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Subject: E-filing (Dkt. No. 120009-EI)

Attachments: 120009 OPC Response to Motion to Strike.Final.pdf

Electronic Filing

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b. Docket No. 120009-EI

In re: Nuclear Cost Recovery Clause.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 9 pages.

e. The document attached for electronic filing is Office of Public Counsel's Response to FPL's Motion to Strike Portions of the Testimony of Dr. William Jacobs.
(See attached file: 120009 OPC Response to Motion to Strike.Final.pdf)

Thank you for your attention and cooperation to this request.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause.	DOCKET NO.: 120009-EI FILED: August 10, 2012

OFFICE OF PUBLIC COUNSEL'S RESPONSE TO FPL'S MOTION TO STRIKE PORTIONS OF THE TESTIMONY OF DR. WILLIAM JACOBS

The Citizens of the State of Florida, through the Office of Public Counsel, submit their response to Florida Power & Light Company's (FPL) Motion to Strike Portions of the Testimony of Dr. William Jacobs ("Motion to Strike" or "Motion"). The Commission should deny the Motion. FPL is demonstrably mistaken when it contends that the testimony that is the subject of its Motion attempts to propose a "risk sharing" mechanism. Further, contrary to FPL's representation that its Motion to Strike raises only a legal issue, the testimony that is the subject of the Motion presents factual and policy matters relevant to the issues in the proceeding. OPC is entitled, pursuant to the Florida Administrative Procedure Act (Chapter 120, Florida Statutes) to present evidence on these issues to the Commission for adjudication. To grant FPL's Motion would be erroneous as a matter of law.

FPL's argument depends on its hope that the Commission will view the brief passages of testimony that are the subject of its Motion in isolation and out of context. For that reason, a brief background is essential to the Commission's evaluation of FPL's argument.

BACKGROUND

During the evidentiary phase of Docket No. 110009-EI, when responding to OPC witness

Dr. Jacobs' assertion that the costs of FPL's uprate projects would, in his opinion, continue to spiral upwards, FPL assured the Commission that its revised estimates (which had increased by at least $180 million over the prior year) were at that time "highly informed." (Testimony of FPL witness Terry Jones in Docket No. 110009-EI, at TR- 1208)

FPL presented that testimony in August of 2011. The Commission cited Mr. Jones' "highly informed" statement as a basis for concluding that FPL's construction cost estimate was "adequate." Order No. PSC-11-0547-FOF-EI, at pages 36, 40.

In May 2012, FPL submitted its updated estimate in the current proceeding. The new estimate is ***$632-671 million*** higher than the one it sponsored last August. (Prefiled rebuttal testimony of FPL witness Terry Jones, at page 14, dated July 9, 2012)

In prefiled testimony dated June 19, 2012, OPC witness Dr. Jacobs notes that, of the astonishing year-over-year increase in FPL's 2012 overall cost estimate, ***$555 million*** relates to increases associated with the uprate being implemented at the Turkey Point plant site. He observes also that in 2010 the consulting engineers of High Bridge Associates, an "independent project estimating expert" (Docket No. 110009-EI, TR-1208) whom FPL engaged specifically to advise FPL on costing out the Turkey Point uprate project, submitted a detailed analysis in which they predicted that the Turkey Point uprate would reach the extreme high order of magnitude of FPL's current estimate; however, FPL failed to give credence to the information until February 2012. Dr. Jacobs testifies that FPL's managerial failure to act timely on High Bridge's advice constituted a missed opportunity to recognize—and take action to protect customers from—the runaway costs it now, belatedly, acknowledges in its current projection. Dr. Jacobs also describes the $555 million increase as a significant change in circumstances from the last hearing cycle that should cause the Commission to separate the Turkey Point uprate project from FPL's

aggregated, consolidated feasibility analysis and view the economic feasibility of the Turkey Point uprate on a standalone basis. Dr. Jacobs refers to and relies on an analysis being sponsored in the case by OPC witness Brian Smith, in which Mr. Smith demonstrates, using the same "sunk costs" methodology that FPL employs in its feasibility study that, at the level of FPL's current estimate of construction costs, the Turkey Point project already is not cost effective to customers.

In his testimony, Dr. Jacobs recommends that the Commission protect customers from FPL management's imprudently belated recognition of the magnitude of the Turkey Point uprate costs. As a proxy for the excessive costs from which FPL imprudently failed to protect ratepayers by timely action to halt an economically infeasible project, which costs cannot be measured directly, Dr. Jacobs recommends that the Commission limit FPL's recovery to the $1.6 billion estimate of the total cost of constructing the Turkey Point uprate project it is sponsoring in this 2012 hearing cycle.

ARGUMENT

FPL's Motion fails to identify a valid basis for striking OPC's testimony. Section 120.57(1)(b), Florida Statutes, a portion of Florida's Administrative Procedure Act ("APA"), states: "All parties shall have an opportunity to respond, to present evidence and argument on all issues involved. . ." OPC is a party to this docket. OPC has raised issues regarding the quality of FPL's management of its Turkey Point uprate project, the feasibility study that FPL submitted in support of its petition to collect the costs of its uprate projects from customers, the cost-effectiveness of the Turkey Point uprate project from customers' perspective, and the action the Commission should take in light of FPL's imprudent management of the Turkey Point uprate project.

Related to OPC's rights under the APA are the provisions of the statute that delimit an

agency's ability to exclude evidence. Section 120.569(2), Florida Statutes, says an agency may exclude "irrelevant, immaterial or unduly repetitious evidence from the proceeding." (This provision clearly is an administrative counterpart to Rule 1.140(f), Florida Rules of Civil Procedure, which authorizes motions to strike "redundant, immaterial, impertinent, or scandalous matter from any pleading.") Based on this fundamental evidentiary standard, FPL's Motion is not well founded, because it does not demonstrate—indeed, does not purport to be based on—any of the grounds that are recognized by the APA as a basis for excluding testimony. Indisputably, the testimony described in the Background section of this Response is relevant and material. The quality of FPL's management of its Turkey Point uprate activity and the economic feasibility of the project that results from management actions and inactions are at the core of the matters being evaluated by the Commission for disposition.

FPL has taken the testimony of Dr. Jacobs that is the subject of its Motion out of context. In its Motion to Strike, FPL focuses on "three short, specific portions of Dr. Jacobs' prefiled testimony." (Motion, at page 1) The three passages are those in which Dr. Jacobs describes the remedy that he recommends in light of FPL imprudence that he identifies elsewhere in his prefiled testimony. Having isolated these passages from the context in which they were developed and supported, FPL proceeds to mischaracterize Dr. Jacob's recommended action. Specifically, FPL describes Dr. Jacobs' recommendation as a "risk-sharing mechanism" of the kind that was the subject of a prior order, and asserts that the recommendation is an effort to prevent FPL from recovering "all prudent costs." Neither characterization is valid.

Dr. Jacobs' recommendation is not a "risk-sharing" mechanism. Implicit in the concept of a "risk sharing mechanism" is the proposition that a utility may be required to absorb costs in the absence of proof of mismanagement. Whether portrayed as an effort to require the

utility to have "skin in the game" or an "incentive" to the utility, the concept is disengaged from any notion of poor management or imprudent action/inaction. This "disconnect" is at the center of Order No. PSC-11-0095-FOF-EI, quoted by FPL at page 5 of the Motion to Strike, in which the Commission ruled it does not have authority "to implement a risk sharing mechanism that would preclude a utility from recovering all prudently incurred costs resulting from the siting, design, licensing, and construction of a nuclear power plant."

Here, there is no such "disconnect" between the issue of prudence and the risk of non-recovery. In his testimony, Dr. Jacobs asserts that FPL, through imprudence, failed to heed and act on information from its outside project estimation expert indicating that the Turkey Point uprate was headed toward extremely high costs, and consequently customers are now (as evidenced by OPC's stand-alone feasibility study) being asked by FPL to pay exorbitantly high project costs. Consistent with the fundamental premise that the uprate projects should be cost-effective to customers, and in light of proof of imprudence leading to high costs, OPC's witness could have asserted that costs exceeding benefits are imprudent and the Commission should limit recovery accordingly. OPC's alternative, which is to disallow amounts exceeding FPL's revised estimate containing an increase of $555 million over a year ago, is therefore a conservative means of measuring the impact of FPL's imprudence on the costs that customers will be required to bear. In any event, the recommendation is tied to an assertion of imprudence and is intended to be a measurement of the impact of that imprudence on costs that FPL wants to collect from customers. These facets of the testimony of OPC witness Dr. Jacobs differentiate the instant situation from the type of "risk sharing mechanism" that the Commission addressed in Order Nos. PSC-11-0095-FOF-EI and PSC-11-0224-FOF-EI.

Nor does Order No. PSC-11-0547-FOF-EI, cited by FPL at page 6 of the motion, support

FPL's argument. In that order, the Commission denied OPC's recommendation to require FPL to apply to its uprate projects the type of "breakeven" analysis that it employs for the proposed new Turkey Point 6 & 7 nuclear units instead of the its feasibility methodology in which FPL excludes past spent amounts ("sunk costs") from the comparison with its resource alternative. However, the feasibility study that OPC witness Brian Smith is sponsoring in the current proceeding, to which Dr. Jacobs refers in his testimony, does not employ the "breakeven" methodology that the Commission addressed in the 2011 order. Nor did Mr. Smith exclude "sunk costs" from his analysis. The feasibility study sponsored by Mr. Smith applies the methodology favored by FPL and approved by the Commission, with the sole exception that it segregates (from the St. Lucie uprate data) the costs and projected benefits of the Turkey Point uprate so that (as a consequence of FPL's skyrocketing cost estimate) the project can be compared with FPL's alternative on a separate, standalone basis. In that regard, at page 39 of Order No. PSC-11-0547-FOF-EI (the same 2011 order cited by FPL), the Commission stated, "We find that we are not limited to a specific form of economic analysis, breakeven or otherwise. We may require any form of analysis we believe would provide insight into the long-term feasibility of completing the EPU project." Therefore, FPL is mistaken when it argues that OPC is "relitigating" matters that the Commission decided in the 2011 order.

OPC notes that, prior to the hearing in Docket No. 110009-EI, FPL filed a motion to strike portions of the testimony of Dr. Jacobs that related to the "breakeven" approach he sponsored at the time. Recognizing OPC's right to present its testimony at the evidentiary hearing, the Commission denied FPL's last effort to short circuit the evidentiary process with an inappropriate motion to strike. Order No. PSC-11-0547-FOF-EI, at page 5. Through the instant Motion, it is FPL, not OPC, who is ignoring the lessons of past litigations.

OPC's testimony and exhibit present factual and evidentiary matters for the Commission's consideration. The testimony that is the subject of the Motion is an integral part of OPC's presentation. Contrary to FPL's Motion, the Commission cannot evaluate the testimony in a vacuum. At page 7 of the Motion, FPL argues that its Motion presents "... a legal issue, not a factual issue, requiring consideration of evidence ..." FPL is wrong in its assertion. In testimony and exhibits, OPC has offered evidence to prove (1) Turkey Point uprate costs have soared to levels that already exceed benefits and (2) FPL knew, or should have known, that its Turkey Point uprate was headed toward exorbitant cost levels in time to take action to mitigate customers' exposure to excessive costs. Only by selectively lifting the brief passages out of Dr. Jacobs' testimony and mischaracterizing them in isolation of his proposal's "cause and effect," "imprudent management and ratemaking consequence" evidentiary surroundings can FPL attempt to describe OPC's case as "legal, not factual."

FPL's complaint that OPC's recommendations would preclude it from recovering all prudently incurred costs begs the essential question pending before the Commission. In its Motion, FPL invokes Sections 366.93(2) and 403.519(4)(e), F.S., and argues that OPC's recommendation would run afoul of these provisions by preventing FPL from recovering all prudently incurred costs. FPL's argument neatly begs the question of whether all costs it seeks to recover were prudently incurred. More to the point, through testimony and exhibits OPC contends management imprudence has caused the Turkey Point uprate costs to reach excessive levels. The statutes provide that FPL may recover all prudently incurred costs. It is not a violation of the cited statutory provisions to request the Commission to disallow costs that were incurred as a consequence of managerial imprudence. As it is impossible to go back in time and measure with precision the costs that could have been saved had FPL timely recognized the

magnitude of project costs, OPC's witness has proposed—rather generously to FPL, it could be argued—to use the current estimate reflecting a $555 million increase over and above the 2011 estimate as the maximum prudent amount.

The statutes that FPL cites must be interpreted and implemented in the context of facts and policy. Through its motion, FPL offers a self-serving view of the limits of the Commission's authority and discretion—and asks the Commission to endorse it in a vacuum. FPL's Motion is an attempt to preempt procedures that are based on due process. It is also an attempt to require Commissioners to don strait jackets before entering the hearing room. OPC's testimony calls on the Commission to evaluate an approach to the measurement of the effect of imprudence that varies from the "blank check" view that FPL espouses. It would be erroneous as a matter of law for the Commission to grant FPL's motion, which is a transparent attempt to once again keep the Commission from reaching the merits of OPC's recommendation on FPL's stunning cost overruns. The Commission should deny FPL's Motion to Strike, hear the testimony that is the subject of the Motion, and evaluate the totality of the issues of fact, policy, and law that are crystallized by OPC's full presentation and FPL's response.

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CERTIFICATE OF SERVICE
Docket No. 120009-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic and/or U. S. Mail to the following parties on this 10th day of August, 2012.

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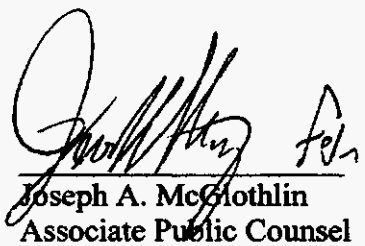

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