

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Nuclear Cost Recovery Clause.

DOCKET NO.: 130009-EI

FILED: July 29, 2013

**CITIZENS' LEGAL BRIEF ON ISSUES 1, 2, AND 3**

Pursuant to Order No. PSC-13-0333-PHO-EI, issued July 23, 2013, the Citizens of the State of Florida by and through the Office of Public Counsel ("Citizens" or "OPC"), hereby submit this Legal Brief on Issues 1, 2, and 3.

**INTRODUCTION**

The essential questions to be addressed by the Commission are what effect do the recent amendments to Section 366.93, Florida Statutes (F.S.), have on (1) the 2013 Nuclear Cost Recovery Clause (NCRC) docket (which is an annually recurring docket); and (2) the petitions filed by Florida Power & Light (FPL) and Duke Energy Florida (DEF or Duke) on May 1, 2013, for recovery starting in January 2014; and (3) if it applies to this proceeding, whether there is testimonial evidence supporting recovery consistent with the amended statute or other competent substantial evidence in the record to support the requests which the utilities' filed. OPC notes that since July 1, 2013, the effective date of the amendments to Section 366.93, F.S., neither utility has petitioned the Commission to file supplemental testimony nor have they modified their requests for recovery consistent with the statutory amendments. For the reasons stated below, OPC does not agree with the utilities' interpretation that the 2013 statutory changes do not affect the petitions for cost recovery filed this year pursuant to Section 366.93, F.S. which are currently pending.

## LEGAL STANDARD

As noted in the case law cited by FPL and others in their preliminary positions statements on Issues 1, 2, and 3, substantive changes in the law should be applied prospectively and remedial/procedural changes should be applied to *pending* cases in order to fully effectuate the purpose of the legislation. *Smiley v. State*, 966 So. 2d 330, 334 (Fla. 2007). There is a presumption against retroactive application of substantive statutory changes in the law. *Fla. Ins. Guar. Ass'n v. Devon Neighborhood Ass'n*, 67 So. 3d 187, 195 (Fla. 2011). To determine whether a substantive change was intended to apply retroactively, the two-prong test for retroactivity set forth in *Devon Neighborhood* must be applied: 1) the court (or Commission in this case) must ascertain whether the Legislature intended for the statutory language to apply retroactively; and 2) if retroactive application was the intent, then whether such retroactive application would violate any constitutional principles. *Devon Neighborhood* at 195 (quoting *Menendez v. Progressive Express Ins. Co*, 35 So. 3d 873 (Fla. 2010). *Id.* at 196. A court may engage in statutory construction to determine whether the Legislature clearly intended retroactive application. *Id.* at 196. The examination of intent considers language, purpose, structure, and/or legislative history of the statute. *Id.* at 197 (citations omitted). Therefore, it is incumbent on the Commission, in its quasi-judicial role in this proceeding, to determine whether the amendments to Section 366.93, F.S., are substantive and/or remedial/procedural in nature, whether the Legislature intended these amendments to apply to the current 2013 NCRC proceeding including the petitions and testimony filed by the utilities on May 1, 2013, and whether the Legislature clearly intended retroactive application of these amendments to an earlier period.

## ARGUMENT

The utilities assert that the amendments to Section 366.93, F.S., should not apply to their currently pending petitions for recovery because their filings were filed on May 1, 2013, prior to the July 1, 2013 effective date. This does not make sense. The NCRC is an annually recurring docket. The utilities' cost recovery petitions, projection filings, and pre-file direct testimony are routinely filed on or about May 1st of the current year for the following year's cost recovery. This allows the Intervenor parties and Commission staff adequate time to examine the requests, conduct formal discovery, and pre-file direct testimony, as well as provide time for the utilities to pre-file rebuttal testimony. Then the Commission conducts a formal administrative hearing, usually in August, to establish the record upon which the Commission bases its decision, and this decision is normally rendered in October. It is undisputed that the decision to establish next year's NCRC factor is made in October when the Commission weighs the evidence in the record and not in May when the utilities file their petitions for recovery.

In this case, the utilities' requests for cost recovery under the amended statute are still pending. The utilities' NCRC cost recovery petitions were filed in May; however, their pre-filed testimony and exhibits supporting their requests will not be entered into the record (or become evidence) until the conclusion of the August 5-9, 2013 NCRC Hearing, and the Commission will not approve, modify, or deny the utilities' requests for recovery until October (or later), which is well after the July 1, 2013 effective date for the amendments to Section 366.93, F.S. Therefore, consistent with the case law cited herein, the Commission should reject the utilities' assertion that the amended statute does not apply to the 2013 NCRC proceeding or their still pending requests for recovery under the statute.

**ISSUE 1: Does recently enacted Senate Bill 1472, effective July 1, 2013, change the AFUDC rate that should be used for nuclear cost recovery clause computations in this year's pending case?**

In 2013, the Legislature amended Section 366.93, F.S., with respect to the application of an AFUDC rate. It is a question of law for the Commission to decide whether the amendments were substantive, remedial/procedural, or both. Pursuant to *Smiley v. State*, 966 So. 2d 330, 334 (Fla. 2007), substantive changes in the law should be applied prospectively, and remedial/procedural changes apply to any currently pending proceeding. Accordingly, in this case, it appears that the changes should govern as of July 1, 2013, and the amended statute should apply to all decisions to be made by the Commission to approve cost recovery through the NCRC after July 1, 2013.

In light of the amendments enacted in 2013 to Section 366.93, F.S., each utility should certify that its AFUDC rate comports with the amended statute or resubmit testimony prior to the evidentiary hearing in light of these statutory changes; otherwise, the utility will be unable to meet its burden of proof for the proper AFUDC rate to be used for nuclear cost recovery clause computations.

**ISSUE 2: Does recently enacted Senate Bill 1472, effective July 1, 2013, preclude a utility from continuing preconstruction work not related to obtaining a combined operating license from the Nuclear Regulatory Commission or certification, that was under contract or commenced prior to July 1, 2013?**

In 2013, the Legislature amended Section 366.93, F.S. It is a question of law for the Commission to decide whether the amendments were substantive, remedial/procedural, or both. Pursuant to *Smiley v. State*, 966 So. 2d 330, 334 (Fla. 2007), substantive changes in the law

should be applied prospectively, and remedial/procedural changes apply to any currently pending proceeding. Accordingly, in this case, the changes should govern as of July 1, 2013.

With regards to FPL, OPC is not aware of any “continuing preconstruction work not related to obtaining a combined operating license from the Nuclear Regulatory Commission or certification that was under contract or commenced prior to July 1, 2013” that would be affected by the statutory amendments. If such preconstruction work does exist, FPL should certify that its preconstruction work comports with the amended statute or resubmit testimony prior to the evidentiary hearing in light of these statutory changes; otherwise, the utility will be unable to meet its burden of proof for this issue.

With regards to Duke, “preconstruction work not related to obtaining a combined operating license from the Nuclear Regulatory Commission or certification, that was under contract or commenced prior to July 1, 2013” is addressed by the settlement approved by Order No. PSC-12-0104-FOF-EI, issued March 8, 2012, in Docket No. 120022-EI. Since substantive statutory changes should be applied prospectively, it does not appear that the statutory changes were intended to apply retroactively to the settlement approved by the Commission.

**ISSUE 3: Does recently enacted Senate Bill 1472, effective July 1, 2013, preclude a utility from recovering costs associated with preconstruction work not related to obtaining a combined operating license from the Nuclear Regulatory Commission or certification, that was under contract or commenced prior to July 1, 2013?**

In 2013, the Legislature amended Section 366.93, F.S. It is a question of law for the Commission to decide whether the amendments were substantive, remedial/procedural, or both. Pursuant to *Smiley v. State*, 966 So. 2d 330, 334 (Fla. 2007), substantive changes in the law

should be applied prospectively, and remedial/procedural changes apply to any currently pending proceeding. Accordingly, in this case, the changes should govern as of July 1, 2013.

With regards to FPL, OPC is not aware of any “costs associated with preconstruction work not related to obtaining a combined operating license from the Nuclear Regulatory Commission or certification that was under contract or commenced prior to July 1, 2013” that FPL is seeking to recover. If FPL is seeking to recover any such costs, in light of the amendments enacted in 2013 to Section 366.93, F.S., FPL should certify that its requested cost recovery comports with the amended statute or resubmit testimony prior to the evidentiary hearing in light of these statutory changes; otherwise, the utility will be unable to meet its burden of proof for this issue.

With regards to Duke, “recovering costs associated with preconstruction work not related to obtaining a combined operating license from the Nuclear Regulatory Commission or certification that was under contract or commenced prior to July 1, 2013” is addressed by the settlement approved by Order No. PSC-12-0104-FOF-EI, issued March 8, 2012, in Docket No. 120022-EI. Since substantive statutory changes should be applied prospectively, it does not appear that the statutory changes were intended to apply retroactively to the settlement approved by the Commission.

## CONCLUSION

The Commission should determine whether the amendments to Section 366.93, F.S., apply to the current 2013 NCRC proceeding, and if so, what effect that has on the utilities' petitions for cost recovery.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to the following parties on this 29<sup>th</sup> day of July, 2013:

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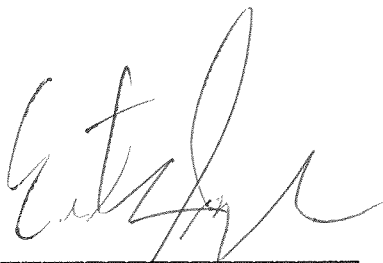
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