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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In Re: Joint Petition for)
Determination of Need for an)
Electrical Power Plant in Volusia)
County by the Utilities Commission,)
City of New Smyrna Beach, Florida,)
and Duke Energy New Smyrna Beach)
Power Company Ltd., L.L.P.)

DOCKET NO. 981042-EM
RECORDS AND REPORTING
FILED: November 4, 1998

PETITIONERS' MOTION TO STRIKE PORTIONS OF PREFILED DIRECT
TESTIMONY OF FLORIDA POWER CORPORATION'S
WITNESS, MICHAEL D. RIB

The Utilities Commission, City of New Smyrna Beach, Florida, ("UCNSB" or "Utilities Commission") and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P. ("Duke New Smyrna"), collectively referred to as "Petitioners," pursuant to Uniform Rule 28-106.206, Florida Administrative Code ("F.A.C."), hereby move to strike portions of the prefiled direct testimony of Michael D. Rib. In support of this motion, Petitioners say:

1. On October 12, 1998, Intervenor, Florida Power Corporation ("FPC") filed with the Commission in this docket the direct testimony and exhibits of Michael D. Rib. Portions of Mr.

ACK _____ Rib's testimony constitute his legal opinion, as to the
AFA 2 _____ Commission's jurisdiction, the meaning of various statutory
APP _____
CAF _____ provisions, and Florida Supreme Court precedent, and as such
CMU _____ should be stricken. Legal arguments are not the proper subject
CTR _____
EAG Futrell _____ for prefiled testimony.

EG 3 _____ 2. FPC's attempt to boot-strap legal arguments into this
IN 5 _____ evidentiary proceeding, in the guise of direct testimony, is
OPC _____
RCH _____ inappropriate. In In re: Investigation Into the Appropriate

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EAG Futrell _____
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SEC 1 _____
WAS _____
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Rate Structure for Southern States Utilities, Inc. for all Regulated Systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties, 94 FPSC: 3:724, (hereinafter "Southern States"), Commissioner Julia L. Johnson, serving as prehearing officer, addressed a similar attempt to offer legal opinion as expert testimony, and Commissioner Johnson stated:

It has not been Commission practice to allow expert testimony on legal issues. I concur. The most appropriate place for legal discussion is in a post-hearing filing, such as a brief, where all of the parties have equal opportunity to present case law and argument in support of their position on the issue. Cross-examination of a witness on legal opinion is not contemplated by Section 120.57, Florida Statutes, which provides for a fact finding proceeding. Legal argument is more appropriately reserved for argument of counsel in a party's brief.

Id. at 3:726. In Southern States, Commissioner Johnson granted a motion to strike the legal analysis from the prefiled testimony. The same rationale applies in this case. FPC will have ample opportunity to raise all legal arguments¹ in its post-hearing filing. It would be fundamentally inappropriate to require Petitioners to cross-examine Mr. Rib on the legal issues addressed in his direct testimony and more fully described below.

3. Accordingly, the following portions of Mr. Rib's testimony should be stricken as inappropriate legal opinion:

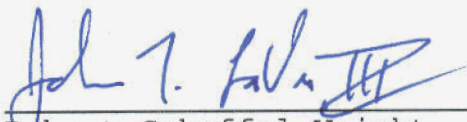
¹In fact, FPC has already made most of the legal arguments that appear in Mr. Rib's testimony in its Motion to Dismiss Proceeding, filed in this docket on September 8, 1998.

- a. Page 8, line 16 through page 9, line 3.
- b. Page 9, line 6 through page 10, line 13.
- c. Page 13, line 7 (starting with "(1)") through line 14 (ending with the word "severe").
- d. Page 15, line 6 (starting with the word "are") through line 7 (ending with the word "and").
- e. Page 15, line 14 (beginning with the word "merchant") through page 15, line 19.
- f. Page 16, line 1 through page 16, line 9 (ending with the word "state").
- g. Page 22, line 4 through page 22, line 12.
- h. Page 23, line 7 (starting with the word "[a]s") through line 10 (ending with the word "utilities").
- i. Page 29, line 7 through line 10.

4. The parties of record in this proceeding take the following positions on this motion: FPL, FPC, and FECA oppose it, and LEAF does not oppose it. Petitioners' counsel has attempted to obtain Staff's and TECO's positions, but was unsuccessful.

WHEREFORE, the Utilities Commission, New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P. request that the Commission strike as legal opinion the above-cited portions of the direct testimony of Michael D. Rib.

Respectfully submitted this 4th day of November, 1998.



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CERTIFICATE OF SERVICE
DOCKET NO. 981042-EM

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 4th day of November, 1998:

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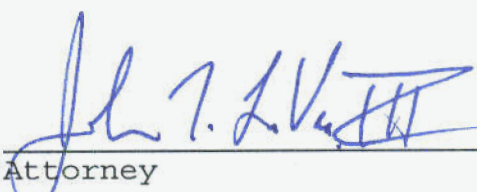
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