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Matthew M. Childs, P.A.

February 9, 1999

Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
4750 Esplanade Way, Room 110
Tallahassee, FL 32399

RE: DOCKET NO. 990067-EI

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen (15) copies of Florida Power & Light Company's Motion to Dismiss in the above-referenced docket.

Very truly yours,



Matthew M. Childs, P.A.

ACK _____
AFA Slankiewicz

APP _____

CAF _____ MMC:ml

CMU _____ Enclosure

CTR _____ cc: All Parties of Record

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SEC 1

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DOCUMENT NUMBER-DATE

01726 FEB-99

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for a full revenue)
requirements rate case for) DOCKET NO. 990067-EI
Florida Power & Light Company) DATE: FEBRUARY 9, 1999
_____)

MOTION TO DISMISS

Florida Power & Light Company ("FPL"), hereby files this Motion to Dismiss those portions of the January 20, 1999 petition by the Office of Public Counsel which request that FPL be directed to hold revenues subject to potential refund with interest pursuant to Section 366.071, Florida Statutes and that FPL be required to file a full set of MFRs based upon a historic 1998 test year. This Motion by FPL is not and is not to be construed as an Answer by FPL to the petition by the Office of Public Counsel. In support of this Motion, FPL states:

1. On January 20, 1999, the Office of Public Counsel filed and served its petition for a full revenue requirement rate case for Florida Power & Light Company. Under the applicable rules of procedures, a Motion to Dismiss this Petition, if any, is due to be filed within 20 days. Therefore, FPL's Motion to Dismiss is timely.

2. The Petition of the Office of Public Counsel asks that the Commission:

"order FPL to stop its accruals under the Plan [As approved in Docket No. 970410-EI] and order FPL to hold all revenues contributing to earnings above the currently allowed maximum ROE of 13%, calculated without regard to additional expenses which would have been recorded under the current Plan, subject to potential refund with interest at the end of this proceeding pursuant to Section 366.071, Florida Statutes (1997)."

The legal authority and basis for this relief as requested by the Office of Public Counsel is not provided. FPL maintains moreover that the relief requested is in direct conflict with the provisions of Florida Statutes 366.071, entitled "Interim rates; procedure. -" and is in direct conflict with the doctrine of administrative finality by failing to recognize that the accruals by FPL under the Plan are presumptively valid. In addition, the procedure proposed by the Office of Public Counsel violates the proscription against retro-active ratemaking as recognized by the Florida Supreme Court in City of Miami v. Florida Public Service Commission, 208 So. 2d 249 (Fla. 1968). There, the Court cited with approval the following:

"The establishment of new rates must be preceded by a finding that the old rates are unjust and unreasonable, and the new rates are prospective as of the date they are fixed. There is no basis in the Statute for concluding that the Commission's orders can be retro-active to the date when the Commission's inquiry into the rates was begun; on the contrary the explicit language of the Statute precludes such a construction."

208 So. 2d at 260., citing the decision of the United States Supreme Court in Public Utilities Commission of Ohio v. United Fuel Gas Co. The Florida Supreme Court continued by concluding that "the Statutes [that is Sections 366.06(3) and 366.07] preclude such a retro-active order by the Commission."

The request of the Office of Public Counsel is in conflict with the doctrine of finality as discussed by the Florida Supreme Court in Florida Power & Light Company v. Beard, 626 So. 2d 660 (Fla. 1993). FPL recognizes the eighth "ordering paragraph" of Order No. PSC-98-0027-FOF-EI entered in Docket No. 970410-EI as set forth in footnote 3 in the Petition of the Office of Public Counsel. FPL does not contest or disagree with the statement in the eighth ordering paragraph. However, the "retro-active" application of a potential decision which the Commission might make if it were to "review...the Plan during the context of a proceeding to reset base rates..." was not authorized and would be violative of the prohibition against retro-active ratemaking.

3. In its paragraph number 9, the Commission is requested to require FPL to file a full set of MFRs based upon a historic 1998 test year. The Petition contains no basis in rule or statute administered by this Commission for this particular relief. FPL submits that the cost of preparing a "full set" of MFRs is extremely high. Moreover, FPL submits that the applicable rule [25-6.043, Fla. Admin. Code] concerning the filing of MFRs would

not and does not contemplate entry of an Order such as herein requested by the Office of Public Counsel. Moreover, FPL respectfully submits that any order by the Commission as requested by the Office of Public Counsel would constitute a "Rule" under Section 120.52(13), Fla. Stats. (1997) and would not be validly issued.

WHEREFORE, for the foregoing reasons FPL respectfully requests that those portions of the January 20, 1999 petition by the Office of Public Counsel which request that FPL be directed to hold revenues subject to potential refund with interest pursuant to Section 366.071, Florida Statutes and that FPL be required to file a full set of MFRs based upon a historic 1998 test year be dismissed.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP
Suite 601
215 South Monroe Street
Tallahassee, FL 32301
Attorneys for Florida Power
& Light Company

By: 
Matthew M. Childs, P.A.

CERTIFICATE OF SERVICE
DOCKET NO. 990067-EI

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Motion to Dismiss has been furnished by Hand Delivery (*), or U.S. Mail this 9th day of February, 1999, to the following:

Robert V. Elias, Esq.*
Legal Division
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2540 Shumard Oak Boulevard
Gunter Building, Room 370
Tallahassee, FL 32399-0872

Jack Shreve, Esq.*
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By: _____
Matthew M. Childs, P.A.