

State of Florida



Public Service Commission

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

DATE: September 23, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Economic Regulation (Breman)
Office of the General Counsel (Stern)

RE: Docket No. 040472-EI – Petition for approval of cost recovery for new environmental program necessitated by U.S. Environmental Protection Agency's adoption of rules establishing new requirements for cooling water intake structures at existing electric power generating facilities under Section 316(b) of Clean Water Act, by Progress Energy Florida, Inc.

AGENDA: 10/05/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\040472.RCM.DOC

Case Background

On May 18, 2004, Progress Energy Florida, Inc., (“PEFI” or “Company”) petitioned for cost recovery, through the Environmental Cost Recovery Clause (“ECRC” or “statute”), of all costs incurred to comply with new rules affecting cooling water intake at power plants. In general, the rules require a reduction in the mortality of aquatic organisms by cooling water intake structures. The compliance costs fall into two categories: 1) costs to prepare a Comprehensive Demonstration Study that will be used to determine the design, operational, or restoration activities needed to reduce aquatic organism mortalities; and, 2) costs to implement any new design, operational, or restoration activities needed.

The rule changes were adopted by the U.S. Environmental Protection Agency (“EPA”) pursuant to Section 316(b) of the Clean Water Act, and will be codified in 40 CFR Parts 9, 122,

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123, 124, and 125. The effective date of the new rules is September 7, 2004, however, the new rules have been challenged.

In Docket No. 040582-EI, In Re: Petition for approval of recovery through environmental cost recovery clause of costs associated with Clean Water Act section 316(b) Phase II rule project, by Florida Power & Light Company, Florida Power & Light Company (“FPL”) also filed a petition for ECRC treatment of its Comprehensive Demonstration Study pursuant to the same new rules. FPL’s petition differs from PEFI’s petition in that FPL does not seek ECRC treatment of the costs of implementing any activities that are suggested as necessary by the results of the Comprehensive Demonstration Study while PEFI’s petition does.

Section 366.8255, Florida Statutes, the ECRC, gives the Commission the authority to review and decide whether a utility's environmental compliance costs are recoverable through an environmental cost recovery factor. Electric utilities may petition the Commission to recover projected environmental compliance costs required by environmental laws or regulations. Section 366.8255(2), Florida Statutes. Environmental laws or regulations 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.” Section 366.8255(1)(c), Florida Statutes. If the Commission approves the utility's petition for cost recovery through this clause, only prudently incurred costs may be recovered. Section 366.8255(2), Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission approve PEFI's petition for cost recovery of the Comprehensive Demonstration Study and the costs to implement any new design, operational, or restoration activities needed to reduce mortality of fish and shellfish pursuant to new federal standards for cooling water intake structures?

Recommendation: Yes in part, and no in part. The program is eligible for recovery through the ECRC and any prudently incurred costs for the Comprehensive Demonstration Study are appropriate for recovery through the ECRC consistent with the Commission's offsetting policy established in Order No. PSC-00-1167-PAA-EI. However, it is premature to approve cost recovery for implementing any new design, operational, or restoration activities because projections of those costs cannot be supplied at this time. If the new EPA rules are stayed, PEFI should submit a copy of the stay to the Commission within two weeks of its issuance. (BREMAN, STERN)

Staff Analysis: Effective September 7, 2004, EPA established new performance standards for reducing the mortality of fish and shellfish associated with cooling water intake structures at certain existing large electric generating plants. The plants subject to the new rules must have commenced construction on or before January 17, 2002, and be designed to withdraw at least 50 million gallons per day from waters of the United States. The EPA estimates 22 existing power plants in Florida will be affected by the new performance standards. In Florida, the Department of Environmental Protection ("DEP") will be incorporating the new performance requirements into utilities' National Pollutant Discharge Elimination System ("NPDES") permits as the permits are renewed.

PEFI's affected power plants are shown in Table 1 below. Pursuant to the requirements of the new national standard, PEFI must first complete a Comprehensive Demonstration Study ("CDS"). The purposes of the CDS are to: 1) determine a quantified baseline of impact and derive performance standards; 2) gauge the current performance of the facility against the performance standards; and, 3) develop and design appropriate measures for compliance if the facility fails to meet the performance standards. Thus, the CDS will provide PEFI with the necessary information to determine the most efficient and cost-effective manner for compliance with the new environmental regulation. The DEP will use PEFI's CDS results as a basis for evaluating compliance and issuance of future NPDES permits for each plant. As noted in Table 1, PEFI is currently in an NPDES permit renewal effort for Crystal River South and the Suwannee River Plant permit expires in July 2005. The DEP will be implementing the new national standard at those sites, which may result in changes from the projections included in PEFI's petition. Each renewed NPDES permit is expected to codify additional PEFI compliance requirements that are currently unknown.

At paragraph 9 of its Petition, PEFI makes clear that it intends to seek ECRC treatment of the CDS and the costs of implementing any activities that result from the CDS. At this time, PEFI's petition only includes projections associated with the CDS because any other activities that may be necessary rely on the results of the CDS. PEFI did not and cannot provide projections of any post-CDS costs because the results of the CDS will determine the activities that are needed.

The ECRC requires a utility to supply projected environmental compliance costs in its petition. Section 366.8255(2), Florida Statutes. The Commission's policy in this matter was clearly stated when the Commission denied a utility's request to reserve the right to submit expenditures before costs were projected. Order No. PSC-96-1171-FOF-EI, issued September 18, 1996, in Docket No. 960007-EI, In Re: Environmental Cost Recovery Clause. Consequently, only the projected costs incurred in preparing the CDS can be approved for recovery at this time.

Costs for environmental activities to be passed through the ECRC must first be offset against any allocation for the same in base rates. The ECRC requires that "any costs in base rates may not also be recovered in the environmental cost recovery clause." Section 366.8255(5), Florida Statutes. Thus, when a utility allocates costs for environmental studies in base rates and that allocation goes unused, the costs for any new studies passed through the ECRC should be offset by the unused portion of the allocation in base rates. See Order No. PSC-00-1167-PAA-EI, issued June 27, 2000, in Docket No. 991834-EI, In Re: Petition for approval of deferred accounting treatment for the Gulf Coast Ozone Study Program by Gulf Power Company. In that proceeding Gulf questioned the practice of offsetting, but the Commission determined that the practice:

fairly balances the interests of the ratepayers and shareholders and is consistent with Section 366.8255, Florida Statutes, which provides that '[a]n adjustment for the level of costs currently being recovered through base rates or other rate-adjustment clauses must be included in the filing.'

A total amount of \$287,500 per year for environmental studies is included in PEFI's current base rates set by Order No. PSC-02-0655-AS-EI, issued May 14, 2002, in Docket No. 000824-EI, In Re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light. As stated in Table 1, the CDS is eligible for recovery through base rates or the ECRC, thus, creating the potential for double recovery unless an adjustment is made. PEFI's petition includes an adjustment to ensure double recovery of costs for environmental studies does not occur. The proposed adjustment is consistent with Order No. PSC-00-1167-PAA-EI. PEFI requests recovery of only those annual costs of the CDS in excess of the amount included in current base rates reduced by the amount actually spent on environmental studies as an operating expense during the relevant ECRC recovery period. If the amount reflected in surveillance reports for expenditures on environmental studies during the relevant ECRC recovery period exceeds the amount included in current base rates, there shall be no adjustment to the amount of expenses associated with CDS environmental studies for recovery through the ECRC.

Table 1
 PEFI's Environmental Studies, Permits, and Costs

PEFI's Affected Power Plants	Prior Impingement & Entrainment Studies		NPDES Permit Expiration date	Estimated Cost for the Comprehensive Demonstration Study 7/04 – 12/05 (See note)	Annual Costs for Environmental Studies not in clauses
	Year	Cost			
Anclote	1995	\$226,500	September 2004	\$641,000 primarily environmental studies through 12/2005	\$287,500 allowance in current base rates 2004 budget level is \$0
Crystal River South	1983-84	\$490,000	In renewal process		
Crystal River North			December 2004		
Suwannee River	None	\$0	July 2005		
Bartow	1985	N/A	May 2009		

Note: The projected cost for the CDS activity through 2005 is based on past efforts and PEFI internal expert opinion.

Since PEFI filed its Petition, the new EPA rules have been challenged by six states, several utilities, and several environmental groups. The challenge is currently pending before the U.S. Court of Appeals, Ninth Circuit. Under federal rulemaking procedures, a final rule is open to challenge for a period of 120 days starting two weeks after the date it is published in the Federal Register. The 120 day period ends on November 22, 2004. However, the rule becomes effective, unless stayed by the EPA or a court, 60 days after publication in the Federal Register. The 60 day period ended on September 7, 2004. To request a stay from a court, the stay must have first been denied by the EPA. The EPA has denied requests for stays from several parties in this case. At the time this recommendation was filed, no stay had been requested from the court, however there is no deadline for requesting a stay. It is impossible to know at this time whether the rule will be stayed, whether the stay will apply to the provisions on the CDS, or how long a stay would be in effect.

At this time, there is no stay and the rule became effective on September 7, 2004, so the CDS is eligible for cost recovery through the ECRC. The costs projected for the activities appear reasonable. Given that rule challenges have been filed by parties with opposing interests, and that a stay may yet be requested, it is up to the utility to decide if it is prudent to start spending money on the program under these circumstances. As always, the issue of prudence will be decided at the annual November hearing on the ECRC. If a stay is issued, PEFI should file a copy of it with the Commission within two weeks of its issuance. The manner in which the stay will be handled procedurally and substantively will be addressed at that time.

Conclusion

PEFI has shown that its CDS activity is legally required to comply with a governmentally imposed environmental regulation. PEFI provided information explaining its proposed CDS activity and projected costs through 2005. PEFI included an adjustment for the level of costs currently being recovered through its bases rates for environmental studies. It is premature to approve cost recovery for implementing any new design, operational, or restoration activities because projections of those costs cannot be supplied at this time. If a stay is issued, PEFI should file it with the Commission within two weeks of its issuance.

In light of the above, staff believes prudently incurred costs for the Comprehensive Demonstration Study are appropriate for recovery through the ECRC consistent with the Commission's offsetting policy established in Order No. PSC-00-1167-PAA-EI.

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Issue 2: Should this docket be closed?

Recommendation: Yes, this docket should be closed upon issuance of a Consummating Order unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the proposed agency action. (STERN)

Staff Analysis: If no timely protest to the proposed agency action is filed within 21 days, this docket should be closed upon the issuance of the Consummating Order.