL filed its Petition for Waiver of Rule 25-6.0423(6)(c)5, Florida Administrative Code. On May 2, 2016, the notice was filed in the Florida Administrative Register that comments on the Petition are due 14 days from the publication of the notice which deadline is Monday, May 16, 2016.

3. In support of its Petition, FPL first argues that Section 366.93, Florida Statutes, does not require an annual feasibility analysis before the company seeks approval to begin preconstruction work. Second, FPL claims that it qualifies for a waiver of the feasibility analysis requirement contained in the applicable administrative rule because compliance would create a substantial hardship for the company, or would otherwise be unfair.
4. Both the Commission's Rules, and its previous Orders in this particular continuing docket, dictate that the annual long-term feasibility analysis is required; therefore, whether the requirement is expressly listed in statute is not relevant to the disposition of FPL's Petition. Further, OPC submits that FPL failed to make even a minimal factual showing of the elements required to qualify for a waiver, and that FPL's arguments fail to properly consider the burden to which ratepayers may be exposed if the feasibility analysis is not performed annually, as required. Because FPL filed its waiver petition on the DAY the submission was due and not as soon as it was aware of the reasons it asserts as justifying the waiver, it should be deemed to be untimely filed.

BACKGROUND FOR RULE 25-6.0423(6)(c)5, F.A.C., REGARDING THE  
ANNUAL LONG-TERM FEASIBILITY ANALYSIS

5. Rule 25-6.0423, F.A.C. (NCRC Rule or Rule), relies on Section 366.93(2), F.S., for its

rulemaking authority. Section 366.93(2), F.S., states:

[w]ithin 6 months after the enactment of this act, the commission shall establish, by rule, alternative cost recovery mechanisms. . . . Such mechanisms must be designed to promote utility investment in nuclear or integrated gasification combined cycle power plants and allow for the recovery in rates of all prudently incurred costs.

Rule 25-6.0423, F.A.C., was adopted April 8, 2007, and was subsequently amended on February 3, 2008 and January 29, 2014 following statutory amendments. FPL asserts that Section 366.93, F.S., does not require an annual long-term feasibility analysis;<sup>1</sup> however, FPL's argument ignores the importance of the Rule-making process. Rule-making is designed to establish the regulatory process details to implement the statute, which is exactly what Rule 25-6.0423(6)(c)5, F.A.C., does.

6. An annual long-term feasibility analysis has always been required by the NCRC Rule. When first adopted in 2007, Rule 25-6.0423(6)(c)5, F.A.C., stated:

By May 1 of each year, along with the filings required by this paragraph, a utility shall submit for Commission review and approval a detailed analysis of the long-term feasibility of completing the nuclear plant.

7. There was no change to the feasibility analysis requirement until 2013. Following the Legislature's 2013 overhaul of the NCRC Statute, this provision of the NCRC Rule was amended to read as follows:

Along with the filings required by this paragraph, each year a utility shall submit for Commission review and approval a detailed analysis of the long-term feasibility of completing the power plant. Such analysis shall include

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<sup>1</sup>Nonetheless, even if FPL is correct that the amended statute does not *expressly* require an annual long-term feasibility analysis, the pre-2013 amended version of Section 366.93, F.S. did not require the analyses either; yet, pursuant to the Rules, the analysis was required *and was performed by FPL in all previous NCRC dockets*. Pursuant to the broad grant of statutory authority bestowed on the Commission under Section 366.93, F.S., the Commission has the authority to require an annual long-term feasibility analysis via Rule 25-6.0423(6)(c)5, F.A.C.

evidence that the utility intends to construct the nuclear or integrated gasification combined cycle power plant by showing that it has committed sufficient, meaningful, and available resources to enable the project to be completed and that its intent is realistic and practical.

Rule 25-6.0423, F.A.C. (emphasis added for the new language). Rather than removing the annual feasibility analysis requirement, the amended Rule language actually *strengthened it* by specifically requiring that the feasibility analysis demonstrate that the utility's intent to build is "*realistic and practical.*"<sup>2</sup>

8. Section 366.93(3), F.S., initially stated: "After a petition for determination of need is granted, a utility may petition the commission for cost recovery as permitted by this section and commission rules," (emphasis added), meaning that cost recovery was contingent on complying with the NCRC Rule, which included filing a long-term feasibility analysis. Section 366.93(3) was amended in 2013 to add six sub-subsections, which detail how recovery for costs may be obtained during the different phases of a project.<sup>3</sup> However, no change was made to the requirement that cost recovery is governed by Commission rules. On its face, Section 366.93(3)(a), F.S., continues to state that cost recovery proceeds "as permitted by" Commission rules.<sup>4</sup> Therefore, FPL is wrong when it suggests that it is not required to

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<sup>2</sup>When the Legislature amended Section 366.93, F.S., it was aware of the Commission's NCRC Rule which provided for, among other things, an annual long-term feasibility analysis. If the Legislature intended to abrogate the Commission's Rule, it would have done so. However, the amendments to Section 366.93, F.S., do not expressly or implicitly abrogate the NCRC Rule. Therefore, the Legislature presumptively approved of the Rule's annual long-term feasibility analysis requirement.

<sup>3</sup>Subsection (3)(a) was the old Subsection (3); Subsection (3)(b) pertains to the phase between need determination and obtaining the combined license (COL); Subsection (3)(c) pertains to the phase between COL and commencing preconstruction; Subsection (3)(d) pertains to the phase between preconstruction and construction; Subsection (3)(e) pertains to the construction phase; Subsection (3)(f) contains additional requirements if the utility has not begun construction of the plant within specified time periods. **The addition of the referenced sub-subsections was complementary to sub-subsection (3)(a) - they were not intended to override the mandate for annual long-term feasibility analyses, and they certainly do not prohibit the Commission from requiring these analyses on an annual basis.**

<sup>4</sup>One purpose of the NCRC statute is to promote utility investment in nuclear power. To achieve this, the statute allows utilities to recover "**prudently incurred costs....**" Section 366.92, F.S. (emphasis added). The Commission determines

file an annual long-term feasibility analysis.

9. Section 120.542, F.S., which governs variances and waivers, states as follows:

Variances 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). In order to receive a waiver, the petitioner must satisfy **both** prongs of this two part test. This section defines “substantial hardship” as “a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver.” It also defines how “principles of fairness” would be 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.* As discussed below, FPL’s Waiver Petition does not satisfy the plain language of the statute.

10. The term “feasibility” as contemplated by the Commission does not mean solely economic feasibility, but it also encompasses technical and regulatory feasibility. *See*, Order No. PSC-15-0521-FOF-EI, pp. 5-19 (outlining the PSC’s “specific guidance” concerning the “annual” feasibility analysis required of FPL, and explaining that the analysis incorporates economic analyses, along with regulatory and technical considerations).<sup>5</sup>

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the prudence of costs incurred related to building nuclear plants while reviewing the annual long-term feasibility analysis report. Therefore, the Rule’s annual long-term feasibility analysis is an important prerequisite for cost recovery through the nuclear cost recovery clause (NCRC).

<sup>5</sup>Since 2008, the Commission’s Orders have expressly stated that FPL “shall” provide an annual feasibility analysis as part of its annual cost recovery process. The Commission stated that “[p]roviding this information on an annual basis will allow us to monitor the feasibility regarding the continued construction of Turkey Point 6 and 7.” *See*, Order No. PSC-08-0237-FOF-EI, issued April 11, 2008, in Docket No. 070650-EI, at p. 29 (Need Determination Order). Thus, it is clear that as an overall part of its determination of continued cost recovery, the Commission intended to review an updated feasibility analysis each and every year.

11. Without the annual feasibility “check-up,” a utility could unreasonably incur millions of dollars in costs without the Commission and customers having the benefit of knowing whether the plant remains feasible in terms of economic and regulatory concerns, and whether it continues to be in the best interests of the customers.

**Waiver Test - Achievement of Statutory Purposes by Other Means**

12. Rather than making a factual showing of how FPL would satisfy the purpose of the NCRC statute by some means other than the annual feasibility analysis, FPL instead asserts that the statute does not require a feasibility finding prior to the utility’s petition for preconstruction work.
13. FPL also claims, without stating specifically how, that it is generally meeting the underlying purposes of the statute. FPL characterizes the statute’s purposes as to promote investment in nuclear power plants and to ensure cost recovery. In so doing, FPL implies that it is achieving the purpose of the statute by simply planning to build a nuclear plant and passing through costs; however, this interpretation of the statute’s purpose is inconsistent with a thorough review of the entire statute.
14. While OPC agrees that one purpose of the statute is to promote investment in nuclear power plants, a second purpose listed in the NCRC statute is to ensure that only **prudently** incurred costs are allowed recovery from customers; therefore protection of ratepayers’ interests is also a purpose of the statute.
15. FPL’s argument incorrectly glosses over the purpose of the annual feasibility analysis at issue. The feasibility analysis, as required pursuant to the statute’s rule-making directive, must be

considered as part of the waiver test outlined in Section 120.542, F.S. The purpose of the analysis is to provide the Commission a regularly updated evaluation of feasibility so that ratepayers are not stuck paying millions of dollars for a project which is not viable. In fact, it would be imprudent under the NCRC statute to continue allowing costs to be incurred in the face of evidence that the project is no longer feasible (i.e. cost effective, technically sound and meeting regulatory approvals). Section 120.536, F.S., states that “[a]n agency may adopt only rules that implement or *interpret* the specific powers and duties granted by the enabling statute.” (emphasis added) The Commission has broad latitude in interpreting the statute and its formulation of the rules that implement the statute.

16. Compliance with the Rule’s annual long-term feasibility analysis requirement furthers the intent of the legislature to promote nuclear power in Florida. Section 366.93, F.S., was amended in 2013 to allow the Commission **more oversight** of the NCRC, and to institute **additional safeguards** in the nuclear cost recovery process. The annual long-term feasibility analysis is a crucial tool in the Commission’s toolbox; without it, the Commission could misguidedly approve cost recovery for a plant that has – due to circumstances that have changed since the last feasibility analysis – become no longer economically feasible, to the detriment of the customers.<sup>6</sup>

#### **Waiver Test - Substantial Hardship**

17. FPL suggests that compliance with the feasibility analysis requirement would use too much of its time, and also that any time spent would be wasted because the analysis would “*serve*

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<sup>6</sup>OPC questions FPL’s suggestion that denial of its waiver request would hinder or thwart the development of utility investment in nuclear power plants. If the analysis shows that the project is feasible, then there is no rational reason for FPL to seek a waiver of this Rule. Alternatively, if the analysis shows that the project is no longer feasible to construct, then perhaps the Commission should place the burden on FPL to explain why it should not end the project or to explain why FPL should continue recovering costs from ratepayers for a project that is no longer feasible.

*no meaningful purpose* at this stage” of the project, and because FPL only plans to incur costs related to obtaining and then maintaining its license, permits, and certifications from 2017 to 2020.

18. OPC disagrees with FPL’s unsubstantiated assertion that conducting the feasibility analysis would be meaningless. One reason the annual feasibility analysis is crucial is that it provides the Commission an update on whether the regulatory posture of the project affects its feasibility. OPC submits that, in light of recent judicial and regulatory decisions, the regulatory feasibility of the subject project may well be in serious doubt, and the Commission deserves a full, annual analysis.

- On April 20, 2016, Florida’s Third District Court of Appeal reversed and remanded the State Siting Board’s certification of the new units at Turkey Point. *Miami-Dade County v. In Re: Florida Power & Light, Co.*, No. 3D14-1467, et al. (Fla. 3d DCA 2016).
- On April 21, 2016, the U.S. Nuclear Regulatory Commission (NRC) Atomic Safety Licensing Board (ASLB) denied FPL’s Motion for Summary Disposition regarding proposed injection wells for the Turkey Point project that may impact the Floridian Aquifer, and thus may adversely affect the groundwater. The NRC’s decision alone created a year-long delay in the project at issue in this case.
- On April 21, 2016, the Florida Department of Environmental Protection (FDEP) issued a Final Order approving FDEP’s Administrative Order that requires FPL to abate the saltwater plume which resulted from the Turkey Point cooling canal system, and which is contaminating both Biscayne Bay and the County’s groundwater.<sup>7</sup> The FDEP Administrative Order does not directly impact the proposed new units; however, in conjunction with the ASLB decision on Contention 2.1 relating to contamination of the Florida Aquifer, it provide further uncertainty about the environmental approvals related to the feasibility of the units.

19. FPL claims that performing the feasibility analysis now would require “*significant utility*

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<sup>7</sup>The recent flurry of judicial and regulatory activity shows that FPL now seeks continuing recovery of costs for obtaining a COL for a nuclear site that recently lost one of its transmission corridors and a consequence the entire site certification is a nullity, and for a COL that may still take years to obtain.



*resources,*” and thus present a hardship. However, FPL failed to provide specific facts to support its conclusory statement. FPL complains that the feasibility analysis process takes “approximately 250 man-hours. . . .” However, FPL failed to place its estimation of man hours into context regarding the number of employees and consultants it employs, and it failed to quantify the cost of the man hours in relation to either the cost of the project or the company’s net worth. As such, FPL’s bare “man-hours” estimate, without more, is insufficient for purposes of showing that the feasibility analysis is a “substantial” hardship.<sup>8</sup>

20. OPC submits that spending approximately 250 man-hours hours or less than \$20,000 (assuming an average salary of \$100,000 and a loadings factor of 50%) on the annual feasibility analysis process is insignificant when compared with the overall cost of this project (which is currently estimated to total between \$14.1 to \$21.4 billion dollars<sup>9</sup>), or when compared with the approximately \$282 million already recovered from ratepayers for this project as of December 31, 2015.<sup>10</sup> The \$282 million already recovered will grow to \$318 million by 2017, pursuant to FPL’s requests to recover an additional \$22 million in 2016, and \$14 million more in 2017.<sup>11</sup> Tellingly, FPL has not affirmatively stated that it did NOT perform any or all of the analysis. It seems highly unlikely and imprudent for FPL to have waited until the day the analysis was due to ask for a waiver. It seems more likely that FPL

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<sup>8</sup>Even if FPL had presented data showing a cost for the man hours listed, Commission staff has previously stated that just because one method is more costly than another, that fact alone does not demonstrate substantial hardship or unfairness, as contemplated under s. 120.542. See, Order No. PSC-15-0363-PAA-EU, issued September 8, 2015, in Docket No. 150142-EU.

<sup>9</sup>Order No. PSC-13-0493-FOF-EI, p. 17.

<sup>10</sup> Docket No. 160009-EI, Testimony of Steven D. Scroggs, Exh. SDS-7, Turkey Point 6 & 7 Site Selection, Pre-Construction Costs, and Carrying Costs on Construction Cost Balance, Schedule TOR-2 (True-up to Original).

<sup>11</sup>FPL is also incurring approximately \$7 million dollars per year in “carrying costs,” so even if the project is infeasible, FPL is proposing to collect these costs through 2020 without reporting to the Commission as to feasibility. See, *Id.*, at Turkey Point 6&7- Pre-Construction Costs, NCRC Summary, Schedule TOR-1 (True-up to Original).

would have prudently performed some of the analyses required for the long-term feasibility study, but without the benefit of the outcome flowing out of the perhaps surprising mid-April events. Once these events occurred, it would appear to have changed the analysis and also perhaps changed the ultimate conclusion about feasibility. FPL has not identified the actual cost or stated that it has not incurred or has not in fact recovered in 2016 NCRC rates (or otherwise in base rates) the cost of the 250 man-hours for conducting the 2016 analysis. FPL has also not provided a comparison of the incremental cost of its “250 man hours” not included in rates against the \$1,989,635,495 in net operating income that it reported earning on its most recent (February 2016) FPSC surveillance report.<sup>12</sup>

21. In fact, FPL’s witness Scroggs in his March 1, 2016, testimony stated that “[t]he analysis presented in the May 2015 NCRC filing demonstrated that the project remains feasible. An updated feasibility study will be filed on April 27, 2016.” *Id.* at p. 19. The facts that FPL cites as making the feasibility analysis unnecessary at this time (the change in the statute, delay in the 1<sup>st</sup> wave of AP 1000 nuclear plants, changing environmental and fuel inputs) were or should have been known well in advance of the April 27, 2016 testimony filing date. The waiver request could have been brought to the Commission’s attention well in advance of the deadline rather than submitted on the filing deadline as a part of a brinkmanship gambit that places the parties and the Commission in an untenable position of caving into FPL’s unreasonable

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<sup>12</sup> FPL’s resources are vastly different and more extensive than other companies which the Commission has deemed deserving of waivers based on hardship. *See, In re: Review of 2007 Electric Infrastructure Storm Hardening Plan filed pursuant to Rule 25-6.0342, F.A.C., submitted by Florida Public Utilities Co., Order Granting Temporary Waiver of Rule 25-6.0342(2), F.A.C., 2007 PUC LEXIS 342, 260 P.U.R. 4th 158 (2007)*(granting company an additional 60 days to file a storm hardening plan and stating that the original due date would create a substantial hardship because “FPUC is a **substantially smaller company than the other electric IOUs with limited resources and personnel** to keep up with FPUC’s several pending dockets before this Commission”). In contrast, FPL is the largest electric provider in Florida.

demands or having the feasibility analysis filed late and limiting discovery and analysis. FPL knew of the facts that it now asserts, well in advance of the filing deadline when it prepared its testimony and supporting financial schedules. These documents are not prepared overnight and the underlying facts in those documents are the same ones FPL alleges in the waiver request and were known long ago. This last minute filing is impeached by the very factual basis FPL advances for its waiver and supports the notion that this waiver is driven by recently emergent exigent circumstances and not the desire to save a microscopic amount of already customer-funded “man-hours” for one of the largest companies in Florida. FPL has not alleged that they took the 250 hours out of the 2017 projected costs. Moreover, the 2015 testimony did not include an adjustment to remove the feasibility analysis work that would be properly allocated to the NCRC for a feasibility analysis that the company is only now (sometime after March 1, 2016) proposing to abandon.

22. Waiver of the Rule’s requirement to file the annual feasibility analysis would constitute a substantial hardship **to the customers** who are currently paying in 2016 rates FPL’s planning costs which include the component parts of the feasibility analysis that were almost certainly done but not filed. FPL has the customer-provided resources and the ability to conduct a robust long-term feasibility analysis. For this reason alone, it would be patently burdensome and unfair to FPL’s customers for the Commission to grant FPL its requested waiver.
23. FPL indicates it will move into a “license-maintenance period” once it obtains its COL and it will “monitor nuclear construction industry progress and economic factors” before it moves to the preconstruction phase for this project.<sup>13</sup> With this statement, FPL recognizes that global

“economic factors” and fluctuating costs of nuclear construction are factors that may demonstrate that the TP 6&7 project is not currently feasible.

24. However, the proposed pause in the “license-maintenance period” that places the project on indefinite hold is inconsistent with the statutorily required intent to build. Utility investment in nuclear power plants means building power plants that produce electricity. Preserving the “option” to build a plant sometime in the future does not equate to “intent to build.” As stated in FPL’s Waiver Petition Paragraph 15c, FPL is seeking to “pause” after receiving its COL. Thus, FPL is not actually seeking to build a nuclear power plant, but only to preserve the option to build one sometime in the future *if and when* the “. . . nuclear industry and economic factors indicate it is appropriate to begin the preconstruction work phase,” i.e., if the economic conditions are favorable. This suggests that FPL means “nuclear industry and economic factors” indicate it is NOT feasible to begin the preconstruction work at this time. It follows that it may not be appropriate to allow FPL’s requested cost recovery.<sup>14</sup> This is exactly why *annual* feasibility analyses are necessary and required.
25. By alleging (without saying when the Company came to this conclusion) the annual feasibility analysis “serves no meaningful purpose,” FPL – after at least 7 years of enthusiastically filing and supporting filing such an analysis – now abruptly reverses course and suggests that the annual feasibility analysis is not a valuable tool for evaluating whether it is prudent for FPL to continue incurring costs, and that this critical analysis should be discarded until such time

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<sup>14</sup>By way of example, Duke Energy Florida is maintaining the “option” to construct a nuclear plant at its Levy site; however, **Duke’s shareholders are bearing the risks, burdens, and expense of preserving the option** to construct it. In this case, FPL is seeking recovery from its customers of millions of dollars – *without the benefit of a long-term feasibility analysis* – in order to preserve the idea or option of building a nuclear plant. If FPL wants to effectively put its nuclear ambitions on hold through 2020, then perhaps the Commission should ask the Company why its shareholders, not customers, should not foot the bill to maintain this nuclear option.

as FPL subjectively deems it necessary, i.e., at whatever unspecified time that FPL decides to petition to move to the preconstruction phase. Under FPL's proposal, **four to five years of cost recovery could go by without appropriate and adequate oversight by the Commission.** As such, FPL appears to view the "purpose" of the statute and rule only in relation to its own corporate interests, rather than in relation to the interests of the ratepayers.

26. In support of its Petition, FPL cited to cases which are very factually dissimilar from the facts of the instant matter. *In Re: Request for Waiver of Rule 25-6.1353, F.A.C., Concerning 2002 Forecasted Earnings Surveillance Report, by Florida Power Corp.*, Docket No. 020112-EI, Order No. PSC-02-0782-PAA-EI (Fla. P.S.C. 2002) was a case in which the exact same data required in a report had already been provided to the PSC in a separate rate case. The PSC found that no legitimate regulatory purpose would be served by simply re-formatting and re-submitting the data **a second time**. By contrast, in this case, FPL wants to forego the annual feasibility analysis report **altogether**, despite the fact that the updated data will not be provided to the Commission in any other manner. **Instead of duplication of effort, FPL proposes no effort**, and instead proposes providing absolutely no information on which the Commission can evaluate the feasibility of the pending \$20 billion project. The legitimate regulatory purpose in this instance is that of acting in the best interests of the ratepayers.

27. Similarly, in *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, p. 4 (Fla. P.S.C. 2012), the subject company was not trying to avoid submitting required reports the way FPL is here, but instead the company was simply seeking an extension of time to file – only a couple of months, not indefinitely. The company was in

the midst of a corporate consolidation of three companies into one, so they wanted to file one consolidated report for all three to avoid duplication, or to file all three at the same time. Also, the company demonstrated hardship, in that its employees were fully engaged in the corporate reorganization and relocation process around the time the reports were due. Nonetheless, the key distinguishing factor in each case is that the information was already, or soon would be, submitted to the Commission, whereas FPL seeks to completely avoid providing the annual feasibility information at issue. Neither case supports FPL's position. As to cost recovery, FPL quotes the need determination statute, Section 403.519(4)(e), F.S., which states in part that recovery of costs "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." *Id.* However, in the Need Determination Order for Turkey Point 6&7, the Commission specifically stated

FPL shall provide a long-term feasibility analysis as part of its annual cost recovery process which, in this case, shall also include updated fuel forecasts, environmental forecasts, break-even costs, and capital cost estimates. In addition, FPL should account for sunk costs. Providing this information on an annual basis will allow us to monitor the feasibility regarding the continued construction of Turkey Point 6 and 7.

*Id.* at p. 29. In fashioning the rules required by the Legislature in Section 366.93, the Commission required the feasibility analysis as a vital component of its duty to monitor costs and assure ratepayers of the ongoing basis of recoverability of costs – i.e. continued feasibility. It reinforced this in every order granting cost recovery since 2008. This precedent is not empty regulatory rhetoric but instead is a fundamental reaffirmation of the Commission's effort to meet the underlying statutory requirements of Section 366.93 and (as incorporated by reference) Section 403.519(4)(e), F.S.

### **Waiver Test - Principles of Fairness**

28. Section 120.542(2), F.S., states 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.”
29. FPL failed to state any facts which demonstrate how application of the NCRC Rule affects it differently from other persons subject to the Rule. Currently, FPL is the only utility in Florida seeking to use the NCRC Rule; however, Duke Energy Corporation sought to use the NCRC at one time, but ceased recovery attempts for its proposed Levy Project. **Duke’s shareholders are now bearing the costs of seeking a COL for the Levy Site.**
30. Therefore, FPL cannot state any facts to show that it is being treated differently than similarly situated companies, and therefore, cannot show that compliance with the NCRC Rule is unfair, as the term is defined in the applicable statute. In fact, to the extent FPL is being treated differently than Duke, it is to FPL’s advantage.

### **CONCLUSION**

31. To qualify for the waiver at issue, FPL must demonstrate that it satisfies the two-part test outlined in Section 120.542, F.S., by a preponderance of the evidence. In its untimely waiver request, FPL elected not to offer specific facts to support any claim to have achieved the underlying purposes of the statute in an alternate manner; it also failed to provide credible evidence of substantial hardship or unfairness. Instead, presenting even minimal, *prima facie* evidence of the statutory elements required to qualify for a waiver, FPL focused on its argument that the annual feasibility analysis is either not required or is unnecessary. As fully explained above, both assertions are incorrect, as a matter of law.

32. Continuation of the Turkey Point 6&7 project (and continuing to pass millions of dollars per year in costs through to customers) without an annual feasibility analysis exposes ratepayers to an unreasonable amount costs for a project that may not be viable, either economically, technically, or from a regulatory approval standpoint. For all the reasons set forth above, the waiver request should be denied.
33. Due to the highly controversial nature of FPL's request, and the fact this Commission relies upon the long-term feasibility analysis in the NCRC process, OPC requests that the parties to the NCRC docket be allowed to address the Commission when it considers whether to grant or deny FPL's petition for waiver of the Rule.

WHEREFORE, the OPC hereby urges that the Commission deny FPL's Petition for Waiver of Rule 25-6.0423(6)(c)5, Florida Administrative Code, and require that FPL file a detailed analysis of the long-term feasibility of completing the nuclear power plant.

Respectfully Submitted,

J.R. KELLY  
PUBLIC COUNSEL



Patricia A. Christensen  
Associate Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
Tallahassee, FL 32399-1400  
(850) 488-9330

Attorneys for the Citizens  
of the State of Florida



**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic mail on this 16<sup>th</sup> day of May, 2016 to the following:

Jessica Cano/Bryan S. Anderson  
Florida Power and Light Company  
700 Universe Blvd  
Juno Beach, FL 33418  
[jessica\\_cano@fpl.com](mailto:jessica_cano@fpl.com)  
[bryan.anderson@fpl.com](mailto:bryan.anderson@fpl.com)

Matthew R. Bernier  
Duke Energy Florida.  
106 East College Ave, Suite 800  
Tallahassee, FL 32301-7740  
[matthew.bernier@duke-energy.com](mailto:matthew.bernier@duke-energy.com)

Martha Barrera  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850  
[mbarrera@psc.state.fl.us](mailto:mbarrera@psc.state.fl.us)

J. Michael Walls/Blaise N. Gamba  
Carlton Fields Law Firm  
P.O. Box 3239  
Tampa, FL 33601-3239  
[mwalls@CFJBLaw.com](mailto:mwalls@CFJBLaw.com)

Jon C. Moyle, Jr.  
Florida Industrial Power Users Group  
118 North Gadsden Street  
Tallahassee, FL 32301  
[jmoyle@moylelaw.com](mailto:jmoyle@moylelaw.com)

Kenneth Hoffman  
Florida Power & Light Company  
215 South Monroe St., Suite 810  
Tallahassee, FL 32301-1859  
[ken.hoffman@fpl.com](mailto:ken.hoffman@fpl.com)

James W. Brew/Owen J. Kopon  
Laura A. Wynn  
1025 Thomas Jefferson St. NW, 8<sup>th</sup> Flo,  
West Tower  
Washington, DC 20007  
[jbrew@smxblaw.com](mailto:jbrew@smxblaw.com)  
[ojk@smxblaw.com](mailto:ojk@smxblaw.com)  
[laura.wynn@smxblaw.com](mailto:laura.wynn@smxblaw.com)

R. Scheffel Wright/ John LaVia  
Florida Retail Federation  
Gardner Law Firm  
1300 Thomaswood Drive  
Tallahassee, FL 32308  
[schef@gbwlegal.com](mailto:schef@gbwlegal.com)  
[jlavia@gbwlegal.com](mailto:jlavia@gbwlegal.com)

Dianne M. Triplett  
Duke Energy Florida  
299 First Avenue North  
St. Petersburg, FL 33701  
[dianne.triplett@duke-energy.com](mailto:dianne.triplett@duke-energy.com)

Victoria Méndez, City Attorney  
Matthew Haber, Assistant City Attorney  
The City of Miami  
444 S.W. 2<sup>nd</sup> Avenue, Suite 945  
Miami, FL 33130  
[vmendez@miamigov.com](mailto:vmendez@miamigov.com)

Robert H. Smith  
11340 Heron Bay Blvd. #2523  
Coral Springs, FL 33076  
[rpjrb@yahoo.com](mailto:rpjrb@yahoo.com)

George Cavros  
Southern Alliance for Clean  
Energy  
120 E. Oakland Park Blvd.,  
Ste. 105  
Fort Lauderdale, FL 33334  
[george@cavros-law.com](mailto:george@cavros-law.com)



Patricia A. Christensen  
Associate Public Counsel