

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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In re: Nuclear Cost Recovery Clause

Docket No. 130009-EI

Submitted for Filing: August 1, 2013

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**DUKE ENERGY FLORIDA, INC.'S MOTION TO DEFER AND ALTERNATIVE  
PETITION FOR A TEMPORARY VARIANCE OR WAIVER OF RULE 25-6.0423(5)(c)2,  
F.A.C. ON AN EMERGENCY BASIS**

Duke Energy Florida, Inc. (“DEF” or the “Company”) moves the Florida Public Service Commission (“PSC” or the “Commission”) to defer the Commission determinations in the 2013 Nuclear Cost Recovery Clause (“NCRC”) proceeding to the 2014 NCRC proceeding with respect to the Company’s Levy Nuclear Project (“LNP”), and the Crystal River Unit 3 (“CR3”) Uprate project (“CR3 Uprate project”), pending the Commission’s ruling on the Company’s Petition for Limited Proceeding to Approve the Revised and Restated Stipulation and Settlement Agreement (“Revised and Restated Settlement Agreement”) filed with the Commission on August 1, 2013. The Revised and Restated Settlement Agreement, if approved by the Commission, will resolve the 2013 NCRC CR3 Uprate project and LNP issues. As a result, Commission approval of the Company’s Motion to defer the PSC’s determination of these issues from the 2013 NCRC to the 2014 NCRC proceeding will promote administrative efficiency; avoid the time, expense, and uncertainty associated with resolving these issues in the 2013 NCRC; and is consistent with the Commission’s long-standing practice of encouraging parties to settle contested issues in proceedings whenever possible. For all these reasons, as explained in more detail below, the Company moves the Commission to grant its Motion. Alternatively, DEF further petitions on an emergency basis, as may be necessary, for a temporary variance or waiver of Rule 25-6.0423(5)(c)2, Florida Administrative Code (“F.A.C”) for this year only to enable the deferral of the PSC determinations that are the subject of the Company’s Motion from this

docket to the 2014 NCRC docket.

### **BACKGROUND AND REQUESTED RELIEF**

1. Pursuant to Section 366.93, Florida Statutes, and Commission Rule 25-6.0423, F.A.C., on March 1, 2013, DEF filed the direct testimony and exhibits of Mr. Christopher M. Fallon, Mr. Thomas G. Foster, and Mr. Jon Franke<sup>1</sup> supporting the prudence of DEF's actual 2012 costs and 2012 project management, contracting, accounting and cost oversight controls for the LNP and the CR3 Uprate project. Likewise, on May 1, 2013, DEF filed the direct testimony and exhibits of Mr. Fallon, Mr. Foster, and Mr. Garry D. Miller in support of DEF's actual/estimated 2013 and projected 2014 costs for the LNP and the CR3 Uprate project. In addition, the testimony and exhibits of Mr. Fallon included DEF's analysis of the long-term feasibility of completing the LNP consistent with Rule 25.6.0423(5)(c)5, F.A.C.<sup>2</sup>

2. Subsequently, following extensive negotiations between the Company and the Office of Public Counsel ("OPC"), the Florida Industrial Power Users Group ("FIPUG"), the Florida Retail Federation ("FRF"), and White Springs Agriculture Chemicals, Inc. d/b/a PCS Phosphate ("White Springs"), (hereinafter collectively the "Parties"), the Parties executed the Revised and Restated Settlement Agreement that replaces and supplants the Stipulation and Settlement Agreement (the "2012 Settlement Agreement"), approved by the Commission in Order No. PSC-12-0104-FOF-EI, and that resolves, among other issues, the 2013 NCRC CR3 Uprate project and LNP issues. On August 1, 2013, DEF filed its Petition for Limited Proceeding to Approve the Revised and Restated Settlement Agreement with the consent of the Parties. This Petition is presently pending before the Commission.

3. The Revised and Restated Settlement Agreement will not become effective until

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<sup>1</sup> Thereafter, Mr. Garry D. Miller adopted the March 1, 2013 testimony and exhibits of Mr. Franke.

<sup>2</sup> As explained in Mr. Miller's May 1, 2013 testimony, a determination on the feasibility of the CR3 Uprate project is not needed as a result of the decision to retire CR3.

the Company's Petition for Limited Proceeding to Approve the Revised and Restated Settlement Agreement is approved by final Commission vote. A final Commission vote on the Company's Petition is not expected to occur prior to the 2013 NCRC hearing, which commences on August 5, 2013. Consequently, while the Revised and Restated Settlement Agreement resolves the 2013 NCRC CR3 Uprate project and LNP issues, there is not sufficient time prior to the 2013 NCRC hearing for the Commission to review and potentially approve the Petition for Limited Proceeding to Approve the Revised and Restated Settlement Agreement.

4. Accordingly, DEF moves to defer the Commission's determination of the CR3 Uprate project and LNP issues in the 2013 NCRC docket to the 2014 NCRC docket pending Commission review, and potentially approval, of the Company's Petition for Limited Proceeding to Approve the Revised and Restated Settlement Agreement. DEF further requests that the Commission allow recovery of the requested cost amounts for the deferred CR3 Uprate project and LNP costs presented in DEF's petitions in the 2013 NCRC docket subject to refund and true-up in the 2014 NCRC docket, after the Commission has reviewed the Revised and Restated Settlement Agreement.

5. As grounds for this Motion, DEF states that the requested deferral will promote administrative efficiency; avoid the time, expense, and uncertainty associated with resolving the issues in the 2013 NCRC; and is consistent with the Commission's long-standing practice of encouraging parties to settle contested issues in proceedings whenever possible.<sup>3</sup> Deferral will

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<sup>3</sup> See In re: Request for approval of amendment to connection/transfer sheets, increase in returned check charge, amendment to miscellaneous service charges, increase in meter installation charges, and imposition of new tap-in fee, in Marion County, by East Marion Sanitary Systems Inc., Order No. PSC-11-0566-AS-WU, Docket No. 080562-WU, (P.S.C. December 11, 2011); In re: Application for staff-assisted rate case in Lee County by Mobile Manor Water Company, Inc., Order No. PSC-10-0299-AS-WU, Docket No. 090170-WU (P.S.C. May 10, 2010); In re: Application for increase in water and wastewater rates in Pasco County by Labrador Utilities, Inc., Order No. PSC-09-0711-AS-WS, Docket No. 080249-WS (P.S.C. October 26, 2009); In re: Petition of Tampa Electric Company to close Rate Schedules IS-3 and IST-3, and approve new Rate Schedules GSLM-2 and GSLM-3, Order No. PSC-00-

permit the Commission to timely review the Company's Petition for Limited Proceeding to Approve the Revised and Restated Settlement Agreement, and if the Commission approves the Petition as requested by the Parties, the Revised and Restated Settlement Agreement will resolve the issues that must be decided by the Commission in the 2013 NCRC docket. As a result, granting the Company's Motion promotes administrative efficiency by facilitating the efficient resolution of the CR3 Uprate project and LNP issues and avoiding unnecessary time, expense, effort, and uncertainty in the 2013 NCRC docket.

6. The Commission has approved similar requests in the past. See Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI, (Feb. 2, 2011) (approving the stipulation to defer all Florida Power & Light ("FPL") issues to further investigate certain cost issues and allowing recovery of costs subject to refund). Further, in Docket No. 110009-EI, the Commission granted DEF's Motion for deferral and deferred determinations of reasonableness of actual/estimated 2011 and projected 2012 CR3 Uprate costs and feasibility to the 2012 NCRC docket based on cost and schedule impacts resulting from the March 2011 CR3 delamination. See Order No. PSC-11-0547-FOF-EI, Docket No. 110009-EI, (Nov. 23, 2011). In Docket No. 080009-EI, the Commission also agreed to defer the prudence determination for the LNP and the Turkey Point Units 6 & 7 projects from the 2008 NCRC docket to the 2009 NCRC docket. See Order No. PSC-08-0749-FOF-EI, Docket No. 080009-EI, (Nov. 12, 2008). The Commission has, therefore, recognized that the NCRC is a continuing docket and, when warranted by the circumstances and requested by the affected utility, the Commission has deferred certain cost and feasibility determinations under the nuclear cost recovery rule to the subsequent docket year.

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0374-S-EI, Docket No. 990037-EI (P.S.C. February 22, 2000); In re: Application for staff-assisted rate case in Pasco County by Orangeland Water Supply, Order No. PSC-08-0640-AS-WU, Docket No. 070601-WU, (P.S.C. October 3, 2008); and In re: Application for increase in water and wastewater rates in Lake County by Utilities, Inc. of Pennbrooke, Order No. PSC-07-0534-AS-WS, Docket No. 060261-WS, (P.S.C. June 26, 2007).

7. For all the reasons provided herein, the current circumstances warrant the deferral requested in the Company's Motion. Accordingly, DEF requests that the Commission grant its Motion and defer the Commission determinations regarding the CR3 Uprate project and the LNP from Docket No. 130009-EI to the 2014 NCRC docket, and allow DEF to recover its requested costs subject to refund and true-up in the 2014 NCRC docket, based on the outcome of the docket for Commission review of the Petition for Limited Proceeding to Approve the Revised and Restated Settlement Agreement.

**PETITION FOR EMERGENCY AND TEMPORARY WAIVER OR VARIANCE OF  
RULE 25-6.0423(5)(c)2 FOR THE 2013 NCRC DOCKET**

8. DEF, in an abundance of caution, alternatively petitions the Commission on an emergency basis for a temporary variance or waiver of Rule 25-6.0423(5)(c)2, F.A.C. for this year only to defer the PSC determinations regarding the CR3 Uprate project and the LNP from the 2013 NCRC docket to the 2014 NCRC docket.

9. A petition for emergency waiver or variance of a rule is appropriate when (1) the requirements of Section 120.542, Florida Statutes, for a rule waiver or variance are met, (2) the specific facts make the situation an emergency, and (3) the facts demonstrate that the petitioner will suffer an immediate adverse effect unless the variance or waiver is issued more expeditiously than the time frames provided in Section 120.542, Florida Statutes. See Rule 28-104.004, F.A.C. The time frames under Section 120.542, Florida Statutes, provide for a final determination on a requested petition for waiver or variance of a rule requirement within ninety (90) days after receipt of the petition. There is inadequate time under Section 120.542, Florida Statutes, then, to obtain a determination that the requested waiver or temporary variance of Rule 25-6.0423(5)(c)2 should be granted before the currently scheduled hearing for the 2013 NCRC docket commences on August 5, 2013. DEF will be denied its statutory right to request a

variance or waiver of Rule 25-6.0423(5)(c) 2 under Section 120.542, Florida Statutes, unless the petition is considered an emergency request. See In re: Petition for a Determination of Need for an Electrical Power Plant in Martin County by Florida Power & Light Co., 2002 Fla. PUC LEXIS 378, Order No. PSC-02-0703-PCO-EI, Docket No. 020262-EI (May 23, 2002) (granting request for waiver of 90-day requirement to hold a need determination hearing on an emergency basis because a decision on the rule waiver petition on a non-emergency basis yielded a decision more than a month past the current need determination schedule). Accordingly, for the reasons provided below, DEF's petition for a temporary waiver or variance of the identified requirements in Rule 25-6.0423(5)(c)2, F.A.C. this year should be granted on an emergency basis.

10. Under Section 120.542, Florida Statutes, “[v]ariations and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.” § 120.542(2), Fla. Stats. A substantial hardship is “a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.” Id. These statutory requirements are satisfied by the temporary variance or waiver this year of the requirements in Rule 25-6.0423(5)(c)2, F.A.C. that the Commission determine that the filed CR3 Uprate project and LNP costs are reasonable or prudent.

11. The purpose of Section 366.93, Florida Statutes, is to establish alternative cost recovery mechanisms in order to promote electric utility investment in nuclear power plants and allow for the recovery in rates of all such prudently incurred costs. § 366.93(2), Fla. Stats. Rule 25-6.0423(1), F.A.C. expressly implements this legislative purpose. Rule 25-6.0423(1), F.A.C. This statutory purpose can still be achieved if there is a temporary variance or waiver of the requirements to determine the prudence and reasonableness of the CR3 Uprate project and LNP

project costs this year.

12. Pursuant to DEF's request in its Motion, the Commission can still determine the prudently incurred CR3 Uprate project and LNP costs consistent with Section 366.93 next year if the temporary variance or waiver of Rule 25-6.0423(5)(c) 2, F.A.C. is granted this year. Thus, the purpose of Section 366.93, Florida Statutes, will be achieved if the temporary variance or waiver is granted. See generally, In re: Review of 2007 Electric Infrastructure Storm Hardening Plan filed pursuant to Rule 25-6.0342, F.A.C. submitted by Florida Public Utility Company, Order No. PSC-07-0558-FOF-EI, Docket No. 070300-EI (July 3, 2007) (finding that underlying purpose of the statute would be met even with the granting of a waiver to provide an additional 60 days to file a storm hardening plan because Florida Public Utility Company did not seek to be excused altogether and the extension would not deny staff or intervenors the opportunity to review and evaluate the plan).

13. The determination of what is a hardship and what makes it substantial is made by the agency that enacted the rule consistent with the legislative policy the rule implements. See generally, Fla. Dep't of Bus. & Prof'l Regulation, Div. of Para-Mutuel Wagering v. Inv. Corp. of Palm Beach, 747 So. 2d 374, 383 n7 (Fla. 1999) ("[Section 120.542] is intended to give agencies much-needed flexibility to address unique or unusual situations that are not contemplated by agency rules that, by necessity, are written to address general circumstances.") (quoting, Blanton & Rhodes, Flexibility, Flexibility, Flexibility, The New Variance & Waiver Provision, Fla. B.J., Mar. 1997 at 35, 38-39). The Florida Legislature deferred to the Commission the enactment of alternative cost recovery mechanisms for nuclear power plant costs consistent with the Legislative purpose that the Commission's cost recovery mechanisms promoted utility investment in nuclear power plants and allowed for the recovery in rates of all prudently incurred costs. § 366.93(1), (2), Fla. Stats. The Commission, therefore, has the discretion to determine

what warrants a waiver of its requirements for review and approval of the prudence and reasonableness of costs on nuclear power plant projects under the substantial hardship test of Section 120.542.

14. The Commission can find that there is a substantial hardship to DEF if strict compliance with the requirements in Rule 25-6.0423(5)(c)2, F.A.C., is required this year. These specific requirements exist only in Rule 25-6.0423, F.A.C. They are not requirements under Section 366.93, Florida Statutes. They exist to assist the Commission in its review and approval of costs incurred on nuclear power plant projects and to promote the utility investment in nuclear power plants by allowing recovery of reasonable projected costs subject to true-up and a subsequent determination that the costs were prudently incurred. As a result, the Commission can temporarily waive or grant a variance of these specific requirements this year and preserve these benefits of the rule in the continuing NCRC docket next year.

15. In fact, DEF, the Commission, and all other parties to this docket will benefit from the temporary waiver or variance of these requirements this year because they will have the benefit of the results of the Commission review of the Company's Petition for Limited Proceeding to Approve the Revised and Restated Settlement Agreement, which resolves the CR3 Uprate project and LNP cost issues in the 2013 NCRC docket. Accordingly, the requested temporary waiver or variance protects all interests in the NCRC process pending the Commission's review of the Revised and Restated Settlement Agreement. Applying these rule requirements this year, therefore, would be a substantial hardship. See generally, Order No. PSC-07-0557-FOF-EI (July 2, 2007) (rule waiver granted when FPUC intended to comply with filing requirement and staff and others had the opportunity to review and evaluate the plan when filed); In re: Petition for waiver of Rule 25-17.250(1) and (2)(a), F.A.C., 2008 Fla. PUC LEXIS 523, Order No. PSC-08-0706-TRF-EI, Docket No. 080501-EI (Oct. 23, 2008) (waiving rule

requiring filing of standard offer contract when it was factually inapplicable to DEF's situation). Indeed, strict application of these requirements in Rule 25-6.0423(5)(c) 2, F.A.C. at this time imposes on DEF a requirement that does not serve the purpose of the statute or even these rule requirements at this time. See generally, In Re: Request for waiver of carrier selection requirements of Rule 25-4.118, F.A.C., 2007 Fla. PUC LEXIS 647, Order No. PSC-07-0999-PAA-TX, Docket No. 070611-TX (Dec. 12, 2007) (waiving individual customer authorization of carrier change rule requirement when strict compliance served no useful purpose because adequate public notice to customers was provided and individual authorization could cause confusion and claims to detriment of utility and customers).

16. No other person or entity can claim any prejudice if a waiver or variance is granted because the information required by these specific requirements will be reviewed in the docket to review the Petition for Limited Proceeding to Approve the Revised and Restated Settlement Agreement or in next year's NCRC docket. See generally, In re: Petition for a Determination of Need for an Electrical Power Plant in Martin County by Florida Power & Light Co., 2002 Fla. PUC LEXIS 378, Order No. PSC-02-0703-PCO-EI, Docket No. 020262-EI (May 23, 2002) (granting request for waiver of 90-day requirement to hold a need determination hearing so that a second request for proposals (RFP) could be issued, potentially avoiding the substantial hardship of expensive, complicated litigation over issues the second RFP might resolve).

17. For purposes of this petition for temporary waiver or variance of Rule 25-6.0423(5)(c)2, F.A.C. on an emergency basis the Petitioner's name and address are: Duke Energy Florida, Inc., 299 1<sup>st</sup> Avenue North, St. Petersburg, Florida 33701. Any pleading, motion, notice, order, or other document required to be served upon DEF or filed by any party to this proceeding should be served upon the following individuals:

John T. Burnett  
Florida Bar No. 173304  
Deputy General Counsel  
Dianne M. Triplett  
Florida Bar No. 872431  
Associate General Counsel  
DUKE ENERGY FLORIDA, INC.  
299 First Avenue, N., DEF-151  
St. Petersburg, FL 33701  
Telephone: (727) 820-5587  
Facsimile: (727) 820-5519

Matthew R. Bernier  
Florida Bar No. 0059886  
Associate General Counsel II  
DUKE ENERGY FLORIDA, INC.  
106 East College Avenue, Ste. 800  
Tallahassee, FL 32301-7740  
Phone: (850) 222-8738  
Facsimile: (850) 222-9768

James Michael Walls  
Florida Bar No. 0706272  
Blaise N. Gamba  
Florida Bar No. 0027942  
CARLTON FIELDS, P.A.  
Post Office Box 3239  
Tampa, FL 33601-3239  
Telephone: (813) 223-7000  
Facsimile: (813) 229-4133

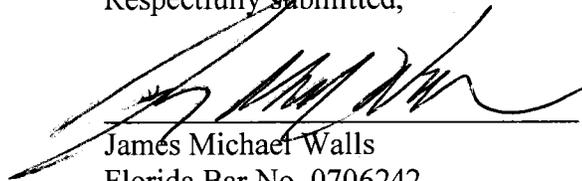
18. As explained above, the Commission can grant a temporary waiver or variance this year of the identified requirements of Rule 25-6.0423(5)(c)2, F.A.C. on an emergency basis under Section 120.542 when (1) the purpose of the rule will otherwise be satisfied even though the rule is waived and (2) substantial hardship of a technological, economic, legal, or other type of hardship will result from compliance with the rule. § 120.542(2), Fla. Stat. Both requirements are met here and, therefore, DEF's petition should be granted.

## CONFERENCE WITH OTHER PARTIES

19. Pursuant to Rule 28-106.204(3), F.A.C., DEF has conferred with all parties of record and is authorized to represent that OPC, FRF, FIPUG, and White Springs support this motion. While SACE has not yet had the opportunity to review the motion, based on representations of DEF counsel regarding the nature of the motion, SACE expressed that it does not oppose this motion. FPL takes no position on this motion.

WHEREFORE, for the all the reasons stated above in this Motion, DEF respectfully requests that the Commission (1) grant DEF's Motion and defer the Commission's determinations with respect to the CR3 Uprate project and the LNP from the 2013 NCRC docket to the 2014 NCRC docket; (2) allow DEF to recover the costs described in DEF's filings in the 2013 NCRC docket subject to refund and a determination in the 2014 NCRC docket consistent with the Commission's review of the Revised and Restated Settlement Agreement; and (3) to the extent necessary, grant DEF's petition for an emergency, temporary waiver of the requirements in Rule 25-6.0423(5)(c)2, F.A.C. this year to accomplish the deferral of the Commission's determinations with respect to the CR3 Uprate project and LNP from the 2013 NCRC docket to the 2014 NCRC docket.

Respectfully submitted,

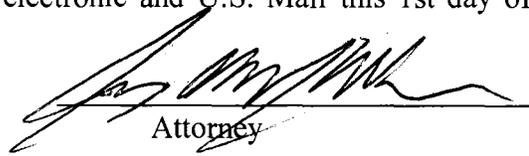


James Michael Walls  
Florida Bar No. 0706242  
Blaise N. Gamba  
Florida Bar No. 0027942  
CARLTON FIELDS, P.A.  
Post Office Box 3239  
Tampa, FL 33601-3239  
Telephone: (813) 223-7000  
Facsimile: (813) 229-4133

John T. Burnett  
Deputy General Counsel  
Dianne M. Triplett  
Associate General Counsel  
Matthew R. Bernier  
Associate General Counsel II  
DUKE ENERGY FLORIDA, INC.  
Post Office Box 14042  
St. Petersburg, FL 33733-4042  
Telephone: (727) 820-5587  
Facsimile: (727) 820-5519

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to counsel and parties of record as indicated below via electronic and U.S. Mail this 1st day of August, 2013.



Attorney

Keino Young  
Michael Lawson  
Staff Attorney  
Florida Public Service Commission  
2540 Shumard Oak Blvd  
Tallahassee 32399  
Phone: (850) 413-6218  
Facsimile: (850) 413-6184  
Email: [kyoung@psc.fl.state.us](mailto:kyoung@psc.fl.state.us)  
[mlawson@psc.fl.state.us](mailto:mlawson@psc.fl.state.us)

Charles Rehwinkel  
Deputy Public Counsel  
Erik Saylor  
Associate Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street  
Room 812  
Tallahassee, FL 32399-1400  
Phone: (850) 488-9330  
Email: [rehwinkel.charles@leg.state.fl.us](mailto:rehwinkel.charles@leg.state.fl.us)  
[Saylor.erik@leg.state.fl.us](mailto:Saylor.erik@leg.state.fl.us)

Jon C. Moyle, Jr.  
Moyle Law Firm  
118 North Gadsden Street  
Tallahassee, FL 32301  
Phone: (850) 681-3828  
Fax: (850) 681-8788  
Email: [jmoyle@moylelaw.com](mailto:jmoyle@moylelaw.com)

James W. Brew  
F. Alvin Taylor  
Brickfield Burchette Ritts & Stone, PC  
1025 Thomas Jefferson St NW  
8th FL West Tower  
Washington, DC 20007-5201  
Phone: (202) 342-0800  
Fax: (202) 342-0807  
Email: [jbrew@bbrslaw.com](mailto:jbrew@bbrslaw.com)  
[ataylor@bbrslaw.com](mailto:ataylor@bbrslaw.com)

Paul Lewis, Jr.  
Matthew R. Bernier  
Duke Energy Florida, Inc.  
106 East College Avenue, Ste. 800  
Tallahassee, FL 32301-7740  
Phone: (850) 222-8738  
Facsimile: (850) 222-9768  
Email: [paul.lewisjr@duke-energy.com](mailto:paul.lewisjr@duke-energy.com)  
[matthew.bernier@duke-energy.com](mailto:matthew.bernier@duke-energy.com)

Florida Power & Light Company  
Jessica A. Cano/Bryan S. Anderson  
700 Universe Boulevard  
Juno Beach, FL 33408  
Phone: 561-304-5226  
Facsimile: 561-691-7135  
Email: [bryan.anderson@fpl.com](mailto:bryan.anderson@fpl.com)  
[jessica.Cano@fpl.com](mailto:jessica.Cano@fpl.com)

George Cavros  
Southern Alliance for Clean Energy  
120 E. Oakland Park Blvd, Ste. 105

Kenneth Hoffman  
Florida Power & Light Company  
215 South Monroe Street, Suite 810

Fort Lauderdale, FL 33334  
Phone: (954) 295-5714  
FAX: (866) 924-2824  
Email: [george@cavros-law.com](mailto:george@cavros-law.com)

Tallahassee, FL 32301-1858  
Phone: 850-521-3919/FAX: 850 521-3939  
Email: [Ken.Hoffman@fpl.com](mailto:Ken.Hoffman@fpl.com)

Robert Scheffel Wright  
John T. LaVia, III  
Gardner Bist Wiener Wadsworth Bowden  
Bush Dee LaVia & Wright, P.A.  
1300 Thomaswood Drive  
Tallahassee, FL 32308  
Phone: (850) 385-0070  
Email: [Schef@gbwlegal.com](mailto:Schef@gbwlegal.com)  
[Jlavia@gbwlegal.com](mailto:Jlavia@gbwlegal.com)