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August 14, 2001

By Hand Delivery

Blanca S. Bayó, Director
Division of the Commission Clerk &
Administrative Services
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-0850

In Re: Review of Florida Power & Light Company's proposed merger with Entergy Corporation, the formation of a Florida Transmission company ("Florida transco"), And their effect on FPL retail rates
Docket Number 001148-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") are the original and fifteen (15) copies of FPL's Motion to Strike South Florida Health and Hospital Association's Answer to FPL's Response to Motion for Reconsideration Motion to Dismiss in Docket No. 001148-EI.

If you or your Staff have any questions regarding this transmittal, please contact me.

Very truly yours,

Charles A. Guyton

Charles A. Guyton

CAG/lg
Enclosure
TAL_1998/39547-1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power & Light Company's proposed merger with Entergy Corporation, the formation of a Florida Transmission company ("Florida transco"), And their effect on FPL retail rates	)))))	Docket No. 001148-EI Filed: August 14, 2001

FPL's MOTION TO STRIKE SOUTH FLORIDA HEALTH AND HOSPITAL ASSOCIATION'S ANSWER TO FPL's RESPONSE TO MOTION FOR RECONSIDERATION

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code ("FAC"), hereby moves to strike the "Answer" of the South Florida Hospital and Healthcare Association (the "Hospital Association") to FPL's Response the Hospital Associations's Request for Clarification and states:

I. THE UNIFORM RULES PROHIBIT THE HOSPITAL ASSOCIATION's "ANSWER" AND IT MUST THEREFORE BE STRICKEN

The Commission entered Order No. PSC-01-1346-PCO-EI (the "2001 Order") on June 19, 2001, and thereby determined, based upon its prior Order No. PSC-99-0519-AS-EI (the "1999 Order"), not to place interim rates subject to refund in this proceeding. On July 5, 2001, the Hospital Association filed a motion for reconsideration of the 2001 Order (the "Motion"), and FPL responded on July 17, 2001.[1] At that point the briefing closed. There is simply no place under the applicable procedural rules for further reargument by the movant.

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[1] The Motion is styled a "Request for Clarification or in the alternative, Reconsideration." There is no provision in the Commission's rules or the uniform rules for a "request for clarification." Under past Commission practice, such requests are treated as motions for reconsideration. *See, e.g., In re: Intrastate Access Charges for Toll Use of Local Exchange Services,* 85 FPSC 19.

Rule 28-106.204(1) only authorizes the filing of a single response to a motion. The movant is allowed no right of reply.[2] In ruling upon motions, agencies have therefore repeatedly refused to consider papers other than the motion and the response thereto. *See e.g., Harden v. DEP*, 1998 Fla. Div. Adm. Hear. LEXIS 6069 (DEP 1998); *in Re: Application for a Rate Increase in Brevard County by General Development Utilities Inc. (Port Malabar Division)*, 92 FPSC 4:306; *In Re: Application for amendment of Certificate No. 247-S by North Fort Myers Utility, Inc*, 96 FPSC 3:120; *see also, In re: Petition of Gainesville Gas Company for Authority to Increase and Restructure Rates and Charges*, 88-9 FPSC 202 (denying leave to file reply memorandum).

Consistent with this line of authority, the Commission has routinely refused to allow attempts by a movant to have the last word in contravention of the rules. For example, in *In re: Adoption of Numeric Conservation Goals by Florida Power & Light Company,* 98 FPSC 10:419, the Commission struck a reply to a response to a motion for a procedural order, holding that "the pleading cycle must stop at a reasonable point" and "unequivocal precedent" prohibited such replies. *Id.* This principle was, in fact, recently applied by the Commission in this very docket. *See* Order No. PSC-01-0099-PCO-EI (January 12, 2001) (refusing to consider Colonial Pipeline Company's "comments" on FPL's Response to its Petition to Intervene).

Moreover, there can be no argument that a distinction exists with respect to motions for reconsideration. As is the case with other types of motions, only the motion

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[2] Similarly, Rule 25-22.037(2), which applied prior to the adoption of the Uniform Rules did not allow a reply to a response to a motion.

and a response in opposition are allowed. For example, in *In re: Petition by ITCDeltaCom Communications, Inc. d/b/a ITCDeltaCom for Arbitration of Certain Unresolved Issues,* 01 FPSC 2:350 (2000), the Commission refused BellSouth's request to reply in support of a motion for reconsideration that BellSouth filed with respect to an interlocutory order in that case. The Commission rightly found that "[t]he Uniform Rules do not provide for a Reply to a Response to a Motion for Reconsideration," and denied BellSouth leave to file its reply.[3] *Id.*; *see also, In re: Complaint of Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc.*, Order No. PSC-00-1777-PCO-TP , 00 FPSC 9:541 (striking reply in support of motion for rehearing; "neither the Uniform Rules nor our rules contemplate a reply to a response to a Motion").

Both *ITCDeltaCom* and *Supra Telecommunications* are indistinguishable from the present case and compel striking the Hospital Association's Answer. Based on the clear intent of Rule 28-106.204, and the long line of cases that interpret it to bar any response to a motion other than a response in opposition, the Hospital Association's Answer must be given no consideration.

II. THE ARGUMENTS IN THE ANSWER DO NOT JUSTIFY OVERTURNING THE COMMISSION'S PRIOR ORDER

Because the Answer is not allowed under the Uniform Rules and past Commission precedent, it should be afforded no consideration whatsoever. FPL will

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[3] In that proceeding BellSouth at least sought leave to file a pleading that is outside the regulatory framework. Here the Hospital Association simply took it upon itself to file a reply, completely ignoring the applicable procedural rules. This of course necessitated FPL's filing of this Motion to Strike.

therefore not provide detailed response. However, a few key misconceptions in the document should be addressed.

First, the Hospital Association completely misses the point in arguing that FPL did not oppose its intervention. What matters is that the Commission has not granted the Hospital Association's Petition to Intervene, and the Hospital Association is therefore not a party to this docket. Because it is not a party, the Hospital Association has no right to seek rehearing of orders entered in this Docket at the present time, regardless of what position FPL or anyone else took on its request to intervene.

Second, the Hospital Association continues to argue that the stipulation approved in the 1999 Order is merely a private agreement that binds only those persons that were direct signatories, completely ignoring the fact that the 2001 Order relies not upon the stipulation itself, but on the final 1999 Order of the Commission that implemented it. In the 1999 Order the Commission entered a final agency decision setting an innovative rate structure for a three-year period. Whether that agency order stemmed from a contested proceeding or a stipulation makes no difference. What matters is that the Commission took final agency action with respect to FPL's rates for a three-year period, and the time limitations to challenge that decision have long passed.

In the 2001 Order from which the Hospital Association seeks rehearing the Commission correctly found decisive the fact that the Commission had taken final agency action to implement the stipulation, holding that this bound the Commission regardless of whether it was a party to it to the stipulation.[4] There is nothing new in the

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[4] For this reason the Hospital Association's arguments based on the Staff Recommendation regarding the stipulation fail. The fact that staff noted that the

Answer that justifies departing from that decision.

Finally, the Hospital Association's arguments regarding the role of Public Counsel are inapposite. Public Counsel's mandate is of course not as limited as the Hospital Association claims. And, in any case, the interim rate reduction that the Hospital Association seeks would be distributed equally to all customers. The types of inter-class conflict to which the Hospital Association alludes simply do not exist with respect to its request.

CONCLUSION

For the foregoing reasons the Answer of the South Florida Hospital and Healthcare Association to FPL's Response on the Motion for Clarification and Reconsideration should be stricken and disregarded in its entirety.

Commission was not bound and could, at that time (*i.e.*, prior to entry of the 1999 Order), enter an interim rate order is irrelevant. The Staff's points, which related to the Commission's authority to accept or reject the stipulation, became moot once the Commission decided to approve the stipulation and entered final agency action implementing it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion to strike was served by Hand Delivery (*) or mailed this 14th day of August 2001 to the following:

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