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**Subject:** Electronic Filing / Docket 110009-EI  
**Attachments:** Motion To Exclude issues 4510 16-18 (v 6 - CLEAN).docx

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b. Docket No. 110009-EI

IN RE: Nuclear Power Plant Cost Recovery Clause

c. The documents are being filed on behalf of Florida Power & Light Company.

d. There are a total of twelve (12) pages.

e. The document attached for electronic filing is: *Florida Power & Light Company's Objections to Issues 4, 5, 10A, 10B, 16, 17 AND 18*

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7/26/2011

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Nuclear Power Plant Recovery  
Clause.

Docket No. 110009-EI  
FILED: July 26, 2011

**FLORIDA POWER & LIGHT COMPANY'S  
OBJECTIONS TO ISSUES 4, 5, 10A, 10B, 16, 17 AND 18**

Florida Power & Light Company ("FPL") hereby provides the Prehearing Officer with the basis of its objections to portions of the Florida Industrial Power User's Group's ("FIPUG's") proposed issues 4 and 5, as well as the Office of Public Counsel's ("OPC's") proposed issues 10A, 10B, 16, 17 and 18 in their entirety.

**Introduction and Summary**

**FIPUG Proposed Issues 4 and 5:** FPL objects to the portions of FIPUG's issues 4 and 5 specified below because they purport to require the Commission to make determinations of reasonableness that are not those provided for by Florida law. FPL recognizes FIPUG's interest in information concerning current estimated costs of the Turkey Point 6 & 7 nuclear project and the current estimated capacity operating date for the project. That information is provided in FPL's filing, and its witnesses will be available to answer questions during the hearings.

Florida law requires that FPL annually provide its non-binding cost estimate for Turkey Point 6 & 7, as well as submit for Commission review and acceptance its detailed project feasibility analysis. These required steps under the Nuclear Cost Recovery Rule are accurately reflected in Staff's issues in this proceeding. However, FIPUG's requested issues 4 and 5 go too far by asserting that the parties should litigate and the Commission should make a determination as to the "reasonableness" of the Turkey Point 6 & 7 cost estimate for completion of the project and capacity operation date. Simply put, such reasonableness findings are not provided for under

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the Florida law applicable to this case, and FIPUG's issue language seeking an unauthorized "reasonableness" determination should be rejected.

**OPC Proposed Issues 10A, 10B, 16, 17 and 18:** On July 20, 2011, FPL filed its motion to strike portions of OPC's direct testimony, described in more detail below. FPL requested that its motion be decided by the full Commission because it goes to the heart of OPC's case. The testimony that FPL seeks to strike relates, in large part, to OPC's claim that the Commission should essentially overturn its own need determination approving FPL's proposal to proceed with the Extended Power Uprate ("EPU") project on an expedited or "fast track" basis, contrary to express provisions of Florida law. FPL's Motion also seeks to strike OPC testimony advocating the unlawful use of: (a) a breakeven analysis to determine prudence of costs, (b) separate feasibility analyses for the St. Lucie and Turkey Point Uprates, and (c) a cost sharing mechanism under which costs in excess of a new breakeven analysis threshold would be borne by shareholders.

The challenged OPC testimony relates directly to OPC's proposed issues 10A, 10B, 16, 17 and 18. FPL is providing a summary of its legal points in relation to these issues consistent with the direction of the Pre-Hearing Officer. FPL requests that its objections to these issues be taken up and decided by the full Commission contemporaneously with FPL's motion to strike the portions of OPC's testimony related to these issues.

**I.  
PORTIONS OF FIPUG ISSUES 4 AND 5 VIOLATE FLORIDA LAW**

FIPUG proposes issues 4 and 5, which state:

**Issue 4: What is the current total estimated all-inclusive cost (including AFUDC and sunk costs) of the proposed Turkey Point Units 6 & 7 nuclear project and is that reasonable?**

**Issue 5: What is the current estimated planned commercial operation date of the planned Turkey Point Units 6 & 7 nuclear facility and is that reasonable?**

FPL witness Steven Scroggs states in his testimony that FPL's current non-binding cost estimate range for Turkey Point 6 & 7 is \$3,482/kW to \$5,063/kW. Mr. Scroggs also states that, for planning purposes, FPL's current estimated commercial operations dates of Turkey Point Units 6 & 7 are 2022 and 2023, respectively. A determination at this juncture as to whether the total projected cost of the project is reasonable and whether the current estimated commercial operation dates are reasonable is contrary to Florida law.

The issues to be litigated and decided by the Commission are defined by substantive law. The substantive law applicable to this proceeding is determined by Florida statutes and the Commission's rules. *See Rinella v. Abifaraj*, 908 So. 2d 1126, 1129 (Fla. 1st DCA 2005) (affirming administrative law judge refusal to consider issue not contemplated in enabling statute).

Sections 403.519, Florida Statutes, Section 366.93, Florida Statutes and Rule 25-6.0423, Florida Administrative Code articulate in detail the elements of cost recovery for nuclear generation projects such as Turkey Point 6 and 7. Following the Commission's need determination, FPL is entitled to recover all of its prudently incurred costs "unless and only to the extent the [C]ommission finds, based on a preponderance of the evidence adduced at a hearing . . . that certain costs were imprudently incurred." § 403.519(5)(e), Fla. Stat. In order to recover its costs, FPL must annually file a report of the actual expenditures it incurred during the prior and current year, as well as projected expenditures to be incurred the current and following

year. Rule 25-6.0423(5)(c)(1)(a)-(c), F.A.C.<sup>1</sup> Rule 25-6.0423(5)(c)(2) prescribes with particularity the issues subject to a reasonableness determination during a nuclear costs recovery proceeding. Prior to October 1 of each year, the Commission must determine the reasonableness of expenditures projected to be incurred by FPL in the current year and the following year. *Id.*

FPL complied with all statutory and regulatory requirements. Before May 1, 2011, FPL submitted its actual and projected costs related to Turkey Point 6 and 7. Accordingly, during the August hearing the Commission will consider the reasonableness of FPL's projected costs for the current and following year. **No other reasonableness determination is contemplated by the applicable statutes or rules.**

Additionally, FPL must annually file a non-binding cost estimate for project completion. § 366.93(5), Fla. Stat.; Rule 25-6.0423(8)(f), F.A.C. FPL also must annually submit for the Commission's review and approval an analysis of the long-term feasibility of completing the project. Rule 25-6.0423(5)(c)(5), F.A.C. Providing this information on an annual basis allows the Commission to monitor the feasibility regarding the continued construction of Turkey Point 6 and 7.

FPL complied with these statutes as well. FPL timely submitted a non-binding cost estimate and a long-term feasibility analysis. By doing so, FPL supplied the Commission with all of the information required by rule that it needs to evaluate and approve the continued feasibility of Turkey Point 6 and 7. **No applicable statutes or rule contemplates a finding of reasonableness as to the projected 2022 and 2023 all-inclusive costs for Turkey Point 6 and 7, or the estimated commercial operation dates for those projects.** Thus, the Commission

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<sup>1</sup> Rule 25-6.0423(8), Florida Administrative Code, details the information FPL must include in these annual filings.

should exclude proposed issues 4 and 5. *See, e.g., Re Nuclear Cost Recovery Clause*, Docket No. 100009-EI, Order No. 11-0095-FOF-EI, 2011 WL 365049, \*5 (F.P.S.C. Feb. 2, 2011) (Commission refused to modify or enlarge the authority it derives from the statute).

Indeed, the statutory construction maxim *expressio unius est exclusio alterius* – the mention of one thing within a statute implies the exclusion of another thing not so mentioned – militates against consideration of FIPUG’s issues 4 and 5. Here, the Legislature and the Commission enumerated certain filing requirements and attendant reasonableness determinations that must be made in connection with a nuclear cost recovery proceeding. Thus, the Commission cannot indulge requests for additional reasonableness determinations not mentioned in the governing statutes or rules. *In Re Resolution of Toll Settlement Dispute between General Telephone Company of Florida and Southern Bell Telephone and Telegraph Company*, 83 F.P.S.C. 117 (April 11, 1983) (Commission refused to adjudicate interstate toll dispute where statute only identified jurisdiction over intrastate matters).

Significantly, a finding or determination of reasonableness as to the projected cost of completing Turkey Point 6 and 7 creates the potential for future misuse. Proposed issues 4 and 5 place unwarranted attention on the unknown. Notwithstanding the current preliminary status of the project, FIPUG will undoubtedly attempt to use any such reasonableness finding in this proceeding as a benchmark by which to measure the reasonableness of costs incurred ten years in the future. The Florida Legislature enacted the nuclear cost recovery statutes precisely to curb this type of criticism and to encourage investment in capital-intensive nuclear projects. Proposed issues 4 and 5, by contrast, threaten to reinstate the very uncertainty the legislature sought to

reduce and threaten to abolish needed progress in achieving a more fuel diverse, more reliable, lower emission, and lower fuel cost Florida energy future.

**II.**  
**OPC PROPOSED ISSUES 10A, 10B, 16, 17 AND 18:**  
**The Full Commission Should Rule on Exclusion of Issues**  
**10A, 10B, 16, 17 and 18 Contemporaneously With FPL’s Motion To Strike**

On July 21, 2011, FPL filed a Motion To Strike Office of Public Counsel’s Testimony Collaterally Challenging the Commission’s Nuclear Uprates Need Determination, Requesting Implementation of a Risk Sharing Mechanism, and Proposed Issues 3, 4, 5a and 5b (the “Motion To Strike”), and requested a hearing by the full Commission.<sup>2</sup> FPL’s Motion To Strike addresses certain portions of the testimony of OPC witnesses William Jacobs and Brian Smith offered in direct support of OPC’s proposed issues 10A, 10B, 16, 17 and 18. The testimony and the proposed issues are inextricably intertwined and the legal bases for excluding the testimony and issues are the same. Thus, the full Commission’s resolution of the Motion To Strike will also determine the exclusion or inclusion of proposed issues 10A, 10B, 16, 17 and 18. Accordingly, the full Commission should make its determination regarding these proposed issues contemporaneously with FPL’s Motion To Strike.

**Inclusion of Issues 10A, 10B, 16, 17 and 18 Violates Florida Law**

Issues 10A, 10B, 16 and 17 state:

**Issue 10A: Should the Commission accept the quantitative methodology that FPL employed to assess the long-term feasibility of the EPU project?**

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<sup>2</sup> After FPL filed the Motion To Strike, the parties renumbered the proposed issues as follows:

<u>No. at time of Motion To Strike</u>	<u>Current number</u>	<u>No. at time of Motion To Strike</u>	<u>Current number</u>
3	10A	5a	16 and 17
4	10B	5b	18

**Issue 10B: Should the Commission require FPL to perform separate long-term feasibility analyses for the Turkey Point and St. Lucie uprate activities?**

**Issue 16: Was it prudent for FPL to undertake the EPU projects at Turkey Point and St. Lucie on a “fast track” basis?**

**Issue 17: Was it prudent for FPL to undertake the EPU projects at Turkey Point and St. Lucie in the absence of a break-even calculation?**

As set forth more fully in FPL’s Motion To Strike, inclusion of these issues in the Nuclear Cost Recovery violates Florida law.

In 2007, pursuant to Section 403.519, Florida Statutes (“Section 403.519”), FPL filed a petition for determination of need for increased generating capacity of four nuclear units at the Turkey Point and St. Lucie power plants (the “EPU project”). The petition made clear that (i) FPL would implement the EPU project on an expedited basis in order to meet projected customers needs for 2012, (ii) FPL required the combined increased generation from the units in both plants, and (iii) FPL used a cumulative present value revenue requirement feasibility study that analyzed the increased generation capacity of both plants as a unified project.

In January 2008 the Commission granted FPL’s petition, finding that the EPU project, as proposed, was necessary to meet FPL’s 2012 customer needs. The Commission also found that FPL’s EPU project achieved the goals of fuel diversity, increased electric grid stability, and would provide a net benefit to customers. The Commission further concluded that the EPU project was cost effective. *See In Re: Petition for Determination of Need for Expansion of Turkey Point and St. Lucie Nuclear Power Plants*, Docket No. 070602-EI, Order No. PSC-08-0021-FOF-EI (F.P.S.C. Jan. 7, 2008) (hereinafter “EPU Need Determination Order”).



OPC's issues 10A, 10B, 16 and 17 challenge each of the Commission's findings more than three years after the Commission entered the EPU Need Determination Order. OPC's collateral attack on the Commission's EPU Need Determination Order violates Florida law. First, the doctrine of administrative finality bars OPC from raising issues 10A, 10B, 16 and 17 because the Commission already resolved – or could have resolved – those questions in the Need Determination proceeding. *See* FPL's Motion To Strike at pp. 11-14 for full discussion.

Second, Section 403.519(4)(e), Florida Statutes, expressly provides that “[p]roceeding with the construction of the nuclear ... power plant following an order by the commission approving the need for the nuclear ... power plant under this act shall not constitute or be evidence of imprudence.” Accordingly, OPC's effort to challenge FPL having proceeded with the construction of the EPU project on an expedited basis, after the Commission's clear need determination decision approving that construction, cannot be claimed by OPC to “constitute or be evidence of imprudence” and the OPC issues should be rejected.

Additionally, Florida Statutes and Rule 25-6.0423, Florida Administrative Code (“Rule 25-6.0423”) limit the scope of nuclear cost recovery hearings to determinations of whether FPL's decisions and expenditures during the prior year (2009 and 2010)<sup>3</sup> were prudent and whether FPL's projected expenditures for this year and next year (2011 and 2012) are reasonable. The controlling framework precludes OPC from litigating in this docket whether in 2007 FPL should have adopted an expedited project approach or used separate “breakeven” quantitative analyses to establish cost-effectiveness for each uprate site. *See* FPL's Motion To Strike at pp. 15-16 for full discussion.

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<sup>3</sup> Because the parties stipulated to deferral of the issues presented in 2010, the Commission will also consider the prudence of 2009 expenditures in this docket.

Finally, to the extent OPC argues that costs might be imprudently incurred now or in the future as a result of FPL management's 2007 decision to expedite the EPU project, such argument constitutes legally improper hindsight. Florida's well-established legal prudence standard prohibits application of facts known today to decisions made in the past. *See* FPL's Motion To Strike at pp. 16-17 for full discussion.

OPC's proposed issue 18 also violates Florida law. Issue 18 states:

**Issue 18: If the Commission finds FPL was imprudent in Issues 16 [fast-track schedule] or 17 [breakeven analysis], what action can and should the Commission take?**

First, because issue 18 is derivative of issues 16 and 17, it must be excluded for the same reasons described above. Second, Section 366.93, Florida Statutes ("Section 366.93") and Section 403.519 unambiguously provide utilities the right to recover all costs prudently incurred in connection with a new nuclear plant. Indeed, recovery of such costs "shall not be subject to challenge unless and only to the extent the commission finds, **based on a preponderance of the evidence** adduced at a hearing before the commission . . . **that certain costs were imprudently incurred.**" § 403.519(4)(e) (emphasis added). Therefore, the plain language of the statutes dictate that the Commission may disallow a particular recovery request only if the greater weight of the evidence demonstrates that the particular cost was imprudently incurred. No other disallowance is permitted. *See* FPL's Motion To Strike at pp. 18-19 for full discussion.

In fact, as recently as May 2011, the Commission wholly rejected a proposed mechanism that restricted recovery to anything less than "all imprudently incurred costs" because it would contravene Section 366.93. *Re Nuclear Cost Recovery Clause*, Docket No. 100009-EI, Order No. 11-0095-FOF-EI, 2011 WL 365049, \*3 (F.P.S.C. Feb. 2, 2011), *confirmed on*

*reconsideration in* Order No. 11-0224-FOF-EI, 2011 WL 1924075 (F.P.S.C. May 16, 2011). Finally, the disallowance standard articulated in Section 403.519(4)(e), Florida Statutes, requires proof by a preponderance of evidence that “certain costs” were imprudently incurred. Thus, any mechanism that caps recovery without regard to whether a particular FPL management decision was prudent violates Florida law. FPL’s Motion To Strike at pp. 19-22 for full discussion.

WHEREFORE, for the reasons stated above, the Commission should exclude the portions of proposed issues 4 and 5 identified above, and the full Commission should consider the exclusion of proposed issues 10A, 10B, 16, 17 and 18 contemporaneously with FPL's Motion To Strike.

Respectfully submitted,

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