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June 22, 2001

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Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light
Docket No: 000824-EI

Dear Ms. Bayo:

Florida Power Corporation ("FPC" or the "Company") is filing herewith an original, disc and fifteen (15) copies of Memorandum of Florida Power Corporation in Opposition to Motion for Expedited Customer Rate Relief by Florida Industrial Power Users Group.

We request you acknowledge receipt and filing of the above by stamping the additional copy of this letter and returning it to me in the self-addressed, stamped envelope provided.

If you or your Staff have any questions regarding this filing, please contact me at (727) 821-7000.

Very truly yours,

Gary L. Sasso
Gary L. Sasso
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Counsel of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light.

Docket No. 000824-EI

Submitted for filing:
June 25, 2001

**MEMORANDUM OF FLORIDA POWER CORPORATION
IN OPPOSITION TO MOTION FOR EXPEDITED CUSTOMER RATE
RELIEF BY FLORIDA INDUSTRIAL POWER USERS GROUP**

Florida Power Corporation (FPC) opposes the request by the Florida Industrial Power Users Group (FIPUG) for expedited customer rate relief. The Florida Statutes provide no authority for the granting of such relief.

BACKGROUND

The Commission opened this docket on July 7, 2000 to review FPC's earnings. On May 3, 2001, Staff recommended that the Commission order FPC to place \$97,970,532 of annual revenue subject to refund, including interest, effective March 13, 2001, "pending final disposition in this proceeding" and further recommended that the Commission order FPC to hold an additional amount of \$15,924,217 subject to refund, effective July 1, 2001, for a total amount of \$113.8 million held subject to refund. (Staff Mem. 5/3/2001, p. 3). Staff specifically acknowledged that, "[c]onsistent with §366.071(2)(b), Florida Statutes, FPC is authorized to continue to collect its previously authorized rates, subject to the appropriate corporate undertaking." (*Id.*) (emphasis added). The Commission approved Staff's recommendation at the Agenda Conference on May 15, and the Commission entered an order on June 24, 2001 requiring FPC to place revenues subject to refund.

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ARGUMENT

FIPUG contends that the Commission should grant “immediate rate relief” to FPC’s customers in the form of a “base rate reduction of \$113,894,794,” the total amount to be held subject to refund. (Motion, p. 3). FIPUG suggests that this amounts to .312 cents per kwh, which “will effectively mitigate the \$3.71 fuel surcharge increase that became effective April 1, 2001.” (Id.). Although FIPUG asserts, without substantiation, that the “Commission has legal authority to order a rate reduction of this amount to take place July 1, 2001,” FIPUG concedes that, “[i]f the Commission follows its current policy on funds held subject to refund, . . . FPC will be allowed to use th[ose] funds,” pending the outcome of the full rate case. (Id.) (emphasis added).

Contrary to what FIPUG asserts, the Florida Statutes provide no authority for ordering “immediate rate relief” prior to a full hearing on rates. As the Commission recognized in its June 20 Order, Chapter 366 provides specific authority for obtaining “interim rate” rate relief, pending the outcome of a full rate proceeding, which does not encompass ordering “immediate” refunds or reductions in rates.

As a threshold matter, Section 366.06 specifically provides that, in order to adjust rates, “the commission shall order and hold a public hearing, giving notice to the public and to the public utility, and shall thereafter determine just and reasonable rates to be thereafter charged” (Emphasis added). In the same vein, Section 366.07 provides that the commission may “fix . . . fair and reasonable rates” only “after public hearing.” (Emphasis added). Because ratemaking affects the utility’s substantial interests, the utility is entitled to a full evidentiary hearing before its rates are adversely adjusted. Rule 28-106.201, Fla. Admin. Code. Consistent with this requirement, in its May 3 recommendation, Staff requested that the Commission order the filing

of MFRs, and the Commission has ordered FPC to do so. The parties and Staff have been working toward the identification of issues and the development of a CASR that will culminate in a full rate hearing, should that prove to be necessary.

Further, Section 366.071 specifically provides that the Commission may obtain “interim” relief in a narrowly circumscribed way: namely, the “commission may, during any proceeding for a change of rates . . . authorize the collection of interim rates until the effective date of the final order.” Section 366.071(1), Fla. Stats. (emphasis added). In order to obtain even this measure of interim relief, the Commission must “establish a prima facie entitlement for interim relief” by “demonstrat[ing] that the public utility is earning outside the range of reasonableness on rate of return calculated” for the most recent 12-month period. *Id.* Section 366.071 goes on to provide that, “[i]n a proceeding for an interim decrease in rates, the commission shall authorize . . . the continued collection of the previously authorized rates . . . subject to refund with interest at a rate ordered by the commission.” Section 366.071(b), Fla. Stats. (emphasis added). The statute then provides that the Commission may actually order refunds only after the completion of the full rate hearing with respect to revenues earned “during the pendency of the proceeding” and then only on a basis consistent with “the newly authorized rate of return which is found fair and reasonable on a prospective basis.” Section 366.071(4), Fla. Stats. (emphasis added); see, e.g., *In re Gulf Power Co.*, 120 P.U.R. 4:1 (Oct. 3, 1990); *In re Indian Town Co.*, Docket No. 990939-WS; PSC-00-2054-PAA-WS (October 27, 2000) (slip opinion).

In seeking “immediate” rate relief, FIPUG ignores these provisions and moves under Section 366.076, Fla. Stats. But that provision does not alter or supercede the very specific provisions that we have described that govern “interim” rate relief. Section 366.076 merely provides that the Commission may commence a proceeding to consider limited issues that may

result in the adjustment of rates, consistent with the requirements of Chapter 366. This section does not authorize the Commission to adjust rates without affording the full panoply of due process rights to which the utility and other parties are entitled—under Chapter 366, applicable rules, and the state and federal constitutions—including a full evidentiary hearing.

The Commission’s own prior construction of Section 366.076 compels this conclusion. In re Tampa Electric Company, 94 FPSC 6:465 (June 27, 1994), the Office of Public Counsel (OPC) moved in November 1993 for an expedited hearing to set a new rate of return on equity (ROE) for TECO, to rescind TECO’s 1994 rate increase, and to order a rate reduction. The Commission denied OPC’s motion. In denying OPC’s motion for reconsideration, the Commission explained, “While we could use this type of proceeding [referring to Section 366.076] to adjust rates, it would be virtually impossible to do so on an expedited basis (as requested by OPC) and still comply with the notice requirements of Chapter 366, Florida Statutes, by providing a reasonable opportunity to present testimony, conduct discovery and obtain ratepayer input.” (emphasis added).

Likewise, In re Tampa Electric Company, 94 FPSC 3:578 (March 25, 1994), the Commission rejected OPC’s request for a limited proceeding under Section 366.076 to presume a downwardly adjusted return on equity and then to adjust TECO’s rates accordingly. The Commission held: “To include a consideration of rate reduction in this [limited] proceeding is inconsistent with symmetry in the rate setting process. Clearly, if returns on equity were increasing, Public Counsel would expect, and we believe due process would require, a full exploration of all changes to the Company’s operation in arriving at the fair, just and reasonable rates to be enacted. Such a comprehensive review is beyond the scope of this limited proceeding.” (emphasis added).

In this case, FIPUG bases its request for “immediate” rate relief on Staff’s recommendation to place funds subject to refund on the basis of Staff’s review of FPC’s overall operations, not some narrowly delimited issue. Moreover, that recommendation does not establish that a refund in the amount of \$113.9 million should be ordered but merely establishes a cap for any refund that the Commission may determine to be appropriate after completion of a full rate case (assuming only for the sake of argument that the Commission appropriately designated these funds as subject to refund). Before the Commission could actually order any refund along the lines contemplated by the Staff’s recommendation, the Commission would have to do so based on the record in a full rate case, considering all impacts (in either direction) on FPC’s rates.

Accordingly, Chapter 366 does not authorize the Commission to grant the “immediate” rate relief that FIPUG seeks. As FIPUG concedes, doing so would run directly contrary to the Commission’s consistent handling of interim rate relief. Further, it would violate FPC’s due process rights under the state and federal constitutions.

FIPUG suggests, nonetheless, that the Commission could order immediate relief as proposed agency action, permitting FPC to object and request a hearing if FPC wished to do so. The problem with that suggestion is, the Commission does not have statutory authority to order “immediate” rate relief in the first place no matter how FIPUG wishes to characterize it. This would amount to making a determination that a refund is in fact appropriate in a specified amount based merely on Staff’s articulated suspicion that a refund may later be determined to be in order, after a full hearing.

If FPC objects and requests a hearing, what will occur? Presumably, FIPUG would propose that the Commission conduct some limited proceeding that does not take into account

overall system impacts. As we have described, the Commission has repeatedly refused to use Section 366.076 to truncate what ought to be more comprehensive rate proceedings. If, on the other hand, the Commission were to conduct a full rate case, we end up where we started, except that the Commission will have implied that Staff's preliminary determination is entitled to more credence than was intended or than Chapter 366 permits. So FIPUG's proposal either accomplishes nothing or it violates FPC's statutory and due process rights.

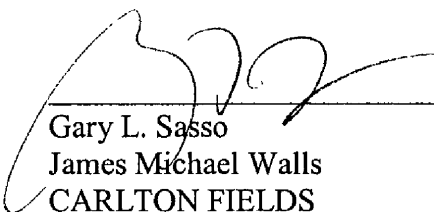
Finally, the fact that the rate relief FIPUG proposes roughly equals the amount of the recent fuel surcharge increase is legally irrelevant. That does not somehow create a legally sufficient basis for the Commission to grant rate relief that is not authorized in the statute. And FIPUG may not properly use this rate proceeding to mount an untimely and unfounded collateral attack on the Commission's earlier order approving the fuel surcharge increase. FIPUG was a party intervenor in the fuel adjustment docket and took no appeal from that order; that order is now final and binding.

CONCLUSION

For the foregoing reasons, FPC respectfully requests that the Commission deny FIPUG's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of foregoing Memorandum of Florida Power Corporation in Opposition to Motion for Expedited Customer Rate Relief by Florida Industrial Power Users Group has been furnished to the following via U.S. Mail this 20th day of June, 2001.

Robert V. Elias, Esquire
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Florida Public Service Commission
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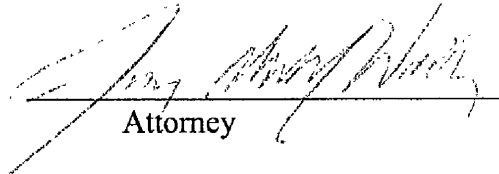
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