

State of Florida



Public Service Commission

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

DATE: November 30, 2017

TO: Office of Commission Clerk (Stauffer)

FROM: Division of Engineering (Mtenga, Ellis) *MM*
Division of Accounting and Finance (Smith II) *POE*
Division of Economics (Wu) *WH*
Office of the General Counsel (Cuello, DuVal, Murphy) *CM* *SHAC* *TR* *ALM* *BO* *TB*

RE: Docket No. 20170007-EI – Environmental cost recovery clause.

AGENDA: 12/12/17 – Regular Agenda – Post-Hearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brisé

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

Florida Power & Light Company (FPL) operates the Turkey Point Power Plant (Turkey Point), which includes multiple generating units, including Units 3 and 4, which are nuclear steam units. For cooling of these generating units, FPL utilizes a 5,900 acre cooling canal system (CCS) that was placed in service in 1973. On November 18, 2009, the Florida Public Service Commission approved the Turkey Point Cooling Canal Monitoring Plan (TPCCMP or Monitoring Plan) for cost recovery through the Environmental Cost Recovery Clause (ECRC) by Order No. PSC-09-0759-FOF-EI (Approval Order).¹

¹Order No. PSC-09-0759-FOF-EI, issued November 18, 2009, in Docket No. 090007-EI, *In re: Environmental cost recovery clause*.

On September 2, 2016, FPL filed projection testimony in the ECRC for the TPCCMP that included requests for recovery of costs associated with recent actions of two of its environmental regulators. FPL entered into a Consent Agreement (CA) with the Miami-Dade Department of Environmental Resource Management (DERM) on October 7, 2015, which was later amended and referred to as the Consent Agreement Addendum (CAA) on August 15, 2016. FPL also entered into a Consent Order (CO) with the Florida Department of Environmental Protection (FDEP) on June 20, 2016. Collectively, costs associated with the CA, CAA, and CO are referred to herein as the TPCCMP Disputed Costs.

On November 22, 2016, the Commission issued Order No. PSC-16-0535-FOF-EI that deferred consideration of issues associated with the TPCCMP Disputed Costs until 2017.² The Order also directed FPL to file additional information in its 2017 Actual/Estimated Testimony for the ECRC Docket, and established desired time periods for intervenor, staff, and rebuttal testimony filing dates.

On January 3, 2017, the Commission established Docket 20170007-EI.³ The Office of Public Counsel (OPC) and the Florida Industrial Power Users Group (FIPUG) retained party status in the docket.⁴ On March 27, 2017, Southern Alliance for Clean Energy (SACE) was granted intervention by Order No. PSC-17-0112-PCO-EI.⁵ Collectively, OPC, FIPUG, and SACE are referred to herein as the Intervenors.

Staff notes that other parties participated in the 2017 ECRC Docket, including Duke Energy Florida, LLC, Tampa Electric Company, Gulf Power Company (Gulf), and PCS Phosphate – White Springs, but none of these parties took positions on the Issues discussed in this recommendation and are therefore not included in the Positions of the Parties set forth herein.

The Commission Hearing was held October 25, 2017 through October 27, 2017. On November 13, 2017, briefs were filed by FPL, OPC, and SACE. FIPUG filed a notice of joinder with OPC's brief, and the two are collectively referred to as OPC/FIPUG herein. As part of its November 13, 2017 filing, SACE filed proposed findings of fact and conclusions of law. Such filings are anticipated by Chapter 120, Florida Statutes (F.S.), the Uniform Rules of Procedure, and our procedural orders. The Commission must consider these filings, as it would any other post-hearing filing, but no special ruling or finding must be made for each proposed finding of fact or conclusion of law. Thus, like all post-hearing filings, staff has reviewed each of SACE's proposed findings of fact and conclusions of law to determine which, if any, should be specifically addressed in staff's post-hearing recommendation.

The Commission has jurisdiction over this subject matter pursuant to provisions of Section 366.8255, F.S. A list of acronyms is provided on the next page.

²Order No. PSC-16-0535-FOF-EI, issued November 22, 2016, in Docket No. 160007-EI, *In re: Environmental cost recovery clause*.

³Order No. PSC-17-0007-PCO-EI, issued January 3, 2017, in Docket No. 170007-EI, *In re: Environmental cost recovery clause*.

⁴Document Nos. 00153-2017 and 00049-2017.

⁵Order No. PSC-17-0112-PCO-EI, issued March 27, 2017, in Docket No. 170007-EI, *In re: Environmental cost recovery clause*.

Acronym List

AO	Administrative Order
Approval Order	Commission Order No. PSC-09-0759-FOF-EI
CA	Consent Agreement
CAA	Consent Agreement Addendum
CCS	Cooling Canal System
CO	Consent Order
COC	Conditions of Certification
DERM	Miami-Dade Department of Environmental Resources Management
ECRC	Environmental Cost Recovery Clause
EPA	Environmental Protection Agency
FDEP or DEP	Florida Department of Environmental Protection
FEA	Federal Executive Agencies
FERC	Federal Energy Regulatory Commission
FIPUG	Florida Industrial Power Users Group
FO	Final Order
FPL	Florida Power and Light
F.S.	Florida Statutes
GAAP	Generally Accepted Accounting Principles
GULF	Gulf Power Company
NOV	Notice of Violation
O&M	Operation and Maintenance
OPC	Office of Public Counsel
PSU	Practical Salinity Units
RFRP	Retraction and Freshening Remediation Project
RWS	Recovery Well System
SACE	Southern Alliance for Clean Energy
SFWMD	South Florida Water Management District
TP	Turkey Point
TPCCMP	Turkey Point Cooling Canal Monitoring Plan
USOA	Uniform System of Accounts

Discussion of Issues

Issue 10A: Should FPL be allowed to recover, through the ECRC, prudently incurred costs, if any, associated with the June 20, 2016 Consent Order between FPL and the Florida Department of Environmental Protection and the October 2015 Consent Agreement between FPL and the Miami-Dade County Department of Environmental Resources Management (as amended by the August 15, 2016 Consent Agreement Addendum)?

Recommendation: Yes. FPL should be allowed to recover the TPCCMP Disputed Costs, if prudently incurred, through the ECRC. The TPCCMP Disputed Costs are costs incurred after the inception of the ECRC and are not being recovered through another clause mechanism or base rates. Staff recommends that FPL is subject to new governmentally imposed environmental requirements enacted after FPL's last test year on the date of filing in the 2016 ECRC proceeding. The prudence of the TPCCMP Disputed Cost activities is addressed in Issue 10B. (Ellis, Mtenga)

Position of the Parties

FPL: Yes. FPL is required to comply with the 2015 CA, 2016 CO, and 2016 CAA and costs that FPL has prudently incurred as a result of these requirements are recoverable pursuant to Section 366.8255. The administrative procedural history reflecting other parties' dissatisfaction with the FDEP's AO (Administrative Order) and subsequent findings of violations fails to demonstrate that, as a policy matter, FPL's costs should be disallowed. Moreover, there is no legal basis to disallow costs determined to be prudently incurred to comply with environmental requirements.

OPC/FIPUG: No. The jurisdictional portion of approximately 95 percent of the total O&M and capital expenditures of \$132,577,031 in remediation costs to clean up the Biscayne Aquifer should be disallowed.

SACE: No. FPL was issued a Notice of Violation by the DEP in 2016 and by Miami-Dade County in 2015. The Commission has never allowed a utility to recover costs through the Environmental Cost Recovery Clause (ECRC) for compliance costs arising from a violation of law. Doing so in this case would establish a dangerous precedent in future ECRC proceedings. Regardless, recovery of costs should not be allowed because FPL's failure to mitigate the impact of CCS-caused hyper-saline plume before 2014 was imprudent.

Staff Analysis:

Parties' Arguments

FPL

FPL argues that FPL, as part of the Turkey Point Uprate Project, was required by its Conditions of Certification (COC), specifically Section IX and X, to implement monitoring of various state surface and ground waters subject to the regulation of the DEP, DERM, and South Florida Water Management District (SFWMD). (FPL BR 5-6; EXH 6) As part of implementing the COC, FPL sought, and was granted, approval of the Monitoring Plan by the Commission in the Approval Order in November 2009. (FPL BR 6; EXH 74) FPL argues that it continued to meet its regulatory requirements of monitoring, and as part of that monitoring process in April 2013,

SFWMD determined that saline water had moved into water resources outside of the plant's boundaries. FPL was instructed to begin consultations with SFWMD to "identify measures to mitigate, abate, or remediate." (FPL BR 6-7; EXH 7) FPL states that it then began working with its environmental regulators to evaluate options which resulted in an AO by FDEP being issued in December 2014. (FPL BR 7; EXH 8)

FPL claims one of its regulators, DERM, was unsatisfied with the DEP's AO. As a result, DERM challenged the AO and issued a Notice of Violation (NOV) in October 2015. (FPL BR 7; EXH 9) The challenge to the AO resulted in a Final Administrative Order (FO) that led to the FDEP issuing a separate NOV in April 2016. (FPL BR 7; EXH 11; EXH 12) FPL argues that both DERM's and the DEP's NOVs were resolved by entering into the CO in June 2016 and the amended CAA in August 2016. (FPL BR 7; EXH 10; EXH 13) Further, FPL contends that the actions required by the CAA and CO that constitute the TPCCMP Disputed Costs, are direct consequences of its COC. (FPL BR 7)

FPL alleges it is overly simplistic for the Intervenor Parties to claim that the NOVs are violations of law. (FPL BR 7). First, FPL contends that the environmental standard cited by all three of its environmental regulators are narrative standards that require the agency's judgement to determine if a violation had occurred, and there was no bright line defining a violation of law. (FPL BR 8; TR 359) Second, FPL argues that it operated the CCS in full compliance with its regulations and that the environmental degradation is an unintended consequence. (FPL BR 8) Last, FPL asserts that the NOVs are not the sole reason for the TPCCMP Disputed Costs, and that FPL would be obligated by its COC to perform the same actions. (FPL BR 9; TR 374-375)

FPL also argues that OPC is mistaken regarding the Commission's discretion regarding recovery, and that if the Commission approves the Company's activities, the Commission must allow cost recovery through the ECRC pursuant to Section 366.8255, F.S. (FPL BR 9)

OPC/FIPUG

OPC/FIPUG argues that FPL has not met its burden of proof to be eligible for recovery of the TPCCMP Disputed Costs, which OPC/FIPUG refers to as the Retraction and Freshening Remediation Project (RFRP). (OPC/FIPUG BR 2) OPC/FIPUG asserts that in its original 1972 permitting, FPL was responsible for both monitoring and preventing the spread of saltwater from the CCS. (OPC/FIPUG BR 3; EXH 4)

OPC/FIPUG contends that while a Consent Order or Agreement does not preclude recovery through the ECRC, costs implementing remediation activities to correct violations of law are not eligible. (OPC/FIPUG BR 4-5) OPC/FIPUG argues that FPL specifically justifies its activities by relying on the DEP CO which resulted from an NOV. (OPC/FIPUG BR 5) OPC/FIPUG asserts that as a result of the NOV, FPL would have been liable to the state of Florida for damage to the Biscayne Aquifer, and therefore should not be eligible for recovery as though RFRP costs were payment of damages for unlawful conduct. (OPC/FIPUG BR 5) OPC/FIPUG notes that Section 366.8255, F.S., requires that costs must be "designed to protect the environment." (OPC/FIPUG BR 6)

OPC/FIPUG argues that the ECRC recovery standard includes both prudence and public policy elements, and that the Commission must be vigilant about improper efforts to recover costs through the ECRC. (OPC/FIPUG BR 9)⁶

OPC/FIPUG states that the ECRC is an inappropriate method to recover costs associated with past harms. Instead, the clause is meant to allow recovery of costs required by new regulations to prevent future harm. (OPC/FIPUG BR 13) OPC/FIPUG refers to prior Commission decisions that use language relating to maintaining compliance or continuing compliance, and suggests that because FPL has committed a violation and is out of compliance, FPL's costs are now ineligible under the ECRC. (OPC/FIPUG BR 13-14) OPC/FIPUG acknowledges that the Commission has allowed remediation costs before, but suggests that those circumstances were with specific regulations that are not similar to the circumstances with the TPCCMP Disputed Costs. OPC/FIPUG further argues that a Consent Order or Agreement is the equivalent of an environmental regulation when it has a prospective application to abate or eliminate future harm, and that in prior instances when the Commission has approved cost recovery for a Consent Decree such costs only covered prospective actions. (OPC/FIPUG BR 16)

SACE

SACE alleges that FPL knew or should have known by 1992 that the operation of the CCS was causing an adverse impact to waters adjacent to the CCS. (SACE BR 1) SACE argues that FPL omitted information on the scale of the environmental impacts of the CCS from both SFWMD and the Commission. (SACE BR 1) SACE contends that FPL's imprudence caused the environmental compliance requirements from the CO and CA, and therefore it should be not allowed for cost recovery. (SACE BR 1-2)

SACE alleges that FPL downplayed or even ignored the conclusions of annual monitoring reports that were filed with environmental regulators. (SACE BR 17) SACE asserts that had environmental regulators been provided with a complete analysis of the monitoring data, FPL's Turkey Point Uprate Project might not have been approved. Therefore the COCs FPL relies upon as an environmental requirement would not have been required. (SACE BR 7) SACE argues that allowing FPL cost recovery would establish a dangerous precedent for cost recovery in this docket moving forward. (SACE BR 34)

Analysis

Eligibility Criteria

The ECRC, enacted into law in 1993, provides an investor-owned utility the opportunity to recover the costs associated with changes in environmental regulations between rate cases. The statute authorizes the Commission to review and decide whether a utility's environmental compliance costs are recoverable through an environmental cost recovery factor. When the Commission first implemented the provisions of Section 366.8255, F.S., it identified the criteria

⁶At page 9 of OPC/FIPUG's brief, OPC/FIPUG quotes from the Order No. PSC-07-0722-FOF-EI, issued September 5, 2007, in Docket No. 060162-EI., *In re: Petition by Progress Energy Florida, Inc. for approval to recover modular cooling tower costs through environmental cost recovery clause*. However, the quotation in OPC's Brief does not reflect the text of the Commission's Order. The correct text is "It is our opinion that; with respect to ECRC recovery, OPC's position restricts the eligibility of environmental costs beyond what the statute contemplates" *Id.* at 8.

required to demonstrate eligibility for cost recovery under the ECRC and interpreted the statute to prescribe three requirements for recovery of environmental compliance costs through the clause, as detailed below:⁷

Upon petition, we shall allow the recovery of costs associated with an environmental compliance activity if:

1. such costs were prudently incurred after April 13, 1993;
2. the activity is legally required to comply with a governmentally imposed environmental regulation enacted, became effective, or whose effect was triggered after the Company's last test year upon which rates are based; and,
3. such costs are not recovered through some other cost recovery mechanism or through base rates.

Pursuant to Section 366.8255, F.S., only the utility's prudently incurred environmental compliance costs are allowed to be recovered through the ECRC.⁸ The prudence of the TPCCMP Disputed Costs is discussed in Issue 10B.

Eligibility Criteria Review

Timing

To be eligible for the ECRC, costs must have been incurred after April 13, 1993. In 1994, the Commission determined that such recovery would apply to qualifying expenditures that were prudently incurred after April 13, 1993, the effective date of Section 7, Chapter 93-35, Laws of Florida, which created Section 366.8255, F.S.⁹ This threshold date has been applied by the Commission many times since it was originally established.¹⁰

No party argues and there is no evidence in the record that the TPCCMP Disputed Costs were incurred prior to this date. Therefore, staff recommends that the TPCCMP Disputed Costs meet the first criteria of ECRC eligibility.

New Regulatory Requirement

To be eligible for the ECRC, costs must be for activities that are legally required to comply with a governmentally imposed regulation that has been enacted, or become effective, or whose effect was triggered after the Company's last test year upon which rates are based. Therefore, to

⁷Order No. PSC-94-0044-FOF-EI, issued January 12, 1994, in Docket No. 930613-EI, *In re: Petition to establish an environmental cost recovery clause pursuant to Section 366.8255, Florida Statutes, by Gulf Power Company*

⁸Order No. PSC-05-0164-PAA-EI, issued on February 10, 2005, in Docket No. 041300-EI, *In re: Petition for Approval of New Environmental Program for Cost Recovery Through Environmental Cost Recovery Clause, by Tampa Electric Company.*

⁹Order No. PSC-94-0044-FOF-EI, issued January 12, 1994, in Docket No. 930613-EI, *In re: Petition to establish an environmental cost recovery clause pursuant to Section 366.0825, Florida Statutes by Gulf Power Company.*

¹⁰See e.g., Order No PSC-12-0493-PAA-EI, issued on September 26, 2012, in Docket No 20110262-EI, *In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause, by Tampa Electric Company.*

determine eligibility of the TPCCMP Disputed Costs, the Commission must first identify the new regulations and then determine if the date of such regulations is after the Company's last test year.

Section 366.8255 (1)(c), F.S., defines environmental laws or regulations to include "all federal, state, or local statutes, administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment." The FDEP and DERM are state and local environmental regulators, respectively, with the authority to impose requirements on FPL's operations of the CCS and other relevant plant. The CO, CA, and CAA all include specific new requirements that apply to FPL in relation to its function as an electric utility. (EXH 13; EXH 10; EXH 14) These are primarily detailed in Sections 20 through 33 of the DEP's CO and Sections 17 and 34 in DERM's CA, as amended by the CAA. (EXH 13; EXH 10; EXH 14) These requirements include items such as implementing plans to meet salinity thresholds, installation and operation of freshening projects, improving thermal efficiency, and engaging in remediation projects including a recovery well system. (EXH 13; EXH 10; EXH 14)

The Commission has previously interpreted a Consent Decree to be a qualifying requirement under the ECRC.¹¹ In another instance, the Commission allowed ECRC cost recovery based on an agreement reached as a result of alleged violations of the Clean Air Act.¹² FPL's Witness Sole states that without the DEP's NOV, FPL would not have signed a Consent Order. (TR 375) Staff notes that DEP's NOV directed FPL to enter into a Consent Order or equivalent. (EXH 12) Witness Sole states FPL is engaging in the TPCCMP Disputed Cost activities pursuant to the CO and CA. (TR 302-305)

Staff notes that the activities within the CO, CA, and CAA expressly require FPL to engage in remediation activities. (EXH 13; EXH 10; EXH 14) The Commission previously has approved recovery of costs associated with remediation activities under the ECRC.¹³ Based on the statutory definition, the Commission's past decisions, and the record in this docket, staff recommends that the CO, CA, and CAA meet the definition of new environmental regulations and therefore any associated compliance costs are eligible for cost recovery under the ECRC.

Timing of New Regulation

To be eligible for the ECRC, the activity is legally required to comply with a governmentally imposed environmental regulation that was enacted, became effective, or whose effect was triggered after the Company's last test year upon which rates are based. FPL's most recent rate case was resolved by a settlement between many parties, including FPL and OPC, and approved by the Commission pursuant to Order No. PSC-16-0560-AS-EI.¹⁴ No party argues and there is

¹¹Order No. PSC-07-0499-FOF-EI, issued on June 11, 2007, in Docket No. 050958-EI, *In re: Petition for Approval of New Environmental Program for Cost Recovery through Environmental Cost Recovery clause by Tampa Electric Company.*

¹²Order No. PSC-00-2104-PAA-EI, issued on November 6, 2000, in Docket No. 001186-EI, *In re: Petition for approval of new environmental programs for cost recovery through the Environmental Cost Recovery Clause by Tampa Electric Company.*

¹³Order No. PSC-05-1251-FOF-EI, issued on December 22, 2005, in Docket No. 20050007-EI, *In re: Environmental Cost Recovery Clause.*

¹⁴Order No. PSC-16-0560-AS-EI, issued December 15, 2016, in Docket No. 160021-EI, *In re: Petition for rate increase by Florida Power & Light Company.*

no evidence in the record that the TPCCMP Disputed Costs were triggered prior to FPL's last test year upon which rates are based. Therefore, staff recommends that the TPCCMP Disputed Costs meet the second criteria of ECRC eligibility.

Costs Not Recovered

To be eligible for the ECRC, costs also must not be recovered through some other cost recovery mechanism or through base rates. No party argues and there is no evidence in the record that the TPCCMP Disputed Costs are being recovered through base rates or an alternate clause mechanism. Therefore, staff recommends that the TPCCMP Disputed Costs meet the third criteria of ECRC eligibility.

Conclusion

Based on the foregoing analysis, staff recommends that FPL should be allowed to recover the TPCCMP Disputed Costs, if prudently incurred, through the ECRC. The TPCCMP Disputed Costs are costs incurred after the inception of the ECRC and are not being recovered through another clause mechanism or base rates. Staff recommends that FPL is subject to new governmentally imposed requirements enacted after FPL's last test year on the date of filing in the 2016 ECRC proceeding. Whether the TPCCMP Disputed Cost activities are prudent is addressed in Issue 10B.

Issue 10B: Which costs, if any, associated with the June 20, 2016 Consent Order between FPL and the Florida Department of Environmental Protection and the October 2015 Consent Agreement between FPL and the Miami-Dade County Department of Environmental Resources Management (as amended by the August 15, 2016 Consent Agreement Addendum) were prudently incurred?

Recommendation: Staff recommends that FPL has prudently incurred the 2015 and 2016 TPCCMP Disputed Costs, and that FPL's request for 2017 and 2018 TPCCMP Disputed Costs are reasonable. However, FPL has not met its burden of proof that the \$1.5 million escrow deposit component is associated with the operation of the CCS for the direct benefit of FPL's customers. Staff notes that the 2017 and 2018 TPCCMP Disputed Costs and removal of the escrow payment are subject to true-up in future ECRC proceedings. (Ellis, Mtenga)

Position of the Parties

FPL: All costs associated with the 2015 CA, 2016 CO, and 2016 CAA are being prudently incurred. FPL has operated the CCS and interceptor ditch as required. No prior imprudence was demonstrated by any party. In asserting there was a knowable problem earlier, OPC is substituting its judgment for the judgement of the SFWMD which reviewed the same data as OPC and determined no action was warranted. In asserting the RWS is not needed or will be ineffective, OPC is substituting its judgement for the judgement of agencies that mandated the RWS and approved its design and modeled impacts.

OPC/FIPUG: The costs of the Retraction Well System are remedial in nature and should not be imposed on FPL's customers. FPL's management knew or should have known that its actions in operating the CCS were creating material harm to the Biscayne Aquifer. FPL's actions and inaction over time placed the Company in violation of law, and therefore, constitute imprudence, such that the costs of addressing the consequences of that imprudence are not appropriate costs that should be borne by customers.

SACE: None. Customers should not have to pay for FPL's mistakes. FPL knew or should have known that the CCS was causing an underground hyper-saline contamination plume spreading from its Turkey Point plant property by 1978, and certainly by 1992 at the latest. It failed to take any action to mitigate the impacts of the CCS on the Biscayne Aquifer (a G-II water source) until 2014. A prudent utility manager would have acted promptly and proactively well before 2014 to mitigate and / or remediate the growing hyper-salinity contamination plume outside the CCS boundary.

Staff Analysis:

Parties' Arguments

FPL

FPL states that it has prudently operated the CCS in compliance with its permits and applicable regulations and has cooperated with its environmental regulators throughout its service life. (FPL BR 11) FPL disputes that it has never violated any operational requirements in its environmental permits. (FPL BR 11) FPL argues that, pursuant to its regulatory requirements, that it engaged in increased monitoring that resulted in the determination that corrective action was required, and that it is now engaging in corrective actions. (FPL BR 11)

FPL contends that the TPCCMP Disputed Costs are prudently incurred and that it is inappropriate for the Intervenor Parties to second guess the requirements of its environmental regulators. (FPL BR 12) Further, FPL states that the environmental actions required by the CO, CA, and CAA have significant overlap and that they require similar monitoring and corrective actions. (FPL BR 12-13)

FPL argues that OPC failed to identify any imprudent management decisions that resulted in the TPCCMP Disputed Costs and that it operated the system in compliance with regulations, which is acknowledged by its environmental regulators. (FPL BR 13-14; EXH 47; EXH 13) FPL asserts that OPC's arguments are made with the benefit of hindsight using FPL's groundwater monitoring reports, that the COC acknowledges the concerns expressed by OPC and that its enhanced monitoring requirements were the result of its environmental regulators having insufficient data to determine what actions, if any, would need to be taken. (FPL BR 14-15)

FPL specifically defends the prudence of the Recovery Well System (RWS) and related costs as a well understood remediation method that was the result of consensus between FPL and its environmental regulators. (FPL BR 15-16) FPL argues that OPC's review of the RWS impacts on the hypersaline plume uses invalid assumptions and misinterprets the modeling done to analyze it. (FPL BR 16) FPL acknowledges that while uncertainty exists regarding the impact upon some layers of the Aquifer the operation of the RWS is subject to further review of its environmental regulators and should move forward. (FPL BR 16-17) FPL argues that the need for future modification of its corrective actions is appropriate and does not undermine a determination of prudence for those activities. (FPL BR 17) FPL asserts that regardless of the impact of the RWS, it is a specific requirement by the CO and CA and the associated modeling has been approved by DERM. (FPL BR 17; EXH 10; EXH 13)

OPC/FIPUG

OPC/FIPUG contends that the build-up of salt from the CCS was foreseeable and would occur absent the attention and intervention by FPL. (OPC/FIPUG BR 3) OPC/FIPUG argues that FPL failed to take actions on its own to prevent harm despite being required to monitor its wastewater and propose modifications to prevent such harm. (OPC/FIPUG BR 3-4) OPC/FIPUG faults FPL for following faulty advice from consultants and failing to follow recommendations to monitor trends and verify assumptions. (OPC/FIPUG BR 4) OPC/FIPUG contends that its observations are not hindsight, but are consistent with FPL's historic obligations under its environmental agreements. (OPC/FIPUG BR 4) OPC/FIPUG also argues that FPL failed to prudently plan and execute tasks to avoid foreseeable damage, and that the Commission in the past has held such failure as imprudent. (OPC/FIPUG BR 6-7)

OPC/FIPUG asserts that FPL broke the law by violating groundwater protection rules and its permit conditions causing damage to the aquifer, and is attempting to recover repair costs through customers for its violations. (OPC/FIPUG BR 10) OPC/FIPUG argues it is FPL's responsibility to pay for damages caused by its poor management of the situation that allowed the damage to occur. (OPC/FIPUG BR 12) OPC/FIPUG contends that costs to remediate harm are ineligible for cost recovery through the ECRC or any other mechanism based on FPL's ability to foresee harm, if not violations of law, caused by its operation of the CCS. (OPC/FIPUG BR 16)

OPC/FIPUG states that it is inappropriate for FPL to suggest that it relied upon environmental regulators to provide the requirement to act to address the damage caused by operation of the CCS. (OPC/FIPUG BR 19-20) OPC/FIPUG argues that because FPL was in possession of the data and did not put forward any testimony from a manager of the water monitoring regulatory program, it has failed to meet its burden of proof. (OPC/FIPUG BR 20) OPC/FIPUG asserts that given the three-year lapse of reporting by FPL, not resulting in any action by SFWMD, that the regulator was not actively monitoring the environmental situation, and therefore could not be relied upon to provide a requirement to act. (OPC/FIPUG BR 20) OPC/FIPUG argues that reliance on the regulator's guidance was at the Company's risk and inappropriate, given that the regulator relied upon the Company's data and analysis. (OPC/FIPUG BR 21)

OPC/FIPUG contends that the \$1.5 million escrow payment required by the CO is akin to a donation, and the funds may not be used towards mitigation of saltwater intrusion caused by FPL, and should therefore be ineligible for recovery. (OPC/FIPUG BR 22) Furthermore, OPC/FIPUG argues that land donations required by the CO, while not sought for recovery at this time, might result in a below market value transaction and that such losses should be reviewed in a future proceeding and not determined at this time. (OPC/FIPUG BR 22-23)

SACE

SACE asserts that FPL knew or should have known by 1992 that the operation of the CCS was causing an adverse impact to adjacent waters to the CCS. (SACE BR 1) SACE argues that FPL omitted information on the scale of the environmental impacts of the CCS from both SFWMD and the Commission. (SACE BR 1) SACE contends that FPL's imprudence caused the environmental compliance requirements from the CO and CA, and therefore it should be not allowed for cost recovery. (SACE BR 1-2)

SACE argues that FPL is imprudent by its inaction in that a reasonable utility manager would have attempted corrective actions prior to 2014, instead of sitting on information about the environmental damage which allowed it to increase in size and concentration. (SACE BR 4) SACE asserts that as late as 2010, FPL consultants provided a feasibility analysis that identified a solution that would have addressed the hypersaline conditions within three years, but failed to act. (SACE BR 6)

SACE argues that FPL intentionally misled regulators by failing to provide SFWMD with reports for several years, and when those reports were provided, failed to provide analysis regarding the effectiveness of its current actions in preventing environmental damage, instead attributed greater salinity to seasonal conditions. (SACE BR 7) SACE asserts that had environmental regulators been provided with a complete analysis of the monitoring data, FPL's Turkey Point Uprate Project might not have been approved, therefore not requiring the COCs FPL relies upon as an environmental requirement. (SACE BR 7) SACE argues that FPL intentionally misled the Commission regarding the potential for mitigation measures in the Commission's review of the TPCCMP. (SACE BR 8)

SACE alleges that the overall regulatory process associated with the CCS is poor, with FPL failing to provide monitoring data, using poor monitoring standards, and co-writing its AO which was deficient of charges. (SACE BR 8) SACE argues that there was no provision in any of its agreements with regulators that prevented FPL from altering the operation of the CCS, improving its monitoring and analysis, or proactively engaging its regulators regarding the need for corrective action. (SACE BR 9)

Analysis

Pursuant to Section 366.8255, F.S., the Commission “shall allow recovery of the utility’s prudently incurred environmental compliance costs.”¹⁵ Environmental compliance costs include “all costs or expenses incurred by an electric utility in complying with environmental laws or regulations.”¹⁶ As discussed in Issue 10A, FPL incurred the TPCCMP Disputed Costs in response to new environmental requirements.

Review Standard

Due to the varying time periods of when costs were or are to be incurred, the Commission must apply separate standards of review to the TPCCMP Disputed Costs. This is consistent with the Commission’s decision when it established the ECRC, noting:

We shall not make a specific finding of prudence for any activity included in Gulf’s petition at this time. There are several reasons for this. First, many of the costs included in Gulf’s petition are based on projections, and some of the projects have not yet been implemented. Thus, it is premature to establish prudence for a project that has not been completed. Second, the environmental cost recovery clause, like the fuel cost recovery clause, will be an on-going docket involving trueing-up projected costs. We retain jurisdiction in the fuel cost recovery clause because of the true-up provisions associated with fuel filings.¹⁷

FPL’s Witness Deaton testified in support of FPL’s actual costs for 2016, actual/estimated costs for 2017, and projected costs for 2018. (TR 261) As 2015 and 2016 represent actual expenditures by FPL, these are subject to a full prudence determination by the Commission at this time. However, 2017 and 2018 TPCCMP Disputed Costs cannot be determined as prudent or imprudent. The Commission instead subjects these costs to a reasonableness test for inclusion in clause recovery, with prudence to be determined in a future ECRC proceeding as part of the traditional true-up mechanism.

FPL is currently recovering costs through the ECRC factor that include the TPCCMP Disputed Costs pursuant to a stipulation approved by the Commission at the October 25, 2017 evidentiary hearing. Any adjustments or modifications the Commission makes pursuant to this recommendation should be addressed in a future ECRC proceeding. Staff notes the appropriate

¹⁵Section 366.8255, Florida Statutes at (2).

¹⁶*Id.* at (1)(d).

¹⁷Order No. PSC-94-0044-FOF-EI, issued January 12, 1994, in Docket No. 930613-EI, *In re: Petition to establish an environmental cost recovery clause pursuant to Section 366.8255, Florida Statutes by Gulf Power Company.*

allocation between O&M and capital is addressed separately in Issue 10D, and may also impact the annual amount for cost recovery.

Review of Activities

As discussed in Issue 10A, staff recommends that the CO, CA, and CAA introduce new regulatory requirements and are therefore eligible for potential recovery through the ECRC subject to a prudency review. As part of that review, the Commission must analyze the Company's activities leading up to CO, CA, and CAA. If prudently managed prior to the issuance of the CO, CA, and CAA, the Commission must then analyze whether FPL's expenditures for compliance are prudent and reasonable for recovery through the ECRC.

Actions Prior to New Requirements

The Intervenors suggest FPL was imprudent because it either knew or should have known about deteriorating environmental conditions, and that FPL should have taken action prior to the requirements of the CO, CA, and CAA. (TR 619; TR 621-622; TR 624; EXH 45) Staff reviews each of these claims below.

FPL's Witness Sole outlines FPL's compliance with its monitoring requirements since the start of the Company's operation of the CCS, including well and surface water monitoring and quarterly reports. (TR 291) Witness Sole outlines that monitoring data was provided to SFWMD on at least an annual basis. (TR 292) FPL's Witness Sole and OPC's Witness Panday agree that a three year gap in providing monitoring reports existed between 2005 and 2007, and was resolved in 2008. (TR 628; 714) Witness Sole observed that even with the information provided, SFWMD did not take additional action once the monitoring oversight had been corrected. (TR 714)

Both the DEP and DERM's NOV's do not identify attempts to mislead or failure to provide data as the source of the violation. The DEP's NOV ultimately identifies Rule 62-520.400, Florida Administrative Code, and DERM's NOV identifies Section 24-42(3) of the Code of Miami-Dade County, both of which address the water quality criteria. (EXH 12; EXH 9)

FPL's Witness Sole notes that with the exception of the NOV's received from the DEP and DERM, FPL has operated the CCS in compliance with its regulatory permits. (TR 414) OPC's Witness Panday agreed that at no time did SFWMD direct the utility to engage in consultation prior to its April 16, 2013 letter requesting consultation. (EXH 7) Staff observes that the data collected during those three years discussed above, was available to FPL's environmental regulators prior to SFWMD's letter requesting consultation. (EXH 7) The record indicates that the regulatory bodies responsible for water quality were sufficiently informed of the condition of the Biscayne Aquifer, and no evidence was provided that FPL withheld evidence or submitted false data.

OPC's Witness Panday argues that FPL should have known, based on its monitoring reports that showed hypersalinity outside the boundaries of the CCS as early as 1990, that the salinity within the CCS exceeded the maximum level proposed in the 1978 Dames and Moore Report. (TR 623; EXH 45) OPC's Witness Panday asserts that the long-term trends were unmistakable signs that damage was occurring. (TR 624; TR 625) OPC's Witness Panday alleges that by at least 1992, FPL should have known that the CCS was causing harm, but that FPL willfully or carelessly

ignored these results. (TR 624-628) OPC's Witness Panday alleges that by failing to follow its experts' advise to track salinity changes, FPL failed in its obligations. (TR 628)

FPL's Witness Sole argues that if FPL had acted without prior direction from an environmental regulator, that OPC or another party could have argued against cost recovery. (TR 743) Staff agrees with this argument because a clear governmental requirement is necessary for recovery of costs through the ECRC.

While the Intervenor argue that FPL should have engaged in action prior to the CO, CA, and CAA, no evidence was provided in the record for what these actions were and the potential alternatives or cost savings measures that FPL could or should have implemented prior to engaging in the activities that resulted in the TPCCMP Disputed Costs. As discussed above, the record indicates that FPL adhered to the monitoring requirements and was under the continuous oversight of FDEP, DERM, and SWFMD. No evidence was provided that FPL intentionally withheld or submitted false data to environmental regulators or the Commission. Based on our review of the record, staff recommends that given what FPL knew or should have known at the time, FPL was prudent in its actions regarding the historic operation of the CCS.

Actions to Comply with New Requirements

OPC's Witness Panday argues that FPL's RWS would have only a marginal effect on the hypersaline plume, and even when combined with freshening will not accomplish the retraction of the hypersaline plume to the boundaries of the CCS. (TR 639) FPL's Witness Sole defends the use of the RWS, stating it is a common remediation method and was only selected after evaluating other alternatives. (TR 717) As discussed in Issue 10A, the CO, CA, and CAA contained specific environmental requirements.

Staff notes that the CO at Section 20(c) states that FPL shall "[i]mplement a remediation project that shall include a recovery well system..." (EXH 13) Section 20(c) also contains several milestones leading to the construction of the RWS. (EXH 13) OPC's Witness Panday agreed that DERM had approved the use of the RWS as of May 2017. (TR 677) Regardless of the efficacy of the RWS, it is a requirement imposed by a governmental authority as part of FPL's remediation efforts.

As discussed in Issue 10A, the CO, CA, and CAA introduce a variety of new requirements for inspections, monitoring, data analysis, reporting, planning, construction, operation, and other activities associated with the operation of the CCS and remediation of environmental damage. The requirements also include a deposit of funds with the Florida Department of Financial Services and the conveyance of land to SFWMD. (TR 299; TR 302-303) Excluding the escrow deposit and the land conveyance discussed in more detail below, staff recommends that TPCCMP Disputed Costs comply with the requirements of FPL's continued monitoring under the Monitoring Plan or the new requirements of the CO, CA, or CAA. It is not the Commission's role to determine if the requirements of the CO, CA, or CAA are appropriate or will be effective at mitigating saltwater intrusion from the CCS. As discussed above, the record indicates that FPL adhered to the monitoring requirements and the associated continuous oversight of FDEP, DERM, and SWFMD. In addition, no evidence was presented that FPL intentionally withheld or provided false or misleading data to environmental regulators. Therefore, staff recommends that the actual TPCCMP Disputed Costs for 2015 and 2016 expenditures are prudent, and that FPL's

actual/estimated 2017 expenditures and projected 2018 expenditures are reasonable such that they are eligible for recovery through the ECRC.

Adjustments for Escrow and Land Conveyance

Section 23(c) of the CO requires FPL to deposit \$1.5 million in a Florida Department of Financial Services escrow account. (EXH 13) FPL projected payment of the \$1.5 million is to be completed in December 2017. (EXH 61) FPL's Witness Sole states in cross-examination that these funds may be used by the DEP to address projects that do not have any relation to FPL's CCS or the related hypersaline plume. (TR 459-460) Witness Sole also states that the \$1.5 million is not a fine or administrative penalty. (TR 460) OPC/FIPUG's argument is that FPL failed to meet its burden of proof that the \$1.5 million deposit is a reasonable cost that will directly benefit FPL's customers. While staff acknowledges that the \$1.5 million escrow deposit is a requirement of the CO, it was established that the \$1.5 million component is not associated with the operation of the CCS for the benefit of FPL's customers. Staff agrees with OPC/FIPUG's argument that FPL failed to meet its burden of proof for the recovery of the \$1.5 million.

As to the land conveyance, Section 23(b) of the CO requires FPL to provide land to SFWMD if requested. (EXH 13) OPC/FIPUG's argument is that approval of any such transaction should be withheld until a later review. Staff observes that the Commission is not approving or disapproving cost recovery for this component of the CO as part of this docket. Staff agrees with OPC/FIPUG's argument, and recommends that the appropriate accounting review of this land transaction should be conducted during the Company's next base rate proceeding.

Conclusion

Staff recommends that FPL has prudently incurred the 2015 and 2016 TPCCMP Disputed Costs, and that its request for 2017 and 2018 TPCCMP Disputed Costs are reasonable. The only exception to recovery should be the \$1.5 million escrow payment, which should be disallowed as the Company has not met its burden of proof that the funds would be used to directly benefit FPL's customers. Staff notes that the 2017 and 2018 TPCCMP Disputed Costs and removal of the escrow payment are subject to true-up in future ECRC proceedings.

Issue 10C: Should the costs FPL seeks to recover in this docket be considered part of its Turkey Point Cooling Canal Monitoring Plan project?

Recommendation: Yes. Based on the TPCCMP Approval Order, the TPCCMP Disputed Costs should be considered part of the existing TPCCMP project. The costs FPL is requesting to recover are the result of the anticipated evolution of the original TPCCMP program. (Ellis, Mtenga)

Position of the Parties

FPL: Yes. Requirements for the TPCCMP project have progressed from monitoring to implementing corrective actions. At the time the TPCCMP project was approved for recovery through the ECRC in 2009, FPL made clear that such a progression was a potential outcome. As demonstrated in the 2009 Order, it was also clear that the scope of the projected extended to historic impacts of the CCS generally – not just those related to the EPU (Extended Power Uprate) project. FPL provided testimony at key project expansion points and reflected incremental costs for the expansion of FPL’s compliance activities each year in its ECRC filings.

OPC/FIPUG: No.

SACE: No. FPL omitted material information on its exposure to significant environmental corrective action and costs related to its operation of the CCS. FPL knew that the CCS-caused hyper-saline plume had pushed the saltwater interface well west of the boundary of the CCS in 2009. In fact, the Company’s consultants started developing remediation plans months after the Commission approved the project. Regardless, recovery of costs should not be allowed because FPL’s failure to mitigate the impact of CCS-caused hyper-saline plume before 2014 was imprudent.

Staff Analysis:

Parties’ Arguments

FPL

FPL asserts that the Commission, in its Approval Order, acknowledged the potential for it to include corrective actions. (FPL BR 19-20, 22) FPL argues that in its request for the Monitoring Program, it included the Conditions of Certification IX and X which included specific language that would require FPL to engage in corrective action. (FPL BR 20) FPL states that its monitoring activities in the Monitoring Program directly lead to information that determined the need for additional actions were necessary by its environmental regulators. (FPL BR 20-21) FPL notes that similar activities to the TPCCMP Disputed Costs were approved as part of the 2015 ECRC Docket, specifically water delivery projects and sediment management. (FPL BR 21) FPL argues that while the Approval Order states that “the eligibility of ECRC recovery for any similar project will depend on individual circumstances and shall, therefore, be considered on a case-by-case basis,” that this is a reference to a potential disagreement of the location of recovery, through the ECRC or through the Nuclear Cost Recovery Clause, not that costs would be unrecoverable in general. (FPL BR 22-23)

OPC/FIPUG

OPC/FIPUG contends that the Commission's Order approving the Monitoring Program was strictly limited to monitoring impacts associated with the Turkey Point Uprate Project. (OPC/FIPUG BR 24) OPC/FIPUG argues that the scale of the TPCCMP Disputed Costs compared to Monitoring Program costs requires review independent of that conducted of the TPCCMP in 2009. (OPC/FIPUG BR 24-25) Further, OPC/FIPUG asserts that the Company did not disclose the full scope of the remediation projects, and that when the Company agreed to the CA, CAA, and CO the environmental regulators did not approve specific actions such as the RWS system. (OPC/FIPUG BR 25) OPC/FIPUG argues that the TPCCMP Disputed Costs are not related to the Monitoring Program and inclusion in the Monitoring Program is an attempt to evade scrutiny and the Company's burden of proof that costs are reasonable and prudent. (OPC/FIPUG BR 25) OPC/FIPUG notes that a change of scope has been considered a new activity in prior cases, and that therefore the TPCCMP Disputed Costs constitute a new program, with a separate evaluation necessary for it to be recovered. (OPC/FIPUG BR 26) OPC/FIPUG contends that the Approval Order addressed monitoring for the Turkey Point Uprate Project only, and does not mention remediation, correction, or corrective action. (OPC/FIPUG BR 26-27) OPC/FIPUG argues that the Monitoring Program should not include costs to halt and retract the hypersaline plume as they are unassociated with the Turkey Point Uprate Project. (OPC/FIPUG BR 27) OPC/FIPUG notes that the Approval Order states that new projects would be considered on a case-by-case basis. (OPC/FIPUG BR 24, 29)

SACE

SACE alleges that FPL was aware or should have been aware that measures would be required to address the hypersaline plume prior to the Commission's approval of the TPCCMP. (SACE BR 24) SACE argues that the Company failed to mention the potential magnitude of costs that would be associated with the CCS. (SACE BR 25) SACE contends that the Commission approved the TPCCMP with incomplete information due to intentional omissions by the Company. (SACE BR 35)

Analysis

Staff agrees with Witness Sole's statement that the TPCCMP Approval Order specifically included discussion of the potential for mitigation costs. (TR 308-309) The TPCCMP Approval Order included a stipulation between FPL, OPC, FIPUG, and the Federal Executive Agencies (FEA), in which OPC, FIPUG, and FEA took no position on the approval of the program. Specifically, the TPCCMP Approval Order states, in relevant part:¹⁸

These activities will be incremental to FPL's current monitoring efforts. . . . The CCM Plan has been designed to focus on the objectives as they relate to the cooling canal system and the Uprate Project and those resources that may be affected adjacent to the cooling system. . . . [R]eports will be submitted every six months during the pre Uprate period and initially during the post Uprate period. . . . The potential additional measures that might be

¹⁸Order No. PSC-09-0759-FOF-EI, issued November 18, 2009, in Docket No. 090007-EI, *In re: Environmental cost recovery clause*.

required include . . . the development and application of a 3-dimensional coupled surface and groundwater model to further assess impacts of the Uprate Project on ground and surface waters . . . **[and] mitigation measures to offset such impacts of the Uprate Project necessary to comply with State and local water quality standards . . .**

(emphasis added)

Staff notes that the bold portion of the text above is also a quotation from the Conditions of Certification, Section X, subsection D.2. (EXH 6, p. 26)

OPC, FIPUG and SACE are correct to note that the costs for O&M and capital have increased for the Monitoring Plan. (EXH 79). Staff recommends that an increase in costs itself is not a change of scope of a project. Regarding OPC and FIPUG's assertion that the TPCCMP is specifically referencing the Turkey Point Uprate Project and does not mention remediation, correction, or corrective action, staff notes that the Approval Order stated the following:

Because the costs for the TP-CCMP Project are predominantly O&M expenses that will continue for an uncertain duration, and because the water-quality issues the Project is being undertaken to address relate to operation of the Turkey Point **plant as a whole and not just the TP Nuclear Uprate**, FPL should be allowed to recover the costs associated with the TP-CCMP Project through the ECRC.¹⁹

(emphasis added)

As a result, the Approval Order considered the concern brought forth by OPC and FIPUG, and addressed the concern directly by providing that the Monitoring Program is inclusive of the plant as a whole. (EXH 74) As stated by FPL's Witness Sole, environmental compliance programs evolve based upon information that determines the next appropriate action. (TR 310) The costs FPL is requesting to recover are the result of the anticipated evolution of the original Monitoring Program. The Intervenor's concerns regarding prudence of the TPCCMP Disputed Costs are addressed in Issue 10B.

Conclusion

Based on the Approval Order, the TPCCMP Disputed Costs should be considered part of the existing Monitoring Program. The costs FPL is requesting to recover are the result of the anticipated evolution of the original Monitoring Program.

¹⁹*Id.* at 13.

Issue 10D: Is FPL’s proposed allocation of costs associated with the June 20, 2016 Consent Order between FPL and the Florida Department of Environmental Protection and the October 2015 Consent Agreement between FPL and the Miami-Dade County Department of Environmental Resources Management (as amended by the August 15, 2016 Consent Agreement Addendum) between O&M and capital appropriate? If not, what is the correct allocation of costs between O&M and capital?

Recommendation: Yes. Staff recommends that the RWS and related activities perform both remediation and containment functions. Consistent with accounting principles, remediation expenses should be recovered as O&M, and containment should be recovered as capital. Based on the record, staff recommends that the Company’s proposed allocation of costs is appropriate, and should be 74 percent containment (capital) and 26 percent remediation (O&M) for the RWS and related activities. (Ellis, Mtenga, Smith)

Position of the Parties

FPL: Yes. FPL’s proposed allocation between O&M and capital appropriately identifies the extent to which the RWS will achieve retraction of the hypersaline plume back to the FPL CCS boundaries (O&M) versus containment of the hypersaline plume within the FPL CCS boundaries (capital). Capitalization will appropriately spread the cost recovery of the asset over the expected life of the asset.

OPC/FIPUG: No. The costs of the Retraction Well System are remedial in nature and should not be imposed on FPL’s customers. FPL’s management knew or should have known that its actions in operating the CCS were creating material harm to the Biscayne Aquifer. FPL’s actions and inaction over time placed the Company in violation of law, and therefore, constitute imprudence. Thus, the costs of addressing the consequences of that imprudence are not properly costs that should be borne by customers.

SACE: No. FPL shareholders should not be permitted to benefit from FPL’s mistakes. FPL argues that its Recovery Well System is preventative. Yet, the requirements stemming from the Consent Order and Consent Agreement are not preventative. The term “abatement” as used in the Consent Order means to “minimize.” The Recovery Well System, that is intended to “remediate” will not prevent hyper-salinity in deeper layers from migrating westward. GAAP accounting principles are permissive on allocating costs to capital investment. Regardless, recovery of costs should not be allowed because FPL’s failure to mitigate the impact of CCS-caused hyper-saline plume before 2014 was imprudent.

Staff Analysis:

Parties’ Arguments

FPL

FPL argues that the RWS must be allocated to both capital and O&M because it serves both containment and remediation functions. (FPL BR 24) FPL contends that it used a conservative approach based on Tetra Tech’s analysis of the salt mass removal to produce a 74 percent prevention (capital) and 26 percent remediation (O&M) allocation of costs for the RWS project. (FPL BR 25) FPL proposes that its recovery of capital for prevention or mitigation expenses is appropriate and similar to the treatment of emissions control equipment. (FPL BR 25) FPL states

that a volumetric approach would result in a higher capital percentage. (FPL BR 25-26) FPL argues that OPC's Witness Panday's suggested approach of revisiting the allocation periodically is inappropriate and not consistent with Generally Accepted Accounting Principles (GAAP). (FPL BR 26)

OPC/FIPUG

OPC/FIPUG argues that the consideration of allocation between expense and capital is not appropriate, as it relates to the Monitoring Program. (OPC/FIPUG BR 28) OPC/FIPUG assert that FPL's analysis shows that under the Company's proposed remediation methods, FPL will be unable to complete its remediation efforts within the 10 year period required by the CO. (OPC/FIPUG BR 29-30, 35) OPC/FIPUG argues that FPL is ignoring the Company's own models to ignore the impacts of the CCS on the deepest portions of the Aquifer. (OPC/FIPUG BR 32-34)

OPC/FIPUG contends that the proposed freshening activities were more effective than the RWS towards remediation for the initial ten years of operation. (OPC/FIPUG BR 31) OPC/FIPUG argues that freshening activities eliminate the need for containment except in the deepest layers of the Aquifer. (OPC/FIPUG BR 37) OPC/FIPUG then contends that the RWS will be ineffective because it will not adequately impact the Aquifer's upper or lower layers, and that it is an imprudent activity that should be disallowed. (OPC/FIPUG BR 31) In contrast, OPC/FIPUG asserts that FPL's proposed RWS would serve a remediation function for the first ten years of its operation, followed by a potential ten years as a containment function. (OPC/FIPUG BR 36)

OPC/FIPUG argues that compliance with the CO merely resolves FPL's prior Notice of Violation with DEP. (OPC/FIPUG BR 36) OPC/FIPUG suggests that therefore the containment phase of FPL's remediation project should be considered a separate project from the remediation project, and not recoverable from customers during the first ten years of operation. (OPC/FIPUG BR 37)

SACE

SACE argues that the Commission cannot approve cost recovery if a utility is imprudent. (SACE BR 26) SACE alleges FPL was imprudent in its actions and inactions with regards to the Turkey Point CCS that resulted in the TPCCMP Disputed Costs. (SACE BR 31) SACE also asserts it is inappropriate for FPL to capitalize any of the TPCCMP Disputed Costs as they will fail to prevent or retract the hypersaline plume in deeper layers of the aquifer. (SACE BR 36)

Analysis

As noted in Issue 10B, the RWS is required by the CO with DEP. (EXH 13, p. 8) As detailed by Witness Sole, FPL is also required by the CO to implement the Nutrient Management Plan and a Thermal Efficiency Plan, and construct an Upper Floridian Aquifer well system to provide freshening water. (TR 302) FPL asserts that all of these functions serve to decrease salinity entering the Biscayne Aquifer from the CCS and result in both remediation and containment. (EXH 61; ROG 62 Attachment 1) Witness Ferguson testified that the RWS serves both a remediation and preventive function. (TR 561-562) Based on the record, staff recommends that the RWS and related systems simultaneously serve both the function of containment of the

hypersaline plume within the boundaries of the CCS and retraction or remediation of the hypersaline plume outside the boundaries of the CCS. Therefore, costs associated with these functions should be allocated to both containment and remediation activities. The CO also requires the completion of projects associated with Barge Canal and Turkey Point Canal. (EXH 13, p.10) FPL asserts that these projects are totally allocated to containment. (EXH 61; ROG 62 Attachment 1) FPL Witness Ferguson further stated that all of the costs associated with the Barge Canal Turning Basin Back Fill should be capitalized because that project is preventive in nature. (TR 563)

Allocation Percentage

Both FPL's Witness Ferguson and OPC's Witness Panday rely upon a model of salt mass removal developed by Tetra Tech to determine the appropriate cost allocation between capital and O&M. (TR 562, TR 649) The Tetra Tech model attempts to determine the total mass of salt removed from various layers of the Aquifer, and allocates them to remediation or containment based on whether the salt mass originated inside or outside the boundaries of the CCS. (EXH 21) The primary difference in analysis is the timeframe used. FPL Witness Ferguson asserts that the appropriate period to consider is year 20, the expected life of the RWS, which would result in a 74 percent containment, 26 percent remediation allocation. (TR 562) OPC Witness Panday argues instead for year 11, when the hypersaline mass is anticipated to be fully removed, which would result in a 65 percent containment, 35 percent remediation allocation. (TR 651) As noted by FPL's Witness Anderson, the use of 11 years does not acknowledge that the RWS will be operating in a containment function for the remaining nine years of its operational life. (TR 859)

OPC's Witness Panday testified that the allocation between remediation and prevention should be reevaluated on a more regular basis. (TR 652) OPC Witness Panday testified that this is particularly true after the first two years of operating the RWS. (TR 652) For the initial two-year period, OPC Witness Panday proposes an alternative of using the first two years of the Tetra Tech model to allocate 41 percent to containment and 59 percent to remediation. (TR 652) Staff observes that OPC/FIPUG does not support the use of this methodology in its brief, but rather an approach by which all activities are categorized as either remediation or containment until the end of all remediation activities.

Accounting Treatment

Accounting Standards Codification 410-30-25-16 to 18 (ASC 410-30) describes the conditions that must be met in order to capitalize all or a portion of the costs related to environmental contamination treatment. (TR 560) It states that the costs can be capitalized if "the costs mitigate or prevent environmental contamination that has yet to occur and that otherwise may result from the future operation or activities." (TR 560) FPL Witness Ferguson explained that costs related to mitigation or prevention can be capitalized and costs related to remediation should be expensed. (TR 560)

OPC's Witness Panday did not testify as to whether the costs should be capitalized or expensed. However, OPC Witness Panday did suggest reevaluating the allocation between expense and capitalization after two years of operation. (TR 652) FPL Witness Ferguson testified that OPC Witness Panday's proposed treatment is not consistent with GAAP or Federal Energy Regulatory Commission (FERC) Uniform System of Accounts (USOA) because it could change the

historical cost of an asset already placed into service. (TR 823) FERC USOA account 101 A specifically states:

This account shall include the original cost of electric plant, included in accounts 301 to 399, prescribed here-in, owned and used by the utility in its electric utility operations, and having an expectation of life in service of more than one year from date of installation, including such property owned by the utility but held by nominees.²⁰

Moreover, neither OPC Witness Panday nor any other Intervenor offered any alternative accounting treatment for this project that is consistent with GAAP.

Based on the evidentiary record, staff recommends the accounting treatment for the costs associated with the RWS and Barge Canal Turning Basin Back Fill Project proposed by FPL is appropriate. Whether prudently incurred remediation costs are appropriate to recover from customers is addressed in Issue 10B.

Conclusion

Staff recommends that the RWS and related activities perform both remediation and containment functions. Consistent with accounting principles, remediation expenses should be recovered as O&M, and containment should be recovered as capital. Based on the record, staff recommends that the Company's proposed allocation of costs are appropriate, and should be 74 percent containment (capital) and 26 percent remediation (O&M) for the RWS and related activities.

²⁰*Code of Federal Regulations Conservation of Power and Water Resources*, Office of Federal Register National Archives and Records Administration, 2012, p. 395.

Issue 10E: How should the costs associated with the June 20, 2016 Consent Order between FPL and the Florida Department of Environmental Protection and the October 2015 Consent Agreement between FPL and the Miami-Dade County Department of Environmental Resources Management (as amended by the August 15, 2016 Consent Agreement Addendum) be allocated to the rate classes?

Recommendation: TPCCMP Disputed Costs should be allocated pursuant to the Commission's Order No. PSC-09-0759-FOF-EI. (Ellis, Mtenga)

Position of the Parties

FPL: Costs associated with the 2015 CA, 2016 CO, and 2016 CAA should be allocated in the same manner as all other environmental cost recovery amounts approved for recovery under the TPCCMP project.

OPC/FIPUG: No Position.

SACE: No customer, regardless of class, should have to pay for FPL's mistakes. FPL knew or should have known that the CCS was causing an underground hyper-saline contamination plume spreading from its Turkey Point plant property by 1978, and certainly by 1992 at the latest. It failed to take any action to mitigate the impacts of the CCS on the Biscayne Aquifer (a G-II water source) until 2014. A prudent utility manager would have acted promptly and proactively well before 2014 to mitigate and or remediate the growing hyper-salinity contamination plume outside the CCS boundary.

Staff Analysis:

Parties' Arguments

FPL

FPL argues that the Commission established in the appropriate allocation methodology for the TPCCMP Disputed Costs in its Order No. PSC-09-0759-FOF-EI. (FPL BR 27)

OPC and FIPUG

OPC and FIPUG did not present arguments regarding this issue.

SACE

SACE argues that the Commission cannot approve cost recovery if a utility is imprudent. (SACE BR 26) SACE alleges the Company was imprudent in its actions and inactions with regards to the Turkey Point CCS that resulted in the TPCCMP Disputed Costs. (SACE BR 31)

Analysis

If the Commission approves recovery of costs in the prior issues, the Commission must determine how these costs will be allocated to the rate classes. No party presented arguments regarding how this allocation should occur for the TPCCMP Disputed Costs, except that the Intervenor argued that no costs are prudent, and therefore none would be available for allocation. Therefore, staff notes that the only allocation methodology available is that given in the Commission's prior Order No. PSC-09-0759-FOF-EI approving the TPCCMP. It states:

F. We approve the following stipulation regarding how the costs associated with the TP-CCMP Project shall be allocated to the rate classes:

Capital costs for the TP-CCMP Project shall be allocated to the rate classes on an average 12 CP demand and 1/13th energy basis. O&M costs shall be allocated on an energy basis.

Conclusion

TPCCMP Disputed Costs should be allocated pursuant to the Commission's Order No. PSC-09-0759-FOF-EI.