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MEMORANDUM

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TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF AUDITING AND FINANCIAL ANALYSIS (SLEMKEWICZ,  
MAUREY) *!S*  
DIVISION OF ELECTRIC AND GAS (JENKINS) *jmj*  
DIVISION OF LEGAL SERVICES (ELIAS, CRUZ-BUSTILLO) *ALM*  
*RVE* *ICB* *JDJ*

RE: DOCKET NO. 950359-EI - PETITION OF AMERISTEEL CORPORATION  
FOR LIMITED PROCEEDING TO REDUCE FLORIDA POWER & LIGHT  
COMPANY'S ANNUAL REVENUES BY \$440 MILLION.

AGENDA: 02/03/98 - REGULAR AGENDA - DECISION PRIOR TO HEARING -  
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\971608EI.RCM

CASE BACKGROUND

In Docket No. 950359-EI, the Commission approved a proposal by Florida Power & Light Company (FPL or the Company) that resolved all of the identified issues regarding FPL's petition to establish a nuclear amortization schedule. Pursuant to Order No. PSC-96-0461-FOF-EI, issued April 2, 1996, FPL was required: (1) to book additional 1995 depreciation expense to the historic reserve deficiency in nuclear production; (2) to record, commencing in 1996, an annual \$30 million in nuclear amortization, subject to final determination by the Commission as to the accounts to which it is to be booked; and (3) to record an additional expense in 1996 and 1997 based on differences between actual and forecasted revenues, to be applied to specified items in a specific order.

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The Commission voted to record additional expenses for 1998 and 1999 through Proposed Agency Action (PAA), Order No. PSC-97-0499-FOF-EI. AmeriSteel Corporation (AmeriSteel) protested the Commission's action. An evidentiary hearing was held on November 25, 1997.

On December 16, 1997, the Commission voted to approve the new plan. By Order No. PSC-98-0027-FOF-EI, issued on January 5, 1998, FPL was authorized to record additional expenses in 1998 and 1999 to: (1) correct any depreciation reserve deficiency resulting from an approved depreciation study order; (2) write off the Unamortized Loss on Reacquired Debt; (3) correct the reserve deficiency, if any, existing in FPL's fossil dismantlement reserves; and (4) correct the reserve deficiency, if any, existing in FPL's nuclear decommissioning reserves. If the available revenues are greater than the specifically listed expenses, the remaining expenses shall be recorded in an unspecified depreciation reserve to be subject to the Commission's disposition at a later date.

On December 11, 1997, AmeriSteel filed the instant Petition entitled: Petition of AmeriSteel Corporation for a Limited Proceeding to Reduce Florida Power and Light Company's Annual Revenues and for an Expedited Hearing Schedule. AmeriSteel's Petition requested that the Commission initiate a limited proceeding for the following purposes: (1) establishing a current and reasonable authorized return on equity for FPL, (2) removing from the calculation of FPL's profits the expenses FPL was permitted to record in Docket No. 950359-EI and Docket No. 970410-EI, which AmeriSteel contends has the effect of reducing reported profits, and (3) distributing the resulting annual revenue reductions evenly to FPL's customers on an equal kWh basis to all customer classes. AmeriSteel calculates that there are at least \$440 million in annual revenue reductions warranted by its proposal. This, according to AmeriSteel, should result in a rate reduction for all FPL customers of roughly 8.1%. AmeriSteel also sought an expedited hearing, stating that FPL's earnings will dramatically increase on January 1, 1998, with the expiration of the additional expense plan approved by the Commission in Docket No. 950359-EI.

On December 15, 1997, FPL filed a response to AmeriSteel's Petition entitled: Florida Power & Light Company's Motion in Opposition to AmeriSteel's Petition. On December 26, 1997, AmeriSteel filed a response to FPL's motion entitled: Response to Florida Power & Light Company's Motion in Opposition to

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AmeriSteel's Petition for a Limited Proceeding. This recommendation addresses FPL's Motion in Opposition and AmeriSteel's request for expedited consideration.

### **DISCUSSION OF ISSUES**

**ISSUE 1:** Should FPL's Motion in Opposition to AmeriSteel's Petition for a Limited Proceeding be granted?

**RECOMMENDATION:** No. FPL has not demonstrated any basis for the Commission to find that AmeriSteel's Petition should be summarily denied.

#### **STAFF ANALYSIS:**

##### **FPL's position:**

FPL filed its Motion in Opposition to AmeriSteel's Petition on December 15, 1997 seeking summary denial of the Petition. It believes that its base rates and authorized return on equity are reasonable (FPL Motion, pp. 2-4). It stated, that because AmeriSteel filed this petition during the pendency of the decision in Docket No. 970410-EI, AmeriSteel is abusing the regulatory process (FPL Motion, p. 5).

In its Motion in Opposition, FPL states that AmeriSteel's request to have the Commission remove the effect of any expenses approved in Docket No. 970410-EI, from its earnings calculations for FPL, should not be permitted. FPL states that what AmeriSteel's request overlooks is the appropriateness of the expenses approved in Docket No. 970410-EI, given that the appropriateness of those expenses have been fully litigated by AmeriSteel. [FPL Response p. 9]. AmeriSteel, by virtue of its participation in Docket No. 970410-EI, is precluded not only by the doctrine of administrative finality, but also by the doctrine of *res judicata* from relitigating the propriety of those expenses. As such, the Petition should be summarily denied.

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With respect to Docket No. 950359-EI, FPL asserts that the Commission approved a series of regulatory expenses to be incurred by FPL. See Order No. PSC-96-0461-FOF-EI. AmeriSteel intervened in that docket, over the strenuous objection by FPL for lack of standing. After FPL incurred substantial time and expense in preparing for hearing, AmeriSteel withdrew from the docket. FPL settled the matter which resulted in Order No. PSC-96-0461-FOF-EI. FPL states that AmeriSteel should not now be heard in its request to have the Commission "disregard from the calculation of FPL's regulated earnings" the "additional expense and early amortization approved by the Commission in Docket No. 950359-EI." [FPL Response p. 8].

According to FPL, the parties to Docket No. 950359-EI, were entitled as a matter of fairness, to rely upon the Commission's determination in that proceeding. Had AmeriSteel stayed as a party, AmeriSteel would be precluded from relitigating the decision based upon the doctrine of *res judicata*. ...The doctrine of administrative finality justifies the Commission treating the decision in Docket No. 950359-EI as final to AmeriSteel. [FPL Motion pp. 8-9]. Accordingly, AmeriSteel is precluded from advancing the argument its advances in its Petition, and said arguments are not an appropriate basis for the requested relief of a revenue reduction. [FPL Motion p. 10].

**AmeriSteel's position:**

AmeriSteel filed its Response to FPL's Motion in Opposition, on December 26, 1997. In that Reply AmeriSteel sought to make it clear that contrary to FPL's assertions:

. . . neither the filing of [this] petition nor the substance of AmeriSteel's petition are an abuse of the Commission's procedures as FPL claims. [AmeriSteel's Response p. 5].

AmeriSteel further argued that:

. . . the Commission intended and expressly stated from the very beginning of Docket No. 970410-EI, that the expense recovery contemplated in that docket could be re-examined in subsequent earnings and rate proceedings. The point was discussed at length in that docket, **FPL agreed that *res judicata* would not be applied to preclude a reassessment of those expense levels in such subsequent**

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**rate or earnings proceedings**, and the Commission emphatically reinforced that point at its December 16 Agenda Conference. [Bold emphasis in original]. [AmeriSteel's Response p. 8].

**Staff analysis:**

In its Motion, FPL asks that AmeriSteel's petition be "summarily denied". FPL cited no rule, statute, Commission Order as support for the requested action. Staff is not aware of any rule, statute, Commission Order, or provision of constitutional law that suggests "summary denial" in the instant case is appropriate, or even permissible. Staff is treating FPL's Motion as a Motion to Dismiss AmeriSteel's Petition. In determining if a Motion to Dismiss should be granted, the factual allegations set forth in AmeriSteel's Petition should be viewed in the light most favorable to AmeriSteel to determine if it's request is cognizable under the provisions of Rule 25-22.036, Florida Administrative Code, and Chapters 120 and 366, Florida Statutes. Staff believes that FPL's arguments do not provide adequate grounds to dismiss AmeriSteel's Petition.

In essence, AmeriSteel alleged three things in its petition:

- 1) that a current market ROE for FPL is 9.5%, and not the 12.0% currently authorized.
- 2) that the expenses authorized in Docket No. 950359-EI and (then pending) in Docket No. 970410-EI should not be included in the calculation of FPL's 1998 earnings.
- 3) that rates should be reduced, on a per kWh basis, by approximately 440 million dollars annually to incorporate these adjustments.

FPL responds:

- 1) that its currently authorized ROE is reasonable.
- 2) that AmeriSteel is barred from relitigating the expenses approved in Docket Nos. 950359-EI and 970401-EI.

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- 3) that the timing of AmeriSteel's Petition (given, at the time, the pendency of the Commission's decision in Docket No. 970410-EI) was an abuse of the regulatory process.
- 4) that AmeriSteel's request to reduce rates on a per kilowatt hour basis fails to consider the parity of the rate return provided by the different classes of customers.

In its Response to Florida Power & Light's motion, AmeriSteel states:

FPL's Motion should be denied. AmeriSteel's petition plainly states the relief sought and discrete issues that warrant an immediate rate reduction for all FPL customers. FPL's Motion asks that the petition be denied outright, but the Company offers no basis for its request. The Company does not challenge the jurisdictional basis for the limited proceeding AmeriSteel requests or AmeriSteel's substantial interests. The Company simply objects generally without actually confronting the essential factual issues raised in AmeriSteel's petition. This merely verifies AmeriSteel's request for an expedited hearing schedule in this matter.

AmeriSteel asserts that none of the historic statistics FPL's references at pages 3-4 of its motion, addresses the question posed by AmeriSteel's petition: whether FPL's current rate levels are excessive compared to its current cost of service.

Viewing the factual allegations of the Petition in the light most favorable to AmeriSteel, its Petition does state a claim for relief that could be granted. Therefore, FPL has not met the standard required to grant a Motion to Dismiss. Staff believes that FPL has not demonstrated any basis for the Commission to find that AmeriSteel's Petition should be summarily denied. Staff finds no basis to conclude that the filing of AmeriSteel's petition constitutes an "abuse of the regulatory process". FPL's response does challenge the actions sought in AmeriSteel's Petition. However, Staff believes that the matters raised by FPL are most appropriately addressed as part of the prehearing issue identification and determination process.

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Staff notes that the final order in Docket No. 970410-EI, explicitly provides that approval of the Plan:

"neither precludes an earnings review nor a review of the Plan during the context of a proceeding to reset base rates."

In this case, one of the requests made by AmeriSteel is that the Commission reset base rates. It follows that AmeriSteel has the right to file the current Petition, without the Petition being summarily denied. At the December 16, 1997, Agenda Conference a Commissioner made clear that the addition of this provision did not mean previously approved regulatory expenses would be disregarded in any subsequent proceeding:

...if someone wants an issue included in some type of proceeding, they demonstrate how it is a relevant issue, and we either include it or exclude it.

I guess the Prehearing Officer would make that decision, and that decision is -- can be then appealed up to the full Commission, it seems to me, and that's the way we normally handle issue identification. And I assume that it would be the same in this situation. (TR p. 12, lines 9-20)

For these reasons, Staff recommends that FPL has not demonstrated any basis for the Commission to find that AmeriSteel's Petition should be summarily denied. Therefore, FPL's request that AmeriSteel's Petition be summarily denied should not be granted.

**ISSUE 2:** Should AmeriSteel's request for an Expedited Hearing to consider its Petition be granted?

**RECOMMENDATION:** Yes. AmeriSteel has alleged that a significant reduction (approximately \$440 million) to FPL's base rates is appropriate. If, after consideration of the evidence, the Commission determines the requested actions are appropriate,

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significant rate reductions will occur. Given the magnitude of these proposed reductions, an expedited hearing is appropriate.

**STAFF ANALYSIS:**

**AmeriSteel's position:**

In this instance, expedited Commission action is required as to the three items noted above to safeguard consumer interests. The time delays of a full rate proceeding would adversely affect the customer interests. The Commission should, therefore, grant the petition for a limited proceeding and consider and decide the issues noted above on an expedited basis... The provisions of the current "Plan" approved by the Commission in Docket No. 950359-EI expire or are completely written off as of the end of 1997. The expiration of these charges, coupled with the out-dated and excessive current mid-point on equity of 12% will result in FPL immediately starting to earn excessive revenues on an annual basis of \$440 million as of January 1998. Accordingly, so as to minimize the economic damage to FPL's customers from excessive rates, AmeriSteel requests that the Commission establish an expedited hearing schedule to consider and decide this case. (Petition of AmeriSteel at pp.11-12)

**FPL's position:**

FPL did not respond, other than as noted in Issue 1, to the request for an expedited proceeding.

**Staff Analysis:**

As previously stated, AmeriSteel requests that the Commission initiate a limited proceeding to: (1) establish a current and reasonable authorized return on equity for FPL, (2) remove from the calculation of FPL's profits the expenses FPL was permitted to record in Docket No. 950359-EI and Docket No. 970410-EI - which AmeriSteel contends has the effect of reducing reported profits, and (3) distribute the resulting annual revenue reductions evenly to FPL's customers on an equal kWh basis to all customer classes. AmeriSteel calculates that there are at least \$440 million in annual revenue reductions warranted by its proposal. This, according to AmeriSteel, should result in a rate reduction for all FPL customers of roughly 8.1%.



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In its petition, AmeriSteel further contends "FPL's return on equity is excessive when compared to equity rates reasonably demanded by current economic conditions and capital markets." FPL's return on equity (ROE) was last considered in an evidentiary hearing on January 9, 1990. While the Commission did consider FPL's ROE in Order No. PSC-93-1024-FOF-EI, issued July 13, 1993, in Docket No. 930612-EI, the matter was handled through a stipulation. The last time the Commission held an evidentiary hearing regarding the ROE for an electric utility was in February 1994 in the case of Tampa Electric Company (Docket No. 930987-EI, Order No. PSC-94-0337-FOF-EI). Given the length of time since the Commission last heard evidence regarding FPL's ROE, Staff believes AmeriSteel's Petition for an expedited hearing on ROE should be granted.

Staff has reserved April 8, 9, and 10 on the Commission calendar for the evidentiary hearing in this docket, subject to the Chairman's approval. That will allow ample time for discovery and the determination of the appropriate issues, while enabling the Commission to make a post-hearing decision as soon as possible.

AmeriSteel has alleged that a significant reduction (approximately \$440 million) to FPL's base rates is appropriate. If, after consideration of the evidence, the Commission determines the actions requested by AmeriSteel are appropriate, significant rate reductions will occur. Given the magnitude of these proposed reductions, an expedited hearing is appropriate.

Therefore, staff recommends that AmeriSteel's request for an expedited hearing to consider its Petition be granted.

**ISSUE 3:** Should this Docket be closed?

**RECOMMENDATION:** No.

**STAFF ANALYSIS:** This docket should remain open pending hearing.