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November 16, 1998

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By Hand Delivery

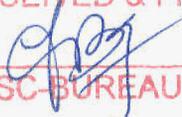
**In re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.
Docket No. 981042-EM**

Dear Ms. Bayó:

Enclosed please find the original and fifteen (15) copies of Florida Power & Light Company's Response to Petitioners' Motion to Strike Portions of Prefiled Direct Testimony of Florida Power & Light Company's Witness, William D. Steinmeier in Docket No. 981042-EM.

If you or your staff have any questions regarding this transmittal, please contact me at 222-2300.

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FPSC-BUREAU OF RECORDS

Very truly yours,


Charles A. Guyton

- CK _____
- FA 2 _____
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- MU _____
- TR _____
- AG Futrell _____
- EG 3 _____
- IN 5 _____
- JPC _____
- RCH _____
- SEC 1 _____
- WAS _____
- OTH _____

Enc.
cc: Counsel for all parties of record

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition for)
Determination of Need for an)
Electrical Power Plan 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

FILED: November 16, 1998

**RESPONSE TO PETITIONERS' MOTION TO STRIKE PORTIONS OF
PREFILED DIRECT TESTIMONY OF FLORIDA POWER & LIGHT COMPANY'S
WITNESS, WILLIAM D. STEINMEIER**

Florida Power & Light Company ("FPL") hereby files its Response to Petitioners' Motion To Strike the prefiled direct testimony of William D. Steinmeier and states as follows:

1. On October 12, 1998, FPL filed the testimony and exhibits of William D. Steinmeier. Mr. Steinmeier is the past chairman of the Missouri Public Service Commissioner and the past president of the National Association of Regulatory Utility Commissioners. Mr. Steinmeier also happens to be an attorney and he is licensed to practice law in the state of Missouri.

2. FPL has retained Mr. Steinmeier as a witness for the sole purpose of providing the Commission with his perspective on the appropriateness of the Joint Petition. Mr. Steinmeier's testimony is based upon his experience as a state regulator and his knowledge of the utility industry. In particular, Mr. Steinmeier gives his opinion as to whether it would be sound regulatory policy for the Commission to approve the Joint Petition.

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3. FPL has urged the Commission to base its decision, in part, upon public policy grounds, and, therefore, FPL is required to prove up Florida's appropriate regulatory policy. Accordingly, FPL has submitted the direct testimony of Mr. Steinmeier.

4. Since Mr. Steinmeier is from Missouri and not from Florida, it would be inappropriate for him to opine on matters of Florida regulatory policy without first reviewing Florida's past and present policies. Indeed, anyone rendering an opinion on the policy issues faced by the Commission would need to review the same statutes and decisions reviewed and referenced by Mr. Steinmeier in his prefiled testimony.

5. There is a necessary and integral relationship between the law and any public policy. The development of Florida's public policy concerning utility need determinations is necessarily chronicled in the decisions of Florida's courts and the Commission. In this case, Mr. Steinmeier recites case holdings and statutes in order to frame the policy issues currently faced by the Commission and to provide the proper foundation for his expert opinion as to policy.

6. In In re: Investigation Into Florida Public Service Commission Jurisdiction of Southern States Utilities, Inc., 94 FPSC 12:178 aff'd 95 FPSC 2:105, Commissioner Julia L. Johnson denied in part and granted in part a motion to strike prefiled testimony of an expert witness which allegedly contained legal argument and opinion. In her decision, Commissioner Johnson found that the portions of the expert's testimony which identified local regulation public policy concerns could be "helpful to the Commission's understanding" of certain issues. Id. 94 FPSC 12:181. Commissioner Johnson further found that the prefiled testimony provided the basis upon which the Commission could consider the public policy concerns raised in the proceeding. Id.

7. Similarly, in this case, Mr. Steinmeier's testimony will allow the Commission to consider the broad public policy concerns raised by the Joint Petition and recognized as issues in the Prehearing Order. Mr. Steinmeier's testimony is clearly probative of the regulatory policy issues which will be addressed by the Commission in this case.

8. It is not by accident that the petitioners cite only one prior Commission decision for the proposition that legal opinion should be stricken from testimony. Striking witnesses' understanding of the law which provides the framework for regulatory policy is almost never done by the Commission. Such testimony is typically allowed and recognized not as a legal opinion, but as the witness' understanding which frames the witness' policy observations.¹ Mr. Steinmeier's testimony should be similarly allowed, and the extraordinary remedy of striking testimony should be denied.

9. The petitioners' motion to strike raises a certain irony which should not go unnoticed. A significant portion of the testimony the petitioners seek to strike is offered in rebuttal to petitioners' witness Hesse.² Witness Hesse extensively discusses federal energy "policy," and her only sources of such "policy" are statutes and regulatory decisions. If the petitioners believe Mr. Steinmeier's discussion of policy is legal opinion because he refers to

¹Several passages the petitioners seek to strike clearly are Mr. Steinmeier's policy opinions and are not a restatement of law. For instance, his statement at page 3, lines 5-7, to the effect that the petition "should be" denied is clearly a policy statement. Similarly, Mr. Steinmeier states his regulatory policy opinion at page 9, lines 19 through page 10, line 6 and at page 13, lines 10-17 as to why the Commission should apply the need determination criteria on a utility specific basis. At page 15, lines 7-9 Mr. Steinmeier makes a simple factual observation; it is not fairly characterized as a legal opinion.

²See, page 3, line 19 through page 4, line 1; page 26, line 6 through page 27, line 12; page 31, lines 14-21; page 34, lines 5-9.

statutes and decisions, where is the petitioners' motion to withdraw Ms. Hesse's testimony? The petitioners' prefiled testimony evidences the difficulty in distinguishing between policy and law and stands in rebuttal as to why the petitioners' motion to strike should be denied.

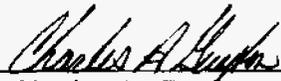
10. Finally, to the extent that the Commission's decision in this proceeding constitutes non-rule policy, Mr. Steinmeier's testimony will assist the Commission with meeting its obligations under Fla. Stat. §§ 120.54(1), 120.56(4), & 120.57 (1)(e).

Based upon the foregoing, it is clear that Mr. Steinmeier's prefiled testimony is not legal opinion since the testimony merely reviews the development of Florida regulatory policy relating to need determination and therefore provides the basis upon which the Commission may properly consider matters of policy when rendering its decision. The Petitioners' motion should be denied in its entirety.

Respectfully submitted,

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Attorneys for Florida Power
& Light Company

By: 
Charles A. Guyton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to Petitioners' Motion to Strike Portions of Prefiled Direct Testimony of Florida Power & Light Company's Witness, William D. Steinmeier in Docket No. 981042-EM was served by Hand Delivery (when indicated with an *) or mailed this 16th day of November, 1998 to the following:

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