Diamond Williams

From: ROBERTS.BRENDA [ROBERTS.BRENDA@leg.state.fl.us]

Sent: Tuesday, July 26, 2011 4:20 PM

To: Filings@psc.state.fl.us

Cc: Anna Norris; Anna Norris; Blaise N. Huhta; Bryan Anderson; James M. Walls; James S. Whitlock; James W. Brew; Jessica Cano (Jessica.Cano@fpl.com); John Burnett; John Moyle; Keino Young; Ken Hoffman; Matthew Feil (mfeil@gunster.com); Mitchell S. Ross; Paul Lewis; Randy B. Miller; Vickie Gordon Kaufman (vkaufman@kagmlaw.com); Wade Litchfield; White, Karen

Subject: e-filing (Dkt. No. 110009-EI)

Attachments: 110009.memorandum of law.final.sversion.doc

Electronic Filing

a. Person responsible for this electronic filing:

Joseph A. McGlothlin, Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
mcglothlin.joseph@leg.state.fl.us

b. Docket No. 110009-EI

In re: Nuclear Cost Recovery Clause.

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

d. There are a total of 18 pages.

e. The document attached for electronic filing is OPC's Memorandum of Law in Support of the Inclusion of Issues 10A, 10B, 16, 17,18, 26 and 30.
(See attached file: 110009.memorandum of law.final.sversion.doc)

Thank you for your attention and cooperation to this request.

Brenda S. Roberts
Office of Public Counsel
Telephone: (850) 488-9330
Fax: (850) 488-4491

DOCUMENT NUMBER-DATE
05173 JUL 26 =
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause.	DOCKET NOS: 110009-EI FILED: July 26, 2011

OPC'S MEMORANDUM OF LAW IN SUPPORT OF THE INCLUSION OF ISSUES 10A, 10B, 16, 17, 18, 26, AND 30

Pursuant to the directive of the Prehearing Officer, as communicated by the Commission Staff during the issue identification meeting of July 22, 2011, the Citizens of the State of Florida, through the Office of Public Counsel ("OPC" or "the Citizens"), hereby submit this Memorandum of Law In Support of Issues 10A, 10B, 16, 17, 18, 26, and 30.

Preliminary Statement

In this Memorandum, OPC will address why the Prehearing Officer, to give effect to OPC's right to due process under the Florida Administrative Procedure Act, must include in his Prehearing Order for adjudication in this proceeding, the issues that are the subject of Florida Power & Light's (FPL) and Progress Energy Florida's (PEF) challenges. Because some of the reasons are common to the issues, and because (with respect to FPL's challenges) the reasons are also germane to the Response to FPL's Motion to Strike portions of the testimony of OPC witnesses Dr. William Jacobs and Brian Smith that OPC will submit on or before Friday, July 29, 2011, some degree of redundancy will be unavoidable.

Docket No. 110009-EI is the proceeding to consider and rule on the petitions of FPL and PEF for authority to collect costs through the Commission's nuclear cost recovery clause. Section 350.0611(1), Florida Statutes, authorizes OPC to intervene and participate as a party in Commission proceedings. In Order No. PSC-11-0009-PCO-EI, dated January 3, 2011, the Commission established Docket No. 110009-EI in the continuing proceeding on utilities' request

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to collect costs through the nuclear cost recovery clause. On January 6, 2011, OPC filed its Notice of Reaffirming Party Status. As an Intervenor, OPC is entitled to exercise the rights afforded parties under Florida's Administrative Procedure Act, Chapter 120, Florida Statutes ("APA"). OPC submits its rights under the APA must be the beginning point of the analysis of each of the utilities' challenges to OPC's issues.

ISSUE 10A

Section 120.57(1)(b) states: "All parties shall have an opportunity to respond, to present evidence and argument *on all issues involved*, to conduct cross-examination and submit rebuttal evidence, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative." (Emphasis provided)[1]

Issue 10A is among the "issues involved" within the meaning of Section 120.57(1)(b), F.S.

FPL filed its petition pursuant to Rule 25-6.0423, F.A.C. One provision of the rule that FPL must satisfy is the requirement of Rule 25-6.0423(5)(c)(5), F.A.C. that a utility submit a study of the long term feasibility of its project annually. FPL submitted such a study, and the Commission will rule as to whether it passes muster. OPC disputes FPL's contention that FPL's long term feasibility study is appropriate. OPC's disagreement with FPL's feasibility study presents an issue to be considered in this docket, and the fact that it arises from FPL's effort to comply with the Commission's governing rule places it among the category of "all issues involved." In fact, over time the Commission has developed a standard set of issues, one of which (Issue 10 in this instance) asks:

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[1]Black's Law Dictionary defines "issue" as a point in dispute between two or more parties; an "issue of fact" as a point supported by one party's evidence and controverted by another's; and a "legal issue" as a legal question, usually at the foundation of a case and requiring a court's decision.

"Should the Commission approve what FPL has submitted as its 2010 and 2011 annual detailed analyses of the long-term feasibility of completing the Extended Power Uprate project, as provided for in Rule 25-6.0423, F.A.C.? If not, what action, if any, should the Commission take?"

Accordingly, the Commission has recognized that a utility's study of long term feasibility is a core issue—one that arises out of its rule, and one that it will address during the proceeding. *FPL does not object to Issue 10.* Issue 10A is enumerated as a subpart of Issue 10 precisely because it is a more specific aspect of the broadly stated issue pertaining to the study of long term feasibility. Issue 10A asks:

"Should the Commission accept the quantitative methodology that FPL employed to assess the long-term feasibility of the EPU project?"

Issue 10B (addressed below) asks:

"Should the Commission require FPL to perform separate long-term feasibility analyses for the Turkey Point and St. Lucie uprate activities?"

OPC formulated these subparts to Issue 10 to inform the Commissioners (and other interested readers of the Prehearing Order) as to the nature of the specific points of contention between the parties, and also to ensure that OPC's specific assertions would receive an explicit ruling at the end of the case.[2] In response to Issue 10A, OPC stated its position that the Commission should direct FPL to perform and submit a study based on a different quantitative approach ("breakeven analysis") in lieu of the method selected by FPL to form the basis for its long term feasibility study. Clearly, OPC's Issue 10A is part and parcel of the standard Issue 10. It is also clear that FPL does not object to Issue 10. Based on FPL counsel's references to "2007 issues" during the issue identification process and FPL's pending Motion to Strike, OPC gathers that FPL objects to Issue 10A—not because OPC chose to formulate sub-issues to serve the

[2] Frequently, the "standard" issues are worded so broadly and generally that they do not educate the reader as to the precise nature of the dispute between the parties. The use of subissues to tee up the specific topics being debated is a frequent, ongoing practice in Commission prehearing procedures, and one which OPC believes improves the process.

objectives of educating Commissioners as to the nature of the dispute over which they will preside and facilitating the decision-making process—but because FPL contends OPC's specific concern is out of reach as a result of the decision in which the Commission granted FPL's petition for a determination of need for the Extended Power Uprates. FPL is mistaken.

In Order No. PSC-08-0021-FOF-EI, issued in Docket No. 070602-EI on January 7, 2008, the Commission accepted the analysis of cost-effectiveness that FPL submitted in support of its petition for purposes of granting the determination of need; however, the Commission did not establish the "CPVRR" comparison as the sole measurement to be used throughout the evolution of the project, regardless of developments. As proof, one need go no farther than the prefiled testimony of FPL witness Dr. Steven Sim in the instant proceeding. With respect to FPL's planned new nuclear units, Turkey Point 6 and Turkey Point 7, FPL submitted in its determination of need docket the very type of "breakeven analysis" that OPC now contends is appropriate for the EPU projects. At page 10-11of his testimony in this docket, Dr. Sim states:

> In regard to the Turkey Point 6&7 project, the analytical approach used is the calculation of breakeven overnight capital costs (in terms of $/kw) for the new nuclear units. This same analytical approach was utilized in the 2007 Determination of Need filing, and in the 2008, 2009, and 2010 NCRC filings, for the Turkey Point 6&7 project. *In later years, as more information becomes available regarding the cost and other aspects of the new nuclear units, another analytical approach may emerge as more appropriate.* (Emphasis provided)

Dr. Sim invokes FPL's ability to propose a different analytical approach to the feasibility analysis when circumstances warrant, even though in the determination of need order relating to Turkey Point 6&7 the Commission directed FPL to provide a long-term feasibility analysis ". . .which, in this case, shall also include updated. . .break-even costs. . ." Order No. PSC-08-0237-

FOF-EI, at page 29, quoted by Dr. Sim at page 5 of his prefiled testimony in this proceeding.[3] Apparently, FPL believes a different quantitative methodology can be proposed following the entry of the determination of need order—as long as it is FPL who is proposing it.

In this docket, there is no dispute that "more information is available" now, as compared to the time of the 2007 determination of need docket, regarding the costs and other aspects of the EPU projects. OPC has addressed those aspects through the testimony of its witnesses, Dr. Jacobs and Mr. Smith, who observe that FPL's practice of excluding past spent amounts from the feasibility calculation, coupled with the steep increases in FPL's estimates of the costs of completing the projects (that have occurred since the 2007 proceeding), have the effect of distorting FPL's indication of cost-effectiveness under its current methodology.[4] OPC's expert made this point regarding the appropriateness of FPL's feasibility methodology a year ago in Docket No. 100009-EI, prior to the time that the Commission voted to defer all FPL-related issues to the present hearing cycle. Docket No. 100009-EI was also the proceeding in which FPL raised its estimate of the cost of completing the EPU projects for the first time--from $1.4 billion to a range of $1.8 billion-$2.0 billion (excluding AFUDC and transmission). (FPL has increased its estimate again in this hearing cycle.) In this proceeding, Dr. Jacobs states, "If there was ever a valid basis for using the comparison of revenue requirements as the means of evaluating the feasibility of the uprate projects, it has eroded in light of FPL's experience with estimating the costs of the project." Dr. Jacobs' prefiled testimony, at page 6. Not surprisingly, FPL disagrees with Dr. Jacobs and Mr. Smith, however, that disagreement properly gives rise to

[3] Order No. PSC-08-0021-FOF-EI, in which the Commission granted a determination of need for FPL's EPU uprates, was far less prescriptive than the order entered in the Turkey Point 6&7 determination of need docket with respect to the guidance the Commission gave concerning future feasibility analyses.

[4] OPC's witnesses criticize FPL's practice of excluding past spent amounts from the capital costs that it incorporates in its feasibility analysis under circumstances of rapidly increasing cost estimates. At the time of the 2007 determination of need proceeding, neither FPL's witness nor the Commission's order granting a determination of need referred to this aspect of FPL's methodology. At the time, there had been no "past spent amounts" to exclude.

disputed facts to be ruled on by the Commission at the end of the case, *not* the exclusion of an issue that is as integral to the Commission's consideration of FPL's petition as is the Commission rule that governs this proceeding.

ISSUE 10B

As stated above, Section 120.57(1)(b) provides: "All parties shall have an opportunity to respond, to present evidence and argument *on all issues involved*, to conduct cross-examination and submit rebuttal evidence, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative." (Emphasis provided)

Issue 10B is also among the "issues involved" within the meaning of Section 120.57(1)(b), F.S.

Nearly all of the comments that OPC presents in support of Issue 10A apply also to Issue 10B. As was the case with Issue 10A, OPC formulated Issue 10B as a subtopic of Issue 10 (to which FPL does not object) for the purpose of conveying to the reader of the Prehearing Order the specific nature of this dispute between OPC and FPL. Issue 10B asks:

> **"Should the Commission require FPL to perform separate long-term feasibility analyses for the Turkey Point and St. Lucie uprate activities?"**

FPL presented a single feasibility study that treats the Turkey Point and St. Lucie EPU activities on a composite basis. OPC's witness points out that the Turkey Point and St. Lucie activities involve separate and distinct units. The projects differ with respect to the estimated capital costs involved in accomplishing their respective uprates, the quantity of megawatts that the EPU activities will add, and, critically, the length of time the expanded facilities will operate prior to the expiration of their licenses. In particular, in his prefiled testimony OPC's Dr. Jacobs observes that the units at Turkey Point will operate 14 *fewer* "unit-years" than the units at St. Lucie. Since the economic feasibility of an EPU project is dependent upon the amount of fuel

savings that can be generated over time to offset the initial capital costs, and since FPL is experiencing significant increases in the estimates of costs of completing the EPU projects, OPC's witness contends that the St. Lucie and Turkey Point EPU projects should be analyzed on a stand-alone basis. In that manner, in the event its shorter operational time frame renders the Turkey Point EPU project marginal or economically infeasible, that fact will appear as a result of the feasibility study.

FPL objects to viewing the St. Lucie and Turkey Point EPU projects on a separate, stand-alone basis.[5] Based on comments made during the issue identification meeting and FPL's pending Motion to Strike, OPC expects FPL will contend that this is another "2007 issue" that is off limits as a result of the order granting FPL's petition for a determination of need.

In Order No. PSC-08-0221-FOF-EI, the Commission treated the EPUs on a combined basis, as FPL presented them. However, just as the additional information to which Dr. Sim alluded could justify a change in the feasibility methodology applicable to the new nuclear units, the additional information regarding significantly and rapidly increasing costs that OPC's witness addresses support the separate analyses he advocates. Since the time of the determination of need order, FPL's estimates of the costs of completing the EPU projects have increased beyond the original $1.4 billion estimate by approximately $600 million. The total now stands at more than $2 billion, and in his testimony OPC's Dr. Jacobs points to reasons why he expects the costs will increase again. In particular, the dramatic increases in estimates have occurred because the process of design engineering has revealed additional plant modifications

[5] Clearly, the plant sites present separate and distinct undertakings, which are severable both in related construction activities and in the feasibility analyses. That being the case, one wonders why, if it intends to act in its customers' interests, FPL objects to the separate analyses. If, hypothetically and for the sake of argument, one of the project plant sites would score well on the separate feasibility analysis and the other would prove to be far less than cost-effective to customers, the individual analyses would enable the utility to identify the situation and protect customers from a project that is not economic for them. From customers' viewpoint, this would be far preferable to a situation in which an individual plant site's failing grade is masked by a composite score while the utility proceeds to develop it.

that will be required (increased scope), and presently FPL has completed only about 50% of the design engineering that is needed to establish the ultimate scope and related costs with any degree of certainty. Under these changed circumstances, it is logical and sensible to scrutinize the plant sites separately. Although the Turkey Point project may have been cost-effective at its original estimate, because of its shorter operational period it may become marginal or less than cost-effective as capital costs increase. OPC's position bears directly on whether the Commission should accept FPL's feasibility analysis. It is clear that FPL disagrees with OPC's testimony; however, as is the case with Issue 10A, that disagreement gives rise to a factual dispute for the Commission to adjudicate. It is not a basis for eliminating an issue that is as integral to the case as is the Commission rule that governs the proceeding.

ISSUE 16

To reiterate once again, Section 120.57(1)(b) provides: "All parties shall have an opportunity to respond, to present evidence and argument *on all issues involved*, to conduct cross-examination and submit rebuttal evidence, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative." (Emphasis provided)

Issue 16 is within the category of "all issues involved."

Issue 16 asks,

"Was it prudent for FPL to undertake the EPU projects at Turkey Point and St. Lucie on a 'fast track' basis?"

OPC regards Issue 16 as related to another of the standard, core issues that the Commission routinely addresses, which in this docket has been assigned Issue no. 11. Issue 11 asks:

"Should the Commission find that for the years 2009 and 2010 FPL's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Extended Power Uprate project?"

OPC formulated its Issue 16 as a means of informing the readers of the Prehearing Order of the specific nature of its contention regarding FPL's project management. OPC would not object to organizing its Issue 16 as a subpart of Issue 11. However, OPC understands that FPL's challenge relates, not to the fact that OPC chose to identify this level of specificity within the category of the quality of project management and cost control, but because FPL contends that OPC is trying, through Issue 16, to relitigate a matter that the Commission disposed of in the determination of need docket. Again, FPL is mistaken.

OPC is not attempting to relitigate a matter that the Commission resolved in the 2007 determination of need case.

As OPC witness Dr. Jacobs testifies (and illustrates with an exhibit that is an excerpt from a deposition—see Exhibit WRJ(FPL)-11), "fast track basis" is a term of art. It has a specialized meaning in the engineering/construction industry. Typically, a power plant project as large as FPL's EPU projects (450 MW, costing more than $2 billion) follows distinct phases sequentially. This normal sequence is designed to reduce risk and establish certainty of costs. For instance, design engineering would be completed and the specifications of necessary plant modifications would be fully developed prior to solicitation of bids; with the availability of complete specifications to vendors, bids would be translated into price-certain contracts; and implementation and construction would follow with the benefit of price knowledge and price certainty. "Expediting" this process might shorten one or more time frames in this sequence, but would not eliminate them. However, "fast tracking" is a concept that goes well beyond anything that the terms "expediting" or "accelerating" would connote.

"Fast tracking" involves undertaking activities in parallel, as opposed to performing them in sequence. "Fast tracking" involves forgoing bids based on design specifications, and accepting contracts that consequently have no price protection. A review of the file in Docket No. 070602-EI (the EPU determination of need case) shows that FPL referred to its plan to "expedite" the EPU projects (FPL petition, at page 23; Transcript of hearing, at page 68), and that it regarded the schedule as "aggressive" (FPL petition, at page 15). However, in its petition and supporting testimony, and also in the stipulations that FPL asked the Commission to approve in its "determination of need" order, FPL did not request the Commission to endorse a "fast track" approach. Accordingly, the Commission could not, and did not, approve FPL's decision to "fast track" the EPU projects and expose itself and its customers to the extreme risks that such a departure from normal procedures entails.[6]

OPC is not asking the Commission to impose hindsight review.

FPL witness Terry Jones discusses at length the severe complexity of the EPU projects. See Mr. Jones' prefiled testimony, at pages 35-38. OPC's witness specifically testifies that the extreme complexity that Mr. Jones describes was known to FPL at the beginning of the EPU projects. See prefiled testimony of Dr. Jacobs, at pages 23-25. OPC is not asking for hindsight review, but an evaluation of FPL's conduct that takes into account information that FPL knew, or should have known, at the time it decided to "fast track" the EPU projects.

OPC is not attempting to relitigate the Commission's decision on a "risk sharing plan."

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[6] OPC notes that, in its pending Motion to Strike, FPL refers to the fact that it told the Commission it would develop the uprates on an "expedited basis," then states, "OPC now argues that FPL should not have undertaken the project on an expedited or "fast track" schedule. . ." (Motion, at page 5) OPC expects that FPL may reiterate this argument in its opposition to Issue 16. However, as OPC's witnesses make clear, FPL's argument depends on a claimed "equivalency" between "expedite" and "fast track" that does not exist.

A risk sharing plan contemplates the possibility that a utility may incur costs that are prudent, but that might be disallowed despite a showing of prudence pursuant to a requirement that it share risks with customers. OPC's Issue 16 does not attempt to impose a risk sharing plan. Rather, through Issue 16, OPC establishes the vehicle for the Commission's consideration of Dr. Jacobs' testimony that the decision to fast track the EPU projects was imprudent, and costs arising from the imprudent decision that exceed those associated with the non-EPU alternative are also, by definition, imprudent. There is no "sharing of risks" if all costs disallowed by the Commission are disallowed on the basis of the utility's imprudence.

OPC's Issue 16 is consistent with Section 403.519, F.S.

Section 403.519(4)(e) provides that "proceeding with the construction of the nuclear . . . power plant following an order by the commission approving the need for the nuclear. . power plant under this act shall not constitute evidence of imprudence. Imprudence shall not include any cost increases due to events beyond the utility's control." If a utility could immunize itself from all challenges of imprudence merely by "proceeding with the construction" of the unit that is the subject of a determination of need order, there would be no occasion for annual reviews. However, the same subsection provides for disallowance of imprudent costs, and it is the prudence (or lack thereof) with which FPL proceeded that OPC addresses, *not* the decision to proceed in and of itself. Similarly, the second statement does not preclude OPC's issue, because OPC's point is that, by "fast tracking" the EPU projects, FPL imprudently sacrificed its ability to control events and costs.

In summary, OPC's Issue 16 is related to a core concern—the prudence and effectiveness of project management. It is as relevant and fundamental an issue as any that can arise from FPL's petition to collect the costs of its EPU projects from customers. It has not been precluded,

either by the Commission's order in the related determination of need docket or by other operation of law. Rather, OPC's assertion of the imprudence of the "fast tracking" of the EPU project, and FPL's disagreement with the assertion, present an issue of fact that OPC is entitled to present for the Commission's consideration and adjudication by the due process provisions of the Florida Administrative Procedure Act.

ISSUE 17

As with the other issues, the appropriate beginning point of analysis of FPL's challenge to OPC's Issue 17 is the provision of the Administrative Procedure Act that ensures parties' rights to due process in Commission proceedings. Section 120.57(1)(b) states: "All parties shall have an opportunity to respond, to present evidence and argument *on all issues involved*, to conduct cross-examination and submit rebuttal evidence, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative." (Emphasis provided)

OPC'S Issue 17 belongs in the category of "all issues involved."

Issue 17 asks: "Was it prudent for FPL to undertake the EPU projects at Turkey Point and St. Lucie in the absence of a break-even calculation?" The question of the utility's prudence in decisionmaking and performance is at the heart of the Commission's inquiry in this proceeding, because the Florida Legislature directed the Commission to disallow imprudent costs from the amounts that the utilities collect from customers. Issue 17 relates both to the selection of the methodology for evaluating cost-effectiveness (Issues 10, 10A, and 10B) and the prudence of FPL's management (an aspect or subtopic of general issue 11). Specifically, OPC contends that the imprudence of the decision to "fast track" the EPU projects was exacerbated by FPL's failure

to develop a "breakeven" value that would identify the maximum amount per kW that it could spend on the EPU and remain cost-effective.[7]

ISSUE 18

OPC again invokes its rights under Section 120.57(1): "All parties shall have an opportunity to respond, to present evidence and argument *on all issues involved*, to conduct cross-examination and submit rebuttal evidence, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative." (Emphasis provided)

OPC'S Issue 18 belongs in the category of "all issues involved."

Issue 18 asks: "If the Commission finds FPL was imprudent in Issues 16 or 17, what action can and should the Commission take?" Issue 18 poses an issue of law. It calls on the Commission to interpret and apply its authority under governing statutes, which include the provisions of Chapter 366 and Section 403.519(4)(e), F.S. The latter provision empowers the Commission to disallow costs of a nuclear project that a utility seeks to recover prior to commercial operation ". . .only to the extent the commission finds, based on a preponderance of the evidence adduced at a hearing before the commission under s.120.57, that certain costs were imprudently incurred." OPC's position is that the costs that exceed the amount by which FPL exceeds the cost of its non-EPU alternative as a consequence of its imprudent decision to "fast track" its EPU projects can and do comprise "certain costs" within the meaning of the subsection. Based upon a review of FPL's pending Motion to Strike, OPC anticipates that FPL will dispute this position and argue that "certain costs" means "particular costs" of individual

[7]During the issue identification meeting of July 22, OPC acknowledged that there is some degree of overlap between Issue 17 and Issue 10A. OPC offered to delete Issue 17 if the Prehearing Officer rules in OPC's favor with respect to the inclusion of Issue 10A.

items—to which OPC will reply that FPL again has attempted to base an argument on an equivalency that does not exist. Given the parameters of the Commission's responsibilities under Chapter 366, Florida Statutes, OPC believes the Legislature did not intend to require the Commission to ignore the "big picture" in a manner that would leave customers without effective protection from the excessive costs arising from imprudent management.

However, for the Prehearing Officer's immediate purposes, a full brief of legal argument is neither appropriate nor necessary. OPC describes its position on Issue 18 to this extent here to make clear that Issue 18 raises a legal issue for the parties to brief at the appropriate time and for the Commission to resolve. Issue 18 stems from OPC's contentions, expressed in Issues 16 and 17 (defended above) that FPL has acted imprudently. Implicit in any decision of imprudence is the identification of the appropriate mechanism for protecting customers in light of the finding. By including Issue 18, the Prehearing Officer of course will not decide the issue. Instead, he will recognize that parties have presented differing and competing interpretations of the extent of the Commission's legal authority that the Commission will decide after presiding over the evidentiary hearing and considering the briefs of parties.

Issue 26

To reiterate once again, Section 120.57(1)(b) provides: "All parties shall have an opportunity to respond, to present evidence and argument *on all issues involved*, to conduct cross-examination and submit rebuttal evidence, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative." (Emphasis provided) Issue 26 asks:

Should the Commission approve for recovery in 2012 any estimated 2011 and 2012 cost not necessary for receipt of the Combined License (COL) for Levy Units 1 & 2? If not, what action can and should the Commission take with respect to these costs?

The issue is proposed by the Citizens in order to provide a decision point regarding the reasonableness or prudence of the company spending money on the LNP when the project may never be completed or may be delayed a significant number of years. This contention is raised in the pre-filed testimony of Citizens' witness Jacobs and is indirectly addressed by PEF witness Elnitsky in his rebuttal testimony (Elnitsky rebut., p.4, L. 1-8). The Citizens are entitled to raise this issue in order to test the reasonableness of dollars not even expended but which are proposed for ratepayer recovery.

At this point the Citizens are unclear on what basis PEF has for objecting to the issue other than that PEF may believe that the Commission has authorized spending that includes the dollars that they estimate or propose for recovery. The Citizens have offered evidence in the form of scenario planning that raises an issue of fact as to the diminished likelihood of the LNP project schedule continuing as proposed by PEF and thus has a direct bearing on the actual dollars for with PEF seeks recovery in 2012. PEF cannot claim that the Commission has given any sort of final approval to expenditures that they may never incur. The Citizens read Order No. PSC-11-0095-FOF-EI as conceptually approving PEF's plan to achieve the COL and then reevaluate options at that time. However, in that order, the Commission did not approve any specific cost for 2011 or 2012 in reaching this decision. The Citizens simply have challenged any cost that is not strictly and directly related to receipt of the COL. The Citizens know of no legal basis for excluding inquiry into this issue and submits that the Commission should be hesitant to restrict its ability to save the customers from incurring a few million dollars of costs

that customers may otherwise have to pay for but for which they may not receive any benefit. To the extent that PEF contends that the Commission is powerless to signal in advance that certain types of costs are imprudent, then the Citizens reply that there is nothing in Section 366.93, Florida Statues, that precludes the Commission from withholding approval – for cost recovery – of costs for which it believes that there is not a reasonable basis that they will be incurred. This decision by the Commission can be based on the prudence of the type of expenditure or the amount or both. In a nutshell, this is what the Citizens are addressing with the evidence proffered. The merits of the issue need not be decided at the Prehearing Officer level. That is for the hearing itself. All that matters at this stage is that the issue is grounded within the scope of the statute that the Commission is implementing. Clearly an issue challenging costs and the basis for recovery meets that simple test.

In summary, the Citizens urge that the Prehearing Officer retain this issue for consideration. The issue raised by the Citizens is a distinct issue that is not subsumed in any other. It frames a factual dispute that the PEF and Citizens' testimony address and should be considered by the full panel. The Citizens are prepared to make its case and carry any burden it has with respect to going forward with the evidence, but PEF ultimately has the burden of proof as to the reasonableness of the costs that it is asking the Commission to approve.

Issue 30

To reiterate once again, Section 120.57(1)(b) provides: "All parties shall have an opportunity to respond, to present evidence and argument *on all issues involved*, to conduct cross-examination and submit rebuttal evidence, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative." (Emphasis provided) Issue 30 reads:

Should the Commission approve as prudent any costs incurred between October 2, 2009 and December 31, 2010 for the Crystal River Unit 3 uprate project?

The sole reason for this issue is to highlight the Citizens' position that the Commission should not give final approval prudence to any costs that were incurred after the discovery of the October 2009 delamination, if and only if the legal impact of such a determination in this proceeding would preclude any disallowance that would otherwise be lawful as a result of a finding of imprudence in another docket. The Citizens believe that this is a legal issue and that it can be briefed. For this reason, the Citizens submit this issue is ripe for determination in this proceeding.

CONCLUSION

For the foregoing reasons, the Prehearing Officer should reject the utilities' challenges to the Citizens' issues.

s/ Charles J. Rehwinkel
Charles J. Rehwinkel
Deputy Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

(850) 488-9330

Attorney for the Citizens
of the State of Florida

s/ Joseph A. McGlothlin
Joseph A. McGlothlin
Associate Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

(850) 488-9330

Attorney for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **OPC'S MEMORANDUM OF LAW IN SUPPORT OF THE INCLUSION OF ISSUES 10A, 10B, 16, 17, 18, 26 and 30** has been furnished by electronic mail and U.S. Mail on this 26th day of July, 2011, to the following:

John T. Burnett/Alexander Glenn
Progress Energy Service Company, LLC
P.O. Box 14042
St. Petersburg, FL 33733-4042

John McWhirter, Jr.
c/o McWhirter Law Firm
Florida Industrial Power Users Group
PO Box 3350
Tampa, FL 33601

Keino Young/Anna Williams
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Mr. Paul Lewis, Jr.
Progress Energy Florida, Inc.
106 East College Ave, Suite 800
Tallahassee, FL 32301-7740

Vicki G. Kaufman/Jon C. Moyle, Jr.
Florida Industrial Power Users Group
118 North Gadsden Street
Tallahassee, FL 32301

Mr. Wade Litchfield
Florida Power & Light Company
215 South Monroe St., Suite 810
Tallahassee, FL 32301-1859

Matthew R. Bernier
Carlton Fields Law Firm
215 South Monroe St., Suite 500
Tallahassee, FL 32301-1866

J. Michael Walls/Blaise N. Huhta
Carlton Fields Law Firm
P.O. Box 3239
Tampa, FL 33601-3239

Randy B. Miller
White Springs Agriculture
Chemicals, Inc
P.O. Box 300
White Springs, FL 32096

Karen S. White, Staff Attorney
c/o AFCESA-ULFSC
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32043-5319

Bryan J. Anderson/Jessica Cano
Florida Power and Light Company
700 Universe Blvd
Juno Beach, FL 33418

James W. Brew/F. Alvin Taylor
Brickfield Law Firm
Eighth Floor, West Tower
1025 Thomas Jefferson St. NW
Washington, DC 20007

Ken Hoffman
Florida Power & Light Company
215 S. Monroe St., Suite 810
Tallahassee, FL 32301

Matthew Feil
Gunster Law Firm
215 South Monroe, Suite 601
Tallahassee, FL 32301

Gary A. Davis
James S. Whitlock
Southern Alliance for Clean Energy
Gary A. Davis & Associates
61 North Andrews avenue
Hot Springs, NC 28743

s/ Joseph A. McGlothlin
Joseph A. McGlothlin
Associate Public Counsel