

Matilda Sanders

ORIGINAL

From: Vicki Gordon Kaufman  
 Sent: Wednesday, December 01, 2004 3:23 PM  
 To: Filings@psc.state.fl.us  
 Cc: John W. McWhirter; Cochran Keating; Wade Litchfield; Patricia A Christensen  
 Subject: Docket No. 041291-EI

Pursuant to the Commission's procedures for e filing, FIPUG and the Office of Public Counsel provide the following information:

- a. The attorney responsible for the filing is:  
 Vicki Gordon Kaufman  
 McWhirter Reeves McGlothlin Davidson Kaufman & Arnold, PA  
 117 South Gadsden Street  
 Tallahassee, Florida 32301  
 850.222.2525  
 850.222.5606 fax
- b. The document is to be filed in Docket No. 041291-EI
- c. The document is filed on behalf of FIPUG and OPC.
- d. The document is 5 pages long.
- e. The document is Joint Response of Citizens and FIPUG to Florida Power and Light Company's Petition to Implement Storm Surcharge Subject to Refund.

CMP \_\_\_\_\_  
 COM 5  
 CTR \_\_\_\_\_  
 ECR \_\_\_\_\_  
 GCL \_\_\_\_\_  
 OPC \_\_\_\_\_  
 MMS \_\_\_\_\_  
 RCA \_\_\_\_\_  
 SCR \_\_\_\_\_  
 SEC 1  
 OTH \_\_\_\_\_

12/1/2004

DOCUMENT NUMBER-DATE  
 12772 DEC-1 3  
 FPSC-COMMISSION CI FRK

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Florida Power & Light Company's  
Petition for Authority to Recover  
Prudently Incurred Storm Restoration  
Costs Related to the 2004 Storm Season  
That Exceed the Storm Reserve Balance

Docket No: 041291-EI  
Filed: December 1, 2004

**JOINT RESPONSE OF CITIZENS AND FIPUG  
TO FLORIDA POWER & LIGHT COMPANY'S  
PETITION TO IMPLEMENT STORM SURCHARGE SUBJECT TO REFUND**

The Citizens of the State of Florida (Citizens), by and through Harold McLean, Public Counsel, and the Florida Industrial Power Users Group (FIPUG), pursuant to rule 28-106.203, Florida Administrative Code, file this response to Florida Power & Light Company's (FPL) "petition" to implement a "storm surcharge" subject to refund filed November 19, 2004. Such "petition" should be denied and the Commission should proceed to hearing as scheduled.

1. On November 1, 2004, FPL filed a petition with this Commission seeking to implement a "storm restoration surcharge." FPL sought to collect \$356 million from ratepayers over a truncated two-year period and to implement that "surcharge" on January 1, 2005.

2. On November 17, 2004, Citizens filed their Notice of Intervention. On November 17, 2004, FIPUG filed a petition to intervene in which it raised numerous disputed issues of material fact as well as disputed legal issues that the Commission will have to resolve in the course of this proceeding. Also on November 17<sup>th</sup>, FIPUG and Citizens filed a Motion to Dismiss FPL's petition. In the Joint Motion, FIPUG and Citizens state, among other things, that FPL's petition fails to state a cause of action because FPL has not demonstrated that it is earning below its authorized return on equity.

3. On November 18, 2004, the Prehearing Officer issued its Order Establishing Procedure in this case, Order No. PSC-04-1150-PCO-EI (OEP). The OEP sets out the pertinent procedural dates and sets the case directly for hearing.

4. On November 19, 2004, FPL filed a second “petition” to implement its requested surcharge on January 1, 2005 – the same relief it sought in its original petition filed on November 1, 2004, with the addition of the request that the monies be held subject to refund. As an initial procedural matter, FPL’s second “petition” is an unauthorized pleading and should be stricken. In essence, it appears that what FPL is attempting to do is to amend its original without seeking permission to do so as the rules require. Rule 28-106.202, Florida Administrative Code, provides:

The petitioner may amend the petition prior to the designation of the presiding officer by filing and serving an amended petition in the manner prescribed for filing and serving the original petition. *The petitioner may amend the petition after designation of the presiding officer only upon order of the presiding officer.*<sup>1</sup>

5. In this case, the Presiding Officer had already been assigned when FPL filed its second “petition.” FPL did not seek leave to amend and thus its pleading is unauthorized and should be stricken on that basis alone.

6. FPL’s “petition” is also substantively defective. In essence, FPL is trying to put the cart before the horse. It asserts its request will ensure “the timely implementation of an appropriate mechanism to recover prudently incurred storm costs...”<sup>2</sup> This does nothing more than prejudge the core issue of the case -- whether any

---

<sup>1</sup> Emphasis added.

<sup>2</sup> FPL second petition at 2.

“mechanism” is needed and the amount that will flow through that “mechanism.” This can only be determined after hearing on the merits.<sup>3</sup>

7. The Prehearing Officer was clearly cognizant of the competing interests at play in this docket and the need to ensure that all parties are accorded due process. The OEP states:<sup>4</sup>

Given the nature and scope of this proceeding, this matter has been set for an administrative hearing. The time frame established herein adequately balances FPL’s request for timely consideration of its petition with the due process rights of any substantially affected parties who may wish to intervene in this proceeding, and permits our staff adequate time to investigate the merits of FPL’s request.<sup>5</sup>

8. Finally, FPL’s original petition is the subject of a pending motion to dismiss. The relief FPL seeks in its “second” petition has the very same flaws Citizens and FIPUG described in their Motion to Dismiss filed on November 17, 2004. In the event that FPL’s second “petition” is not stricken, Citizens and FIPUG adopt and incorporate herein their Motion to Dismiss filed in response to FPL’s November 1 petition.

---

<sup>3</sup> FPL continues to insist that the entire \$356 million be recovered through a surcharge over a greatly truncated two-year period. FPL’s position fails to recognize that the entire risk of hurricane damage may not be transferred to the ratepayers. See, Order No. PSC-93-0918-FOF-EI at 4.

<sup>4</sup> In fact, FPL’s second petition is nothing more than a back door motion seeking reconsideration of the OEP. As such, FPL has failed to satisfy the standard for reconsideration.

<sup>5</sup> OEP at 1.

**WHEREFORE**, FPL's second "petition" should be denied and / or dismissed and this matter should proceed to hearing as scheduled.

Harold McLean  
Public Counsel

S/Patricia A. Christensen  
Patricia A. Christensen  
Associate Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
Tallahassee, FL 32399-1400  
(850) 488-9330

Attorneys for Citizens

Vicki Gordon Kaufman

John W. McWhirter, Jr.  
McWhirter Reeves McGlothlin Davidson  
Kaufman & Arnold, PA  
400 North Tampa Street, Suite 2450  
Tampa, FL 33601  
(813) 224-0866

Vicki Gordon Kaufman  
McWhirter Reeves McGlothlin Davidson  
Kaufman & Arnold, PA  
117 South Gadsden Street  
Tallahassee, FL 32301  
(850) 222-2525

Attorneys for FIPUG

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Joint Response to FPL Petition has been furnished by electronic and U.S. Mail this 1<sup>st</sup> day of December, 2004:

Florida Public Service Commission  
Cochran Keating, Esquire  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Florida Power & Light  
Mr. R. Wade Litchfield, Esquire  
700 Universe Blvd.  
Juno Beach, FL 33408

S/Vicki Gordon Kaufman  
Vicki Gordon Kaufman