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September 29, 1999

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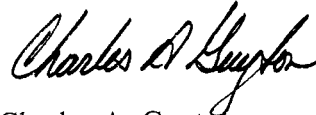
Re: DOCKET NO. 981890-EU

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") in Docket No. 981890-EU are the original and fifteen (15) copies of Florida Power & Light Company's Response to FIPUG's Motion for Order to Compel Discovery to Florida Power & Light Company.

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

Very truly yours,



Charles A. Guyton

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- APP _____ Enclosure
- CAF _____ ec: Parties of Record
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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Generic Investigation)
Into the Aggregate Electric)
Utility Reserve Margins Planned)
for Peninsular Florida)

DOCKET NO. 981890-EI

DATE: September 29, 1999

**FLORIDA POWER & LIGHT COMPANY'S
RESPONSE TO FIPUG'S MOTION TO COMPEL**

Florida Power & Light Company ("FPL") responds as follows to FIPUG's Motion For Order To Compel Discovery filed September 22, 1999 in Docket No. 981890-EU.

FPL'S GENERAL OBJECTION

FPL has raised a general objection which it incorporates into each specific objection to each interrogatory. FPL's general objection is that discovery is not proper in this proceeding, for this is an investigation, and under the Administrative Procedure Act ("APA") and the Uniform Rules of Procedure, both of which are clearly applicable to the Commission, an investigation is not properly conducted as a formal evidentiary proceeding under Section 120.57, Florida Statutes, and discovery is available only in a formal evidentiary proceeding under Section 120.57.

The Commission voted at its December 1998 Agenda Conference to initiate an investigation. This is reflected clearly in the Commission's minutes as well as in the motion made. Consistent with the Commission's vote, the style of the case states: "IN RE: Generic Investigation Into Aggregate Electric Utility Reserve Margins Planned For Peninsular Florida." Even the Commission's subsequent procedural orders that improperly attempt to convert this proceeding into a formal evidentiary hearing nonetheless recognize that this proceeding is an investigation. No Commission

action has been taken or proposed. This proceeding is clearly an investigation preliminary to Commission action.

It is unequivocally clear under the APA that an investigation preliminary to agency action is not to be conducted as a Section 120.57 proceeding. Section 120.57(5), Florida Statutes (1997) states: “This section does not apply to agency investigations preliminary to agency action.” The instruction to the Commission could not be clearer. It is improper to conduct an investigation as a Section 120.57 proceeding.

The APA’s clear instruction that investigations are not to be conducted as Section 120.57 proceedings is reinforced by the Uniform Rules of Procedure that govern the conduct of all Section 120.57 proceedings. Rule 28.106.101, Florida Administrative Code, the rule that explains the scope of Chapter 28-106, the chapter of the Florida Administrative Codes that addresses the conduct of Section 120.57 proceedings, states that Chapter 28-106 does not apply to “agency investigations or determinations of probable cause preliminary to agency action.” In addition, the rule that addresses how Section 120.57 proceedings are properly initiated, Rule 28-106.201(2), Florida Administrative Code, makes it clear that such a proceeding is initiated by a petition filed in response to an agency action. There has been no proposed or final agency action in this proceeding, because this is an investigation preliminary to agency action.

The discovery being attempted by FIPUG is pursuant to Chapter 28-106, Florida Administrative Code. FIPUG’s Motion to Compel at 1. Rule 28-106.101, F.A.C. clearly states that the entire chapter does not apply “to agency investigations or determinations of probable cause preliminary to agency action.” Consequently, the discovery attempted by FIPUG to FPL in this investigation is not contemplated by or permissible under the very rules upon which FIPUG relies.

Because this proceeding is an investigation, because an investigation is not properly conducted as a Section 120.57 proceeding, because a Section 120.57 proceeding is properly initiated only by agency action and there has been no agency action in this proceeding, and because discovery pursuant to Chapter 28-106 is not available in an investigation, FPL has objected to FIPUG's attempt to conduct discovery.

FIPUG's Response

FIPUG's brief response is threefold: (1) FPL has objected to *every single question* posed by FIPUG, (2) the Commission has authorized this investigation to proceed as a Section 120.57 proceeding to determine substantial interest, and (3) the Commission has granted FIPUG party status and that the Order Establishing Procedure authorizes discovery. FPL's response follows.

FPL's Responses

FPL Has Objected To *Every Single Question*

Of course FPL has objected to *every single question*, and this should be no surprise, since FPL has stated a general objection to any discovery being improperly conducted in an investigation. The fact that FPL objected to *every single question* is hardly a valid basis for a motion to compel. It would have been far more valid for FIPUG to move to compel if FPL had been selective and not objected to *every single question*, picking and choosing among questions it was willing to address and others that FPL objected to on the ground that discovery is inappropriate. The fact is that discovery in an investigation is inappropriate, and that makes every FIPUG discovery request objectionable.

The Commission Has Improperly Created A Section 120.57 Proceeding

Under the APA it is not the Commission that initiates a Section 120.57 proceeding, it is a

person who has substantial interests determined or affected by agency action that initiates a Section 120.57 proceeding by filing a petition requesting a hearing regarding an agency action. The Commission has not proposed or taken any agency action in this proceeding. This is an investigation preliminary to agency action. The APA could not be clearer: “[t]his section does not apply to agency investigations preliminary to agency action.” Section 120.57(5), Florida Statutes (1997).

Rather than confront the clear language of the APA, FIPUG quotes extensively from two Commission orders that purport to authorize the conduct of this investigation as a proceeding to affect substantial interests: Order Nos. PSC-99-1274-PCO-EU and PSC-99-1716-PCO-EU. Order No. PSC-99-1274-PCO-EU mistakenly treats the position advanced by FPL and others that the Commission may not conduct an investigation as a proceeding to determine substantial interests as a challenge to its grid jurisdiction. FPL recognizes the Commission’s statutory authority to maintain grid reliability and to conduct proceedings designed to maintain grid reliability. However, that jurisdictional authority is not authority to ignore the procedural requirements imposed by the Legislature. The Legislature, in the APA, has explicitly stated that investigations are not to be handled as Section 120.57 proceedings. The Commission has apparently ignored or misread that clear statutory mandate. The Commission’s decision in Order No. PSC-99-1274-PCO-EU to conduct this investigation as a Section 120.57 proceeding despite the clear statement in Section 120.57(5) that “this section does not apply to agency investigations preliminary to agency action,” makes that order inconsistent not with the Commission’s authority to maintain grid reliability but with its requirement to follow the APA.

Similarly, Order No. PSC-99-1716-PCO-EU mistakenly interprets FPL’s argument that an investigation may not be conducted as a Section 120.57 proceeding to determine substantial interests

as a jurisdictional challenge to the Commission grid authority. FPL has not challenged the Commission's authority in this area. Once again, the Commission ignores the plain language of Section 120.57(5).

The fact that the Commission has issued orders inconsistent with the APA hardly excuses the Commission from following the APA. An investigation is not properly conducted as a proceeding under Section 120.57, and discovery in an investigation as if the proceeding were a Section 120.57 proceeding is inconsistent with both the APA and the Uniform Rules of Procedure. The Commission cannot by order repeal the requirements established by the Legislature in the APA.

FIPUG Is Not Properly a Party And The Order Establishing Procedure Violates The APA.

First, investigations are not proceedings in which party status is properly requested or granted. Party status is determined in proceedings to determine substantial interests, Section 120.57 proceedings. An investigation is a less formal proceeding in which no entity has its interests determined or substantially affected by an agency. An investigation is preliminary to agency action. The purported granting of party status in an investigation is an inappropriate confusion of the informal investigatory process with the more formal Section 120.57 proceeding to determine substantial interest process.

Second, FIPUG has not and cannot meet the legal standard for demonstrating party status in a Section 120.57 proceeding. FPL without waving its objection that intervention in an investigation is inappropriate, notes that the Petition for Leave to Intervene filed by FIPUG does not conform to Rule 28-106.205 or to Rule 25-22.039 (as to Rule 25-22.039 titled Intervention, FPL would point out that although this Rule has been identified in Chapter 25-40.001 as an exception to the Uniform Rules of Procedure, the exception authorized was only as to the timing by which a petition for

intervention must be filed.)

Looking to Rule 25-22.039, the Commission's procedural rule on intervention, FIPUG's petition is deficient. The rule states that the petition "must conform with Commission Rule 25-22.036(7)(a)," but FIPUG's petition cannot so comply because the rule referred to has been repealed. Order No. PSC-99-0413-NOR-PU.

Looking to Rule 28-106.205, the uniform rule applicable to intervention, FIPUG's petition to intervene is deficient. FIPUG's petition to intervene does not "conform to Rule 28-106.201(2)" as required.

- a. The petition does not contain a "statement of when and how the petitioner received notice of the agency decision" as required by subsection 28-106.201(2)(c) (because there has been no agency decision, which reflects that this is not a proceeding determining substantial interests because there has not been an agency action, the event necessary to initiate a 120.57 proceeding).
- b. The petition to intervene does not contain a "concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrants reversal or modification of the agency's proposed action" as required by Rule 28-106.201(2)(c) (once again certain allegations necessary for a petition have not been made because there has not been any agency action, which is contemplated under the APA and the Uniform Rules as the event initiating a 120.57 proceeding).
- c. The petition to intervene does not contain a "statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action (because the agency has not taken proposed action, which is contemplated as

preceding a 120.57 proceeding).

- d. The petition to intervene does not contain a “statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the agency to take with respect to the agency’s proposed action” as required by Rule 28-106.201(20(g)).

Order No. PSC-99-0838-PCO-EU purporting to grant FIPUG party status does not authorize discovery; it merely authorizes intervention. It improperly allowed FIPUG’s intervention for the reasons just discussed: an investigation is not a proceeding for intervention and party status, and FIPUG failed to meet pleading requirements.

The Order Establishing Procedure, Order No. PSC-99-0760-PCO-EU, states that the purpose of the docket was “to investigate planned, aggregate electric utility reserve margins in Peninsular Florida,” and it was expressly issued pursuant to Rule 28-106.211, Florida Administrative Code. As previously discussed, Rule 28-106.101, F.A.C., the rule that discusses the application of all rules in Chapter 28-106, including Rule 28-106.211, clearly states that the entire chapter does not apply “to agency investigations or determinations of probable cause preliminary to agency action.” Thus, that order attempting to apply Chapter 28-106 to this investigation is a nullity.

SUMMARY OF GENERAL OBJECTION

Conducting this investigation as a Section 120.57 proceeding to determine substantial interests is a clear, reversible, procedural error which FPL and other parties have tried to help the Commission avoid making. No entity participating in this proceeding, including the Commission, is served by the Commission following a procedurally infirm path. The discovery sought by FIPUG, discovery pursuant to Rule 28-106.206, is discovery pursuant to Chapter 28-106 and pursuant to Section 120.57. Such discovery is appropriate in a proceeding to determine substantial interests, but

it is not permitted in a Commission investigation. Section 120.57(5) clearly states that Section 120.57 is not applicable to investigations, and Rule 28-106.101 states that Chapter 28-106, including Rule 28-106.206, the rule under which FIPUG justifies its discovery, does not apply to “agency investigations.”

FPL objects to FIPUG’s discovery to preserve its position that the procedural handling of this case is inconsistent with the legislative directive of the APA as well as the rule provisions of the Uniform Rules of Procedure. It is not too late for the Commission to avoid reversible error, but regardless of whether the Commission is inclined to reverse its mistake, FPL must preserve its position, and its objections to FIPUG’s discovery preserves FPL’s position. FPL respectfully objects to the discovery being attempted by FIPUG.

SPECIFIC OBJECTIONS

FPL’s Curtailment Objection

FPL has received clarification from FIPUG as to what FIPUG meant by the term “curtailment.” FPL stands by its other grounds for objection, including the other phrases FPL does not understand and which FIPUG has not clarified in either verbal communication or its motion to compel.

Interrogatories 2 and 3

In these interrogatories FIPUG requests information from FPL that is readily available to FIPUG at the Florida Public Service Commission. It is unduly burdensome for FPL to answer questions that are readily answered by FIPUG by referring to publicly available reports. Moreover, FIPUG admits in its motion to compel that it has asked the same question of FPL for the last five years. In other words, except for the data for 1998 and 1999 to date, FIPUG already has the data.

It is unduly burdensome for FIPUG to keep asking FPL for data FPL has already provided to FIPUG.

Interrogatory 6

In this interrogatory FIPUG asks FPL to perform a calculation that FPL has not performed and would not perform in the ordinary course of business. In addition the underlying premise of the interrogatory, that every non-firm load customer would give notice that it was terminating non-firm service, is ridiculous. The data necessary for FIPUG to perform the calculation is the data readily available to FIPUG at the Florida Public Service Commission. It is the data requested in Interrogatories 2 and 3 and FPL's 1999 Ten Year Site Plan. With that data FIPUG can perform the calculation it requests FPL to perform just as easily as FPL. The purpose of discovery is not to have FPL act as FIPUG's or any other entity's analyst. FIPUG is attempting to misuse the discovery process and make FPL perform calculations that are just as easily performed by FIPUG as they are by FPL. This is unduly burdensome on FPL.

Interrogatory 9

FPL stands by its objections to Interrogatory 9. More information is needed to address the question, none of which was provided in FIPUG's motion to compel. The question is overly broad, asking for the impact of power shortages in some states that clearly would have no impact on FPL. Also, the question asks FPL to address the impact on Florida rather than on FPL, and FPL cannot speak for Florida.

Interrogatory 10

FIPUG has clarified that a "request to reduce load" does not mean an interruption under an interruptible rate or through an exercise of load control. However, FPL did explain what it considered burdensome. Any question that treats FPL efforts to have large firm and industrial

customers undertake DSM initiatives as “requests to reduce load” is unduly burdensome, and FIPUG’s question is still susceptible to such a broad reading. FPL stands by that portion of its objection.

Interrogatory 12

FPL did not object to Interrogatory 12 stating it was unfamiliar with the NERC capacity margin calculation. FPL requested an explanation because the question states a factual premise that is not self-evident to FPL: that there is a capacity margin calculation preferred by NERC over a reserve margin calculation. To answer the question, FPL needs to be apprised of the basis for FIPUG’s factual premise and reference to a specific methodology. That is why FPL asked for an explanation. FIPUG has treated FPL’s request for an explanation as an objection and declined to provide any explanation. In the absence of the requested explanation, FPL cannot answer the question, if discovery were found to be appropriate.

Production Requests 5 and 6

Production request 5 asks FPL for all complaints by load control customers over a five year period. It does not ask for complaints related to load control. To answer this request FPL would have to check with each complaining load control customer to see if they considered the complaint to be confidential or proprietary to them. This is unduly burdensome, particularly given that this docket is not about load control customer complaints but about the methodology for calculating reserve margins.

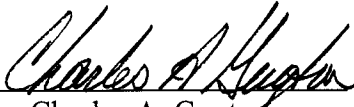
Production request 6 asks FPL to provide all wholesale contracts in effect during curtailments made by FPL during the last five years. FPL objected on the ground that the request was unduly burdensome and vague. FIPUG makes no effort to address the concern articulated about their

request being vague, and that is related in part to the request being unduly burdensome. FPL stands by its objection.

For the reasons discussed herein, FPL has posed valid objections to *every single question* posed by FIPUG. FIPUG's motion to compel should be denied.

Respectfully submitted,

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By: 
Charles A. Guyton

CERTIFICATE OF SERVICE
DOCKET NO. 981890-EU

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to FIPUG's Motion for Order to Compel Discovery was furnished by Hand Delivery* or U.S. Mail this 29th day of September, 1999 to the following:

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