

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Nuclear Cost Recovery Clause

DOCKET No.: 160009 - EI  
Filed: May 16, 2016

**THE CITY OF MIAMI'S OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S PETITION FOR WAIVER OF RULE 25-6.0423(6)(C)5, F.A.C.**

NOW BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION, through undersigned counsel, comes the CITY OF MIAMI ("City"), pursuant to Section 120.542(6), Fla. Stat., and Rule 28-104.003(1), F.A.C., hereby submits the City of Miami's Opposition to Florida Power & Light Company's Petition for Waiver of Rule 25-6.0423(6)(c)5, F.A.C.

**BACKGROUND**

In 2008, the Florida Public Service Commission ("FPSC" or "Commission") granted Florida Power & Light Company's ("FPL") petition for a determination of need for Turkey Point Nuclear Units 6 & 7. *In re: Petition to determine need for Turkey Point Nuclear Units 6 & 7 electrical power plant, by Florida Power & Light Company*, Order No. PSC-08-0237-FOF-EI, Docket No. 070650-EI (Fla. P.S.C. 2008). In 2008, FPL began petitioning for nuclear cost recovery and has continued to petition for advanced cost recovery annually pursuant to section 366.93, Fla. Stat. As of the date of this submission, FPL has recovered approximately \$247 million in advanced cost recovery.

On March 1, 2016, FPL filed its Petition for Approval of Nuclear Power Plant Cost Recovery True-Up for the Year Ending December 2015, in which FPL witness Steven D. Scroggs testified that "[a]n updated feasibility analysis *will* be submitted on April 27, 2016 in this docket." Testimony of Steven D. Scroggs, March 1, 2013, Docket No. 160009-EI, at 8 (emphasis added) (hereinafter, "Scroggs, March 1, 2013"). On April 27, 2016, despite assurances

to the contrary, FPL failed to file its long-term feasibility analysis as required under 25-6.0423(6)(c)5, F.A.C. Instead, it filed its Petition for Waiver of Rule 25-6.0423(6)(c)5, F.A.C. claiming undue hardship and violations of principles of fairness.

## STANDARD OF REVIEW

Section 120.542(2), Florida Statutes, establishes a two-pronged test for determining when an agency should deny or grant a rule waiver. *See In re Petition for variance from or waiver of Rule 25-6-049(5) and (6), F.A.C., by 4111 South Ocean Drive, LLC*, 2015 WL 9258191, at \*2 (Fla. P.S.C. 2015). The statute 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 violates rules of fairness.

§ 120.542(2), Fla. Stat. (emphasis added). The statute defines a “substantial hardship” as “a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.” *Id.* The statute further elaborates 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.*<sup>1</sup>

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<sup>1</sup> “[Section 120.542] is unique in that it requires all agencies subject to the [Florida Administrative Procedure Act] to grant variances and waivers when petitioners can satisfy the *detailed criteria* of the statute and the uniform rules implementing the statute. The provision is intended to give agencies much-needed flexibility to address *unique or unusual situations* that are not contemplated by agency rules that, by necessity, are written to address general circumstances.”

Donna E. Blanton and Robert M. Rhodes, *Flexibility, Flexibility, Flexibility: The New Variance and Waiver Provision*, FLA. B.J., March 1997, at 35, 38 (emphasis added).

## **THE PURPOSE OF SECTION 366.93, FLA. STAT., HAS NOT BEEN ACHIEVED**

The purpose of section 366.93, Florida Statute, is to promote investment in nuclear or integrated gasification combined cycle power plants, provide certainty, and to allow the utility recover all prudently incurred costs. *See* § 366.93(2), Fla. Stat. In furtherance of that purpose, section 366.96 authorizes the FPSC to “establish, by rule, alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of a nuclear power plant, including new, expanded, or relocated electrical transmission lines and facilities that are necessary thereto, or of an integrated gasification combined cycle power plant.” *Id.*

In accordance with the statute, the FPSC promulgated Rule 25-6.0423 outlining the requirements for petitioning the FPSC to recover the costs incurred by the utility in the prior year. One of the requirements is that the utility must submit for Commission review and approval a detailed analysis of the long-term feasibility of completing the power plant. The FPSC promulgated this rule in furtherance of the statute so that it may review “evidence that the utility intends to construct the nuclear . . . power plant . . . and that its intent is realistic and practical.” Fla. Admin. Code § 25-6.0423(6)(c)(5).

The Commission further elaborated on the purpose of the statute and rule in its Final Order in last year’s docket when it stated:

Under this regulatory scheme, the statutes and rule governing the NCRC identify specific activities a utility *must* undertake to comply with the regulatory requirements of the NCRC process. FPL undoubtedly incurs costs associated with compliance with the annual NCRC proceedings during the preconstruction period. Costs associated with these activities, by definition, are preconstruction costs incurred during the preconstruction period. Even though they may not be related to obtaining or maintaining the COL, these costs are recoverable if found reasonable and prudent as they are part of the regulatory requirements a utility must follow. *There is a yearly proceeding where FPL must prove that it intends to construct the nuclear plant through a long-term feasibility study, that it has committed sufficient, meaningful and available resources to enable the project to be completed, and that its intent is realistic and practical.*

*In re: Nuclear cost recovery clause*, Order No. PSC-15-0521-FOF-EI, Docket No. 150009-EI, at 28 (Fla. P.S.C. 2015) (emphasis added).

Section 366.93 and Rule 25-6.0423 have multiple purposes in addition to simply promoting investment in nuclear power plants. The requirement for a long-term feasibility helps provide certainty and ensure that costs have been prudently incurred by the utility. The rule does this by ensuring that a utility has “committed sufficient, meaningful, and available resources to enable the project to be completed and that its intent is realistic and practical.” Fla. Admin. Code § 25-6.0423(6)(c)(5).

It is important to consider the feasibility of the investment when determining whether the costs were prudently incurred. Assuming that costs are being incurred pursuant to a “step-wise approach” and using disciplined cost, business, and process controls, if a project is no longer feasible or practical, then the costs incurred are not prudent. Investment into a project that no longer is economically feasible or is no longer practical to complete would make any investment into the project imprudent.

As such, the purpose of section 366.93 has not been satisfied, because without a long-term feasibility analysis the Commission cannot make a finding that the costs to be incurred from 2016 through 2020 were or are going to be prudently incurred by FPL. FPL must show that Turkey Point Units 6 & 7 project is and continues to be feasible and practical in the long run in order to qualify for cost recovery under section 366.93.

A long-term feasibility study is even more critical now since FPL plans on pausing and only focusing on maintaining its licenses that it has received. *See Florida Power and Light Company’s Petition for Waiver of Rule 25-6.0423(6)(c)5, F.A.C.*, at 4 (hereinafter, “Petition”);

Steven D. Scroggs Testimony, April 27, 2016, at 2-3 (hereinafter, “Scroggs, April 27, 2016”).<sup>2</sup> FPL Witness Scroggs admitted during his May 11, 2016 deposition that FPL intends to continue recovering its costs during the “license maintenance” period. Since FPL plans to continue recovering costs pursuant to section 366.93 while doing no additional work towards the completion of the project, it is imperative that FPL demonstrate the project is still economically feasible and practical. Further, FPL estimates that it will have expended approximately 1.5% of the high end of the estimated cost of the project through 2017. *See* Scroggs, April 27, 2016, at 9. Despite FPL’s costs being on the high end, FPL still has not received its Combined Operating License or its Section 404(b) wetland permit, licenses and permits that FPL has admitted it does not know when it will receive. *See id.* at 30 (“Another consideration is the remaining uncertainty in the timeline for receipt of the Combined License and the associated U.S. Army Corps of Engineers 404(b) permits and resolution of the Site Certification.”). Moreover, FPL no longer has the Site Certification it received in 2014 which has added additional uncertainty to the Turkey Point Units 6 & 7 project. *See id.* at 25 (“The focus will remain on obtaining the federal licenses and permits . . . and resolving the reversal of the Site Certification”).

Given that FPL’s costs are already on the high-end of the cost of the project (\$20.0 billion) at such an early stage of the project and the high level of uncertainty in the timeline of receipt of the required licenses, much less the project, a long-term feasibility analysis is critical and necessary at this juncture to determine whether the costs FPL intends to incur are prudent.

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<sup>2</sup> Due to time constraints, the City does not yet have the transcripts of this deposition, which will be filed once received.

## **THE APPLICATION OF RULE 25-6.0423(6)(C)5 DOES NOT CREATE A SUBSTANTIAL HARDSHIP**

Assuming that FPL has achieved the purpose of section 366.93, which it has not, the application of Rule 25-6.0423(6)(c)5 does not create a substantial hardship for FPL. Section 150.542(2) defines a “substantial hardship” as “a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.”

Various agencies have identified what may constitute a substantial hardship for a petitioner. For example, the FPSC has explained that there is a substantial hardship if the petitioner can demonstrate that the application of a rule puts it at a competitive disadvantage amongst its competitors. *In re Petition for variance from or waiver of Rule 25-6-049(5) and (6), F.A.C., by 4111 South Ocean Drive, LLC*, Docket No. 150222-EU, Order No. PSC-15-0565-PAA-EU (Fla. P.S.C. 2015). Similarly, in *In re A Request for Waiver by: Argus Tires Corp*, the Florida Department of Environmental Protection (“FDEP”) held that Argus Tires Corporation would suffer a substantial hardship because Argus Tires Corporation provided detailed criteria showing that the required assurances it had to provide pursuant to the rule were overshadowed by the high transaction costs associated with complying with the rule. *See* 2014 WL7649083, at \*1-2 (Fla. D.E.P. 2014). FDEP also noted that the petitioner further demonstrated that the waiver would pose no significant economic risk to Florida taxpayers. *See id.* at \*1.

FPL has not demonstrated that the feasibility analysis puts it at a competitive disadvantage or that there are high transaction costs associated with producing the feasibility study. In its petition, FPL asserts that the feasibility analysis is unnecessary, meaningless, and serves no legitimate project or regulatory purpose. In support of this proposition, FPL cites *In re: Request for Waiver of Rule 25-6.1353, F.A.C., Concerning 2002 Forecasted Earnings Surveillance Report, by Florida Power Corporation*. However, the facts of the referenced

petition are substantially different from FPL's current petition. In Florida Power Corporation's petition, the FPSC found that forecasted surveillance report was duplicative given that the information was already provided and that the surveillance report simply reformatted that already available information. *See In re: Request for Waiver of Rule 25-6.1353, F.A.C., Concerning 2002 Forecasted Earnings Surveillance Report, by Florida Power Corporation*, 2002 WL 1343631 (Fla. P.S.C. 2002). In FPL's current petition for cost recovery, this information is not already available or included in its prior submission nor would submitting the required feasibility analysis be considered duplicative.

Additionally, FPL's reliance on *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* ("*In re: Joint petition*") is inapposite to its current petition for a waiver. In *In re: Joint petition*, the petitioners requested an extension of time to file because the petitioners were consolidating their companies and that the consolidation of operations itself was already a burdensome task. *See* 2012 WL 4829206, at \*2 (Fla. P.S.C. 2012). The additional requirement to submit the depreciation studies would have increased the workload of the respective petitioners' employees amounting to undue hardship for the petitioners to submit the filings by the required deadlines. *See id.* Moreover, the petitioners were simply asking for an extension of time, not requesting a complete waiver from the filing requirements. *See id.*

FPL is not asking for an extension of time but for a waiver until approximately 2020, when it anticipates it will pursue preconstruction work. *See* Petition at 12; May 11, 2016 Deposition of Steven D. Scroggs (hereinafter, "*Scroggs Deposition*"). Until 2020, FPL expects the FPSC as well as ratepayers to assume that Turkey Point Units 6 & 7 remains economically

feasible and therefore all the costs recovered or that FPL anticipates recovering are prudent. However, as we have witnessed in Docket 160009-EI, the petitioner can change its position despite previous assurances. *Compare* Scroggs May 1, 2015 at 8 (“An updated feasibility analysis *will be submitted* on April 27, 2015 in this docket.”)(emphasis added) *with* Scroggs April 27, 2015, at 3 (“ . . . no feasibility analysis is needed at this time.”). As such, there is a clear regulatory purpose for the feasibility requirement – assuring the investments and costs associated into this costly project are prudent.

Finally, any substantial hardship being asserted is of the petitioner’s own doing. During FPL witness Scroggs’ deposition on May 11, 2016, Mr. Scroggs stated that FPL staff begins collecting data for use in the feasibility analysis in January. Further, Mr. Scroggs stated that if the FPSC were to deny FPL’s petition for a rule waiver that FPL would be able to submit a feasibility analysis in three (3) months. Scroggs Deposition. While the City finds incredulous FPL’s claim that it does not have a draft or began preparing the feasibility analysis despite Jennifer Grant-Keene’s May 12, 2016 deposition testimony that she was made aware of FPL’s decision to not submit a feasibility analysis approximately one (1) to two (2) weeks prior to the April 27, 2016 filing deadline or FPL’s claim that preparation of the feasibility analysis takes approximately 250 man-hours, there was never any showing by FPL prior to April 27, 2016 in this docket or previous dockets that the feasibility analysis constituted a substantial hardship. It was only a mere two (2) months after FPL had assured the Commission, all parties of record, and ratepayers that it would submit a feasibility analysis that FPL conjured a substantial hardship claim.

As such, FPL has failed to establish that application of Rule 25-6.0423(6)(c)5 constitutes a substantial hardship.



## **THE APPLICATION OF RULE 25-6.0423(6)(C)(5) DOES NOT VIOLATE PRINCIPLES OF FAIRNESS**

FPL has also failed to establish that the application of Rule 25-6.0423(6)(c)(5) violates principles of fairness. Under section 150.542(2), 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.”

In *In re Petition for variance from or waiver of Rule 25-6-049(5) and (6), F.A.C., by 4111 South Ocean Drive, LLC*, the FPSC found that principles of fairness were violated because the petitioner planned on operating its development similar to hotels and motels who were exempt from the rule at issue and application of the rule to the petitioner created disparate treatment of similar facilities. *See* 2015 WL 9258191, at \*4 (Fla. P.S.C. 2015).

Section 366.93 is only applicable to electric utility companies who wish to avail themselves to the benefits of the statute. If any electric utility company chose to invest in nuclear or integrated gasification combined cycle power plants and take advantage of the cost recovery mechanisms provide by the statute, those utility companies would be subject to the requirements of the statute and its accompanying rules.

Although the FPSC did hold in *In re: Request for Waiver of Rule 25-6.1353, F.A.C., Concerning 2002 Forecasted Earnings Surveillance Report, by Florida Power Corporation*, that assigning manpower to a time-consuming task can amount to a violation of principles of fairness, the present petition before the Commission is different. The FPSC found in *In re: Request for Waiver of Rule 25-6.1353, F.A.C., Concerning 2002 Forecasted Earnings Surveillance Report, by Florida Power Corporation* that the forecasted surveillance reports were duplicative of information already provided to the Commission and that valuable manpower

would be consumed to prepare a report that amounted to little more than reformatting of previously submitted information.

FPL's current petition makes no claims that the information is duplicative or that preparing the feasibility study consumes valuable manpower. Although FPL notes that preparation of the feasibility analysis takes about 250 man-hours, FPL also has stated that it has "dedicated teams with the requisite subject matter expertise coordinated to meet project objectives." *See* Petition, at 11; Scroggs, April 27, 2016, at 11. In fact, FPL Witness Scroggs leads the team dedicated to several facets of project development including "FPSC regulatory issues." *See* Scroggs, April 27, 2016, at 11-12. In addition to having dedicated teams, the teams are supported by FPL business units as well as various contractors. As such, FPL has a team and adequate the adequate manpower and resources dedicated to preparing filings required under section 366.93, Florida Statutes, and Rule 25-6.0423(6)(c)5.

Moreover, granting FPL's petition for a waiver would constitute a violation of principles of fairness and due process for the City, all the parties of record, and ratepayers. Section 403.519(4)(e), Florida Statutes, states that:

After a petition for determination of need for a nuclear or integrated gasification combined cycle power plant has been granted, the right of a utility to recover any costs incurred prior to commercial operation . . . 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 before the commission . . . that certain costs were imprudently incurred.

As was noted earlier, the economic feasibility and practicality of the project is necessary to determine that the costs incurred by FPL are prudent. If FPL does not provide a long-term feasibility analysis then it in effect hinders the ability of the City to challenge any petitions for cost recovery. This constitutes a violation of due process since the City and any other parties of record would not be able to effectively challenge the prudence of any costs incurred by FPL from

2016 through 2020. *See Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So. 2d 1239, 1254 (Fla. 1996) (“Procedural due process . . . requires that a defendant be able to rebut a statutory presumption.”). In fact, in last year’s docket, the Commission spent a substantial portion of its Final Order discussing the information contained in the feasibility analysis and how it supported the Commission’s finding of reasonableness of FPL’s estimated costs and its decision ultimate decision to grant FPLs petition for nuclear cost recovery. *See In re: Nuclear cost recovery clause*, Order No. PSC-15-0521-FOF-EI, Docket No. 150009-EI, at 5-21 (Fla. P.S.C. 2015). Without the feasibility analysis, all parties will not be able to effectively challenge the presumption of prudence of costs incurred by FPL. *See* § 403.519(4)(e), Fla. Stat.

Therefore, FPL has not demonstrated that the application of Rule 25-6.0423(6)(c)(5) violates principles of fairness. Furthermore, a granting of the waiver would constitute a violation of the principles of fairness and of due process for the City, the parties of record, and ratepayers.

### **CONCLUSION**

FPL has failed to meet the two-pronged test established under section 120.542(2), Fla. Stat. FPL has failed to establish that the purpose of section 366.93, Fla. Stat. has been achieved and it has failed to establish that the requirements of Rule 25-6.0423(6)(c)(5) constitutes a substantial hardship or violates principles of fairness.

The City of Miami respectfully requests this Commission deny FPL’s Petition for Waiver of Rule 25-6.0423(6)(c)5, F.A.C. and amend the March 11, 2016 Scheduling Order, as amended. If the Scheduling Order cannot be amended, then in the alternative, the City of Miami respectfully requests this Commission deny FPL’s Petition for Waiver of Rule 25-6.0423(6)(c)5,

F.A.C. and deny FPL's Petition for Approval of Nuclear Cost Recovery Amount for the Year 2017 on the basis of FPL submitting an incomplete filing.

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on the 30<sup>th</sup> day of March, 2016, I served the foregoing document on all parties listed in the attached Service List by e-mail.

By: /s/Kerri L. McNulty  
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