

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

IN RE: Fuel and Purchased Power Cost  
Recovery Clause with Generating Performance  
Incentive Factor

Docket No: 140001-EI  
Filed: November 11, 2014

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE TO FIPUG'S  
COORECTED [sic] MOTION TO STRIKE FPL'S REQUEST TO ESTABLISH  
GUIDELINES RELATED TO OIL AND GAS EXPLORATION AND  
PRODUCTION AND ACCOMPANYING TESTIMONY**

Florida Power & Light Company ("FPL" or the "Company"), pursuant to Rule 28-106.204, Florida Administrative Code and the directive of the Prehearing Officer at the Prehearing Conference, hereby files with the Florida Public Service Commission ("FPSC" or "Commission") this response to the Florida Industrial Power Users Group Coorected [sic] Motion To Strike FPL'S Request to Establish Guidelines Related to Oil and Gas Exploration and production and Accompanying Testimony ("Motion to Strike") and states:

**INTRODUCTION**

1. On the eve of the Prehearing Conference, more than four and half months after FPL filed its petition and direct testimony in this case, FIPUG filed a Motion to Strike seeking to strike undisclosed portions of FPL's initial pleading and direct testimony. There are at least five bases upon which FIPUG's Motion to Strike should be denied:

- a. FIPUG's Motion to Strike is premised upon the erroneous proposition that the Commission must conduct rulemaking to approve FPL's proposed guidelines in this proceeding.
- b. The minimal case law cited in support of FIPUG's Motion to Strike does not address the facts and circumstances before the Commission.
- c. FIPUG repeatedly and fundamentally misrepresents the relief sought by FPL in this proceeding.

- d. FIPUG's Motion to Strike is untimely and disregards that FIPUG has had four and a half months since FPL filed its petition and direct testimony to prepare for addressing the proposed FPL specific guidelines.
- e. FIPUG's motion is facially deficient. It fails to meet even the minimum requirements of Rule 28-106.20, the Uniform Rule regarding motions in Section 120.57 proceedings.

### **RULEMAKING IS NEITHER REQUIRED NOR DESIRABLE**

2. FIPUG takes the position in its motion that rulemaking is either required<sup>1</sup> or desirable<sup>2</sup> in this proceeding because FPL seeks approvals of guidelines that FIPUG erroneously suggests are applicable industry wide.<sup>3</sup> Rulemaking is neither required nor desirable in this case.

3. Even if Section 120.54(1)(a) were applicable in this proceeding (and it is not, see paragraph 4 below), it does not require Company-specific guidelines such as those proposed by FPL in this proceeding to be approved through rulemaking. Instead, Section 120.54(1) applies to "agency statements of general applicability." FPL has not proposed guidelines for any entity other than FPL, and, if approved, the guidelines would, on their face, apply only to FPL and no other public utility. So, even if the Commission were not exempted from rulemaking in recovery clause proceedings, it does not have to engage in rulemaking to approve FPL's proposed

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<sup>1</sup> In paragraph 7 of its Motion to Strike FIPUG invokes Section 120.54(1)(a), Florida Statutes, arguing that rulemaking is not discretionary, suggesting rulemaking must be conducted.

<sup>2</sup> In paragraph 5 of its Motion to Strike FIPUG argues that FPL's proposed guidelines "should more appropriately be considered, if warranted, in a rulemaking proceeding as set forth in chapter 120, Florida Statutes." Here FIPUG seems to acknowledge that rulemaking may not be warranted but instead is desirable.

<sup>3</sup> FIPUG states in paragraph 4 of its Motion to Strike, "FPL's Petition and its request that the Commission adopt guidelines for future oil and gas projects seeks a Commission decision that, if granted, could have considerable impact on ratepayers not just of FPL's, *but of other utilities who may decide to likewise venture into the oil and gas exploration and production business.*" (Emphasis added.) FIPUG adds in Paragraph 6 that rulemaking is judicially preferred "if the impact of a particular policy would be industry-wide," suggesting the guidelines would be applicable industry wide.

Company-specific guidelines. FIPUG's suggestion otherwise in paragraph 7 of its Motion to Strike invokes a legal principle that simply does not apply to the circumstances of this case.

4. Further, even if FPL's guidelines were industry-wide standards or statements of general applicability (which they are not), the Commission would not be required to conduct a rulemaking because the Florida Public Service Commission is specifically exempted by the Legislature from rulemaking in recovery clause proceedings. Section 120.80(13) (a), Florida Statutes provides:

Agency statements that relate to cost-recovery clauses, factors, or mechanisms implemented pursuant to Chapter 366, relating to public utilities, are exempt from the provisions of s. 120.54(1)(a).

FIPUG's suggestions that rulemaking is required in this case is wholly and totally without legal support.

5. Not only is rulemaking not required, it is not desirable in this proceeding. FPL is the only utility that has expressed any interest or intent in pursuing gas reserve transaction designed to reduce customers' fuel costs. It would be a waste of resources and time for the Commission to convene an industry wide rulemaking when FPL may be the only utility that ever pursues such transactions. Moreover, if another utility should decide to pursue such transactions, the customers of that utility are better protected by that utility having to petition for relief and the customers being able to request a Section 120.57 proceeding rather than having the issue taken up through rulemaking. In such a case the utility would have to file a petition, guidelines, testimony and exhibits. The utility would have to meet a burden of proof on its guidelines. Customers could participate by intervening and filing testimony and cross examining. This is even more due process than FIPUG suggests would be provided in a rulemaking. The precedent

of the prior FPL decision would not be controlling. The utility would still have to meet its burden of proof, and the Commission could not rely upon evidence from this proceeding. Rather, it would have to rely upon the record developed in that separate proceeding.

### **FIPUG'S LEGAL CITATIONS ARE INAPPOSITE**

6. In its motion FIPUG cited only three legal authorities: one statutory provision and two judicial decisions. Tellingly, none of the authorities addressed a motion to strike. As the discussion above shows, the Commission is exempt from the statute that FIPUG cited. Similarly, neither case cited by FIPUG applies to the circumstances of this case.

7. FIPUG correctly states that *City of Tallahassee v. Florida Public Service Commission*, 433 So.2d 505, 508 (Fla. 1983) stands for the proposition that, “rulemaking is preferable if the impact of the rule would be industry-wide.” However, there is no industry-wide guideline at issue in this proceeding, despite FIPUG’s mischaracterizations.

8. FIPUG cites the case of *Neu v. Miami Herald Publishing Co.*, 462 So2d821, 824 (Fla 1985) as prohibiting the Commission as an agency of the Legislature from binding future Commissions. (Paragraph 9) That is not even close to an accurate representation of the holding in the *Neu* case. First, the *Neu* case did not involve this Commission or even an administrative agency; it involved an action of the Legislature. Second, and far more important, the *Neu* case holding was very specific, and it pertains to something not at all at issue here. The Court said, “A legislature may not bind the hands of a future legislature *by prohibiting amendments to statutory law.*” (Emphasis added.) There is no attempt here by FPL to have the Commission prohibit amendments to statutory law. FPL is not asking the Commission to approve guidelines without the prospect of revising or suspending them, either. The *Neu* case is simply not on point and in no way supports FIPUG’s motion to strike.

9. Simply stated, FIPUG's Motion to Strike is devoid of applicable legal authority. FIPUG has provided no legal predicate to strike either FPL's pleading or testimony.

**FIPUG FUNDAMENTALLY MISREPRESENTS THE RELIEF SOUGHT BY FPL**

10. FIPUG seems to follow the proposition of "why should we let accurate facts or statements of law get in the way of making an argument?" In contrast, FPL asks the Prehearing Officer to act on both the facts and the law before the Commission. FIPUG's mischaracterization that FPL's guidelines are industry-wide has already been addressed, but FIPUG's misstatements do not stop there. Two other misstatements are noteworthy.

11. At paragraph 5 of its Motion, FIPUG argues that FPL is seeking Commission permission to venture into the oil and gas business in Oklahoma. That is not what FPL's petition requests. FPL is simply seeking a Commission determination of whether entering into a joint venture to supply gas to use to generate for its customers is (a) prudent and (b) recoverable through the Fuel Clause.

12. In paragraph 8 of its Motion, FIPUG -- without any supporting legal authority -- argues that if FPL's guidelines are adopted they will have the force and effect of rules so rulemaking procedures should be followed. Setting aside FIPUG's apparent unawareness that rulemaking procedures are not applicable to PSC cost recovery statements, FPL is not seeking an agency statement of general applicability that applies to an entire industry or for that matter to any entity other than FPL. It is seeking guidelines applicable only to FPL.

### **FIPUG'S MOTION TO STRIKE IS UNTIMELY**

14. The fourth deficiency in FIPUG's Motion to Strike is that it is untimely and blithely ignores that FIPUG and the other parties have had four and a half months to prepare to address the FPL-specific guidelines proposed by FPL. Under the Uniform Rules responses to petitions, i.e. answers and motions to dismiss, must be filed within 20 days. See Rule 28-106.203, 204, Florida Administrative Code. The Uniform Rules do not even specifically mention a motion to strike a pleading. FIPUG's motion is almost five months after FPL filed its case. It is untimely, if authorized at all.

15. Regardless of FIPUG's untimely attack on FPL's pleading, FIPUG's suggestion that there is a rush to approve FPL's Company-specific guidelines is grossly inaccurate. By hearing FIPUG will have had more than five months to conduct discovery, present evidence and legal argument on the FPL specific guidelines. That FIPUG chose to wait this late to put together a case is no one's fault but FIPUG's. However, there is no rush to decision as suggested by FIPUG on page 2, paragraph 5 of its Motion.

### **FIPUG'S MOTION IS FACIALLY DEFICIENT**

16. FIPUG's motion fails to meet the minimum requirements of Rule 28-106.204, F.A.C., the Uniform Rule regarding motions. Subsection (1) of that rule requires in pertinent part that a motion, "shall fully state the action requested and the grounds relied upon." Neither the Prehearing Officer nor FPL knows the specific provisions of FPL's Petition that FIPUG seeks to strike, because FIPUG failed to "fully state" just what any of those provisions are. Similarly, FIPUG fails to identify any specific passage in testimony that it seeks to strike, leaving the Prehearing Officer and FPL to wonder just what the scope of FIPUG's motion is.

FPL simply has no idea of the specific action requested by FIPUG, because that action has not been “fully stated” as required by Rule 28-106.204.

17. Even more problematic is that FIPUG’s Motion to Strike is devoid of any applicable legal authority. As discussed above, The three specific citations of authority offered in the Motion to Strike are either inapplicable or exempted by a statute that FIPUG failed to cite or acknowledge. Of course, there are entire passages in the motion, like paragraph 8, that make conclusory legal arguments without a shred of authority. This falls far short of the requirement of Rule 28-106.204 that the grounds relied upon in a motion be “fully stated.”

For the foregoing reasons, FPL respectfully requests that Florida Industrial Power Users Group Coorrected [sic] Motion to Strike FPL’S Request to Establish Guidelines Related to Oil and Gas Exploration and Production and Accompanying Testimony be denied.

Respectfully submitted this 11th day of November, 2014.

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**CERTIFICATE OF SERVICE**  
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service on this 11<sup>th</sup> day of November, 2014 to the following:

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