

State of Florida



## Public Service Commission

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

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**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. 040582-EI – 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.

**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\040582.RCM.DOC

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### Case Background

On June 21, 2004, Florida Power & Light Company (“FPL” or “Company”) petitioned for cost recovery through the Environmental Cost Recovery Clause (“ECRC” or “statute”), for a Comprehensive Demonstration Study to determine the effect of cooling water intake structures on aquatic life. FPL asserts the Comprehensive Demonstration Study is necessary to address rule changes adopted by the U.S. Environmental Protection Agency (“EPA”) pursuant to Section 316(b) of the Clean Water Act. The new rules establish requirements to reduce the mortality of aquatic organisms by cooling water intake structures at certain existing large power plants, and will be codified in 40 CFR Parts 9, 122, 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. 040472-EI, In Re: 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., Progress Energy Florida, Inc. ("PEFI") filed a petition for ECRC treatment of all costs incurred to comply with 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 changes suggested 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 FPL's petition for the Comprehensive Demonstration Study as a new activity for cost recovery through the ECRC?

**Recommendation:** Yes. 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. If a stay of the new rules is issued, then FPL should submit a copy of the stay to the Commission within two weeks of its issuance. (BREMAN, STERN)

**Staff Analysis:** Effective September 7, 2004, the EPA established new performance standards for reducing the mortality of fish and shell fish 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.

FPL's affected power plants are shown in Table 1 below. Pursuant to the requirements of the new rules, FPL must first complete a Comprehensive Demonstration Study ("CDS"). The purpose of the CDS is 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 falls short of meeting the performance standards. Thus, the CDS will provide FPL with the necessary information to determine the most efficient and cost-effective manner to meet the new performance standards. The DEP will use FPL's CDS results as a basis for evaluating compliance and issuance of future NPDES permits for each plant. The expiration dates of FPL's current NPDES permits are noted in Table 1. Each renewed NPDES permit is expected to codify additional FPL compliance requirements that are currently unknown.

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 to be 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 \$673,000 per year for environmental studies is included in FPL's current base rates which were set by Order No. PSC-02-0501-AS-EI, issued April 11, 2002, in Docket No. 001148-EI, In Re: Review of the retail rates of Florida Power & Light Company.

For 2004, FPL budgeted \$704,000 for environmental studies that will not be recovered through the ECRC. This amount is \$31,000 in excess of environmental study costs currently recovered in base rates. Thus, allowing FPL recovery of costs through the ECRC for the 2004 CDS activity is consistent with Order No. PSC-00-1167-PAA-EI because FPL is incurring costs for environmental studies in excess of the amount included in current base rates. Consequently, FPL's 2004 CDS expense is eligible for recovery through the ECRC without any adjustments. Staff notes that, consistent with Order No. PSC-00-1167-PAA-EI, a future FPL filing may include a downward adjustment in the event that FPL's annual expenditures on environmental studies decline below the amount included in current base rates during the relevant ECRC recovery period.

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

FPL's Affected Power Plants	Prior Impingement & Entrainment Studies		NPDES Permit Expiration date	Estimated Cost for the Comprehensive Demonstration Study 7/04 – 12/04 (See note)	Annual Costs for Environmental Studies not in clauses
	Year	Cost			
St. Lucie	1983	N/A	June 2004 awaiting Action	\$500,000 Proposals for Information Collection activity at three sites	\$ 673,000 allowance in current base rates  2004 budget level is \$704,000
Cutler	1975	N/A	February 2005		
Sanford	1976	N/A	August 2006		
Cape Canaveral	1980	N/A	August 2003 awaiting Action	Not scheduled	
Port Everglades	1976	N/A	March 2008	Not scheduled	
Ft. Lauderdale	1976	N/A	June 2008	Not scheduled	
Riviera	1976	N/A	August 2008	Not scheduled	
Ft. Myers	1976	N/A	November 2008	Not scheduled	

Note: The projected cost for the CDS activity through 2004 is based on past efforts and FPL internal expert opinion.

Since FPL 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, FPL 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

FPL has shown that its CDS activity is legally required to comply with a governmentally imposed environmental regulation. FPL provided information explaining its proposed CDS activity and projected costs through 2004. FPL's 2004 CDS expenses are in excess of the level of costs currently being recovered through its base rates for environmental studies. FPL can make subsequent ECRC filings addressing the ongoing nature of FPL's CDS activities. If a stay is issued, FPL should file a copy of it with the Commission within two weeks of its issuance.

Therefore, 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.