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Docket 110009
EF Brief in Opp.

<<Docket 110009 PEF Brief in Opposition to Proposed Issues 21, 22, 26, 30.pdf>> Docket 110009

In re: Nuclear Cost Recovery Clause

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2. The document being filed is Progress Energy Florida, Inc.'s Brief in Opposition to Proposed Issues 21, 22, 26 and 30.
3. This document contains fifteen (15) pages.
4. This document is being filed on behalf of Progress Energy Florida.

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: NUCLEAR COST RECOVERY
CLAUSE

Docket No. 110009-EI
Submitted for Filing: July 26, 2011

**PROGRESS ENERGY FLORIDA, INC.'S BRIEF IN OPPOSITION TO
PROPOSED ISSUES 21, 22, 26, AND 30**

Progress Energy Florida, Inc. ("PEF" or the "Company") provides its brief in opposition to the admittance of proposed issues 21, 22, 26, and 30 in the 2011 Nuclear Cost Recovery Clause ("NCRC") proceeding and states as follows:

INTRODUCTION

The NCRC proceedings before the Florida Public Service Commission (the "Commission") exist to implement the Florida Legislative purpose in the nuclear cost recovery statute, Section 366.93, Florida Statutes. The Florida Legislature directed the Commission in Section 366.93 to establish alternative cost recovery mechanisms to allow the utility to recover its prudently incurred costs resulting from the siting, design, licensing, or construction of a nuclear power plant and its associated transmission facilities. The Commission established these alternative cost recovery mechanisms in Rule 25-6.0423, Florida Administrative Code (F.A.C.). The rule establishes annual NCRC proceedings to review the prudence of the prior year's incurred costs. Estimated and projected costs are recovered in advance if determined by the Commission to be reasonable, and further, the utility must demonstrate the long-term feasibility of completing the nuclear power plant project, pursuant to Rule 25-6.0423, but ultimately the requisite requirement for cost recovery is that the costs were prudently incurred.

Indeed, the Commission ruled this year that the “only statutory requirement is that the utility prove that its costs in new nuclear power plant capacity were prudently incurred.” Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI, p. 7 (Feb. 2, 2011). This is what the Florida Legislature intended, directing in Section 403.519(4) (e) that “the right of a utility to recover any costs incurred prior to commercial operation ... 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 under s. 120.57, that certain costs were imprudently incurred.” The proposed issues in the NCRC proceedings, then, must be consistent with this purpose and the express language of the nuclear cost recovery statute and rule that guides the Commission in meeting this legislative purpose.

The disputed issues proposed by the intervenors are not consistent with the purpose and guiding language of the nuclear cost recovery statute, Section 366.93, and rule, Rule 25-6.0423. As a result, these disputed, proposed issues must be rejected by the Commission. In addition, all of the disputed, proposed issues are not separate issues at all, rather they reflect, at best, the intervenors’ positions or arguments on the issues under Section 366.93 and Rule 25-6.0423 in the 2011 NCRC proceeding. Historically, proposed issues are rejected and not admitted in the proceeding when they are not issues for determination, but are instead position statements or arguments of the parties subsumed in the issues that are to be determined in the proceeding. See generally In re WebNet Communications, Inc., Order No. PSC-01-2091-PHO-TI (Fla. P.S.C. October 22, 2011) (prehearing officer ruling issues withdrawn because they are subsumed in other issue); In re Tampa Elec. Co., Order No. PSC-01-1724-PHO-EI (Fla. P.S.C. August 23, 2001) (prehearing officer ruling issues subsumed); In Re: Investigation into the Statewide Offering of Access to the Local Network, Order No. 19957-A (Fla. P.S.C. Nov. 9, 1988) (same).

For these reasons, as more fully described below, the disputed issues proposed by intervenors the Office of Public Counsel (“OPC”) and the Florida Industrial Users Group (“FIPUG”) should not be admitted in this proceeding.

ARGUMENT

A. Disputed Issues.

i. **Proposed Issue 21:**

What is the total estimated all-inclusive cost (including AFUDC and sunk costs) of the proposed Levy Units 1 & 2 nuclear project and is it reasonable?¹

PEF Position and Argument:

PEF objects to the admittance of this proposed issue because it is not a proper, separate issue in this proceeding. The estimated cost of the LNP is an input in the quantitative, economic feasibility analysis, therefore, any position or argument regarding the reasonableness of this estimate can and should be addressed in Issue 20 regarding the feasibility of the LNP. See Issue 20 (Should the Commission approve what PEF has submitted as its 2011 annual detailed analysis of the long-term feasibility of completing the Levy Units 1 & 2 project, as provided for in Rule 25-6.0423, F.A.C.? If not, what action, if any, should the Commission take?).

To illustrate, no determination by the Commission depends upon the answer to this issue, whether the issue is answered in the positive or negative, rather the only relevance of either answer to this issue is the extent to which the answer affects the determination of the feasibility of the LNP. As PEF has demonstrated in the past, and the Commission has approved, the determination of the long-term feasibility of completing the nuclear power plant project involves

¹ PEF is not addressing the validity of the proposed issue as a factual matter as stated because PEF disputes the issue on other grounds.

a holistic approach, applying both qualitative and quantitative analyses, in that assessment. Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI, pp. 30-31) (“[w]e approve what PEF has submitted as its annual detailed analysis of the long-term feasibility of completing the Levy Units 1 & 2 project. We find that PEF has offered a fully vetted, transparent, and convincing discussion of its selection of a course of action. In doing so, a preponderance of the evidence shows PEF fully considered the economic, regulatory, technical, funding, and joint ownership considerations impacting the feasibility of the project.”). The assessment of any single factor at any single point in time in that holistic approach, such as the reasonableness of the estimated LNP cost, will likely not be determinative of the outcome of the feasibility analysis. As a result, the assessment of any one of the factors in this holistic feasibility analysis should be made in the context of the assessment of all the factors in the feasibility analysis. That means proposed Issue 21 is not a separate issue, instead, it is one factor among several factors that must be addressed under Issue 20 in the 2011 NCRC proceeding regarding the reasonableness of the Company’s analysis of the long-term feasibility of completing the LNP.

Additionally, and for the same reasons, proposed Issue 21 is not a separate issue because it is a position statement or argument under Issue 20. The Commission has long recognized that proposed issues should be rejected when they are not issues for determination, but are instead position statements or arguments of the parties under issues that the Commission will determine in the proceeding. See generally In re WebNet Communications, Inc., Order No. PSC-01-2091-PHO-TI (Fla. P.S.C. October 22, 2011) (prehearing officer ruling issues withdrawn because they are subsumed in other issue); In re Tampa Elec. Co., Order No. PSC-01-1724-PHO-EI (Fla. P.S.C. August 23, 2001) (prehearing officer ruling issues subsumed); In Re: Investigation into the Statewide Offering of Access to the Local Network, Order No. 19957-A (Fla. P.S.C. Nov. 9,

1988) (same). Consequently, proposed Issue 21 must be rejected. It is not a separate issue. Instead, proposed Issue 21 reflects the position or argument of the intervenor under Issue 20 in this proceeding.

ii. **Proposed Issue 22:**

What is the estimated planned commercial operation date of the planned Levy Units 1 & 2 nuclear facility and is it reasonable?

PEF Position and Argument:

PEF objects to the admittance of this proposed issue because it is not a proper, separate issue in this proceeding. The estimated commercial operation dates for the LNP are inputs in the quantitative, economic feasibility analysis, therefore, any position or argument regarding the reasonableness of this estimate can and should be addressed in Issue 20 regarding the feasibility of the LNP. See Issue 20 (Should the Commission approve what PEF has submitted as its 2011 annual detailed analysis of the long-term feasibility of completing the Levy Units 1 & 2 project, as provided for in Rule 25-6.0423, F.A.C.? If not, what action, if any, should the Commission take?).

To illustrate, no determination by the Commission depends upon the answer to this issue, whether the issue is answered in the positive or negative, rather the only relevance of either answer to this issue is the extent to which the answer affects the determination of the feasibility of the LNP. As PEF has demonstrated in the past, and the Commission has approved, the determination of the long-term feasibility of completing the nuclear power plant project involves a holistic approach, applying both qualitative and quantitative analyses, in that assessment. Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI, pp. 30-31) (“[w]e approve what PEF

has submitted as its annual detailed analysis of the long-term feasibility of completing the Levy Units 1 & 2 project. We find that PEF has offered a fully vetted, transparent, and convincing discussion of its selection of a course of action. In doing so, a preponderance of the evidence shows PEF fully considered the economic, regulatory, technical, funding, and joint ownership considerations impacting the feasibility of the project.”). The assessment of any single factor at any single point in time in that holistic approach, such as the reasonableness of the estimated LNP commercial operation dates, will likely not be determinative of the outcome of the feasibility analysis. As a result, the assessment of any one of the factors in this holistic feasibility analysis should be made in the context of the assessment of all the factors in the feasibility analysis. That means proposed Issue 22 is not a separate issue, instead, it is one factor among several factors that must be addressed in Issue 20 in the 2011 NCRC proceeding regarding the reasonableness of the Company’s analysis of the long-term feasibility of completing the LNP.

Additionally, and for the same reasons, proposed Issue 22 is not a separate issue because it is a position statement or argument under Issue 20. The Commission has long recognized that proposed issues should be rejected when they are not issues for determination, but are instead position statements or arguments of the parties under issues that the Commission will determine in the proceeding. See generally In re WebNet Communications, Inc., Order No. PSC-01-2091-PHO-TI (Fla. P.S.C. October 22, 2011) (prehearing officer ruling issues withdrawn because they are subsumed in other issue); In re Tampa Elec. Co., Order No. PSC-01-1724-PHO-EI (Fla. P.S.C. August 23, 2001) (prehearing officer ruling issues subsumed); In Re: Investigation into the Statewide Offering of Access to the Local Network, Order No. 19957-A (Fla. P.S.C. Nov. 9, 1988) (same). Consequently, proposed Issue 22 must be rejected. It is not a separate issue.

Instead, proposed Issue 22 reflects the position or argument of the intervenor under Issue 20 in this proceeding.

iii. Proposed Issue 26:

Should the Commission approve for recovery in 2012 any estimated 2011 and 2012 costs not necessary for receipt of the Combined License (COL) for Levy Units 1 & 2? If not, what action can and should the Commission take with respect to these costs?

PEF Position and Argument:

PEF objects to the admittance of this proposed issue in the 2011 NCRC proceeding for several reasons. First, and most significantly, proposed Issue 26 is inconsistent with the nuclear cost recovery statute, Section 366.93, Florida Statutes, because this proposed issue asks the Commission to act in contravention to that statute since it has nothing to do with the prudence of costs incurred for the siting, licensing, design, engineering, or construction of a nuclear power plant. See §366.93, Fla. Stat. (“Such mechanisms shall be designed to promote utility investment in nuclear or integrated gasification combined cycle power plants and allow for the recovery in rates of all prudently incurred costs.”) (emphasis added); Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI, p. 9, (Feb. 2, 2011) (“[w]e find that the only statutory requirement is that the utility prove that its costs in new nuclear power plant capacity were prudently incurred.”). Proposed Issue 26 also has nothing to do with the decision the Commission must make under the nuclear cost recovery rule, Rule 25-6.0423, F.A.C., to implement the legislative purpose of the nuclear cost recovery statute by determining the reasonableness of actual-estimated and projected costs on a nuclear power plant project prior to the determination of the prudence of these costs. Rule 25-6.0423(1), (5), (c) 2, F.A.C. (“The

Commission shall ... conduct a hearing and determine the reasonableness of projected pre-construction expenditures and ... the reasonableness of construction expenditures ... and the associated carrying costs.”). As a result, proposed Issue 26 must be rejected.

To be clear, proposed Issue 26 suggests on its face that the Commission may disapprove cost recovery for costs reasonably incurred for the siting, design, engineering, or construction of new nuclear power plants, which it cannot do. In fact, under proposed Issue 26, OPC proposes that the Commission act in contravention to the applicable rule and statute and disapprove costs for all aspects of the development of new nuclear power plant capacity, other than the licensing costs necessary to obtain the LNP COL, even if those costs are reasonable for the LNP.

OPC testimony on this issue argues for the denial of the recovery of admittedly reasonable LNP costs until some future point in time because of alleged uncertainties surrounding the construction of the LNP. (Jacobs Test., p. 18, L. 1-9). OPC does not contend that these costs are unreasonable because they are not necessary for the LNP or, if necessary, that they are unreasonable in amount. Instead, OPC requests that the Commission disapprove PEF’s recovery of admittedly reasonable LNP costs simply because OPC wants the Commission to do it.

The Commission cannot do this, nor should it. The Commission cannot disallow cost recovery of reasonable costs for new nuclear power plant capacity under Rule 25-6.0423(5)(c)2, F.A.C. The Commission is required by rule to determine the reasonableness of projected LNP costs and, if they are found to be reasonable, include them in setting the Capacity Cost Recovery Clause factor in the annual Fuel and Purchased Power Cost Recovery proceedings. Rule 25-6.0423(5)(c)3, F.A.C. To do otherwise would constitute an arbitrary and capricious ruling, subject to reversal on appeal. Proposed Issue 26 must, therefore, be rejected.

Second, proposed issue 26 is inconsistent with and contravenes the Commission's determination in the 2010 NCRC proceeding that the Company's decision to proceed with the LNP on a slower pace is reasonable. See Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI, p. 35 (Feb. 2, 2011). OPC's witness agreed in deposition that the Commission determined that the Company's decision to proceed with the LNP is reasonable and that this decision did not limit the recovery of costs incurred as a result of that decision in any way. OPC acknowledges this decision too in its Prehearing Statement in this docket, claiming that it does "not contest the Commission's decision" and that "this decision should not be revisited." OPC Prehearing Statement, p. 6. Yet, that is exactly what OPC purports to do in proposed Issue 26.

OPC contests the Commission's prior decision and revisits it by asserting that otherwise reasonable costs for the LNP should not be recovered because cost recovery should be limited to only those costs related to the LNP COL. OPC did not challenge the Commission's determination that PEF's decision to proceed with the LNP is reasonable by appealing that decision. OPC cannot now collaterally attack that determination by requesting the Commission to limit the recovery of reasonable costs incurred by the Company's implementation of that decision. For this reason too, proposed Issue 26 must be rejected.

In addition to the legal deficiencies noted above, this proposed issue is vague and ambiguous because the Commission cannot determine what costs are and are not "necessary" for receipt of COL based on the evidence in this proceeding. OPC has filed testimony that does not specifically identify what costs are and are not "necessary" for receipt of the COL. Because this is the only testimony asserting that such costs should not be recovered at this time by PEF for this reason there is, then, no evidence before the Commission clarifying the inherent ambiguity in the determination of what costs are and are not "necessary" for receipt of the LNP COL, and

that ambiguity cannot be corrected by arguments from legal counsel, nor can it be properly cured by a witness at hearing since any attempt to do so would violate the Order Governing Procedure in this case and would be outside the scope of pre-filed testimony. As a result, there is no factual basis for the Commission to make a determination under this proposed issue. Proposed Issue 26, accordingly, should be rejected.

Finally, even if it were proper, proposed Issue 26 is not a separate issue. If proposed Issue 26 is construed as a challenge to the reasonableness of certain costs incurred on the LNP – even though OPC has proffered no testimony that any costs for the LNP are unreasonable in any way – then this proposed issue is, at best, a position statement or argument under Issues 27 and 28 in this proceeding. Issues 27 and 28 require the Commission to determine the reasonable actual/estimated 2011 costs and estimated true-up amounts for the Levy Units 1 & 2 project, and the reasonable projected 2012 costs for PEF's Levy Units 1 & 2 project, respectively. Proposed Issue 26 is, therefore, not a separate, distinct issue if it is construed as a challenge to the reasonableness of PEF's 2011 actual/estimated and 2012 projected LNP costs.

Again, the Commission has long recognized that proposed issues should be rejected when they are not issues for determination, but are instead position statements or arguments of the parties under issues that the Commission will determine in the proceeding. See generally In re WebNet Communications, Inc., Order No. PSC-01-2091-PHO-TI (Fla. P.S.C. October 22, 2011) (prehearing officer ruling issues withdrawn because they are subsumed in other issue); In re Tampa Elec. Co., Order No. PSC-01-1724-PHO-EI (Fla. P.S.C. August 23, 2001) (prehearing officer ruling issues subsumed); In Re: Investigation into the Statewide Offering of Access to the Local Network, Order No. 19957-A (Fla. P.S.C. Nov. 9, 1988) (same). If OPC or any other intervenor has proper evidence to present regarding the reasonableness of any of PEF's LNP

costs, they were and are free to do so under Issues 27 and 28 related to the reasonableness of PEF's actual/estimated and projected LNP costs in the 2011 NCRC proceeding. Declining to admit proposed Issue 26 in this proceeding in no way hinders intervenors from presenting proper evidence or arguments regarding the reasonableness of any of PEF's costs they do not believe are appropriate for recovery.

iv. Proposed Issue 30:

Should the Commission approve as prudent any costs incurred between October 2, 2009 and December 31, 2010 for the Crystal River Unit 3 Uprate project?

PEF Position and Argument:

PEF objects to this proposed issue because it is an improper legal argument. OPC's witness does not assert that any specific 2009 or 2010 CR3 Uprate project cost was imprudently incurred. This proposed issue exists only because OPC is concerned about the alleged "uncertainty of the impact of other prudence determinations of PEF's activities related to the delamination of the Containment Building." (Jacobs Test., p. 5, L. 8-12). OPC contends there is uncertainty regarding the ability to repair the CR3 containment structure, the cost and time to repair it, and the approval process at the Nuclear Regulatory Commission ("NRC") regarding the repair and the pending CR3 operating license extension at the NRC. (Jacobs Test., p. 8, L. 8-25). As a result, OPC wants the Commission to defer the determination of the prudence of the 2009 and 2010 CR3 Uprate project costs until some future point, presumably when CR3 is repaired and returns to commercial service with the NRC's approval.

The determination of the prudence of the actual costs that PEF has already incurred on the CR3 Uprate project in 2009 and 2010 cannot legally depend on the outcome of future events.

It is improper hindsight to determine the prudence of costs incurred in 2009 and 2010 on the CR3 Uprate project based on whether CR3 is repaired and returns to commercial service at some future point in time. See, e.g., Order No. PSC-09-0783-FOF-EI, Docket No. 090009-EI, p. 11 (Nov. 19, 2009) (“The applied standard for determining prudence is consideration of what a reasonable utility manager would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decisions were made.”) (emphasis added). Proposed Issue 30, therefore, must be rejected.

Additionally, OPC’s witness admitted in deposition in this proceeding that the SGR project is not part of the CR3 Uprate project and that he is not aware of any activities in 2009 and 2010 on the CR3 Uprate project that are at issue in Docket No. 100347-EI. There is, therefore, no factual basis to delay the determination of the prudence of PEF’s actual costs incurred in 2009 and 2010 on the CR3 Uprate project because of any legal determination that will later be made in Docket No. 100347-EI. For this additional reason, proposed Issue 30 must be rejected.

PEF also objects to the admittance of this issue in this proceeding because in addition to being improper for the reasons discussed above, it is not a separate issue. If OPC or any other intervenor wishes to properly argue against the prudence of 2009 and 2010 CR3 Uprate project costs they may do so as a position or argument under Issue 33 in this proceeding. Issue 33 specifically deals with the prudence of 2009 and 2010 CR3 Uprate project costs. (Issue 33: What system and jurisdictional amounts should the Commission approve as PEF’s 2009 and 2010 prudently incurred costs for the Crystal Rive Unit 3 Uprate project?). OPC, in fact, is limiting its challenge to the prudence of the CR3 Uprate project 2009 costs to costs incurred after the first delamination occurred on October 2, 2009. Clearly, then, if this position or argument is addressed at all, which it should not be, it should be addressed under Issue 33.

The Commission has long recognized that proposed issues should be rejected when they are not issues for determination, but are instead position statements or arguments of the parties under issues that the Commission will determine in the proceeding. See generally In re WebNet Communications, Inc., Order No. PSC-01-2091-PHO-TI (Fla. P.S.C. October 22, 2011) (prehearing officer ruling issues withdrawn because they are subsumed in other issue); In re Tampa Elec. Co., Order No. PSC-01-1724-PHO-EI (Fla. P.S.C. August 23, 2001) (prehearing officer ruling issues subsumed); In Re: Investigation into the Statewide Offering of Access to the Local Network, Order No. 19957-A (Fla.P.S.C. Nov. 9, 1988) (same). Declining to admit proposed Issue 30 in the proceeding in no way hinders intervenors from presenting any proper position or argument regarding the prudence of any of PEF's 2009 or 2010 CR3 Uprate project costs they do not believe are prudent. For this additional reason, proposed Issue 30 should be rejected.

CONCLUSION

For all of these reasons, PEF objects to the admittance of proposed Issues 21, 22, 26, and 30 and respectfully requests that the prehearing officer decline to admit these proposed issues in the 2011 NCRC proceeding.

Respectfully submitted,

s/ Blaise N. Huhta

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to counsel and parties of record as indicated below via electronic and U.S. Mail this 26th day of July, 2011.

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