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October 29, 1999

Jonathan E. Sjostrom

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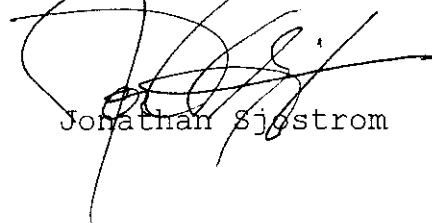
Re: DOCKET NO. 991462-EU

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") in Docket No. 991462-EU are the original and fifteen (15) copies of Response to OGC's Motion to Strike FPL's Reply to OGC's Response to FPL's Motion to Dismiss.

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

Very truly yours,



Jonathan Sjostrom

Enclosure
cc: Parties of Record

- APR _____
- APR _____
- CAF _____
- OGC _____
- OTR _____
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- MAS 3
- OPC _____
- PAI _____
- REC 1
- WAA _____
- OTR _____

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination)
of Need for Electric Power Plant) Docket No. 991462-EU
in Okeechobee County by Okeechobee) Filed: October 29, 1999
Generating Company, L.L.C.)
_____)

FLORIDA POWER & LIGHT COMPANY'S RESPONSE TO
OGC'S MOTION TO STRIKE FPL'S REPLY TO
OGC'S RESPONSE TO FPL'S MOTION TO DISMISS

In its response to FPL's motion to dismiss, OGC ventured beyond addressing why the dismissal should not be granted based on the pleadings then outstanding. Thus, it urged the Commission to "construe" its substantive rules in a way that, if accepted, would exempt OGC from the rules' express precondition to the filing of a need determination petition. This requested "construction" is a request for affirmative relief that *should not* be in a response to a motion to dismiss. If OGC were to present this argument, it was required to do so in its initial Petition, because a petition must contain "a concise statement of the ultimate facts alleged, *as well as the rules and statutes which entitle the petitioner to relief.*" Rule 28-106.201(2)(e), F.A.C. Here we have the circumstance where substantive rules of the Commission establish, prima facie, that OGC is *not* entitled to relief. But, OGC does not even mention them until it "responds" to the motion to dismiss. The effect of this tactic and OGC's motion to strike is to attempt to make its improper argument unassailable. Clearly this is improper.

The principal purpose of a motion to dismiss is to address deficiencies *in the Petition*. OGC did not present its request for

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a "construction" of the applicable rules in its Petition so that it would openly confront the consequences of the Rules. Thus, FPL never had notice or an opportunity to address OGC's request for a "construction." Now, OGC wants to change the basis for the relief it requests and deny FPL the opportunity to even point that out to the Commission.

FPL's proposed reply was entirely appropriate without motion for leave, because it was OGC that improperly used its response to attempt to present a new basis for relief. However, FPL chose to seek leave to give due respect to the orderly process contemplated by the Uniform Rules.

As FPL noted in its motion, "Uniform Rule 28-106.204 permits the filing of a response to a motion, but does not address the filing of a reply," FPL's Motion for Leave at ¶3. Thus, FPL asked for special permission -- in the form of FPL's motion for leave to file its reply -- although, as noted above, OGC's "response" was itself improper.

The case cited by OGC's motion to strike provides no support for its motion and OGC's consternation - though doubtless sincerely held - is entirely misplaced. OGC's motion to strike simply fails to point out the obvious distinctions. The party that filed the reply in Conservation Goals *did not move for leave to file a reply* and, thus, provided no basis for the Commission to evaluate any need for a special right to file. FPL did not, in the Conservation

Goals docket, move to strike a reply accompanying a motion for leave to file because no motion was ever filed. FPL there moved to strike a reply filed with no attempt to show a special need. Here, by contrast, FPL filed the reply with its motion for leave because the reply itself demonstrates its necessity and thus makes the strongest showing of the grounds for FPL's motion for leave.

Likewise, the reply filed in Conservation Goals did not assert that any party's response inappropriately injected a request for affirmative relief that was required to be made, if at all by petition. The motion at issue in Conservation Goals was a motion for a procedural order. By contrast, OGC saved its request for affirmative relief for a paper to which no party could respond. It is inappropriate for a party to raise a request for affirmative relief for the first time in a paper or other forum to which its opponent is permitted no response. See, e.g., State v. Riveron, 723 So.2d 845, 846 (Fla. 3d DCA 1998) (reversing where defendant "sand-bagged" prosecution by raising issue of filing of charging document for the first time during argument on motion to dismiss rather than in motion to dismiss itself); Smith v. Hill, 409 So.2d 141 (Fla. 4th DCA 1982) (it is reversible error to permit plaintiff to argue the amount of damages for the first time in rebuttal argument); General Motors Corp. V. Campolo, 678 So.2d 431 (Fla. 3d DCA 1996) ("The fact that this issue was raised for the first time in the reply brief alone precludes our consideration of the

matter."). Because of OGC's request for affirmative relief, FPL's "reply" is effectively a response memorandum as provided for in Rule 28-106.204. However, FPL chose to indulge OGC's characterization and ask permission to file a reply rather than asking the Commission to appropriately rename OGC's "response" as the motion or petition that it obviously is. Whether denominated "reply" or "response" or even "motion to strike," the Rules permit raising with the Commission inappropriate requests for affirmative relief made outside of the initial petition.

OGC should not be permitted to deprive FPL of its ability to respond to OGC's requests for affirmative relief by misnaming them "responses."

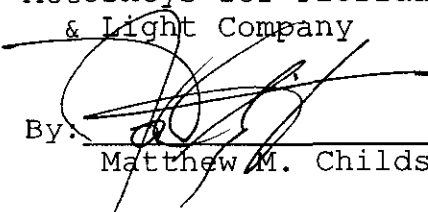
CONCLUSION

OGC's motion to strike should be denied.

Respectfully submitted,

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By: 
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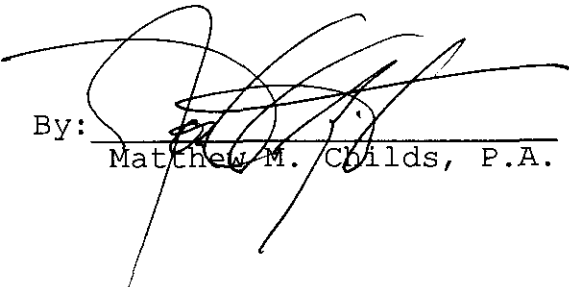
CERTIFICATE OF SERVICE
DOCKET NO. 991462-EU

I **HEREBY CERTIFY** that a true and correct copy of Florida Power & Light Company's Response to OGC's Motion to Strike FPL's Reply to OGC's Response to FPL's Motion to Dismiss has been furnished by Hand Delivery* this 29th day of October, 1999 to the following:

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