

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: March 15, 2007

TO: Commission Clerk (Cole)

FROM: Office of the General Counsel (Bennett, Young)
Division of Economic Regulation (Lester, McNulty)

RE: Docket No. 070052-EI – Petition by Progress Energy Florida, Inc. to recover costs of Crystal River Unit 3 uprate through fuel clause.

AGENDA: 03/27/07 – Regular Agenda – OPC’S Motion to Abate – Oral Argument Not Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Carter

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070052.RCM.DOC

Case Background

On September 22, 2006, Progress Energy Florida (PEF) filed a Petition for Determination of Need for Expansion of an Electrical Power Plant, for Exemption from Rule 25-22.082, Florida Administrative Code (F.A.C.), and for Cost Recovery through the Fuel Cost Recovery Clause in Docket No. 060642-EI. On December 22, 2006, the hearing officer bifurcated the proceeding and a separate docket, Docket Number 070052-EI, was opened to consider the cost recovery aspect of PEF’s petition.

The electrical power plant, which is the subject of both proceedings, is Crystal River Unit 3 (CR3), a nuclear power plant at PEF’s Crystal River site. PEF proposes to expand the existing nuclear power plant to increase generating capacity from 900 megawatts (MW) to 1080 MW.

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An increase of 180 MWs triggers the application of Chapter 403, Florida Statutes, and PEF must obtain approval of its expansion from the Governor and Cabinet, sitting as the Electrical Power Plant Siting Board. As part of the Electrical Power Plant Siting Act, the Commission must determine the need for the expansion and file a report with the Department of Environmental Protection. This Commission, by Order No. PSC-07-0119-FOF-EI, issued February 8, 2007, found a need for the expansion of Crystal River Unit 3. The report was forwarded to the Department of Environmental Protection as required by statute.

On February 2, 2007, the Office of Public Counsel (OPC), AARP, Florida Industrial Power Users Group (FIPUG), and Florida Retail Federation (FRF) filed a Joint Motion to Abate the Petition for Cost Recovery in Docket No. 070052-EI (this was a renewal of the motion to sever and abate previously filed in Docket No. 060642-EI). No party has requested oral argument pursuant to Rule 25-22.0022(1), Florida Administrative Code.

The Commission has jurisdiction over this subject matter pursuant to Chapter 366, Florida Statutes, including Sections 366.04, 366.05, and 366.06, Florida Statutes, and Chapter 403.519, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant the Motion to Abate PEF's request for authority to recover costs of the CR3 expansion through the fuel cost recovery clause?

Recommendation: No. The Commission should deny OPC's Motion to Abate the proceeding. Instead, the Commission should treat the motion as a motion to stay the proceeding and exercise its discretion to postpone the determination of the cost recovery request until after the Siting Board has certified CR3. (Bennett, Young)

Staff Analysis:

OPC's Motion

OPC, AARP, FIPUG and FRF (jointly referred to as the movants) request that the Commission abate PEF's cost recovery proceeding until the conclusion of one or both of two separate proceedings. The first is the proceeding before the Electrical Power Plant Siting Board (Siting Board). OPC states "Unless and until the Board approves PEF's application for certification of the project, there can be no expenditures for increasing the capacity of CR3, which means that currently there simply is no approved project for which to consider means of cost recovery." The second is a general policy determination by the Commission regarding the correct application of the fuel clause. That policy decision will be made, according to movants, based upon a petition that OPC plans to file soon with the Commission.

PEF's Response

PEF responds that a motion for abatement is generally warranted when there is some defect in the application for relief, when the relief requested will be resolved without the need for further proceedings, or that the relief requested will be decided in a separate pending proceeding. PEF argues that none of the circumstances applies to its Petition before the Commission. According to PEF, there is no defect in the petition, there is no proceeding before the Commission that will resolve the current request, and there is no other resolution (such as a settlement between parties) that resolves the issues between the parties.

PEF argues that the Siting Board process has nothing to do with a decision by the Commission regarding the recovery of costs for the expansion. Furthermore, the power plant process will not be lengthy because the request before the Siting Board is for the expansion of an existing power plant. PEF contends that the true reason the movants wish the Commission to abate the proceeding is for the purpose of allowing the Commission to make a broad policy determination of the application of fuel clause recovery to capital and operation and maintenance expenses like the ones at issue in this proceeding. PEF argues that such a policy decision should be applied prospectively and that the precedence and policy of the Commission allows the recovery of the expenses associated with the expansion of CR3 through the fuel clause.

Analysis

A motion to abate is equivalent to either a suspension of the proceeding or a dismissal of the proceeding without prejudice. Miller v. Hayman, 766 So. 2d 1116, (Fla. 4th DCA 2000). An order abating the proceeding is generally used to stop or terminate one proceeding until the other proceeding has concluded. Like a motion to dismiss, abatement should not be readily granted unless the facts alleged clearly warrant the abatement. Horter v. Commercial Bank & Trust Co., 126 So. 909 (Fla. 1930). A Motion to Abate is a matter of right whereas a stay of proceedings involves the discretionary authority of the decision maker. REWJB Gas Investments v. Land O' Sun Realty, Ltd., 643 So. 2d 1107 (Fla. 4th DCA 1994).

The first proceeding the movants argue the Commission should wait upon is the certification by the Siting Board. While OPC is correct that the project does not exist until the Siting Board makes its decision, the Commission may consider the method of cost recovery before the Siting Board acts. The Commission's ratemaking authority is very broad and thus may consider the appropriate cost recovery mechanism for projects prior to their actual construction.

While the movants are not entitled to abatement as a matter of right, the Commission does have discretionary authority to stay a proceeding, especially during the pendency of another proceeding, Allstate Insurance Company v. Titusville Total Health Care 848 So. 2d 1166 (Fla. 5th DCA 2003). Courts recognize stays are appropriate to avoid wasting the court's time, and likewise, the Commission may use its authority to stay a proceeding in order to avoid making a decision on a project which has yet to be approved. As OPC appropriately stated "currently there simply is no approved project for which to consider means of cost recovery." The Commission should, for purposes of administrative efficiency, await the decision of the Siting Board prior to considering the appropriate mechanism for cost recovery of CR3.

The second proceeding the movants wish the Commission to wait upon is a petition OPC states it will file in the future for the Commission to review its policy regarding the types of costs recoverable through the fuel cost recovery clause. Both the movants and PEF focus the majority of their arguments on the policy considerations surrounding cost recovery of CR3. Movants argue that base rate recovery is the appropriate cost recovery mechanism for CR3, while PEF argues that Commission precedent and policy permits fuel clause recovery. Movants argue that the Commission should revisit its use of the fuel clause prior to making a determination of PEF's petition. PEF argues that the Commission has already set its policy and precedent by which PEF can conclude that the expenses associated with expansion of CR3 are recoverable through the fuel clause. Both movants and PEF have missed the point of the fuel clause, which was designed as a mechanism for a case by case determination of the recoverability of costs for each project at issue. Ratemaking is effective when the Commission has the opportunity to examine the facts of each case. The Commission has never before considered a petition for fuel clause cost recovery of the scope and magnitude that PEF seeks here. While Order No. 14564, issued July 8, 1985, in Docket No. 850001-EI, provides: "[w]hen similar circumstances exist, the Commission should attempt to treat, for cost recovery purposes, specific types of fossil fuel-related expenses in a uniform manner among the various electric utilities," it also requires Commission review on a case by case basis and a determination based on the merits of the particular case.

Movant's motion to abate PEF's petition should fail because The Commission is not legally precluded from hearing the cost recovery arguments at this time. Nor is a stay appropriate for a petition that may be filed in the future. Nevertheless, while the motion to abate the proceeding should be denied as an inappropriate remedy, the Commission should treat the Motion to Abate as a Motion to Stay the Proceedings pending the Siting Board's certification of CR3, because that is the most administratively efficient use of the Commission's resources.

Issue 2: Should this docket be closed?

Recommendation: This docket should remain open pending a decision of the Electrical Power Plant Siting Board on the certification of the expansion of Crystal River 3. If the expansion is certified, the docket should remain open. If the Siting Board does not certify the expansion, this docket should be closed. (Bennett, Young)

Staff Analysis: If the Siting Board certifies the expansion of CR3, then this docket should remain open for an evidentiary hearing on PEF's petition. If the Siting Board does not certify the expansion, then the project can not proceed. There would be no need to determine the recoverability of the costs of this project and the docket should be closed.