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January 7, 2005

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Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 041291-EI

Dear Ms. Bayó:

Enclosed please find an original and fifteen copies of a Joint Memorandum of OPC and FIPUG Addressing Issue of Statutory Authority for filing in the above-referenced docket.

Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

Joe A. McGlothlin

Joseph A.McGlothlin
Associate Public Counsel

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

| | |
|---|---|
| Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season that exceed storm Reserve balance, by Florida Power & Light Company<br>_______________________________/ | Docket No. 041291-EI<br><br>Filed: January 7, 2005 |

## JOINT MEMORANDUM OF OPC AND FIPUG ADDRESSING ISSUE OF STATUTORY AUTHORITY

As directed by the Commission during the Agenda Conference of January 4, 2005, the Office of Public Counsel ("OPC") and the Florida Industrial Power Users Group ("FIPUG"), by and through their undersigned counsel, submit their joint memorandum of law in support of their position that the Commission is without authority to permit Florida Power & Light Company ("FPL") to implement a surcharge on customers' bills designed to recover $354 million dollars of claimed storm damage costs prior to the hearing on FPL's petition now scheduled for April 20-22, 2005.

**Question Presented**: Does the Commission's statutory authority empower it to grant FPL's request to place FPL's proposed "storm damage surcharge" into effect prior to the evidentiary hearing scheduled on the matter?

**OPC and FIPUG**: No. Fundamental principles of due process and the requirements of Chapters 120 and 366, Florida Statutes, require the Commission to conduct an evidentiary hearing on FPL's request prior to authorizing a rate change.

The "mid-course correction" routine of the fuel cost recovery mechanism cited by FPL does not support its position. In response to two 1974 opinions by the Attorney General that changes in fuel factors approved without hearing are unlawful, the Commission accepted and approved a stipulation of parties which required a procedure



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under which hearings are conducted on the utilities' fuel adjustment filings. The mid-course correction feature is the result of a stipulation of parties that is consistent with the proposition that parties must be given an opportunity for a hearing. By agreement of parties and order of the Commission, a request for a mid-course correction is subject to a request for a hearing by any party before a change takes effect. The practice therefore remains consistent with the regime of hearings that has been in effect since 1974.

The sole statutory exception to the hearing requirement applicable to changes in rates charged by regulated electric utilities is limited to applications for a general increase in base rates accompanied by minimum filing requirements prescribed by the Commission. It has no application here.

The Florida Supreme Court has ruled that any and all "implied" or "judicially created" authority to grant interim changes in rates was superseded by, and did not survive, the enactment of the statutory provisions governing interim increases in base rates.

The "emergency" orders relating to water/wastewater utilities are inapposite to this case, and do not support FPL's argument.

The imposition of a "refund with interest condition" is no substitute for the missing requisite statutory authority.

## ARGUMENT

Sometimes it is worthwhile to state the obvious: The limitations on governmental agencies' ability to take actions that affects parties' substantial interests are rooted in Constitutional principles. For instance, the Fourteenth Amendment to the United States Constitution states, ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . .".

Similarly, Article I, Section 9 of the Constitution of the State of Florida states:

**Due Process** – No persons shall be deprived of life, liberty or property without due process of law. . ..

The fundamental requirements of due process are satisfied by reasonable notice and a reasonable opportunity to be heard. *Florida Public Service Commission v. Triple "A" Enterprises*, 387 So. 2d 940 (Fla. 1980).

In the Administrative Procedures Act ("APA") (Chapter 120, Florida Statutes) the Florida Legislature delineated the manner in which agencies are to provide "due process" to affected parties before taking action. The APA requires an agency to provide parties whose substantial interests would be affected an opportunity for a hearing, preceded by notice of not less than 14 days. Section 120.569, Florida Statutes. Further, the hearing requirements of Section 120.57 (1), Florida Statutes apply to cases involving disputed issues of material fact unless waived by all parties.[1] In a proceeding to which Section 120.57 (1) applies, parties are entitled to an opportunity to respond, to present evidence on all issues, and to conduct cross-examination.

[1] OPC and FIPUG intervened because FPL's proposal would affect their substantial interests. OPC and FIPUG submit there are issues of material fact associated with FPL's petition. OPC and FIPUG do not waive their right to a Section 120.57 hearing on these issues.

These provisions apply to the Commission's ratemaking activities unless the Legislature has created an exception in the statutes which give the Commission its specific authority. See Section 120.80 (13), Florida Statutes.

The requirement that the Commission provide notice and an opportunity for a hearing prior to authorizing a change in rates is firmly embedded in Chapter 366, Florida Statutes. For instance, Section 366.06 (2) states:

> Whenever the Commission finds, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility for public utility service, or that the rules, regulations, or practices of any public utility affecting such rates, are unjust, unreasonable, unjustly discriminatory, or in violation of law; that such rates are insufficient to yield reasonable compensation for the services rendered; that such rates yield excessive compensation for services rendered; or that such service is inadequate or cannot be obtained, *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 for such service and promulgate rules and regulations affecting equipment, facilities, and service to be thereafter installed, furnished, and used.
> (emphasis provided)

Similarly, Section 366.07, Florida Statutes states:

> Whenever the Commission, *after public hearing* either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, . . . the Commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications. . ..
> (emphasis provided)

In its "Second Petition," in which FPL asked the Commission to authorize an immediate surcharge designed to collect $354,000,000 subject to refund, FPL did not refer to these specific provisions of Chapter 366. As authority, FPL merely waved generally in the direction of Sections 366.04, 366.05, and Section 366.06. In addition, FPL referred to the Commission's practice of authorizing "mid-course corrections" to

fuel adjustment factors. None of the provisions cited by FPL is a source of authority for the immediate surcharge it seeks.

Section 366.04(1) states simply, "in addition to its existing functions, the Commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service . . ."

Similarly, Section 366.05, also cited by FPL, states: "In the exercise of such jurisdiction, the Commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility . . .". However, statutes referring to general powers provide no authority to change rates in a manner inconsistent with the Legislature's specific instructions on the matter. The Legislature has implemented the specific methodology for changing rates through the provisions of Chapter 366 identified earlier. Those specific provisions treating the method of implementing changes in rates discipline any attempt to read a different or broader ability into the general grant of powers found in sections 366.04 and 366.05. "It is a well settled rule of statutory construction. . . that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms." *Cone v. Department of Health*, 886 So. 2d 1007 (Fla. App., 1st DCA, 2004), quoting *State, Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.*, 794 So. 2d 696, 701 (Fla. 1st DCA 2001). In other words, as the Legislature has prescribed a mandatory hearing process in the provisions of Chapter 366 that relates specifically to changes in rates, one cannot read into the agency's general grant of

jurisdiction an ability to authorize a rate change *without a hearing* that is inconsistent with the specific provisions.

During the agenda conference, references were made to the practice of acting on requests for "interim increases" in rate cases. In section 366.06 (3), the Legislature added a provision that allows the Commission to "withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reasonable written statement of good cause for withholding its consent." This provision is part of the "file-and-suspend" concept that the Legislature enacted to govern applications for general base rate increases. That it applies *only* to such applications for full base rate increases is demonstrated by language within the subsection: "as used in this subsection, the commencement date for final agency action" means the date upon which it has been determined by the Commission or its designee that the Utility has filed with the Clerk the minimum filing requirements as established by rule of the Commission. Within 30 days after receipt of the application, rate request, or other written document for which the commencement date for final agency action is to be established, the Commission or its designee shall either determine the commencement date for final agency action or issue a statement of deficiency to the application, specifically listing why said applicant has failed to meet the minimum filing requirements."

The Florida Supreme Court considered the interim mechanism within the "file-and-suspend" language of Section 366.06 in the case of *Citizens v. Mayo*, 333 So. 2d (1) (1976). The case, which grew out of an application for an increase in base rates by Gulf Power Company, involved the first request for interim increase processed by the

Commission pursuant to the then new statute. The Court observed that the statutory interim mechanism applies only to applications for general increases in base rates, and does not disturb or alter the requirement that hearings precede rulings on other rate change requests:

> Section 366.06, Florida Statutes (1975), provides general standards for the award of rate increases to public utilities in the State of Florida. *The general procedure has been and remains that rate increases are awarded only after a public hearing in which testimony is presented by all interested parties and cross-examination is permitted.* [FN8] In the framework of this general approach to rate regulation, the 1974 Legislature enacted a special provision expressly designed to reduce so-called "regulatory lag" inherent in *full rate proceedings*. Subsection 366.06 (4) was created to provide a series of alternatives for the Commission whenever, *in conjunction with a general rate increase request for which a full rate proceeding is required,* a utility company seeks immediate financial relief.
>
> (emphasis provided)

While over time the Legislature has modified, and added to the statutory language that provides the "recipe" for interim rate increases, all of those modifications have taken place within the context of a mechanism that is specific to, and *confined* to, applications for base rate increases in which the utility has prepared minimum filing requirements that enable the Commission to assess whether the utility has made a prima facie showing that it is not earning the bottom of the range of return authorized by the Commission.

During the January 4, 2005 agenda conference, the Commission expressed interest in the relationship between the "judicially created" authority to provide interim increases that predated the time when the Legislature enacted the "file and suspend" language of section 366.03, F.S. The short, complete, and dispositive answer, provided by the Florida Supreme Court in the opinion cited above, is that the prior authority was

supplanted and superseded by the statutory mechanism, and is no longer a relevant consideration. In FN 12, the Court stated:

> Gulf Power also argues for the applicability to this proceeding of our decision in Southern Bell Telephone @ Telegraph Co. v. Bevis, 279 So. 2d 285 (Fla. 1973), on which the Commission also relied. The argument and reliance are not well taken. Southern Bell, which involved a proceeding under Chapter 364, Florida Statutes, is not applicable to proceedings under subsection 366.06 (4). There, without the present Legislative authorization, we held that the Commission could award interim rate relief where a financial need was demonstrated on the basis of the utilities' initial filings with the Commission. The Legislature has now addressed itself to the subject of interim rate relief, consistent with our views in Southern Bell it so happens, *so that reliance on judicial intervention into this aspect of rate regulation is no longer justified.*
>
> (emphasis provided)

In short, neither the judicially created authority for interim rate mechanisms[2] nor that devised by the Legislature supports FPL's request for immediate implementation of its proposed surcharge, because (1) prior authority established by "judicial intervention" has been supplanted by legislative action, and (2) that legislative action-- insofar as it authorizes interim rate increases without a hearing-- is limited to the situation in which the utility has filed an application, complete with minimum filing requirements, for a general increase in base rates. In the words of the Florida Supreme Court, "the general procedure has been and remains that rate increases are awarded only after a public

[2] The *Southern Bell* case, like other cases in which the Commission authorized interim increases to base rates, involved a claim by the utility that it was earning less than the bottom of its authorized range of return. In those cases, the utilities claimed that immediate action was necessary to restore financial integrity. No such claim is made by FPL in this case, and in any event the "interim increase" is only an analogy. However, even the analogy is wrong. To analogize to the interim rate mechanism, FPL would seek to show an increase is necessary to restore its ROE to 10%.

Moreover, while the Florida Supreme Court has held that the creation of the statutory interim increase mechanism renders the prior practice no longer relevant, it is worth noting that in the *Southern Bell* case and others like it the Commission routinely conducted *separate* evidentiary hearings on the utility's interim request prior to authorizing an interim increase. See Order No. 5686, Docket No. 72700, March 30, 1973 (Southern Bell); Order No. 5597, Docket No. 72446-GU, December 11, 1972 (Peoples Gas System).

hearing in which testimony is presented by all interested parties and cross-examination is permitted."

**Orders entered in the Commission's fuel cost recovery proceeding do not support FPL's position.**

At page 3 of its second petition, FPL asserts that Order Nos. PSC-03-0381-PCO-EI and PSC-98-0691-FOF-PU, in which the Commission authorized "mid-course corrections" in the context of its fuel cost recovery proceeding, support FPL's contention that the Commission may authorize FPL to implement its proposed surcharge immediately on an interim basis. FPL is wrong. Both the general history of the fuel cost recovery clause in general and the specific parameters governing mid-course corrections support OPC's and FIPUG's position, not FPL's.

Prior to 1974, the Commission allowed electric utilities to implement changes in fuel cost recovery factors through an "automatic" fuel adjustment formula and mechanism. In 1974, Florida's Attorney General issued two separate opinions in which he concluded that the Commission was without authority to permit electric utilities to modify their fuel cost recovery factors without first conducting public hearings on the requested changes. *See* AGO 074-309, dated October 9, 1974; AGO 074-288, dated September 20, 1974. The Attorney General's opinions led the Commission to accelerate a pending investigation of the utilities' fuel adjustment clauses, which culminated in a stipulation of parties (including the Attorney General, OPC, and FPL). The centerpiece of the Stipulation was a requirement that the Commission conduct hearings prior to authorizing changes in the utilities' fuel factors; in fact, the stipulation called for the

utilities to "freeze" their fuel factors at then current levels until after the first such hearing.

In Order Nos. 6332 and 6332-A, dated October 29, 1974 and October 31, 1974, respectively, the Commission approved the stipulation and initiated a procedure under which it conducts periodic hearings on the regulated utilities' requests for authority to revise their fuel cost recovery factors:

> ORDERED that the stipulation entered into by the Public Counsel, the Attorney General, Florida Power & Light Company, Gulf Power Company, Florida Power Corporation, Tampa Electric Company, and Florida Public Utilities Company be and the same is hereby approved, and no investor-owned electric utility may hereafter change its level of fuel adjustment charges without notice and public hearing. Order No. 6332-A, at p. 2.

The nature of the procedure has evolved over time. At first, hearings were held monthly to review historical data. The Commission modified the procedure to require bi-annual hearings on six month projections, and then moved again to institute a procedure under which it holds hearings annually. However, the hearing mechanism that implements the 1974 stipulation and order has remained intact. See Order No. 9273, entered in Docket No. 74680-CI on March 6, 1980 (referring to the 1974 stipulation, adopting a clause based on 6 month projections, and establishing a procedure for periodic hearings – plus "special hearings" when needed to address extreme variances.)

FPL's superficial treatment of Order Nos. PSC-03-0381-PCO-EI and PSC-98-0691-FOF-PU ignores important aspects of the orders which support OPC and FIPUG, not FPL. At page 2 of Order No. PSC-03-0381-PCO-EI, the Commission stated: "When we moved to annual, calendar year fuel factors, we expressly adopted the mid-course

correction guidelines set forth in Order No. 13694." (Citing Order No. PSC-98-0691-FOF-PU, May 19, 1998.)

Accordingly, to evaluate FPL's claim, it is necessary to review the guidelines of Order No. 13694 that govern mid-course corrections of the type implemented in the orders cited by FPL. In Order No. 13694, the Commission stated:

> Mid-Course Correction
>
> At the prehearing conference the parties *stipulated* to the need for, and the wording of, a procedure by which utilities would notify the Commission that their collections of projected fuel costs were going to be either over or under by 10%. At the hearing a question arose as to whether the wording in Prehearing Order No. 13596 concerning mid-course correction, accomplished the desired results. We find the following wording to be in-line with that which will produce the results to which the parties *stipulated*:
>
> For any six-month fuel recovery period, no interest will be allowed for that portion of an underrecovery in that period unless the utility complies with the mid-course correction procedure. Each utility has the responsibility to request a mid-course correction to ensure that over- or underrecoveries are less than 10%. In light of certain timing considerations, a utility may choose, in lieu of requesting a hearing, to inform the Commission, the Staff, and the intevenors that a greater than ten percent over- or underrecovery is projected to occur. In that event, the staff or an intervenor could request that a hearing be held, and the Commission could order a hearing on its own motion or in response to a Staff or intervenor request. There will be no limitation on interest expense for overrecoveries.
>
> In order to make our position clear on mid-course correction, we add the following:
>
> 1. When a utility becomes aware that its projected fuel revenues, applicable to a given six-month recovery period, will result in an over- or underrecovery in excess of 10% of its projected fuel costs for the period, the utility shall so advise the Commission through a filing promptly made. Failure to comply with this requirement will result in the disallowance of interest on that portion of any underrecovery in excess of 10%.

2. A utility's filing pursuant to No. 1 above shall also include a request for a hearing to revise the fuel adjustment factor if in its judgment such revision would not be impractical.

3. In any event, any party may request or the Commission may order that a hearing be held to consider a revision of the utility's fuel adjustment factor.

(emphasis provided)

The "mid-course correction" routine is therefore subject to a request for hearing by any party. In this respect, a mid-course correction is akin to proposed agency action. In any event, the process was implemented *by stipulation of parties (including FPL)*. The mid-course correction process provides no support for FPL's request.

**The "Water Emergency Rate" Analogy Does Not Support FPL's Argument.**

At the Agenda Conference, Commission staff acknowledged that the only case it could find which addressed "emergency rates" involved a water utility regulated under Chapter 367, Florida Statutes. The attempt to analogize the water case with the instant case is misplaced. Those instances where a water utilities were granted "emergency rate" relief involved Class C water utilities in staff-assisted rate cases prior to implementation of interim rate relief provision in Chapter 367 for such cases. Order No. PSC-95-0098-FOF- WU, issued January 19, 1995, in Docket No. 940973-WU, In Re: Application for a staff-assisted rate case in Alachua County by LANDIS ENTERPRISES, INC.; Order No. PSC-95-1037-FOF-WU, issued August 21, 1995, in Docket No. 950641-WU, In Re: Application for staff-assisted rate case in Palm Beach County by Lake Osborne Utilities Company, Inc. Even in these circumstances, the Commission stated that the situations which justified granting "emergency rate" relief were unique and not favored. Order No. PSC-95-0098-FOF- WU at p. 2; Order No. PSC-95-1037-FOF-WU at p. 2. Specifically, the companies were granted relief to bring their rates up to a level that would cover daily

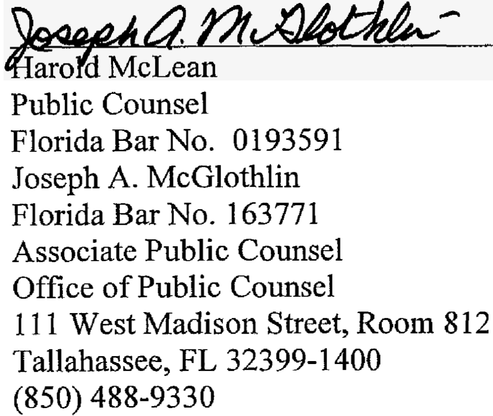
operations since the existing rates were inadequate to cover the operation and maintenance expenses. Id. In other words, the "emergency rates" were granted because these small water utilities were operating at a loss which in turn could endanger the safety of the customers if the company could no longer pay for chemicals, maintenance, etc. This is not the case with the big electric utilities. Since these "emergency rate" relief cases were decided, Section 367.0814(4) and (5), Florida Statutes, now provides for interim "emergency rate" relief in staff-assisted rate case. Thus, even under Chapter 367, Florida Statutes, the Commission now must look solely to its specific statutory authority to which is must rely in grant interim "emergency rate" relief.

**FPL's "no harm, no foul" argument is misplaced.**

During the agenda conference, FPL alluded repeatedly to the fact that, if it is allowed to place the surcharge into effect prior to the hearing, it will be required to refund any amount that is subsequently disallowed with interest—as though this consideration is sufficient, in and of itself, to warrant approval of the request. It is not. If the Commission has no authority to permit the collection of the surcharge, the customers are wronged whether or not a "refund with interest" condition is imposed—because it is *their money*. In addition, future interest would likely do little to assuage a customer who needs the money now to pay bills or buy gasoline. More important, however, is the fact that no number of conditions and no amount of interest can serve as a substitute for absent legal authority.

**CONCLUSION**

The Commission is without authority to grant FPL's proposal to place a "storm damage" surcharge in effect prior to the evidentiary hearing on its Petition.



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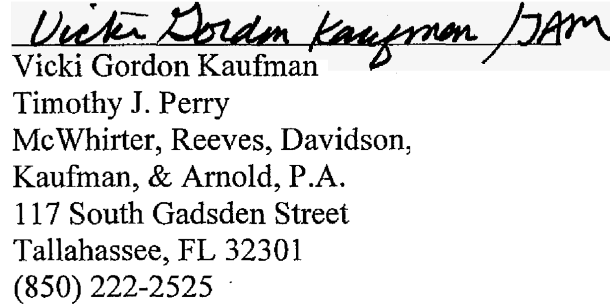

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Joint Memorandum of OPC and FIPUG Addressing Issue of Statutory Authority has been furnished by e-mail and U.S. Mail this 7th day of January, 2005, to the following:

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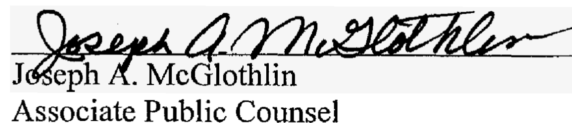

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