

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:** September 24, 2009

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Economic Regulation (Breman, Hinton, Laux)  
Office of the General Counsel (Young, Bennett, Williams)

**RE:** Docket No. 090009-EI – Nuclear cost recovery clause.

*Handwritten signatures and initials: AW, SB, K, J, R, MRL, T, G*

**AGENDA:** 10/6/09 – Proposed Agency Action – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** McMurrian

**CRITICAL DATES:** October 29, 2009 (Rule Waiver Deadline)

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\ECR\WP\090009.RCM.DOC

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### Case Background

On March 2, 2009, Progress Energy Florida, Inc. (PEF) filed a petition to seek a prudence review of and to recover certain costs associated with construction of the Crystal River Unit 3 Uprate and the Levy Units 1 and 2 nuclear power plants, pursuant to Rule 25-6.0423, Florida Administrative Code (F.A.C.), and Section 366.93, Florida Statutes (F.S.). On March 2, 2009, Florida Power & Light Company (FPL) also filed a petition to seek a prudence review of and to recover certain costs associated with nuclear power plant costs. PEF and FPL filed their petitions in Docket No. 090009-EI, or the Nuclear Cost Recovery Clause (NCRC) docket.

On July 31, 2009, PEF and FPL filed a Joint Petition for Variance from or Partial Waiver of Rule 25-6.0423(5)(c)4, F.A.C. (Petition). A Florida Administrative Weekly (FAW) notice was issued August 14, 2009, advising that the Petition was received and providing for a 14-day

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comment period. The comment period expired on August 28, 2009. No comments were received.

The Commission has jurisdiction over this matter pursuant to Sections 120.542, 366.05, and 366.06, F.S.

### Discussion of Issues

**Issue 1:** Should the Commission approve the request for a waiver of the filing deadlines of Rule 25-6.0423(5)(c)4, Florida Administrative Code, by Progress Energy Florida, Inc. and Florida Power and Light Company?

**Recommendation:** Yes, the Commission should approve the request for waiver of the filing deadlines of Rule 25-6.0423(5)(c)4, Florida Administrative Code. (Young, Williams)

**Staff Analysis:** Rule 25-6.0423, F.A.C., was adopted by the Commission to implement Section 366.93, F.S., which provides for alternative cost recovery for costs incurred in the development of nuclear power plants. PEF and FPL are engaged in cost recovery proceedings in the NCRC docket for their respective nuclear projects pursuant to this rule. Alternative cost recovery pursuant to the applicable statute and rule is achieved by incorporating the nuclear cost recovery amount approved by the Commission in the NCRC docket into the utility's capacity cost recovery factor. Subsection (5)(c)2 of Rule 25-6.0423, F.A.C., provides for the Commission's determination in the annual NCRC docket by October 1 of each year. Subsection (5)(c)4 of Rule 25-6.0423, F.A.C., sets forth the timeframe by which the utility must file revisions to its fuel and purchased power cost recovery filings ("fuel clause filings"). It states:

The final true-up for the previous year, actual/estimated true-up for the current year, and subsequent year's projected power plant costs as approved by the Commission pursuant to subparagraph (5)(c)2 will be included for cost recovery purposes as a component of the following year's capacity cost recovery factor in the Fuel and Purchased Power Cost Recovery. The utility must file all necessary revisions to the fuel and purchased power cost recovery filings no later than October 15 of the current year.

In the current NCRC docket, the Commission scheduled a Special Agenda Conference on October 16, 2009, to determine the nuclear cost recovery amounts that PEF and FPL will be permitted to recover. PEF and FPL have notified the Commission of their agreement to the Special Agenda Conference date. In their Petition, PEF and FPL state that they will not be able to comply with the timeframe established by Rule 25-6.0423(5)(c)4, F.A.C., because the date of the Special Agenda Conference in the NCRC docket falls outside of the timeframe established by Rule 25-6.0423(5)(c)2, F.A.C. Because the full Commission will not make its determination in the NCRC docket until October 16, 2009, PEF and FPL state that they cannot revise their fuel clause filings prior to that date. Accordingly, PEF and FPL assert that a strict application of Rule 25-6.0423(5)(c)4, F.A.C., requiring the utilities to make their filings by October 15, or before the Commission has ruled in this proceeding, would cause substantial hardship and violate basic principles of fairness.

Section 120.542, F.S., authorizes the Commission to grant variances or waivers to the requirements of its rules where the party subject to the rules has demonstrated that the underlying purpose of the statute has been or will be achieved by other means, and strict application of the rules would cause the party substantial hardship or violate principles of fairness. "Substantial

hardship,” as defined in this section, means demonstrated economic, technological, legal, or other hardship.

The underlying statutory provision pertaining to Rule 25-6.0423, F.A.C., is Section 366.93, F.S. Section 366.93, F.S., provides for alternative cost recovery for costs incurred in the development of nuclear power plants.

PEF and FPL request that they be permitted to submit their fuel clause filing revisions by October 23, 2009, due to the inability to comply with the filing date set forth in Rule 25-6.0423(5)(c)4, F.A.C. The utilities state that this variance request is temporary, because it is only being sought for 2009. According to the utilities, their variance request is consistent with the underlying purpose of Section 366.93, F.S., which is to allow for timely alternative cost recovery for costs incurred in the development of nuclear power plants. The utilities contend that this statutory purpose cannot be achieved absent a variance from the filing date set forth in Rule 25-6.0423(5)(c)4, F.A.C., which is meant to provide the utility with enough time to revise its fuel clause filings (i.e., at least 15 days), and also to provide the Commission with enough time to include the utility’s revisions in its determination and order in the fuel and purchase power cost recovery docket. PEF and FPL assert that the requested variance will achieve those purposes, and that the seven-day time frame they propose would actually result in a quicker submittal from the utilities than that provided for by the rule.

Staff believes that PEF and FPL have adequately demonstrated that they are entitled to a rule waiver under the criteria of Section 120.542, F.S. Staff believes that the utilities have met the underlying purpose of Section 366.93, F.S., which is to allow for timely alternative cost recovery for costs incurred in the development of nuclear power plants. Moreover, staff believes that PEF and FPL have shown that they will suffer substantial hardship if Rule 25-6.0423(5)(c)4, F.A.C., is strictly applied. Therefore, Staff recommends that the Commission grant PEF and FPL’s request for a variance from Rule 25-6.0423(5)(c)4, F.A.C., to the extent that the rule requires the utilities to make their filings by October 15. Accordingly, the Commission should require each company to submit its fuel clause filing revisions after October 16, 2009, but not later than October 23, 2009.

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**Issue 2:** Should this docket be closed?

**Recommendation:** No. If no timely protest is received to the proposed agency action on PEF and FPL's request for waiver in Docket No. 090009-EI, the Order granting the rule waiver will become final upon the issuance of Consummating Order. Docket No. 090009-EI should remain open pending the Commission's decision on PEF and FPL's petitions in the NCRC. (Young, Williams)

**Staff Analysis:** If no timely protest is received to the proposed agency action on PEF and FPL's request for waiver in Docket No. 090009-EI, the Order granting the rule waiver will become final upon the issuance of Consummating Order. Docket No. 090009-EI should remain open pending the Commission's decision on PEF and FPL's petitions in the NCRC.