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Subject: Electronic Filing for Docket No. 041291-EI / FPL's Memorandum of Law Related to Issues Raised at the January 4, 2005 Agenda Conference

FPL's Memo
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Electronic Filing

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b. Docket No. 041291-EI

In re: 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.

c. Document being filed on behalf of Florida Power & Light Company.

d. There are a total of 16 pages.

e. The document attached for electronic filing is Florida Power & Light Company's Memorandum of Law Related to Issues Raised at the January 4, 2005 Agenda Conference

(See attached file: FPL's Memo of Law.1.7.05.doc)

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Thank you for your attention and cooperation to this request.

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.	)	Docket No: 041291-EI
	)	Filed: January 7, 2005

FLORIDA POWER & LIGHT COMPANY'S MEMORANDUM OF LAW RELATED TO ISSUES RAISED AT THE JANUARY 4, 2005 AGENDA CONFERENCE

MAY IT PLEASE THE COMMISSION:

Florida Power & Light Company ("FPL" or the "Company") submits the following memorandum of law in response to the Commission's request at the January 4, 2005, Agenda Conference, for additional legal analysis and clarification related to Staff Issue 3 regarding FPL's request to implement preliminary storm deficit recovery surcharge subject to refund. Those issues are: 1) whether the Commission has statutory authority to implement the proposed storm surcharge, 2) whether the interim rate provisions of chapter 366 apply to FPL's proposal, 3) whether a formal evidentiary hearing is required before implementation of the surcharge subject to refund; and 4) whether the surcharge may take effect fewer than 30 days following the Commission vote.

In summary, the Commission has very broad authority in determining just and reasonable rates and the means through which costs are recovered and rates established. The Commission's exercise of that authority often takes into account public policy objectives. The Commission's broad authority over ratemaking was used in establishing a regulatory framework for the recovery of storm restoration costs. That plan consisted of a storm reserve at some predetermined target level, coupled with the right to seek extraordinary relief in the event the

reserve proved to be deficient to cover storm costs. FPL's request for prompt implementation of the storm surcharge is consistent with that plan, is within the scope of the Commission's broad ratemaking authority and accomplishes important policy objectives. Those objectives include the need to respond promptly to allowing FPL to begin to recover the substantial deficit in its storm reserve before the next Hurricane season begins on June 1, 2005, a matter of importance to FPL and its customers. In addition, such action sends appropriate signals to the financial community and FPL's partners and contractors in the industry that the self-insurance framework established by the Commission provides adequate means and measures to address the extraordinary circumstances resulting from the catastrophic 2004 Hurricane season and that FPL and the Commission are taking meaningful steps to address the prospect of facing potentially more active storm seasons. Prompt implementation also conveys the proper message to FPL, that it can undertake massive restoration efforts and incur potentially enormous costs with full faith and confidence in the established regulatory framework such that the Company's focus in such instances can be fully devoted to the primary public necessity of restoring power as quickly and safely as possible.

Neither the due process clause nor the Florida Statutes require a hearing before the storm deficiency restoration surcharge takes effect because a formal hearing is scheduled for April and because the surcharge is subject to refund with interest. The provisions on interim rates in chapter 366 apply only to a general base rate increase request and do not apply to FPL's request or otherwise derogate from the Commissions' broad ratemaking authority. As it has done in the past, the Commission should permit fewer than 30 days between its vote on the surcharge and implementation of the charge because FPL's customers have received adequate notice of the pending charge and because the public interest is served by timely implementation of the charge as soon as possible before the 2005 storm season begins. FPL's request for prompt

implementation of the storm surcharge should be granted, with the effective date of implementation to be February 3, 2005.

FPL's legal analysis on the issues raised by the Commission is set forth below:

I. Whether there is statutory authority to implement the storm surcharge

Short Answer: The Legislature has given the Commission very broad authority in determining just and reasonable rates. The Commission has used that authority to determine, among other things, how to allocate and collect costs for utility service. For example, the Commission has instituted a regulatory framework of cost recovery clauses that operate independent of base rates. Extraordinary costs not reflected in base rates have been allowed to be recovered without reference to a utility's authorized or actual earnings. Likewise the Commission relied upon its general authority over the rates and charges of utilities in establishing the current regulatory framework addressing hurricane restoration costs. That framework provides for the establishment of a storm reserve intended to cover some level of storm activity and restoration costs, coupled with the opportunity for a utility to seek extraordinary relief to recover storm reserve deficits through a means that the Commission has indicated could include a surcharge or clause-like mechanism. FPL's request to institute a Storm Surcharge subject to refund, with the opportunity for a true-up following hearing, is not unlike the Commission's practice regarding mid-course corrections in the fuel and purchased power recovery clause. There, the Commission's practice allows mid-course corrections based on changes in circumstances between annual hearings, and may elect to implement such changes promptly, subject to true-up as a result of a hearing that follows. FPL's request is consistent with the regulatory framework established by the Commission for the recovery of hurricane-related costs, a framework that is fully within the broad jurisdiction of the Commission over the utility's rates and charges.

It is well settled law that the Legislature, through chapter 366, Florida Statutes, has given the Commission very broad authority in determining the rates and charges of public utilities such as FPL. The Florida Supreme Court has stated: "This Court has consistently recognized the broad legislative grant of authority which these statutes confer and the considerable license the Commission enjoys as a result of this delegation." Citizens of State v. Public Serv. Comm'n, 425 So. 2d 534, 540 (Fla.1982) ("Citizens"). See also Southern States Utilities v. Florida Public Serv. Comm'n, 714 So. 2d. 1046, 1051 (Fla. 1st DCA 1998) ("Southern States Utilities"). Citing its decision in Rolling Oaks Utilities v. Florida Public Serv. Comm'n, 533 So. 2d 770, 773 (Fla.

1st DCA 1988), the First District Court of Appeal in Southern States Utilities noted that "the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State" but concluded that water and sewer statutory provisions analogous to those granting ratemaking authority over electric utilities were "drawn broadly." See Southern States Utilities, 714 So. 2d at 1051.

Within the broad grant of such authority, the Commission has considerable license to determine through what means the rates and charges are to be allocated and collected. Consistent with such authority, and without the need for specific statutory designation, the Commission has established certain mechanisms through which recovery of costs is achieved outside of base rates and between rate cases. Examples of such mechanisms include the fuel and purchased power cost recovery clause ("fuel clause"), and the energy conservation cost recovery clause.

Consistent with its broad grant of authority over ratemaking, the Commission has acted to approve incremental recovery of items traditionally included in base rates for a limited period of time in order to serve public policy objectives. For example, in Order No. PSC-01-2516-FOF-EI, issued December 26, 2001, in Docket No. 010001-EI, the Commission authorized recovery of incremental security costs incurred in response to the terrorist acts of September 11, 2001, through the fuel clause because it believed that "approving recovery of this incremental power plant security cost through the fuel clause sends an appropriate message to Florida's investor-owned utilities that we encourage them to protect their generation assets in extraordinary, emergency conditions as currently exist." See Order No. PSC-01-2516-FOF-EI, at 4, Docket No. 010001-EI (issued Dec. 26, 2001); see also Order No. PSC-02-1761-FOF-EI, at 3-4, Docket No. 020001-EI (issued Dec. 13, 2002) (noting that the Commission would reassess the treatment

of FPL's incremental security costs at the conclusion of the term of the settlements approved in the most recent base rate proceedings).

Another example of the Commission exercising its broad ratemaking authority to allow preliminary recovery of costs outside of base rates when policy considerations favor doing so is the mid-course correction process in the fuel clause docket. Pursuant to its jurisdiction under sections 366.04, 366.05 and 366.06, Florida Statutes, the Commission implemented mid-course correction procedures in Order No. 13694, issued September 20, 1984, in Docket No. 840001-EI ("Order No. 13694") during its transition from semiannual to annual clause proceedings.[1] Under these mid-course correction procedures, utilities are required to promptly notify the Commission when its projected fuel revenues are expected to result in an over-recovery or under-recovery in excess of an established threshold for the given recovery period so the Commission may approve a mid-course correction to the utility's authorized fuel factors, subject to true up following the evidentiary hearing subsequently held.

Because a delay in implementation of revised fuel factors to hold an evidentiary hearing may increase interest expense and rate shock to the utility's ratepayers, the Commission found interim recovery through the mid-course correction process appropriate as a matter of policy. See id. Further, the mid-course corrections procedure is consistent with the basic principle of ratemaking which seeks to match the timing of the incurrence of costs with the timing of their recovery. See, e.g., Order No. PSC-03-PCO-EI, at 3, Docket No. 030001-EI (issued March 19, 2003).

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[1] Section 120.80(13)(a), Florida Statutes, exempts the Florida Public Service Commission from rulemaking requirements for "[a]gency statements that relate to cost-recovery clauses, factors, or mechanisms implemented pursuant to chapter 366." Thus, rulemaking was not required to implement the mid-course correction process.

Likewise, it was within this broad grant of authority that, in the wake of Hurricane Andrew and the diminished availability of insurance coverage, the Commission took important steps to put in place a regulatory plan that 1) recognizes Florida's vulnerability to hurricane damage, 2) promotes prompt restoration of service, and 3) provides for the recovery of prudent and reasonable costs. Rather than adopt a permanent clause mechanism that would have operated in perpetuity for recovery of all storm-related costs above the reserve amount on a year-to-year basis, the Commission in initiating the current regulatory framework chose instead to institute the two-part plan consisting of a target reserve amount, coupled with the right for the utility to petition for recovery of prudently incurred costs in excess of its storm reserve. See Order No. PSC-93-0918-FOF-EI, at 4, Docket No. 930405-EI (issued June 17, 1993) ("Order No. 93-0918"). The Commission also stated that it would "expeditiously review any petition for deferral, amortization or recovery of prudently incurred costs in excess of the reserve" and that its decision not to adopt the permanent mechanism proposed by FPL at the time "does not foreclose or prevent further consideration at a future date of some type of cost recovery mechanism, either identical or similar to what has been proposed." See id. at 6.[2]

Clearly, the breadth of the Commission's ratemaking authority enables it to pursue policy objectives. In the case of prompt implementation of FPL's proposed surcharge, there are several important policy objectives at issue. First is the need to respond promptly to a matter of significant consequence for FPL and its customers, allowing FPL to begin to recover the

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[2] Interestingly, Order No. 93-0918 is the same order relied upon so heavily by FIPUG and Public Counsel in their Joint Motion to Dismiss. Though the amount of the reserve has been revisited a few times within this regulatory framework, the Commission repeatedly has emphasized the two-part nature of the plan. See discussion and Orders cited by FPL at pp. 9-17 of its Response in Opposition to the Joint Motion to Dismiss of the Office of Public Counsel and the Florida Industrial Power Users Group.

substantial deficit in its storm reserve before the next Hurricane season begins on June 1, 2005. In addition, such action is important in sending appropriate signals to the financial community and FPL's partners and contractors in the industry that the self-insurance framework established by the Commission provides adequate means and measures to address the extraordinary circumstances resulting from the catastrophic 2004 Hurricane season and that FPL and the Commission are taking meaningful steps to address the prospect of facing potentially more active storm seasons.

Moreover, prompt implementation conveys the proper message to FPL, providing a measure of encouragement to the Company that it can undertake massive restoration efforts and incur potentially enormous costs with full faith and confidence in the established regulatory framework such that management's focus in such instances can be fully devoted to the primary public necessity of restoring power as quickly and safely as possible. Providing such signals to the financial community, FPL's partners and contractors, as well as the Company itself, is consistent with Commission action in other instances, such as authorizing incremental power plant security costs recovery through the fuel clause following the events of September 11, 2001, as described above. See Order No. PSC-01-2516-FOF-EI, Docket No. 010001-EI (issued December 26, 2001).

Other benefits of timely implementation of the storm deficit recovery surcharge are similar to those underlying midcourse corrections. Prompt recovery of the deficit in FPL's storm reserve through implementation of a surcharge subject to refund is consistent with the basic principle of ratemaking and Commission policy, which seeks to match the timing of the incurrence of costs with the timing of their recovery. Prompt implementation of the surcharge

also will minimize the bill impact of the surcharge by reducing the amount of interest that would be recoverable if implementation of the surcharge is delayed.

Commission approval of FPL's petition for implementation of the storm reserve deficiency surcharge subject to refund is squarely within the scope of the Commission's statutory authority.

II. Whether section 366.071 applies or would preclude the relief sought

Short answer: The interim rate provisions of section 366.071, Florida Statutes, do not apply to FPL's request for implementation of a limited, temporary, emergency storm deficit recovery surcharge subject to refund nor do they preclude the relief sought because that section applies only to a general base rate increase for which a full revenue requirements rate proceeding is required.

By their very context, the interim rate provisions of section 366.071, Florida Statutes, apply to a request for permanent base rate relief, not to the type of limited, temporary, emergency relief that a FPL seeks within the context of the regulatory framework discussed in section I above. The Florida Supreme Court has confirmed the application of 366.071 to "a general rate increase request for which a full rate proceeding is required." Citizens v. Mayo, 333 So 2d 1, 4-5 (Fla. 1976).

In deciding to establish specific rules governing interim base rate relief, the legislature can not be presumed to have eviscerated the Commission's broad authority over the rates and charges of jurisdictional utilities, including the authority exercised by the Commission in establishing the current regulatory framework to address storm restoration costs.

Similarly, the fact that the legislature provided for the establishment of clause recovery for certain environmental costs, as codified in section 366.8255, Florida Statutes, did not derogate from the Commission's authority to institute other forms of cost recovery outside of base rates, including clauses and surcharges.

III. Whether a formal evidentiary hearing is required before implementation of the surcharge subject to refund

Short answer: Neither the due process clause nor the Florida Statutes require a hearing before the storm deficiency restoration surcharge takes effect because a formal hearing is scheduled for April and because the surcharge is subject to refund with interest. Allowing preliminary implementation of the surcharge subject to refund is consistent with Commission precedent.

A. Due Process

The due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 9, of the Florida Constitution require that a party who is deprived of a constitutionally protected liberty or property interest by state action must be offered a meaningful opportunity to contest the matter before the agency renders a final decision. Procedural due process requires both fair notice and a real opportunity to be heard. See Department of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla. 1991).

Specific parameters of the notice and the opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding. See Gilbert v. Homar, 520 U.S. 924 (1997); see also Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (stating that notice and opportunity for hearing need only be appropriate to the nature of the case). As the Supreme Court has explained, due process, "unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstances." See Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." See Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Hadley v. Department of Administration, 411 So. 2d 184, 187 (Fla. 1982) ("[t]here is ... no single, unchanging test which may be applied to determine whether the

requirements of procedural due process have been met. We must instead consider the facts of the particular case to determine whether the parties have been accorded that which the state and federal constitutions demand.")

The prevailing test under the United States and Florida Constitutions for determining whether due process is satisfied requires a balancing of the government's interest in utilizing the challenged procedures, the risk of error inherent in those procedures and the private interests that are at stake. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Gilbert v. Homar, 520 U.S. at 924; Hadley v. Department of Administration, 411 So. 2d 184 (Fla. 1982) (determining that "the formalities requisite in judicial proceedings are not necessary in order to meet the due process requirements in the administrative process"); Rucker v. City of Ocala, 684 So. 2d 836 (Fla. 1st DCA 1997) (finding that because workers' compensation proceedings are administrative in nature, less stringent formalities were needed to satisfy due process concerns). In the seminal case on due process, Matthews v. Eldridge, which is followed by Florida as well as federal courts, the United States Supreme Court held that the judicial model of an evidentiary hearing was not required before disability benefits were terminated because the prescribed procedures provided the claimant with an effective process for asserting his claim before any administrative action occurred, and also assured a right to an evidentiary hearing as well as subsequent judicial review before the denial of the claim became final.

Similarly, FPL's customers would not be deprived of due process if the surcharge is implemented subject to refund in advance of the formal evidentiary hearing scheduled for April. First, it is disingenuous for the parties to argue that absolutely no evidentiary hearing has been held before Commission approval of FPL's request for implementation of the storm deficit recovery surcharge subject to refund in accordance with the Commission-approved plan because

formal evidentiary hearings were held on the establishment of the self-insurance mechanism as well as the establishment of the reserve and the target amount. Further, consistent with the self-insurance regulatory framework, approval of FPL's request to implement subject to refund a surcharge of approximately $2.09 per 1,000 kWh designed to recover the deficit that exists in FPL's storm reserve as a result of the devastating 2004 hurricane season would represent sound public policy. It would signal the Commission's commitment to act quickly and continue to encourage safe and expeditious storm restoration.

Important to the due process equation is the fact that the proposed surcharge is subject to refund with interest should the Commission determine following April's hearing that any or all of the costs for which FPL seeks regulatory relief were unreasonably or imprudently incurred. Therefore, the risk of erroneously depriving customers of the approximate $2.09 per 1,000 kWh during the interim period is offset by the promise of a refund with interest that will be guaranteed by an FPL corporate undertaking. The interest in timely implementation of the surcharge subject to refund far outweighs any interest in delaying the decision and relief because FPL's customers would be made whole following April's hearing to the extent the Commission determines the surcharge was erroneously applied.

Further, the Florida Supreme Court has found that procedural due process is satisfied in the abbreviated proceedings that are necessary as part of the interim rate process. In Citizens v. Public Service Commission, 425 So. 2d 534 (Fla. 1982), the court articulated the procedural process attendant to the policy of interim rates as follows:

> It is clear that the evidentiary basis for an interim increase need not be subject to the same intense scrutiny, cross-examination, and adversarial contest as is required in the final public hearings. Where, however, the Commission chooses to conduct public hearings in an interim rate proceeding, intervenors, including Public Counsel, will be afforded all procedural due process rights to insure their

> effective participation. ... Whether public hearings are scheduled or not, the test to support an interim rate increase should be whether the Commission had additional or corroborative data on which to grant temporary rate relief at the time that it lifts its suspension – data which it did not initially have, or data which clarifies or amplifies matters initially found to be inadequate. The requisite showing, naturally, will vary from case to case, and judicial review of an interim award will be premised on the traditional test of whether the award is supported by competent substantial evidence.

See id. at 540-541, citing Citizens v. Mayo, 333 So. 2d 1, 7 (Fla. 1976).

Allowing preliminary implementation of the surcharge subject to refund is consistent with Commission precedent in clause proceedings, including the mid-course correction proceedings addressed in section I above. Recognizing "that a more thorough prudence review can occur at the next regularly scheduled hearing in the fuel clause docket," the Commission has granted or denied requests for a mid-course correction at Agenda Conferences after testing the reasonableness of actual and revised projected data supporting a utility's petition for a mid-course correction. See Order No. PSC-01-1665-PAA-EI, at 6, Docket No. 010001-EI (issued August 15, 2001). Implementation of the corrected factors subject to refund preserves the Commission's jurisdiction over the amounts collected as a result of the mid-course correction. See id. If, after an evidentiary hearing, the Commission determines that any collected amounts were imprudently incurred, the utility may be required to refund the amounts with interest.

Filed within the parameters of the Commission-approved self-insurance mechanism, FPL's request to preliminarily implement the surcharge subject to refund with interest is reasonable. This self-insurance mechanism has been an important part of the regulatory framework within Florida, given the state's natural geographic vulnerabilities, because of the unavailability of insurance coverage, and because of the need to ensure that electric utilities remain positioned to respond swiftly and appropriately to the impact of tropical storms.

In support of the reasonableness of FPL's request to implement the surcharge subject to refund, K. Michael Davis, FPL Vice President, Controller and Chief Accounting Officer, filed a sworn affidavit attesting that FPL has incurred extraordinary storm-related costs of more than double the amount of its Storm Reserve. FPL's estimate of storm restoration costs has not been challenged, and the question of the prudence and reasonableness of the costs has been set for formal evidentiary hearing in April, at which time the Commission will determine the final disposition of FPL's request. In the interim, FPL's storm-recovery costs are subject to Commission audit and numerous discovery requests by the parties to this docket. FPL's customers will be made whole through a refund with interest to the extent the Commission determines any or all of the costs were unreasonable or imprudent.

B. Administrative Procedure Act

Further, implementation of the surcharge subject to refund would not violate Chapter 120, Florida Statutes (the Florida Administrative Procedure Act). While Chapter 120 provides for a formal hearing when the substantial interests of a party are at stake and there are disputed issues of material fact, it does not speak to what interim agency action may occur subject to final determination after the formal hearing. Nothing in Chapter 120 prevents the Commission from implementing the storm surcharge subject to refund as proposed by FPL.

IV. Whether the surcharge may take effect fewer than 30 days following the Commission vote

Short answer: The Commission may approve implementation of the surcharge for meter readings on or after February 3, 2005. As it has done in the past, the Commission should vote on a change in customer charges and permit implementation of the change fewer than 30 days from the date of the vote because FPL's customers have received adequate notice of the pending charge and because the public interest is served by timely implementation of the charge as soon as possible before the 2005 storm season begins.

The Commission may approve implementation of the surcharge for meter readings on or after February 3, 2005. Commission practice of requiring 30 days between the date of the Commission vote and implementation of a change in customer charges is a practice from which the Commission has deviated on numerous occasions in the past.[3] For example, in the context of the analogous mid-course corrections procedures, the Commission has repeatedly found that, due to the magnitude of the under-recovery for which relief was requested, revised factors should be implemented as soon as possible so that customers could begin paying the fuel charge increase at the earliest possible time. See, e.g., Order No. PSC-01-0963-PCO-EI, Docket No. 010001-EI (issued April 18, 2001). In ruling on an FPL request for a mid-course correction, the Commission found:

> We have typically not required a 30-day notice period prior to implementing new fuel factors after a mid-course correction. See, e.g., Order No. PSC-96-0907-FOF-EI, issued July 15, 1996; Order No. PSC-96-0908-FOF-EI, issued July 15, 1996; Order No. PSC-97-0021-FOF-EI, issued January 6, 1997. Most recently, at our February 6, 2001, Agenda Conference, we approved mid-course corrections for each investor-owned natural gas utility to become effective on the date of our vote.
>
> Due to the magnitude of the increase, FPL shall notify its ratepayers in writing of the newly approved fuel factors. FPL shall mail the notice to its customers as soon as possible after the date of our vote. The notice shall include, but not be limited to, the following information: the total dollar amount of the mid-course correction; the impact of the mid-course correction on the typical ratepayer's monthly bill; and the effective date of the newly approved fuel factors.

See id. at 6.

Given the magnitude of recovery sought by FPL and the need for implementation as soon as possible before the 2005 storm season, the Commission should allow implementation of the surcharge effective for meter readings on or after February 3, 2005. Further, because of the

[3] Significantly, the Commission has allowed less than 30 days notice on a number of occasions since the decision in Gulf Power Company v. Cresse, 410 So.2d 492 (Fla. 1982).

extensive media coverage of the proposed FPL surcharge, media releases issued by FPL, and the inclusion of the February 3, 2005, implementation date in the Staff Recommendation for the January 4, 2005, Agenda Conference, customers have been blanketed with notice of the possibility of this surcharge and are not prejudiced in their ability to adjust their usage in light of the new charges. With implementation on February 3, 2005, under FPL's proposal, all customers would be billed the surcharge for the same period of time. Under the circumstances, a 13-day lag between the date of the Commission vote and the implementation of the charge is not unreasonable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and United States Mail this 7th day of January, 2005, to the following:

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