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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition for Determination)
of Need for an Electrical Power Plant in) DOCKET NO. 981042-EM
Volusia County by the Utilities)
Commission, City of New Smyrna Beach,) FILED: FEBRUARY 12, 1999
Florida, and Duke Energy New Smyrna)
Beach Power Company Ltd., L.L.P.)

JOINT PETITIONERS' RESPONSE IN OPPOSITION TO FPL'S MOTION TO STRIKE

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 "the Joint Petitioners" herein, pursuant to Commission Rule 25-22.037(2)(b) and Section 28-106.204(1), Florida Administrative Code, hereby respectfully submit this response in opposition to the Motion to Strike "Additional Authority" Letter filed herein by Florida Power & Light Company on February 5, 1999.

Counsel for the Joint Petitioners transmitted the subject letter to the Commission Staff by hand delivery on the afternoon of February 3, 1999 and simultaneously mailed copies of the letter, with attachments, to all parties of record in FPSC Docket No.

981042-EM. Under normal circumstances, FPL would have received (and probably did receive) its copies of the letter and attachments on February 4, 1999. This appears to have been the case, in that FPL prepared and filed its motion to strike on February 5.

In substance, counsel for the Joint Petitioners have done no more than transmit to the Commission Staff (and to all parties of record) pertinent authority regarding a question posed by the

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Commission Staff during the oral argument held on January 28, 1999. The Staff may, in the exercise of their judgment, determine whether these reported and published materials are relevant and useful. The Joint Petitioners did not attempt to introduce the materials into the record, but rather only to assist the Staff by providing existing authority. Nor did the Joint Petitioners' counsel attempt to supplement the record with additional evidence or testimony. The Joint Petitioners submit that neither (1) quoting passages from cases cited in their brief to demonstrate that those cases support the propositions for which they were cited nor (2) directing the recipients of the letter to pertinent sections of the authority transmitted, constitute argument.

FPL's motion to strike is itself inappropriate and inapplicable. Rule 1.140(f) of the Florida Rules of Civil Procedure provides that "[a] party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." In the first instance, FPL's motion to strike is inapt because the subject letter is not a pleading. In the second, the material transmitted -- Florida case law and treatise literature -- is neither redundant, immaterial, impertinent, or scandalous. Accordingly, FPL's motion to strike should be denied because it is procedurally inappropriate.

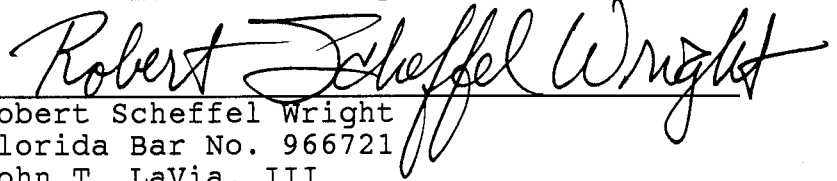
The letter is not, as asserted by FPL, an improper ex parte communication. Rather, it is a communication, in the open, by the same means to all parties at effectively the same time. Considering that it was delivered to the Staff late in the afternoon of February

3, it is not unlikely that the Staff saw it on February 4 at approximately the same time that FPL's Tallahassee representatives were receiving it. Moreover, the applicable prohibitions on ex parte communications -- which determine whether such communications are improper -- apply only to communications involving the "merits, threat, or offer of reward . . . to the agency head . . . or to the presiding officer" (in this context, the Commissioners). See Fla. Stat. §§120.66 & 350.042 (1997).

The bottom line is that the authorities transmitted with the letter are part of Florida's reported case law and published treatise literature, respectively, on the subject addressed. They are pertinent and directly responsive to an express request by the Commission Staff, and the Staff should not be directed to ignore them. The Joint Petitioners' counsel submit that providing such materials is entirely appropriate and consistent with their duties to apprise the Staff of relevant law. (Since the purpose of the letter was to transmit the published materials to the Staff, the Joint Petitioners have no objection to the Staff ignoring the letter, which, of course, they are free to do anyway.) FPL and the other parties who received them had -- and have -- the opportunity to furnish other relevant authority. FPL, however, has chosen to attempt to keep the Staff in the dark. This suggested remedy is inappropriate and does not further any legitimate interest of the public, the Commission, the Staff, or any other participant in this case.

Accordingly, the Commission should deny FPL's motion to strike.

Respectfully submitted this 12 th day of February, 1999.



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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 12th day of February, 1999:

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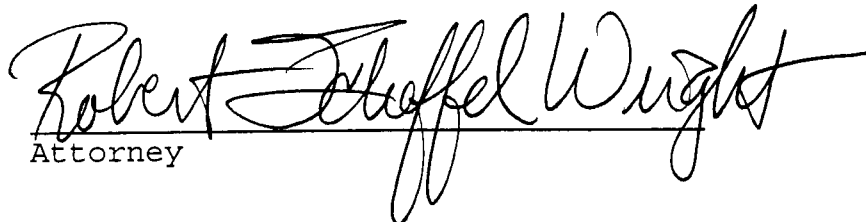
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