BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor	))))	DOCKET NO. 080001-EI FILED: November 10, 2008

PROGRESS ENERGY FLORIDA, INC.'S BRIEF ON ISSUES 27 AND 29A AND OTHER ISSUES IN DOCKET NO. 080001-EI

Progress Energy Florida ("PEF" or the "Company") files this brief on Issues 27 and 29A, with respect to nuclear cost recovery costs, and Issue 5, with respect to fuel projections, among other, general issues in Docket No. 080001-EI, and states:

Introduction

At the hearing in this Docket the Florida Public Service Commission (the "Commission" or "PSC") requested briefs on the parties' positions and arguments on Issues 27 and 29A. Issue 27 requires the Commission to determine what the appropriate jurisdictional separation factors for capacity revenues and costs to be included in the recovery fact are for the period January 2009 through December 2009. Issue 29A requires the Commission to determine if PEF included in the capacity cost recovery clause the nuclear cost recovery amount ordered by the Commission in Docket No. 080009-EI.

There are no disputed fact issues with respect to Issues 27 and 29A. Rather, some but not all interveners dispute the recovery of projected costs incurred for PEF's Levy Units 1 and 2 nuclear power plants ("LNP") already decided by this Commission in Docket No. 080009-EI.[1] They are, therefore, precluded from collaterally attacking that decision in this Docket.

[1] Interveners Florida Industrial Power Users Group ("FIPUG") and the American Association of Retired People ("AARP") join in these improper challenges to the recovery of PEF's projected LNP incurred costs. Interveners the Office of Public Counsel ("OPC") and PCS White Springs do not join in these challenges.

Additionally, these interveners did agree in Docket No. 080009-EI to the total amount, without any adjustment, that the Commission should approve for the Nuclear Cost Recovery Clause to be included in establishing PEF's 2009 Capacity Cost Recovery Clause factor. These interveners are judicially estopped too from this improper attack on the PSC's decision on this issue in Docket No. 080009-EI.[2]

In any event, interveners' arguments that the utilities cannot recover projected nuclear costs are based on an erroneous construction of Section 366.93. Their arguments are contrary to (1) the statute's plain language and principles of statutory construction; (2) this Commission's construction of the statute in Rule 25-6.0423; (3) Rule 25-6.0423, which by law is presumed valid; and (4) the Legislative intent in Section 366.93 to "*promote* utility investment in nuclear . . . power plant[s]." §366.93(2), (2)(b), Fla. Stat. (emphasis added). These arguments must therefore be rejected.

These same interveners also argue against, or for the deferral of, the recovery of projected LNP costs because PEF projected in the need determination proceeding that it will exceed a 15 percent reserve margin upon completion of the LNP. They argue, in essence, that customers should not be required to pay in advance for that part of the LNP that exceeds a maximum 15 percent reserve margin because they claim the LNP was built for a statewide need, they do not have the use of it now, and they may not fully use it when completed, because of potential joint

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[2] FIPUG was, at best, wrong when FIPUG represented to Commissioner Skop that it "didn't agree that we would pay for it in advance" and "didn't stipulate that we would pay for it before prudency was determined." (Tr. Vol I, p. 39, lines 17-18 and 21-22). FIPUG and AARP both joined OPC's stipulation to Issue 13 in Docket No. 080009-EI regarding the total amount to be included in establishing PEF's 2009 Capacity Cost Recovery Clause factor without any specific adjustment at the time should the Commission approve the amount for the Nuclear Cost Recovery Clause subject to prudence reviews in 2009 and 2010. See Prehearing Order, Docket No. 080009-EI, p. 48. When the Commission approved this amount for the Nuclear Cost Recovery Clause in Docket No. 080009-EI FIPUG did indeed agree to pay for it before prudency was determined.

ownership. To begin with, interveners presented no evidence to support this arbitrary cost allocation. They also grossly misrepresent the reserve margin requirements and the Commission's need determination order for the LNP. And --- again --- interveners improperly collaterally attack prior Commission decisions. In sum, interveners demand that this Commission overturn Section 366.93 and its own Rule 25-6.0423.

These motives were not concealed. FIPUG asserted at the hearing that its "only objection" is "to having the consumers pay for [nuclear power plants] in advance." (Tr. 35) (emphasis added). They are, therefore, not challenging the reasonableness or prudence of any particular actual or projected nuclear power plant cost. Rather, they challenge the very policy allowing alternative cost recovery for nuclear power plant costs by arguing that the Commission should deny recovery of projected incurred costs, re-allocate nuclear power costs to unknown wholesale customers, or just defer the recovery of actual and projected nuclear power plant costs.

But the Florida Legislature decided that policy issue in Section 366.93 in favor of alternative cost recovery of nuclear power plant costs. §366.93, Fla. Stats. The Commission implemented this policy in Rule 25-6.0423. The Commission conducted the first nuclear cost recovery clause proceeding under Rule 25-6.0423 in Docket No. 080009-EI and approved the nuclear cost recovery amount for PEF for inclusion in the Capacity Cost Recovery Clause (CCRC) in this Docket. That decision was made without spreading out or deferring the recovery of any of the approved costs. The Commission's rule precludes the Commission from reconsidering that decision. The Commission cannot abrogate that Legislative intent and its own rule now simply because some consumer representatives do not want to pay in advance for the nuclear power plants.

Nuclear generation is a prominent part of Florida's energy policy because it a clean source of energy generation that further reduces the state's reliance on fossil fuels for energy. The Legislature was clear in Section 366.93 that the statute was designed to promote utility investment in nuclear power plants. §366.93(2), Fla. Stats. The Commission was equally clear that the purpose of its nuclear cost recovery rule was to promote electric utility investment in nuclear power plants. Rule 25-6.0423, F.A.C.[3] PEF moved forward with the LNP because of the alternative cost recovery provisions in Section 366.93 and Rule 25-6.0423. Failing to faithfully and consistently implement the alternative cost recovery provisions of Section 366.93 and Rule 25-6.0423 now will discourage investment in nuclear power plants like the LNP and frustrate the energy policy goals of this State. The choice before the Commission now is whether the Commission is serious about implementing the Legislative policy of encouraging nuclear power plant development through the alternative cost recovery mechanisms in Section 366.93 and Rule 25-6.0423.

PEF must also address Issue 5 regarding whether electric utilities should be required to re-project their fuel forecasts prior to the Commission vote on fuel costs whenever an intervener requests the Commission to direct them to do so. This is not existing Commission policy. No evidence was presented that the existing Commission policy does not work or that there is a better, more practical Commission policy. The Commission should not change an existing policy that works at the whim of an intervener.

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[3] FIPUG claims to believe too that nuclear power has "great merit" and is a "good thing for Florida's future," (Tr. Vol. I. p. 26, Lines 21-22; p. 27, Line 18), and that it doesn't "want to do anything to discourage Progress Energy from going forward with" the LNP. (Tr. Vol. I. p. 35, Lines 17-20). Such remarks should be as meaningless to the Commission as they are to PEF when FIPUG repeatedly asserts arguments before this Commission that seek to undermine the cost recovery mechanisms of Section 366.93 and Rule 25-6.0423 and this Commission's application of these cost recovery mechanisms.

Finally, there is the question of whether the Commission can issue a bench vote when it takes up these issues again on Wednesday. Nothing requires the Commission to defer ruling on the legal or policy issues presented. All parties had the opportunity to identify and respond to the issues, to present evidence and argument on all issues, and to conduct cross-examination and submit rebuttal evidence. When there is no disputed fact issue --- as is the case here --- that is all that Florida law and Commission rules require. See §120.57(1)(b), Fla. Stats.

Argument

I. The Commission Should Grant PEF's Positions on Issues 27 and 29A as Required by the Commission's Decision in Docket No. 080009-EI, Section 366.93, Florida Statutes, Rule 26-6.0423, and Commission Precedent.

Issue 27 requires the Commission to determine the appropriate jurisdictional separation factors for capacity revenues and costs to be included in the recovery factor for the period January 2009 through December 2009. PEF's evidence demonstrated these factors were Base 93.753%, Intermediate 79.046%, and Peaking 88.979%. This evidence was undisputed.

Issue 29A required the Commission to determine if PEF included in the capacity cost recover clause the nuclear cost recovery amount ordered by the Commission in Docket 080009-EI. Interveners FIPUG and AARP intervened in and participated in Docket No. 080009-EI. They agreed to **Issue 13 -- What total amount should the Commission approve for the Nuclear Cost Recovery Clause to be included in establishing PEF's 2009 Capacity Cost Recovery Clause factor?** – joining OPC in agreeing to PEF's total amount for PEF's 2009 Capacity Cost Recovery Clause factor, without any recommended adjustment at the time, subject to prudence review of the total amount of projected costs in 2009 and 2010. See

Prehearing Order, Order No. PSC-08-0581-PHO-EI (Sept. 8, 2008) at p. 48.[4] OPC, FIPUG, and AARP nowhere in Docket No. 080009-EI challenged the very same amounts included for PEF's 2009 Capacity Cost Recovery Clause on the grounds that the cost recovery was contrary to Section 366.93, Florida Statutes. Id. The Commission unanimously voted to approve this amount based on staff's recommendation at the October 14, 2008 Agenda Conference.

PEF will address the interveners' erroneous statutory and policy arguments because the Commission is apparently interested in hearing why they are erroneous.[5] But it bears emphasis at the outset that FIPUG and AARP are legally precluded from asserting these arguments at all by res judicata, collateral estoppel, and judicial estoppel principles. The propriety of projected incurred costs for 2009 was decided in Docket No. 080009-EI when that issue was placed in controversy there, the parties presented or had the opportunity to present evidence and argument on it, and the Commission voted to approve that recovery based on Staff's recommendation. That decision is final as to the parties involved in it subject to any appellate review rights the parties might have from that final decision. See In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc., Docket No. 010503-WU, Order No. PSC-04-1050-FOF-WU (Oct. 26, 2004) (citing Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984)).

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[4] Moreover, several of the issues in Docket No. 080009-EI specifically referred to approval of PEF's "projected" and "actual/estimated" costs for the two projects. Id. at Issues 9A, 9B, 9D, 9E, 9G, 11A, 11B, 11D, 11E, and 11G. In their positions with respect to each of these issues, FIPUG and AARP again agreed with OPC in not recommending any specific adjustment to the requested amounts. Id.

[5] PEF notes too that FIPUG and AARP did not include their erroneous position at the hearing that Section 366.93 does not permit the recovery of projected nuclear costs in their positions to any of the issues in this Docket and they nowhere explained why they were unable or precluded from doing so. For this additional reason, these positions are improper and should be deemed waived. Order No. PSC-08-0148-PCO-EI, Section VI, A, C, pp. 5-6. The Commission should not tolerate such "11th hour" subterfuge.

FIPUG and AARP cannot collaterally attack the decision in Docket 080009-EI in Docket No. 080001-EI. The issue of the total amount the Commission should approve for the Nuclear Cost Recovery Clause to be included in establishing PEF's 2009 Capacity Cost Recovery Clause factor was decided in Docket No. 080009-EI.[6] FIPUG and AARP were parties to Docket 080009 and, therefore, they cannot re-litigate the issue of the projected nuclear costs to be included in the Capacity Cost Recovery Clause factor that was decided in Docket No. 080009-EI in this proceeding. Zimmerman v. State Office of Insurance Regulation, 944 So. 2d 1163, 1166 (Fla. 4th DCA 2006). (collateral estoppel "prevents identical parties from relitigating the same issues that have already been decided.").

Further, because FIPUG and AARP agreed to the total amount that the Commission should approve for the Nuclear Cost Recovery Clause to be included in establishing PEF's 2009 Capacity Cost Recovery Clause factor in Docket No. 080009-EI, without any specific adjustment there subject to a prudence review of the costs in 2009 and 2010, FIPUG and AARP are judicially estopped from taking a contrary position in this Docket. The law does not allow parties to change their position from one proceeding to the next on the same issue whenever they perceive it might benefit them. See The Keyes Co. v. Bankers Real Estate Partners, Inc., 881 So. 2d 605, (Fla. 3d DCA 2004) ("Judicial estoppel is an equitable doctrine used to prevent litigants from taking completely inconsistent positions in separate judicial proceedings."). For all these reasons, FIPUG and AARP are legally precluded from challenging the projected cost amounts for the LNP included in PEF's 2009 Capacity Cost Recovery Clause factor.

[6] The fact that this issue was decided in Docket No. 080009-EI was undisputed in this Docket. All parties agreed to the statement of Issue 29A as whether PEF had included in the capacity cost recovery clause "the nuclear cost recovery amount ordered by the Commission in Docket No. 080009-EI."

a. PEF's Position on Issue 29A is Consistent with the plain language of Section 366.93, under accepted principles of statutory construction, and the clear Legislative Intent.

The Legislature's intent in enacting Section 366.93 is clear. They intended to promote utility investment in nuclear power plants. The Legislature was certainly aware of the existing cost recovery mechanisms under Chapter 366 that interveners repeatedly cite to -- such as the general authority to determine fair, just, and reasonable rates for the actual cost of property used and useful in public service under Section 366.06 -- when the Legislature enacted Section 366.93. These were the very provisions the Legislature wanted to establish "alternative" cost recovery mechanisms to for the recovery of costs incurred in the siting, design, licensing, and construction of nuclear power plants. §366.93(2), Fla. Stats. Section 366.06 and the other, existing Chapter 366 rate provisions have no bearing therefore on the meaning of Section 366.93. The construction of Section 366.93 begins and ends with Section 366.93.

Projected costs, like those included in PEF's 2009 Capacity Cost Recovery Clause factor from the Nuclear Cost Recovery Clause in Docket No. 080009-EI, can be recovered under the plain language of Section 366.93. In the operative provision, the Legislature mandates that the Commission "shall establish, by rule, alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of a nuclear .... power plant." §366.93(2), Fla. Stats. (emphasis added). The Legislature required that such measures "shall be designed to promote utility investment in nuclear .... power plants and allow for the recovery in rates of all prudently incurred costs, and shall include, but are not limited to: (a) Recovery through the capacity cost recovery clause of any preconstruction costs, [and] (b) Recovery through an incremental increase in the utility's capacity cost recovery clause rates of the carrying

costs on the utility's projected construction cost balance associated with the nuclear ... power plant. ... ." §366.93(2)(a), (b), Fla. Stats.

Incurred costs are those that one is liable for or subject to paying. Webster's Ninth New Collegiate Dictionary, p. 611. Incurred costs include projected costs for the siting, design, licensing, and construction of a nuclear power plant because the utility is subject to paying them. A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141 (Fla. 1931) (words must be given their plain and obvious meaning) ; see also Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996) (courts, when interpreting statutes, must "look first to the statute's plain reading."). This plain meaning of incurred nuclear costs therefore includes projected nuclear costs.

This plain meaning of incurred costs is supported by the rest of subsection (2). First, the Legislature says incurred costs "shall include" preconstruction costs recovered through the "capacity cost recovery clause." True, the Legislature did not define the term "capacity cost recovery clause" in Section 366.93 but the Legislature did not need to do so. The Legislature did not leave the implementation of Section 366.93 to the general public, who may not know what a capacity cost recovery clause is, instead, the Legislature required the Commission to implement Section 366.93 and the Commission --- as the Legislature understood when it enacted Section 366.93 --- knows what a capacity cost recovery clause is.

When the Commission established the capacity cost recovery clause, the Commission explained that: "Like fuel, the capacity factor calculation will be based on *projected* usage. Therefore, any methodology for computing a capacity recovery factor should include a *true-up mechanism* based on actual usage. The subsequent factor will be adjusted up or down, just as is done in fuel." In re: Generic Investigation of Proper Recovery of Purchased Power Capacity Cost by Investor-Owned Electric Utilities Docket No. 910794-EQ, Order No. 25773 (Feb. 24,

1992) (emphasis added). The Legislature intended the Commission to "include" in incurred costs preconstruction costs recovered through the capacity cost recovery clause, which Commission precedent establishes includes calculations of projection costs followed by a true-up mechanism to actual costs, just like fuel. Incurred costs in Section 366.93 must therefore include projected costs.

Indeed, courts presume that when the Legislature uses technical terms -- like the term "capacity cost recovery clause" in Section 366.93 -- the Legislature intended the technical meaning of that term to be employed in construing the statutory provision. See Ocasio v. Bureau of Crimes Compensation Division of Worker's Compensation, 408 So. 2d 751 (Fla. 3d DCA 1982) ("Technical words and phrases that have acquired a peculiar and appropriate meaning in law cannot be presumed to have been used by the legislature in a loose popular sense. ... Where legal terms are used in a statute, unless a plainly contrary intention is shown they must receive their technical meaning). The technical meaning of the capacity cost recovery clause prescribed by the Commission necessarily is a part of the meaning of Section 366.93. This technical meaning confirms that incurred costs include projected costs under Section 366.93.

The Legislature further recognized that the capacity cost recovery clause included projected costs when it directed the Commission to include in incurred costs the carrying costs on the utility's projected construction cost balance in the capacity clause rates under subsection (2)(b).[7] This is an express reference in Section 366.93 to "projected" costs in the capacity cost recovery clause rates. The Legislature obviously understood how the capacity cost recovery clause worked when it enacted Section 366.93 and it expected the Commission to use that mechanism of projected, actual, and true-up costs for the recovery of incurred nuclear costs in

[7] FIPUG's assertion at the hearing that "nothing in the statute permits a projected cost" is blatantly false. (Vol. 1, Tr. 40, lines 20-21).

Section 366.93. The plain meaning of Section 366.93, principles of statutory construction, and the intent of the Legislation makes clear that incurred costs included projected nuclear costs.

b. The Commission Implemented Section 366.93 by Rule 25-6.0423 and Correctly Construed Incurred Costs to Include Projected Costs in the Alternative Cost Recovery Mechanism under the Rule Without Objection

The Commission understood what the Legislature directed it to do in Section 366.93 when it enacted Rule 25-6.0423, F.A.C. The Commission's stated purpose was "to establish alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of nuclear ... power plants in order to promote electric utility investment in nuclear ... power plants and allow for the recovery in rates of all such prudently incurred costs." Rule 25-6.0423(1), F.A.C. (emphasis added). The Commission's alternative cost recovery clause mechanism for the recovery of such prudently incurred costs includes the recovery of reasonable projected site selection and preconstruction costs and associated carrying costs on projected construction expenditures subject to subsequent true-up to actual costs and prudence review. Rule 25-6.0423(5)(c)2, F.A.C. The Commission understood that the recovery of prudently incurred costs under Section 366.93 included projected costs and enacted a cost recovery mechanism for such projected costs accordingly. Indeed, there are **29** references to "projected" or "estimated" costs, work, and filings in Rule 25-6.0423, explaining in detail the process for the estimation, review, and recovery of "projected" nuclear costs. See Rule 25-6.0423(3); (5)(a); (5)(b); (5)(c)1.,b.; (5)(c)1.,c.; (5)(c)2.; (5)(c)4.; (7)(c); (8)(c); (8)(d); and (8)(e).

Rule 25-6.0423 was approved by the Commission on March 20, 2007 following a workshop and rule development process in which all interested persons were invited to participate. FIPUG and AARP participated in the development of Rule 25-6.0423: if they wanted to challenge the rule that was the time to do it. As Chairman Carter explained: "[i]n the

process of that, looking at the statute and developing the rules, all of the parties had an opportunity to be heard. We went through the process. We took feedback, we took testimony, we took information, we looked at the statute, we went through the process on the interpretation of that. We went through the rule. Any party that had any concerns or whatsoever on that, that was the time to attack and say you misread the statute." (Tr. Vol. I, p. 47, Lines 21-25, p. 48, Lines 1-2).

Interveners were also notified when the rule was adopted and they had the opportunity at that time to challenge it by taking an appeal from the order adopting the rule. In fact, if they truly believed then that the Commission had acted contrary to the Legislature's intent in Section 366.93 by enacting the current version of Rule 25-6.0423 to the detriment of their clients they had an obligation to challenge the rule. They elected not to do so.

FIPUG and AARP now claim for the first time in Docket No. 080001-EI that the Commission's rule allowing the recovery of projected nuclear costs in the Capacity Cost Recovery Clause is inconsistent with and contrary to Section 366.93.[8] They did not make this claim in Docket No. 060508-EI when the Commission adopted Rule 25-6.0423. They also did not make this claim in the Nuclear Cost Recovery Docket, Docket No. 080009-EI, when the Commission decided the nuclear cost recovery clause amounts to be included in the projected 2009 Cost Recovery Clause based on an agreement of the parties to the amount without any adjustment that included FIPUG and AARP. It is improper for FIPUG and AARP to make this claim now.

[8] Ironically, and contrary to this position, FIPUG conceded at the hearing when Chairman Carter expressed the view that FIPUG should seek judicial review if FIPUG believed "the PSC totally misread the statute" that "I don't think you misread the statute." (Tr. Vol. I, p. 48, Lines 18-24). FIPUG apparently refuses to abandon this argument now despite this concession.

Rule 25-6.0423 was properly adopted by the Commission. See In Re: Proposed Adoption of new rule regarding nuclear power plant cost recovery, Docket No. 060508, Order No. PSC-07-0240-FOF-EI (Mar. 20, 2007). The rule, therefore, is presumed valid. See City of Palm Bay v. State, Dept. of Transportation, 588 So. 2d 624 (Fla. 1st DCA 1991). If a party wishes to challenge the validity of an adopted rule the party must do so by filing a separate Section 120.56 proceeding. §§120.56(1), (3) Fla. Stats. A promulgated rule is presumed valid until it is invalidated in a Section 120.56 proceeding. Id. Rule 25-6.0423 is, therefore, a valid Commission rule and it cannot be collaterally attacked in this proceeding.

c. Interveners' Argument that PEF should be Limited in its Nuclear Cost Recovery Clause Costs from Retail Ratepayers to a Maximum of 15 percent reserves Is an Improper Collateral Attack on Prior Commission Orders, Mischaracterizes the Reserve Margins in Florida and Other Orders, Is Speculative, and Is Inconsistent with Section 366.93.

Interveners argue against, or for the deferral of, the recovery of projected incurred LNP costs because PEF projects today that it will exceed a 15 percent reserve margin upon completion of the LNP. They argue, in essence, that customers should not be required to pay in advance for a power plant they do not have the use of now and may not fully use. This argument is improper for several reasons.

Interveners start from the improper premise that "all we need for the statewide reserve margin is 15 percent." (Vol. I, Tr. 30, Lines 18-20). Interveners mislead the Commission. This Commission approved the stipulation of the Florida investor owned utilities to plan for a minimum 20 percent reserve margin, after initiating a reserve margin docket and taking evidence on the appropriate reserve margins. In re: Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida, Order No. PSC-99-2507-S-EU, Docket No. 99-2507-S-EU (Dec. 22, 1999). Prior to this Order, the minimum reserve margin planning criterion was 15 percent

reserves. Rule 25-6.035, F.A.C. Both are minimum reserve margins too, recognizing that utilities necessarily will exceed the minimum reserve margins for periods of time.

Next, FIPUG mischaracterizes the need determination order for Levy Units 1 and 2, asserting that the Commission approved them "because of a statewide need" and arguing that, therefore, PEF's customers should not pay now for the costs of the plants "at least to this 15 percent criteria" when they are needed for potential joint owners as well as PEF. (Tr. Vol. I, p. 31, Lines 20-25, p. 32, Lines 1-3). The Commission granted PEF's determination of need for Levy Units 1 and 2 based on PEF's reliability need for the units, not a statewide need as FIPUG falsely asserts. In re: Petition for determination of need for Levy Units 1 and 2 nuclear power plants by Progress Energy Florida, Inc., Order No. PSC-08-0518-FOF-EI, Docket No. 080148-EI, (Aug. 12, 2008). The issue of a return to a minimum 15 percent reserve margin criteria was discussed yet the Commission determined that PEF had a reliability need for both units for, among other reasons, customer reliability needs from 2016 to 2019, substantial expected cost savings from successive construction of the units, and uncertainties regarding future supply side capacity, including renewable generation and the impact of potential carbon legislation on the Crystal River Units 1 and 2 coal units. Id. at pp. 4-5. The Commission determined, based on the evidence before it, that PEF had a need for the capacity of both Levy units. Thus, interveners' argument is factually incorrect.

Interveners' argument is also an improper collateral attack on Commission Orders Nos. PSC-99-2507-S-EU and PSC-08-0518-FOF-EI. See In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc., Docket No. 010503-WU, Order No. PSC-04-1050-FOF-WU (Oct. 26, 2004) (citing Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984)). Moreover, FIPUG made the exact same argument in Docket No. 080009-EI,

claiming that PEF should not recover nuclear costs in "excess" of the allegedly "maximum" 15 percent reserve margin. In Docket No. 080009-EI, the prehearing officer rejected this argument and that decision was affirmed by the Commission when the issue was excluded. Docket No. 080009, Prehearing Transcript, pp. 31-38. Now, FIPUG asserts the argument again, in yet another improper collateral attack. Zimmerman v. State Office of Insurance Regulation, 944 So. 2d 1163, 1166 (Fla. 4th DCA 2006). (collateral estoppel "prevents identical parties from relitigating the same issues that have already been decided."). The Commission should reject -- again -- FIPUG's attempt to re-argue an issue that has already been determined adverse to it.

The Commission, in any event, cannot entertain FIPUG's argument because it requires rank speculation by the Commission to implement FIPUG's suggested 15 percent reserve "maximum" cost recovery methodology. FIPUG neither presented nor proffered any evidence to support its argument. FIPUG's argument, therefore, does not account for in any evidentiary way potential changes in growth, changes in environmental requirements, changes in unit retirements, and power purchase agreement changes, to name a few circumstances that may impact any attempted application of FIPUG's proposed methodology. There simply is no competent substantial evidence to support FIPUG's argument and, for that reason alone, it is reversible error for the Commission to entertain it. See Rolling Oaks Utilities, Inc. v. Florida Public Service Commission, 533 So. 2d 770, 772 (Fla. 1st DCA 1988) (the "court's task is merely to determine whether competent, substantial evidence supports a Commission order."), citing §120.68, Fla. Stats.; Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983).

Finally, FIPUG's argument to limit the recovery of PEF's nuclear costs to some arbitrary amount associated with an equally arbitrary "maximum" 15 percent reserves is contrary to the

plain language of Section 366.93 and the Legislative intent. The Legislature required an alternative cost recovery mechanism that allowed the utility to recover "all prudently incurred costs" in siting, design, licensing, and construction of a nuclear power plant. §366.93(2), Fla. Stats. In this way, the Legislature intended the cost recovery mechanism to "promote utility investment in nuclear ... power plants." Id. FIPUG's proposal means PEF recovers less than "all" prudently incurred costs by some arbitrary, as yet undetermined limit. Such a proposal violates the express terms of Section 366.93 and the express Legislative intent to "promote" utility investment in nuclear power plants.

II. Interveners' Arguments for Deferring the Recovery of Nuclear Costs Should be Rejected Because it Reverses the Commission's Decision in Docket No. 080009-EI, is Inconsistent with Rule 25-6.0423, Violates Administrative Finality, and is Inconsistent with the Policy and Intent of Section 366.93 and Rule 25-6.0423.

Interveners argue in this Docket that the Commission should spread out or defer the recovery of the nuclear power plant costs the Commission approved for cost recovery in Docket No. 080009-EI. Interveners asserted this same argument in Docket No. 080009-EI, it was rejected, Staff recommended that the Commission approve PEF's requested cost recovery, and the Commission voted to approve that recovery.[9] Interveners are therefore precluded from raising the same issues decided in Docket No. 080009-EI in this Docket. See In re: Aloha Utilities, Inc., Docket No. 010503-WU, Order No. PSC-04-1050-FOF-WU (Oct. 26, 2004) (citing Albrecht, 444 So. 2d at 11-12); Zimmerman, 944 So. 2d at 1166. For this reason alone, interveners' arguments for spreading out or deferring PEF's allowed nuclear costs should be rejected.

[9] FIPUG admitted at the hearing in this Docket that this argument for spreading out or deferring the recovery of the allowed nuclear power plant costs was unsuccessfully asserted in Docket No. 080009-EI. (Tr. Vol. VIII, p. 1039, Lines 4-12).

In any event, the Commission has no authority to reverse its decision in Docket No. 080009-EI in Docket No. 080001-EI. Docket No. 080009-EI was established for purposes of addressing the petitions of PEF and Florida Power & Light Company requesting cost recovery through the nuclear power plant cost recovery clause pursuant to Section 366.93 and Rule 25-6.0423. Staff Recommendation in Docket No. 080009-EI ("Staff Rec."), October 2, 2008, p. 3. Staff explained that the proceeding in Docket No. 080009-EI was conducted pursuant to Rule 25-6.0423(5) which set forth the process by which the Commission conducts an annual hearing "to determine the recoverable amount that will be included in the CCRC pursuant to Section 366.93." (Id.) (emphasis added).

Rule 25-6.0423(5)(c)2 required the Commission to determine in this annual hearing the reasonableness of projected preconstruction and construction costs, the prudence of actual preconstruction and construction costs, and the associated carrying costs. Rule 25-6.0423(5)(c)2, F.A.C. The Rule further provides that the "Commission shall include those costs it determines, pursuant to this subsection, to be reasonable or prudent 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.[10] The Commission has no discretion to disallow costs it determines reasonable or prudent in the annual nuclear cost recovery clause proceeding conducted pursuant to Rule 25-6.0423 in setting the Capacity Cost Recovery Clause factor. The Commission must include the costs it determined to be reasonable or prudent in Docket No. 080009-EI in the Capacity Cost Recovery Clause factor in Docket No. 080001-EI.

[10] See also Rule 25-6.0423(5)(c)4., F.A.C. ("The final true-up for the previous year, actual/estimated true-up for the current year, and subsequent year's projected power plant costs as approved by the Commission pursuant to subparagraph (5)(c)2. will be included for cost recovery purposes as a component of the following year's capacity cost recovery factor in the Fuel and Purchased Power Cost Recovery."). (emphasis added).

The Commission, of course, conducted its first annual nuclear cost recovery clause proceeding under Rule 25-6.0423 in Docket No. 080009-EI. Evidence was submitted, testimony was taken, issues were identified and arguments were presented, and a hearing was held and a decision on the reasonableness or prudence of PEF's recoverable costs was made by the Commission. The same argument asserted here that recovery of these costs should be spread out or deferred was made in that proceeding and rejected by the Commission. The Commission decided the reasonable or prudent costs in the nuclear cost recovery clause proceeding to be included in the Capacity Cost Recovery Clause factor. The Commission cannot now spread out or defer those costs in Docket No. 080001-EI without reversing its prior decision and violating its own Rule. Such action would be improper. See Vantage HealthCare Corp. v. Agency for Health Care Administration, 687 So. 2d 306, 308 (Fla. 1st DCA 1997) (holding that the "agency is obligated to follow its own rules.").

Further, having decided the issue of the recoverable nuclear cost recovery clause amount for inclusion in the Capacity Cost Recovery Clause factor in Docket No. 080009-EI, administrative finality attaches to that decision. Under the well-established principle of administrative finality, the Commission can only reconsider prior orders if there has been a "change in circumstances or a demonstrated public need or interest." Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966); See also In Re: Approval of Demand-Side Management Plan of Florida Power & Light Co., 1995 Fla. PUC Lexis 1373, Docket No. 941170-EG, Order No. PSC-95-1343-S-EG (Nov. 1, 1995). Substantial, competent evidence must support any claimed change in circumstances or demonstrated public need. See Rolling Oaks Utilities, Inc., 533 So. 2d at 772; §120.68, Fla. Stats.; Pan American World Airways, Inc., 427 So. 2d 716. No evidence was offered by interveners of any change in circumstances or demonstrated public need

for reversal of the Commission's decision approving the amounts to be included in the capacity cost recovery clause for the nuclear cost recovery amount ordered by the Commission in Docket No. 080009-EI. Indeed, no such evidentiary showing can be made for a Commission decision made just weeks ago, on October 14, 2008.

Even if the Commission could entertain deferral of the nuclear costs it approved in Docket No. 080009-EI in Docket No. 080001-EI --- which it cannot do --- the Commission's rule provides that deferral is only appropriate for the carrying costs and only up to two years. Rule 25-6.0423(5)(a), F.A.C. This rule provides, in relevant part, that:

> Pre-Construction Costs. A utility is entitled to recover, through the Capacity Cost Recovery Clause, its actual and projected pre-construction costs. The utility may also recover the related carrying charge for those costs not recovered on a projected basis. Such costs will be recovered within 1 year, unless the Commission approves a longer recovery period. Any party may, however, propose a longer period of recovery, not to exceed 2 years.

Rule 25-6.0423(5)(a), F.A.C. (emphasis added). The reference to "such costs" in the third sentence of this subsection requires one to look back to the preceding sentence to determine what costs are referred to as "such costs." The immediately preceding reference to costs prior to the term "such costs" is to "carrying charges for those costs not recovered on a projected basis." "Such costs," therefore, by the last antecedent rule construction means the "carrying charges," and only those charges may be deferred in the nuclear cost recovery clause proceeding up to two years. Any other interpretation violates the last antecedent rule. See Barnhart v. Thomas, 124 S. Ct. 376, 380 (2003) (ruling that construction of a statute in accord with the last antecedent rule is "quite sensible as a matter of grammar.").

It bears emphasis that any contemplated deferral of previously approved nuclear cost recovery clause costs -- whether they are carrying charges or some portion or all of the other nuclear costs -- is inconsistent with the Legislative intent expressed in Section 366.93 and Rule

25-6.0423. That clear intent was to promote utility investment in nuclear power plants. §366.93(2), Fla. Stats.; Rule 25-6.0423(1), F.A.C. Spreading out or deferring the recovery of nuclear power plant costs shortly after they were approved by this Commission for recovery in another Docket despite the same deferral arguments does not promote utility investment in nuclear power plants.

Such action by the Commission will discourage utility investment in nuclear power plants. If the Commission now decides to spread out or defer nuclear power plant costs that it previously approved for recovery the Commission will introduce additional uncertainty and risk in the development of nuclear power plants. This added uncertainty means additional risk to potential bondholders and investors. Additional risk of unreliable and uncertain cost recovery means added costs for investment, if they decide to invest at all. When this perceived additional risk translates to additional cost that means the customers will eventually pay more than they otherwise would have paid absent such additional risk. This concern increases with the volatile capital markets that exist today.

The Legislature wanted to promote utility investment in nuclear power plants through alternative cost recovery mechanisms because the Legislature knew such provisions were required if the Legislature wanted to see new nuclear power plants built in the State. It is not enough to pass such legislation and the rules implementing the legislation to see this Legislative goal achieved however. The alternative cost recovery mechanisms must be reliably and consistently implemented for utilities to continue to invest in new nuclear power plants in Florida. If they are not reliably and consistently applied there simply will be no new nuclear power plants in Florida.

The Commission should therefore resolve to reliably and consistently apply the nuclear cost recovery statute and its nuclear cost recovery rule. The Commission should include in the capacity cost recovery clause the nuclear cost recovery amount the Commission ordered to be included in the CCRC in Docket No. 080009-EI.

III. The Commission Should Apply its Mid-Course Correction Fuel Clause Policy Consistently in this Docket and Should Not Continually Defer Fuel Cost Recovery.

Interveners requested for the first time at the final hearing in Docket No. 080001-EI that the Commission order PEF to make new projections of fuel costs prior to the Commission's decision regarding the fuel costs to be recovered in Docket No. 080001-EI. This is not Commission policy. In fact, this request directs this Commission to reverse a long-standing, well-established policy that has worked well without any proffer of evidence by the interveners to support a change in policy. For all these reasons, interveners' request should be rejected.

The Commission first established its policy regarding mid-course fuel cost projections in In Re: Fuel and Purchase Power Cost Recovery Clause with Generating Performance Incentive Factor, Docket No. 840001-EI, Order No. 13694 (Sept. 20, 1984). This policy was clarified further by subsequent orders. See Docket No. 980269-PU, Order No. PSC-98-0691-FOF-PU (May 19, 1998); Docket No. 070001-EI, Order No. PSC-07-0333-PAA-EI (Apr. 16, 2007). Pursuant to this mid-course correction procedure, utilities must calculate whether the utilities' over or under fuel cost recoveries exceed 10 percent based on the utilities' revised fuel cost projections. If that 10 percent threshold is exceeded, the utility must notify the Commission. Then, the Commission Staff, an intervener, or the utility can request a hearing to address the mid-course correction. There is no Commission requirement that the utilities make periodic projections. Rather, that is left up to the business judgment of the utility in the normal course of the utilities' business operations.

This policy has been employed by the Commission and implemented by the utilities for years. Interveners presented no evidence demonstrating that this policy does not work for any reason or that some other policy improves on it in any definite way. Absent some reasonable explanation for a deviation in Commission policy, supported by competent substantial evidence, the Commission cannot abruptly change this policy. See Martin Memorial Hospital Ass'n v. Dept. of Health and Rehabilitative Services, 584 So. 2d 39 (Fla. 4th DCA 1991); North Miami General Hospital, Inc. v. Office of Community Medical Facilities, 355 So. 2d 1272 (Fla. 1st DCA 1978).

To illustrate, the Commission set water utility rates using a new method to calculate used and useful percentages of wastewater treatment plants in Southern States Utilities v. Florida Public Service Commission, 714 So. 2d 1046 (Fla. 1st DCA 1998). The PSC used a different method prior to this proceeding, which method "had been repeatedly articulated as the PSC's policy." Id., at 1055. The court determined that the Commission could not properly take inconsistent action based upon similar facts without a reasonable explanation for the change. The Court explained that "[b]ecause this policy shift was essentially unsupported by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue resolved," (internal citation omitted), the PSC on remand must give a reasonable explanation supported by record evidence for the policy change. Id.

The Commission likewise has no record evidence supporting a change in the long-standing Commission policy regarding mid-course fuel cost corrections and, therefore, interveners' request for a change in that policy by ordering PEF to re-project its fuel costs in advance of projections under that Commission policy should be rejected.

Additionally, the fact that PEF has already come in and lowered its projected fuel costs prior to the hearing in this matter demonstrates that the Commission's mid-course correction policy aptly addresses the concerns that the interveners raise here. As Commission Skop accurately noted in discussing this issue, the interveners should not take issue with utilities like PEF that have already reprojected and lowered the amount of the fuel costs they are seeking. (Tr. Vol. VIII, p. 1113, Lines 16-25, p. 1114, Lines 1-6).

Alternatively, interveners again request this Commission to defer the recovery of fuel costs without any evidentiary support that such deferral will actually benefit customers. The absence of evidentiary support in the record for such deferral alone requires the Commission to reject this request. Further, the record evidence does show that continued deferral of fuel costs to later time periods only compounds the price impacts on customers as carrying charges are added to the deferred fuel costs. The Commission is gambling that fuel costs will come down, rather than increase, next year. If the Commission is wrong and fuel costs increase again next year the price impact to the customer is exacerbated. Further, deferral of fuel costs sends the wrong price signal to customers with unintended negative impacts on customer conservation behavior. Customers should be allowed to make such consumption decisions on the best information available to the utilities and not some arbitrarily lower price. Finally, deferring fuel cost recovery has a negative impact on the cash flows for the Company at the same time the Company is facing difficult capital markets. For all of these reasons, the Commission should not defer fuel costs yet again.

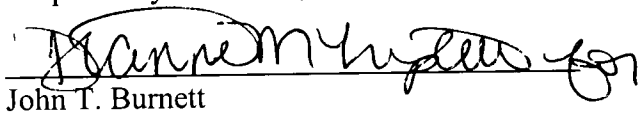
IV. The Commission Can Issue a Bench Decision Without Legal Briefs from the Parties.

The Commission must determine if it can issue a bench ruling on the remaining issues in this docket this Wednesday. The Commission is not required to solicit or accept legal briefs from the parties when there are no disputed issues of fact before it can make a decision.

Section 120.57(1)(b), Fla. Stats., only requires the Commission to allow all parties the "opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative." The Commission is not required to allow parties to submit briefs on *legal* issues argued before the Commission before making a ruling when the parties have been provided the opportunity to present their arguments on the issues involved.

All parties to this proceeding have been provided the opportunity to present evidence and arguments on all issues before the Commission. The facts before the Commission are undisputed so there is no need to wait on submissions of proposed findings of fact. The Commission can render its decision on the issues before it from the bench.

Respectfully submitted,



John T. Burnett
Associate General Counsel
Florida Bar No. 173304
PROGRESS ENERGY SERVICE
COMPANY, LLC
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (727) 820-5587
Facsimile: (727) 820-5519

CERTIFICATE OF SERVICE
Docket No. 080001-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery on the 10th day of November, 2008, to the following:

Lisa Bennett, Esq.(*)
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Lee L. Willis, Esq.
James D. Beasley, Esq.
Ausley & McMullen
Attorneys for Tampa Electric
P.O. Box 391
Tallahassee, Florida 32302

John W. McWhirter, Jr., Esq.
McWhirter Reeves
Attorneys for FIPUG
P.O. Box 3350
Tampa, Florida 33601

Jeffrey A. Stone, Esq.
Russell A. Badders, Esq.
Beggs & Lane
Attorneys for Gulf Power
P.O. Box 12950
Pensacola, Florida 32576-2950

Office of Attorney General
Cecilia Bradley
Capitol-PL 01
Tallahassee, FL 32399-1050

R Scheffel Wright/ John Lavia
Florida Retail Federation
225 South Adams Street # 200
Tallahassee, FL 32301

J. R. Kelly, Esq.
Steve Burgess, Esq.
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399

R. Wade Litchfield, Esq.
John T. Butler, Esq.
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408

Norman H. Horton, Jr., Esq.
Floyd R. Self, Esq.
Messer, Caparello & Self
Attorneys for FPUC
P.O. Box 1876
Tallahassee, Florida 32302-1876

Michael B. Twomey, Esq.
Attorney for AARP
Post Office Box 5256
Tallahassee, Florida 32314-5256

James W. Brew
Brickfield, Burchette,Ritts & Stone, The P.C
1025 Thomas Jefferson Street, NW
Eight Floor, West Tower
Washington, DC 2007-5201

Shayla L. McNeill, Capt. USAF
Karen S. White
AFLSA/JACL-ULT
Atty for the Federal Executive Agencies
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319