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February 6, 2002

- VIA HAND DELIVERY -

Blanca S. Bayó, Director  
Division of the Commission Clerk  
and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

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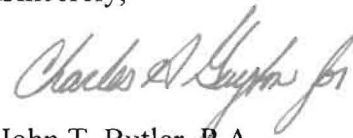
Re: Docket No. 001148-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") are the original and seven (7) copies of FPL's Response in Opposition to Motion of South Florida Hospital and Healthcare Association to Compel Discovery Responses.

If you or your Staff have any questions regarding this transmittal, please contact me.

Sincerely,



John T. Butler, P.A.

AUS  
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OTH

Enclosure  
cc: Counsel for Parties of Record

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Review of the retail rates of ) Docket No. 001148-EI  
Florida Power & Light ) Dated: February 6, 2002  
Company. )  
\_\_\_\_\_ )

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE  
IN OPPOSITION TO MOTION OF SOUTH FLORIDA HOSPITAL AND  
HEALTHCARE ASSOCIATION TO COMPEL DISCOVERY RESPONSES**

Florida Power & Light Company ("FPL") responds as follows to the Motion of South Florida Hospital and Healthcare Association ("SFHHA") to Compel Discovery Responses (the "Motion to Compel"):

**BACKGROUND**

The Motion to Compel relates to two SFHHA interrogatories, Nos. 32 and 33, which read as follows:

Interrogatory No. 32

Please identify the entities receiving gains on the sales of interests in FiberNet, Adlephia Communications Corp. and the one-third ownership interest in the cable limited partnership (referenced in Document Production Request No. 24) all as described in the FPL Group 2000 Annual Report, and the amount of such gain for each entity.

Interrogatory No. 33

Who were the other partners in the cable limited partnership (referenced in Document Production Request No. 24), and why was an FPL affiliate a partner in the enterprise? Identify the assets contributed, or any other consideration furnished, by FPL or an

FPL affiliate as part of the participation in or formation of the partnership or the acquisition of any ownership share in the partnership.

FPL timely objected to Interrogatory Nos. 32 and 33, as follows:

Interrogatory Nos. 32 and 33. These interrogatories relate at least in part to transactions between FPL's unregulated affiliates, or between an unregulated FPL affiliate and an unaffiliated entity. To the extent that they relate to such transactions, FPL objects to these interrogatories as beyond the proper scope of discovery (see objection to definition of "FPL" above). FPL will respond to these interrogatories with respect to transactions involving FPL.

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"FPL" This definition purports to include FPL's parent and its affiliates. The jurisdiction of the Florida Public Service Commission -- and hence the permissible scope of inquiry in this proceeding -- concerning the parent and affiliates of a utility is limited. See §§366.05(9) and 366.093(1), Fla. Stat. (2000). Moreover, the scope of discovery from a party is limited to documents within the possession, custody or control of that party. See, e.g., *Southern Bell Telephone and Telegraph Co. v. Deason*, 632 So.2d 1377 (Fla. 1994). FPL objects to the inclusion of FPL's parent and affiliates within the definition of "FPL" to the extent that it expands the scope of the SFHHA Third Request beyond the bounds of the Commission's jurisdiction and/or the permissible scope of discovery.

Florida Power & Light Company's Objections to and Request for Clarification of the South Florida Hospital and Healthcare Association's Third Set of Interrogatories and Request to Produce, dated January 3, 2002, at 6 and 10.

Consistent with those objections, FPL responded to Interrogatory Nos. 32 and 33 on January 23, 2002, as follows:

(Interrogatory No. 32) FPL's fiber-optic lines were sold to FPL FiberNet at net book value and no gain was recorded. The other transactions didn't involve FPL.

(Interrogatory No. 33) FPL did not participate in the referenced cable limited partnership. Therefore, this interrogatory is beyond the scope or proper discovery and, consistent with FPL's earlier objections, FPL is not required to respond.

### **THE MOTION TO COMPEL IS FATALLY FLAWED**

The Motion to Compel appears to be intended to inflame controversy rather than facilitate legitimate discovery. It is fundamentally premised on the SFHHA's expressed concern that "a rate-regulated entity has many opportunities to shift value away from ratepayers to unregulated entities where the value may be realized exclusively for the benefit of investors." Motion to Compel at 2. FPL has no objection to addressing legitimate questions directed to whether "value" has been improperly shifted out of FPL to an affiliate or other third party. However, Interrogatory Nos. 32 and 33 go well beyond that legitimate inquiry, and it is this overbreadth that has occasioned FPL's objections and the limitations on its answers to those interrogatories.

Discovery in Commission rate proceedings must relate to "information which affects a utility's rates or cost of service." §366.093(2), Fla. Stat. (2001). In the present context, this means that discovery seeking to determine whether a utility has improperly transferred property or other valuable assets to an unregulated affiliate may be appropriate. However, Interrogatory Nos. 32 and 33 skip completely past this threshold issue and seek discovery on unregulated activities and dispositions of unregulated interests. The SFHHA would have one assume that there have been improper transfers of valuable assets from the utility to its affiliates and then, based upon this unsupported assumption, require production of information aimed at tracing the use and disposition of those assets by unregulated interests.

FPL's answers to Interrogatory Nos. 32 and 33 provide all the information to which the SFHHA is legitimately entitled. Interrogatory No. 32 asks about the gain on sales of interests in three entities. FPL's answer confirms that there was no gain on the disposition of FPL fiber-optic lines to FiberNet (one of the three entities) and that FPL was not involved in the other transactions. Interrogatory No. 33 asks about partners in a cable limited partnership, and FPL confirmed that it did not participate in that partnership.<sup>1</sup> There is nothing in FPL's responses to suggest that FPL made any improper transfers to any of the unregulated entities referenced in the interrogatories. No predicate has been established for the SFHHA to explore further into the business dealings of those unregulated entities. Permitting the SFHHA to conduct such discovery without a proper predicate clearly would be beyond the legitimate scope of discovery.

Moreover, the Commission should be aware that the SFHHA has had an explicit, direct opportunity to explore the nature of FPL's property dispositions, but so far has not chosen to avail itself of that opportunity. Shortly before filing the Motion to Compel, counsel for the SFHHA contacted counsel for FPL to inquire about Interrogatory No. 41, which relates to dispositions of property by FPL. The SFHHA's counsel indicated that the SFHHA is particularly interested in dispositions of FPL property to affiliates or other entities in which an affiliate has a financial interest. FPL's counsel promptly wrote back to the SFHHA's counsel to advise as follows:

all dispositions of FPL property to affiliates, as well as to partnerships, joint ventures or other entities in which affiliates have a financial interest (including minority interests), are described in

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<sup>1</sup> FPL's answer to Interrogatory No. 33 is unambiguous as to the absence of *any* FPL involvement with the referenced "cable limited partnership." However, in order to clarify further that there were no transfers of valuable assets from FPL to that entity, FPL will supplement its answer to read as follows: "See the answer to Interrogatory No. 32. FPL did not participate in the referenced cable limited partnership, whether through the contribution of assets or any other consideration. Therefore, this interrogatory is beyond the scope of proper discovery and, consistent with FPL's earlier objection, FPL is not required to respond."

FPL's diversification reports. Copies of FPL's diversification reports for the years 1985 to present were made available to the SFHHA on November 9, 2001, in response to the SFHHA's Request No. 1.

Letter from John Butler to Mark Sundback, dated January 29, 2002, a copy of which is attached hereto as Exhibit 1. After making those documents available to the SFHHA for inspection on November 9, 2001, as an additional courtesy FPL offered a few days later to copy and send them to the SFHHA. *See* Letter from John Butler to Mark Sundback, dated November 15, 2001, a copy of which is attached hereto as Exhibit 2. To date, the SFHHA has neither inspected the responsive documents nor asked FPL to copy them.<sup>2</sup>

In sum, the SFHHA seeks through Interrogatory Nos. 32 and 33 to conduct inflammatory discovery into business dealings of FPL's unregulated affiliates and other unregulated entities, without establishing the least predicate for doing so. FPL confirmed in its responses to Interrogatory Nos. 32 and 33 that FPL was not involved in the entities to which those interrogatories refer. FPL further confirmed in its response to Interrogatory No. 32 the legitimate basis upon which the one property transfer from FPL to such an entity (FiberNet) occurred. And the SFHHA has had an open invitation for almost four months to review documents detailing all transfers of FPL property to FPL's affiliates and other entities in which those affiliates have interests. There is simply no excuse, no justification to allow the SFHHA to proceed with its

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<sup>2</sup> At least two other SFHHA Requests for Documents (Nos. 24 and 42) request information that the SFHHA should have reviewed and considered before launching its Motion to Compel. Request No. 24 asks for "a copy of any contract, agreement or undertaking with (a) FiberNet, (b) Adelphia Communications Corporations, or (c) the 'cable limited partnership' referenced at p. 25 of the FPL Group 2000 Annual Report, or successors of any of the foregoing." Request No. 42 asks for copies of "any contracts or other undertakings or agreements involving commercial relations between FPL and Olympus Communications LP (*see* FPL Group Rating Agency Presentation For 1999)." Documents responsive to Request No. 24 have been available since January 23, 2002, and the documents responsive to Request No. 42 will be made available when FPL's response to the discovery set in which Request No. 42 is contained, on February 8, 2002.

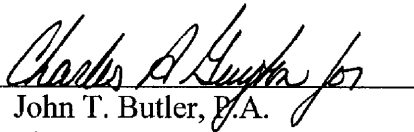
inflammatory discovery where it has failed so utterly to establish -- or even to seek to establish -- a basis for that discovery. The Motion to Compel is groundless.

WHEREFORE, FPL requests that the Motion to Compel be denied.

Respectfully submitted,

R. Wade Litchfield, Esq.  
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Florida Power & Light Company  
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Juno Beach, Florida 33408-0420  
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Telephone: 305-577-2939

By:   
John T. Butler, F.A.  
Fla. Bar No. 283479

## CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by United States Mail this 6th day of February, 2002, to the following:

Robert V. Elias, Esq.  
Legal Division  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Room 370  
Tallahassee, FL 32399-0850

Florida Industrial Power Users Group  
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McWhirter Reeves  
400 North Tampa Street, Suite 2450  
Tampa, FL 33601-3350

Thomas A. Cloud, Esq.  
Gray, Harris & Robinson, P.A.  
301 East Pine Street, Suite 1400  
Orlando, Florida 32801

J. Roger Howe, Esq.  
Office of Public Counsel  
c/o Florida Legislature  
111 W. Madison Street  
Room No. 812  
Tallahassee, Florida 32399-1400

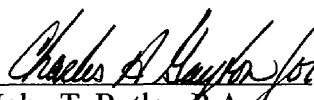
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Vice President and Regulatory Counsel  
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Houston, Texas 77002-5050

Linda Quick, President  
South Florida Hospital & Healthcare Assn  
6363 Taft Street  
Hollywood, FL 33024

By:   
John T. Butler, P.A.



## **Exhibit 1**

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jbutler@steelhector.com

January 29, 2002

**-VIA TELECOPY AND U.S. MAIL-**

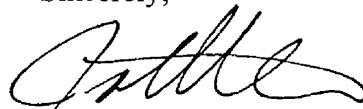
Mark Sundback, Esq.  
Andrews & Kurth LLP  
1701 Pennsylvania Ave., NW, Suite 300  
Washington, DC 20006

**Re: Florida Public Service Commission Docket No. 001148-EI**

Dear Mr. Sundback:

This is to follow up on our conversation yesterday about FPL's objections to the SFHHA's Interrogatory No. 46. I understand that you are interested in information on disposition of FPL property to affiliates or other entities in which an affiliate has a financial interest. I have discussed your request with FPL and am advised that all dispositions of FPL property to affiliates, as well as to partnerships, joint ventures or other entities in which affiliates have a financial interest (including minority interests), are described in FPL's diversification reports. Copies of FPL's diversification reports for the years 1985 to present were made available to the SFHHA on November 9, 2001, in response to the SFHHA's Request No. 1. Since you have not yet scheduled an inspection of FPL's document productions, I do not believe that the SFHHA has yet reviewed the diversification reports but expect that you will find they contain the information you are seeking.

Sincerely,



John T. Butler, P.A.

**Exhibit 2**

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November 15, 2001

**-VIA FEDERAL EXPRESS-**

Mark F. Sundback, Esq.  
Andrews & Kurth LLP  
1701 Pennsylvania Ave., NW, Suite 300  
Washington, DC 20006

Thomas M. Karr, P.A.  
305.577.2862  
tkarr@steelhector.com

**Re: Florida Public Service Commission Docket No. 001148-EI**

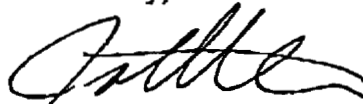
Dear Mr. Sundback:

This is in response to your request today that I send you another copy of the materials that I served on Ken Wiseman by mail last Friday. I am surprised and puzzled that your office has not yet received those materials, as mail usually takes no more than a couple of days. As with the original package, the following materials are enclosed, all of which related to the South Florida Hospital and Healthcare Association's First Set of Interrogatories and Request to Produce ("SFHHA First Request"):

- Florida Power & Light Company's ("FPL") Response;
- FPL's privilege log for the SFHHA First Request; and
- the SFHHA's service copy of FPL's Motion for Protective Order Regarding the South Florida Hospital and Healthcare Association's First Set of Interrogatories and Request to Produce.

Ken mentioned to me that the SFHHA would like to explore the possibility of having all responsive documents copied and sent to you if the volume is not too large. At this time, there are approximately 1,000 pages of responsive documents, most 8½" x 11", but a few 11" x 17". FPL can copy them for you at a cost of \$.08 per page for 8½" x 11" pages and \$.30 per page for 11" x 17" pages. The total cost would be approximately \$115.00. Please let me know if you are interested in having FPL make a complete set of copies for you on that basis.

Sincerely,



John T. Butler, P.A.

Enclosures