

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to approve transaction for accelerated decommissioning services at CR3 facility, transfer of title to spent fuel and associated assets, and assumption of operations of CR3 facility pursuant to the NRC license, and request for waiver from future application of Rule 25-6.04365, F.A.C. for nuclear decommissioning study, by Duke Energy Florida, LLC.

DOCKET NO.: 20190140-EI

FILED: July 2, 2020

**DUKE ENERGY FLORIDA'S RESPONSE IN OPPOSITION TO
OPC'S MOTION FOR OFFICIAL RECOGNITION**

Pursuant to Rule 28-106.204(1), Florida Administrative Code ("F.A.C."), Duke Energy Florida ("DEF") files this Response in Opposition to the Office of Public Counsel ("OPC") Motion for Official Recognition. As stated in further detail below, the requested materials, which involve the amount DEF has lawfully collected from customers pursuant to a securitization order, is wholly irrelevant to the issues in this proceeding. This information has no probative value to the issues at hand in this docket, which are to determine whether the Commission should approve the transaction to decommission CR3 going forward. Rather, the material is intended to prejudice DEF's filing. Accordingly, the Commission should decline to take official recognition of these irrelevant documents and deny OPC's motion.

Standard of Review

Rule 28-106.213(6) provides "Requests for official recognition shall be by motion and shall be considered in accordance with the provisions governing judicial notice in Sections 90.201-.203, F.S." Section 90.202, Fla. Stat. provides a list of types of information that are admissible at the discretion of the court. This Commission, in a previous order, aptly summarized the standard to be applied to these sorts of discretionary requests:

The general standard applied to materials listed in Section 202 to determine whether they are properly judicially noticed is twofold: relevancy and exemption from a claim of privilege. Relevant evidence is evidence tending to prove or disprove a fact. Section 90.401, Florida Statutes. All relevant evidence is admissible unless its use is restricted by law or its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the trier of fact, or being needlessly redundant. Sections 90.402-3, Florida Statutes.¹

As noted by the Florida Supreme Court, the practice of taking judicial notice or official recognition of adjudicative facts should be exercised with great caution. *Makos v. Prince*, 64 So.2d 670, 673 (Fla.1953). This caution arises from the belief that the taking of evidence, subject to established safeguards, is the best way to resolve disputes concerning adjudicative facts. When a matter is officially recognized “it is taken as true without the necessity of offering evidence by the party who should ordinarily have done so.” *Id.* Thus, historically, “[official recognition] applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities.” *Hardy v. Johns–Manville Sales Corp.*, 681 F.2d 334, 347–48 (5th Cir.1982).

Issues in this Proceeding

DEF filed this proceeding for approval of a transaction to accelerate the decommissioning of its Crystal River 3 (CR3) nuclear plant. The issues to be determined in this proceeding are set forth in the draft prehearing order (as reflected in the prehearing statements submitted by the parties in this docket). Of note, none of the issues involve the amount collected by DEF with respect to the securitization that was approved years ago in an entirely separate docket.

ISSUE 1: Should the Florida Public Service Commission approve the transactions as contemplated by the Agreement (Decommissioning Services Agreement), the

¹ *In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor*, Docket No. 19890001-EI; Order No. 20568, 89-1 FPSC 71 (Jan. 1989).

SNF PSA (Spent Nuclear Fuel Purchase and Sale Agreement), and the Ancillary Agreements (as defined in Article I, Section 1.1.1 of the Agreement)?

- ISSUE 2: Is DEF's proposed transaction with ADP and its subsidiaries for decommissioning CR3 consistent with DEF's 2017 2nd Revised and Restated Stipulation and Settlement Agreement (2017 Settlement)?**
- ISSUE 3: Should the Commission approve DEF's 2019 Accelerated Nuclear Decommissioning Study?**
- ISSUE 4: What is the appropriate annual accrual in equal dollar amounts necessary to recover the proposed decommissioning costs of CR3?**
- ISSUE 5: What is the appropriate accrual effective date for adjusting the accrual amount, if any adjustment is needed?**
- ISSUE 6: Should the Commission approve DEF's request to waive, if necessary, the future filing of CR3 decommissioning studies every five years as provided in Rule 25-6.04365, F.A.C.?**
- ISSUE 7: What reports should be given to the Commission to ensure that the decommissioning and spent fuel activities outlined in the DSA are completed, NDT funds are reasonably spent, and sufficient funds remain to complete the decommissioning and spent fuel activities?**

OPC's Request

On July 1, OPC filed its Motion and requested official recognition of a series of filings that DEF has made in Docket 20150171-EI with respect to the amount of money it has collected from customers in compliance with the securitization order entered by this Commission in that docket. First, it is unclear under which subsection of Section 90.202 OPC claims these documents fall. DEF notes that there does not seem to be a category directly on point and so such information may not be of the sort of which the Commission can take official recognition.

Assuming that this material is appropriate for the Commission to recognize, the more problematic aspect of this request is the complete lack of relevance of this sort of information. As explained above, this proceeding involves what DEF should do with respect to future decommissioning of CR3. Amounts being collected pursuant to a prior order, unrelated to the

decommissioning of the plant, are wholly irrelevant to the Commission's consideration of the issues here. Indeed, the only conceivable reason OPC could have for wanting this information recognized is so that they can point to it as somehow an indication that the Commission should apply a different standard of review this docket, simply because of events that have already occurred and been fully and vigorously litigated and resolved (in some cases via settlement with OPC themselves). OPC notes in its basic position in its prehearing statement filed in this docket, "Customers have paid enough for Crystal River Unit No. 3 (CR3)." The only amounts paid by customers that are relevant to this proceeding are those amounts paid into the nuclear decommission trust fund (NDF) because the Commission will be tasked with determining whether those funds are sufficient given the terms of the deal outlined in DEF's petition, testimony, and exhibits. What customers have paid for other aspects of CR3 is not relevant to the Commission's consideration of the issues in this proceeding. This is a red herring designed to distract from the substantive issues in this docket, which are the terms of the contract presented for review and the real protections they offer for DEF's customers with respect to the future decommissioning of the plant.

THEREFORE, DEF respectfully requests that the Commission deny OPC's motion.

/s/ Dianne Triplett

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of DUKE ENERGY FLORIDA, LLC'S RESPONSE IN OPPOSITION has been served by electronic mail to the following, this 2nd day of July, 2020:

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