

State of Florida



FILED OCT 13, 2015  
DOCUMENT NO. 06485-15  
FPSC - COMMISSION CLERK

# Public Service Commission

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**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** October 13, 2015

**TO:** Carlotta S. Stauffer, Commission Clerk, Office of Commission Clerk

**FROM:** Rosanne Gervasi, Senior Attorney, Office of the General Counsel

**RE:** Docket No. 150171-EI - Petition for issuance of nuclear asset-recovery financing order, by Duke Energy Florida, Inc. d/b/a Duke Energy.

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Please place the attached Proposed Stipulations on Financing Order Issues in the above-referenced docket file.

**PROPOSED STIPULATIONS ON FINANCING ORDER ISSUES\***

**LEGAL ISSUE A:** What is the definition of “incremental bond issuance costs” as that term is used in Section 366.95(2)(c)5., Florida Statutes?

**LEGAL ISSUE B:** In determining whether some or all actual bond issuance costs should be disallowed pursuant to Section 366.95(2)(c)5., Florida Statutes, what should the Commission take into account?

If the parties reach stipulations on all the issues as proposed below, these legal issues do not need to be decided by the Commission.

**ISSUE 14:** Do the cost amounts contained in DEF’s CR3 Regulatory Asset meet the definition of “nuclear asset-recovery costs” pursuant to Section 366.95(1)(k), Florida Statutes?

The cost amounts contained in DEF’s CR3 Regulatory Asset meet the definition of “nuclear asset-recovery costs” pursuant to Section 366.95(1)(k), Florida Statutes.

**ISSUE 15:** Do the ongoing financing costs identified in DEF’s Petition qualify as “financing costs” pursuant to Section 366.95(1)(e), Florida Statutes?

The types of ongoing financing costs identified in DEF’s Petition qualify as “financing costs” pursuant to Section 366.95(1)(e), Florida Statutes.

**ISSUE 16:** Has DEF demonstrated that securitization has a significant likelihood of resulting in lower overall costs or would avoid or significantly mitigate rate impacts compared to the traditional method of cost recovery pursuant to Section 366.95(2)(a)6., Florida Statutes?

DEF has demonstrated that securitization has a significant likelihood of resulting in lower overall costs or would avoid or significantly mitigate rate impacts compared to the traditional method of cost recovery pursuant to Section 366.95(2)(a)6., Florida Statutes.

**ISSUE 17:** What amount, if any, should the Commission authorize DEF to recover through securitization?

The amounts that should be authorized for DEF to recover through securitization must meet the criteria set forth in Section 366.95, Florida Statutes. By the nature of this proceeding, that amount will not be known with precision until the bonds are issued. The principal amount of the nuclear asset-recovery bonds should be \$1,283,012,000, representing the projected December 31, 2015 balance of the CR3 Regulatory Asset, subject to true-up to the actual December 31, 2015

balance, plus carrying charges beyond 2015 until the date of the bond issuance, plus upfront financing costs.

**ISSUE 18: What is the appropriate treatment of the deferred tax liability consistent with paragraph 5(j) of the RRSSA?**

No adjustment is necessary for the deferred tax liability. However, consistent with paragraph 5(j) of the RRSSA, the deferred tax liability will be excluded for earnings surveillance purposes.

**ISSUE 19: Should DEF indemnify customers to the extent customers incur losses associated with higher servicing fees payable to a substitute servicer, or with higher administration fees payable to a substitute administrator, as a result of DEF's termination for cause?**

DEF should be required to indemnify customers to the extent customers incur losses associated with higher servicing fees payable to a substitute servicer, or with higher administration fees payable to a substitute administrator, as a result of DEF's termination for cause attributable to its own actions.

**ISSUE 20: What should be the up-front and ongoing fee for the role of servicer throughout the term of the nuclear asset-recovery bonds?**

The up-front fee for the role of servicer is currently estimated to be \$915,000. The actual amount may change based on DEF's final cost. So long as DEF or an affiliate of DEF is servicer, the annual fee for the role of servicer throughout the term of the nuclear asset-recovery bonds is 0.05% of the original principal balance of the nuclear asset-recovery bonds (currently estimated to be approximately \$650,000).

**ISSUE 21: What amount, if any, of DEF's periodic servicing fee in this transaction should DEF be required to credit back to customers through an adjustment to other rates and charges?**

DEF will credit back to customers through the Capacity Cost Recovery Clause all periodic servicing fees in excess of DEF's or an affiliate of DEF's incremental cost of performing the servicer function until the next rate case when costs and revenues associated with the servicing fees will be included in the cost of service.

**ISSUE 22: What should be the ongoing fee for the role of the administrator throughout the term of the nuclear asset-recovery bonds?**

The ongoing fee for the role of the administrator throughout the term of the nuclear asset-recovery bonds will be \$50,000.

**ISSUE 23: What amount, if any, of DEF’s periodic administration fee in this transaction should DEF be required to credit back to customers through an adjustment to other rates and charges?**

DEF will credit back to customers through the Capacity Cost Recovery Clause all periodic administration fees in excess of DEF’s or any affiliate of DEF’s incremental cost of performing the administration function until the next rate case when costs and revenues associated with the administration fee will be included in the cost of service.

**ISSUE 24: How frequently should DEF in its role as servicer be required to remit funds collected from customers to the SPE?**

DEF will remit funds collected from customers to the SPE either on a daily basis based on estimated daily collections or on a monthly basis if certain conditions can be satisfied. These conditions have yet to be determined and will be driven both by rating agency requirements to achieve and maintain the targeted “AAA” rating on the bonds and by investor concerns in the marketing and pricing of the bonds.

**ISSUE 25: If remittances are not daily, should DEF be required periodically to remit actual earnings on collections pending remittance?**

If remittances are not daily, DEF will be required monthly to remit estimated earnings on collections pending remittance. The calculation of earnings will be consistent with the methodology for calculating interest on over- and under-collections associated with DEF’s cost recovery clauses.

**ISSUE 26: Is DEF’s proposed process for determining whether the upfront bond issuance costs satisfy the statutory standard of Section 366.95(2)(c)5., Florida Statutes, reasonable and should it be approved?**

In accordance with Section 366.95(2)(c)5., Florida Statutes, within 120 days after the issuance of the nuclear asset-recovery bonds, DEF will file supporting information on the actual upfront bond issuance costs, for the categories of costs as reflected on page 1 of Exhibit No. \_\_ (BB-1). The Commission shall review such costs to determine compliance with Section 366.95(2)(c)5., Florida Statutes. As part of this review, the Commission shall only consider actual upfront bond issuance costs, but not ongoing financing costs, interest rate, or pricing of the bonds.

After the issuance of a Financing Order, if DEF decides not to cause nuclear asset-recovery bonds to be issued, then as provided in Section 366.95(2)(c)6., Florida Statutes, DEF may not recover financing costs, as defined in Section 366.95(1)(e), Florida Statutes, from customers.

**ISSUE 27: Issue dropped.**

**ISSUE 28: What additional conditions, if any, should be made in the Financing Order that are authorized by Section 366.95(2)(c)2.i.?**

The Financing Order will include ordering paragraphs, findings of fact, and conclusions of law that will give appropriate comfort to investors about the high quality of the nuclear asset-recovery bonds as a potential investment. Examples include:

1. A finding of fact that the Commission anticipates stress case analyses will show that the broad-based nature of the true-up mechanism under Section 366.95(2)(c)2.d, Florida Statutes, and the State pledge under Section 366.95(11), Florida Statutes, will serve to effectively eliminate for all practical purposes and circumstances any credit risk to the payment of the nuclear asset-recovery bonds (*i.e.*, that sufficient funds will be available and paid to discharge the principal and interest obligations when due);
2. A finding of fact and ordering paragraph directing that the automatic true-up mechanism is to be applied at least every six months;
3. A finding of fact and ordering paragraph that the automatic true-up mechanism will be implemented no later than 60 days after a filing by the servicer;
4. A finding of fact that the credit quality of the nuclear asset-recovery bonds are enhanced by Section 366.95, Florida Statutes, due to the requirements that (1) the nuclear asset-recovery charge in amounts authorized by the Commission are to be imposed on all customer bills and collected in full in the form of a nonbypassable charge separate from the electric utility's base rates, (2) the charge shall be paid by all existing and future customers receiving transmission or distribution services from the electric utility, and (3) following any fundamental change in regulation of public utilities in the State, a customer electing to purchase electricity from an alternate electricity supplier must still pay the charge. Furthermore, through the true-up mechanism, any delinquencies or under-collections in one customer rate class will be taken into account in the application of the True Up Mechanism to adjust the nuclear asset-recovery charge for all customers of DEF, not just the class of customers from which the delinquency or under-collection arose;
5. A finding of fact that the Commission interprets the legislative intent of the true-up mechanism provided for in Section 366.95 for allocating costs among customers rises to the level of joint and several liability among the customers of DEF.
6. A finding of fact and conclusion of law that the broad nature of the State pledge under Section 366.95(11), Florida Statutes, constitutes a contract with the bondholders, the owners of the nuclear asset-recovery property,

and other financing parties that the state will not: (1) Alter the provisions of this section which make the nuclear asset-recovery charges imposed by a Financing Order irrevocable, binding, and nonbypassable charges; (2) Take or permit any action that impairs or would impair the value of nuclear asset-recovery property or revises the nuclear asset-recovery costs for which recovery is authorized; or (3) Except as authorized under Section 366.95, reduce, alter, or impair nuclear asset-recovery charges that are to be imposed, collected, and remitted for the benefit of the bondholders and other financing parties until any and all principal, interest, premium, financing costs and other fees, expenses, or charges incurred, and any contracts to be performed, in connection with the related nuclear asset-recovery bonds have been paid and performed in full;

7. A finding of fact that this Commission guarantees that it will act pursuant to this Financing Order as expressly authorized by Section 366.95, Florida Statutes, to ensure that nuclear asset-recovery charge revenues are sufficient to pay principal and interest on the nuclear asset-recovery bonds issued pursuant to this Financing Order and other costs, including fees and expenses, in connection with the nuclear asset-recovery bonds;
8. A finding of fact that the broad based nature of the State pledge under Section 366.95(11), Florida Statutes, and the irrevocable character of this Financing Order, in conjunction with the true-up adjustment provisions required by Section 366.95(2)(c)2.d, Florida Statutes, and included in this Order, constitutes a guarantee of regulatory action for the benefit of investors in nuclear asset-recovery bonds;
9. A conclusion of law that nuclear asset-recovery property is not a receivable or a pool of receivables;
10. A conclusion of law that the nuclear asset-recovery property is not a financial asset in that it only represents a legally-enforceable regulatory property right under Section 366.95 to bill and collect nuclear asset-recovery charges on persons who receive electric transmission and distribution services from the electric utility or its successors or assignees;
11. A finding of fact that the issuer of the bonds is a special purpose finance subsidiary of DEF and a corporate issuer;
12. A conclusion of law that the Commission's obligation under the Financing Order relating to nuclear asset-recovery bonds, including the specific actions the Commission guarantees to take, are direct, explicit, irrevocable, and unconditional upon the issuance of nuclear asset-recovery bonds, and are legally enforceable against the Commission, a United States public sector entity; and

13. A conclusion of law and ordering paragraph that the Financing Order is irrevocable under Section 366.95(2)(c)6, Florida Statutes.

In addition, the Financing Order will call for the Commission's financial advisor to deliver to the Commission a certification as to whether the structuring, marketing, and pricing of the nuclear asset-recovery bonds resulted in the lowest nuclear asset-recovery charges consistent with prevailing market conditions and the terms of the Financing Order and other applicable law. That certification shall include a report of any action or inaction which the Commission's financial advisor believes might have caused the transaction not to achieve the lowest nuclear asset-recovery charges, regardless of whether DEF's reason for action or inaction was the result of DEF's sole view that it would expose DEF or the SPE to securities law liability. The Financing Order will provide that the Commission will take that certification from its financial advisor, along with any other facts and circumstances, except for a change in market conditions after the moment of pricing, into account in determining whether the remaining requirements of Section 366.95, Florida Statutes, and the Financing Order have been met and whether to issue a stop order no later than 5:00 pm Eastern time on the third business day following pricing, as provided in Ordering Paragraph 54 of the Financing Order.

The parties agree that the Financing Order shall be silent on the issue of whether any judgment or other finding of liability against the SPE(s) constitutes "financing costs" as those costs are defined in Section 366.95. Furthermore, the parties each agree that no party will assert that the Financing Order supports a finding in favor of or against the proposition that any judgment or finding of liability against the SPE(s) constitutes "financing costs" as defined in Section 366.95.

**ISSUE 29: Should all legal opinions be subject to review by the Bond Team?**

All legal opinions should be reviewed by the Bond Team. All legal opinions associated with the Nuclear Asset-Recovery Bonds should be submitted to the Commission automatically without requiring the Commission to specifically request the documents.

**ISSUE 30: Should all transaction documents and subsequent amendments be filed with the Commission before becoming operative?**

All transaction documents and subsequent amendments should be reviewed and approved by the Bond Team before becoming operative.

**ISSUE 31: Is DEF's proposed pre-issuance review process reasonable and should it be approved?**

DEF, its structuring advisor, and designated Commission staff and its financial advisor will serve on the Bond Team. One designated representative of DEF and one designated representative of the Commission shall be joint decision makers in

all aspects of the structuring, marketing and pricing of the nuclear asset-recovery bonds except for those recommendations that in the sole view of DEF would expose DEF or the SPE to securities law and other potential liability (*i.e.*, such as, but not limited to, the making of any untrue statement of a material fact or omissions to state a material fact required to be stated therein or necessary in order to make the statements made not misleading) or contractual law liability (*e.g.*, including but not limited to terms and conditions of the underwriter agreement(s)). The Commission's designated staff and financial advisor will be visibly involved, in advance, in all aspects of the structuring, marketing, and pricing of the nuclear asset-recovery bonds. All Bond Team members will actively participate in the design of the marketing materials for the transactions as well as in the development and implementation of the marketing and sales plan for the bonds. DEF believes DEF and the Commission staff and its financial advisor as Bond Team members, excluding DEF's structuring advisor, should also have equal rights on the hiring decisions for the underwriters and counsel to the underwriters. However, DEF will have sole right to select and engage all counsel for DEF and the SPE. In addition, together with the Bond Team's involvement in the structuring, marketing and pricing of the nuclear asset-recovery bonds, and the Issuance Advice Letter process, the Commission will be able to fully review the pricing of the bonds as the Commission determines whether to issue a stop order no later than 5:00 pm Eastern time on the third business day following pricing, as provided in Ordering Paragraph 54 of the Financing Order.

**ISSUE 32: Should the Financing Documents be approved in substantially the form proposed by DEF, subject to modifications as addressed in the draft form of the Financing Order?**

No. The specific terms, conditions, covenants, warranties, representations, and specific language contained in the Financing Documents may be impacted by the Commission's decisions on other issues and must be reviewed in consideration of the Financing Order approved by the Commission.

**ISSUE 33: Is DEF's proposed Issuance Advice Letter process reasonable and consistent with the statutory financing cost objective contained in Section 366.95(2)(c)2.b., Florida Statutes?**

Yes. DEF, its structuring advisor, and designated Commission staff and its financial advisor will serve on the Bond Team. One designated representative of DEF and one designated representative of the Commission shall be joint decision makers in all aspects of the structuring, marketing and pricing of the nuclear asset-recovery bonds, except for those recommendations that in the sole view of DEF would expose DEF or the SPE to securities law and other potential liability (*i.e.*, such as, but not limited to, the making of any untrue statement of a material fact or omissions to state a material fact required to be stated therein or necessary in order to make the statements made not misleading) or contractual law liability (*e.g.*, including but not limited to terms and conditions of the underwriter agreement(s)), so the Commission will be provided with information in real time

about the transaction. Furthermore, the Commission will have an opportunity to review a draft of the proposed Issuance Advice Letter in advance of pricing the transaction.

**ISSUE 34: Should the Standard True-up Letter be approved in substantially the form proposed by DEF?**

The Standard True-up Letter should be approved in substantially the form proposed by DEF.

**ISSUE 35: Is DEF's proposed process for determining whether the structure, plan of marketing, expected pricing and financing costs of the nuclear asset-recovery bonds have a significant likelihood of resulting in lower overall costs or would avoid or significantly mitigate rate impacts to customers as compared with the traditional method of financing and recovering nuclear asset-recovery costs reasonable and should it be approved?**

Yes. DEF's proposed process for determining whether the structure, plan of marketing, expected pricing and financing costs of the nuclear asset-recovery bonds has a significant likelihood of resulting in lower overall costs or would avoid or significantly mitigate rate impacts to customers as compared with the traditional method of financing and recovering nuclear asset-recovery costs.

**ISSUE 36: Is the degree of flexibility afforded to DEF in establishing the terms and conditions of the nuclear asset-recovery bonds as described in the proposed form of Financing Order, reasonable and consistent with Section 366.95(2)(c)2.f., Florida Statutes?**

Yes, as modified by this Stipulation. DEF, its structuring advisor, and designated Commission staff and its financial advisor will serve on the Bond Team. One designated representative of DEF and one designated representative of the Commission shall be joint decision makers in a collaborative process, except for those recommendations that in the sole view of DEF would expose DEF or the SPE to securities law or other potential liability (*i.e.*, such as, but not limited to, the making of any untrue statement of a material fact or omission to state a material fact required to be stated therein or necessary in order to make the statements made not misleading) or contractual law liability (*e.g.*, including but not limited to terms and conditions of the underwriter agreement(s)). This affords the flexibility that is reasonable and consistent with Section 366.95(2)(c)2f.

**ISSUE 37: What persons or entities should be represented on the Bond Team?**

DEF, its structuring advisor, and designated Commission staff and its financial advisor should be represented on the Bond Team.

**ISSUE 38: Based on resolution of the preceding issues, should a Financing Order in substantially the form proposed by DEF be approved, including the findings of fact and conclusions of law as proposed?**

The Financing Order, including findings of fact and conclusions of law, proposed by DEF should be revised, following consultation with and input from the active parties, to reflect the Commission's resolution of all issues in this proceeding.

**ISSUE 39: If the Commission votes to issue a Financing Order, what post-Financing Order regulatory oversight is appropriate and how should that oversight be implemented?**

DEF's customers will be effectively represented throughout the proposed transaction. DEF, its structuring advisor, and designated Commission staff and its financial advisor will serve on the Bond Team. One designated representative of DEF and one designated representative of the Commission shall be joint decision makers for all matters concerning the structuring, marketing, and pricing of the bonds except for those recommendations that in the sole view of DEF would expose DEF or the SPE to securities law and other potential liability (*i.e.*, such as, but not limited to, the making of any untrue statement of a material fact or omission to state a material fact required to be stated therein or necessary in order to make the statements made not misleading) or contractual law liability (*e.g.*, including but not limited to terms and conditions of the underwriter agreement(s)). The final structure of the transaction, including pricing, will be subject to review by the Commission for the limited purpose of ensuring that all requirements of law and the Financing Order have been met.

**ISSUE 40: Are the energy sales forecasts used to develop the bond amortization schedules and the recovery mechanism appropriate?**

The energy sales forecasts used to develop the bond amortization schedules and the recovery mechanism are appropriate.

**ISSUE 41: If the Commission approves recovery of any nuclear asset-recovery related costs through securitization, how should the recovery of these costs be allocated to the rate classes consistent with Section 366.95(2)(c)2.g., Florida Statutes?**

In accordance with Section 366.95(2)(c)2.g., Florida Statutes, DEF should allocate the nuclear asset-recovery costs recoverable under the nuclear asset-recovery charge consistent with the allocation methodology adopted in the RRSSA approved on November 12, 2013 in Order No. PSC-13-0598-FOF-EI. That approved allocation methodology for DEF is the 12CP and 1/13 AD. Spelled out, that means twelve-thirteenths of the revenue requirement is allocated based on 12 monthly coincident peaks (or demand) and one-thirteenth is allocated based on average demand (or energy).

**ISSUE 42:** **If the Commission approves recovery of any nuclear asset-recovery related costs through securitization, what is the appropriate recovery period for the Nuclear Asset-Recovery Charge?**

If the Commission approves recovery of any nuclear asset-recovery related costs through securitization, the appropriate recovery period for the Nuclear Asset-Recovery Charge is 240 months or until the nuclear asset-recovery bonds and associated charges and approved adjustments have been paid in full but not to exceed 276 months.

**ISSUE 43:** Issue dropped.

**ISSUE 44:** **What should be the scheduled final maturity and the legal final maturity of the nuclear asset-recovery bonds?**

The scheduled final maturity and the legal final maturity of the nuclear asset-recovery bonds are to be determined after the issuance of the Financing Order.

**ISSUE 45:** **Is DEF's proposed Nuclear Asset-Recovery Charge True-Up Mechanism appropriate and consistent with Section 366.95, Florida Statutes, and should it be approved?**

DEF's proposed Nuclear Asset-Recovery Charge True-Up Mechanism is appropriate and consistent with Section 366.95, Florida Statutes, and it should be approved.

**ISSUE 46:** **How frequently should the Nuclear Asset-Recovery Charge True-up Mechanism be conducted?**

The Nuclear Asset-Recovery Charge True-up Mechanism should be conducted not less than every six months.

**ISSUE 47:** **If the Commission approves an amount to be securitized, on what date should the Nuclear Asset-Recovery Charge become effective?**

The Nuclear Asset-Recovery Charges should become effective upon the first day of the billing cycle for the month following the issuance of the nuclear asset-recovery bonds.

**ISSUE 48:** Issue dropped.

**ISSUE 49:** If the Commission denies DEF's request for a Financing Order, or if the nuclear asset-recovery bonds are not issued for any reason after the Commission issues a Financing Order, should the Commission approve DEF's alternative request for a base rate increase pursuant to the RRSSA, to be implemented beginning six months after the final order rejecting DEF's request (in the event the Financing Order is not issued) or the date upon which DEF notifies the Commission that the bonds will not be issued (in the event the Financing Order is issued), with carrying costs on the nuclear asset-recovery costs collected from January 1, 2016, through the Capacity Cost Recovery Clause, until such time as the base rate increase goes into effect?

If the Commission denies DEF's request for a Financing Order, or if the nuclear asset-recovery bonds are not issued for any reason after the Commission issues a Financing Order, the Commission should approve DEF's alternative request for a base rate increase pursuant to the RRSSA, to be implemented beginning six months after the final order rejecting DEF's request (in the event the Financing Order is not issued) or the date upon which DEF notifies the Commission that the bonds will not be issued (in the event the Financing Order is issued), with carrying costs on the nuclear asset-recovery costs collected from January 1, 2016, through the Capacity Cost Recovery Clause, until such time as the base rate increase goes into effect.

**ISSUE 50:** Should the form of tariff sheets to be filed under DEF's tariff, as provided in Exhibit \_\_ (MO-6A) of Witness Olivier's testimony, be approved?

The form of tariff sheets to be filed under DEF's tariff, as provided in Exhibit \_\_ (MO-6A) of Witness Olivier's testimony, should be approved.

**ISSUE 51:** In accordance with Section 366.95(2)(c)2.h., Florida Statutes, if the Commission does not issue a stop order by 5:00 p.m. on the third business day after pricing, should the nuclear asset-recovery charges become final and effective without further action from the Commission?

In accordance with Section 366.95(2)(c)2.h., Florida Statutes, if the Commission does not issue a stop order by 5:00 p.m. on the third business day after pricing, the nuclear asset-recovery charges should become final and effective without further action from the Commission.

**ISSUE 52:** Should this docket be closed?

This docket should remain open pursuant to Section 366.95(2)(c)4., Florida Statutes.

\*FIPUG takes no position on these proposed stipulations.