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By Hand Delivery

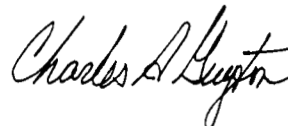
In re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. Docket No. 981042-EM

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") in Docket No. 981042-EM are the original and fifteen (15) copies of FPL's Motion to Strike "Additional Authority" Letter.

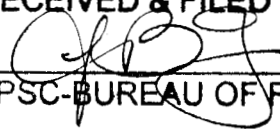
If you or your Staff have any questions regarding this filing, please contact me.

Very truly yours,



Charles A. Guyton

- ACK _____
- AFA 3
- APP _____ encs.
- CAF _____ cc: All Parties of Record
- CMU _____
- CTR _____
- EAG Futrell
- LEG 2
- LIN _____
- OPC _____
- RCH _____
- SEC 1
- WAS _____
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

**In re: Joint Petition for Determination of Need)
for an Electrical Power Plant in Volusia County) DOCKET NO. 981042-EM
by the Utilities Commission, City of New Smyrna)
Beach, Florida, and Duke Energy New Smyrna) DATE: February 5, 1999
Beach Power Company Ltd., L.L.P.)**

**FLORIDA POWER & LIGHT COMPANY'S
MOTION TO STRIKE "ADDITIONAL AUTHORITY" LETTER**

Pursuant to Florida Administrative Code Rule 28-106.205, Florida Power & Light Company ("FPL") moves the Commission to strike and instruct its Staff not to consider the February 3, 1999 "additional authority" letter and attachments provided by the petitioners' counsel to Leslie J. Paugh. As grounds therefor, FPL states:

1. On February 3, 1999, Robert Scheffel Wright, on behalf of the petitioners in Docket No. 981042-EM, sent a two page letter, with 42 pages of attachments, to Leslie J. Paugh. The letter was hand delivered to Ms Paugh and served by mail to the parties, insuring that the Staff would have the letter and its contents at least one full day before the parties could review the transmittal and respond. Counsel for FPL had previously advised counsel for the petitioners at the close of oral argument that he considered an attempt to send supplemental authority to answer a question the petitioners were given an opportunity to answer at oral argument would be improper. Nonetheless, not only was "additional authority" sent, but it was sent in a letter that constitutes argument, and the "additional authority" sent was available to the petitioners at the time they drafted their brief and at the time of oral argument, and they neglected to bring it to the

Commission's attention. The letter is highly improper. It should be struck and the staff should be instructed to disregard the letter and its contents.

2. The letter offers "additional authority" even though there is no procedural rule that permits the filing of supplemental or additional authority. Moreover, there was no request at oral argument for the submission of "additional authority."

3. The letter goes beyond providing "additional authority" and presents a summary of a prior written argument ("I write to you today to summarize the materials cited in our brief,") an argument attempting to rebut oral argument ("While these cases ... do not involve state agencies, the opinions support exactly the propositions for which we cited them."), and additional argument regarding the import of the "additional authority" ("I would call your attention particularly to I would also call your attention to"). This makes the letter more than the submission of supplemental authority, it makes the letter an additional brief, and it would be struck by a body which permits the submission of supplemental authority. *See, Brown & Williamson Tobacco Corp. v. Young*, 690 So.2d 1377 (Fla. 1st DCA 1997), quoting with approval *Ogden Allied Services v. Pansesso*, 619 So. 2d 1023 (Fla 1st DCA 1993) (In striking supplemental authority provided on the eve of oral argument (not after the close of oral argument where there is even less of an opportunity to respond) the court found the submission of five cases, none of them decided after the submission of the brief, to be a misuse of Fla. Rule of App. Proc. 9.210(g). The purpose of the rule is to bring to the Court's attention cases of real significance 'which were not decided until after the briefs had been filed; or because, through inadvertence, they were not discovered earlier. **[It is] not intended to permit a litigant to**

submit what amounts to an additional brief, under the guise of “supplemental authorities”; or to ambush an opponent ...’ Emphasis added.).

4. The letter is an improper rebuttal or reply brief not authorized by either the procedural rules or the procedural orders in this proceeding. See, Rule 28-106.215, F.A.C. The letter, by its own admission, contains a summary of material from brief as well as a commentary on the “additional authority.” Petitioners were provided not one but two opportunities to address this issue. They omitted their “additional authority” from their brief, although it was then available for use - raising a real question as to whether this is a misuse of supplemental authority, which is more properly a submission of authority that was unavailable at the time of the original submission. At oral argument the petitioners were given a full and complete opportunity to answer the question posed by the Staff. They were either unprepared or chose not to answer and provide this authority. The question was posed by the Staff at page 56 of the transcript of the oral argument, and the petitioners “responded” to the question (and follow up questions) through page 83 without ever answering Staff’s specific question. It was the petitioners’ choice not to address this specific matter in oral argument. They should not be accorded an opportunity to provide through a reply brief an answer they either chose not to or neglected to provide in oral argument.

5. The letter is an improper ex parte communication to the Staff that is hardly cured by providing notice and a copy of it a day later to other parties. Parties should not be placed in a position of having to choose between responding to the arguments and engaging in the same improper conduct or moving to strike.

6. Petitioners' misconduct is self-servingly excused by a suggestion in the letter that the petitioners did not fully discuss these materials because of the "crush of concluding oral argument within the time allotted," when, in fact, petitioners attempted to answer this question in oral argument but were not prepared to do so fully or chose to address other matters. All the parties faced the same time limits in argument. No other party has attempted to subvert process by filing a reply brief in the form of an "additional authority" letter. Why? Because they know it would be wrong.

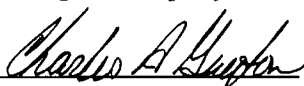
7. FPL has contacted the parties of record regarding this motion. The petitioners object to FPL's motion. U.S. Generating Company's counsel has no position on the motion, because he has not yet had an opportunity to review the original submission by the petitioners. Counsel for LEAF does not object to the motion. Counsel for TECO, FPC and FECA endorse the filing of the motion.

For the foregoing reasons, the petitioners' February 3, 1999 letter to Ms. Paugh should be struck, and the Commission Staff should be instructed to disregard it.

Respectfully submitted,

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Suite 601, 215 S. Monroe St.
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Attorneys for Florida Power &
Light Company

By: 
Charles A. Guyton

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Motion to Strike "Additional Authority" Letter in Docket No. 981042-EM was hand Delivery (when indicated with an *) or mailed this 5th day of February, 1998 to the following:

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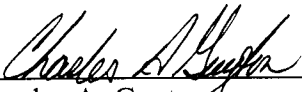
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