

# ORIGINAL

**Timolyn Henry**

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**From:** Mike Twomey [miketwomey@talstar.com]  
**Sent:** Monday, January 10, 2005 12:06 PM  
**To:** Filings@psc.state.fl.us; Cochran Keating; Joseph McGlothlin; Vicki Gordon Kaufman; Tim Perry; Natalie Smith; pchriste@psc.state.fl.us; Wade Litchfield; John McWhirter; MCLEAN.HAROLD  
**Subject:** Legal memo in Docket No. 041291 -

January 10, 2005  
12:05 p.m.

Please file the attached Twomeys' Memorandum Adopting . . . in the following docket:

DOCKET NO. 041291-EI -

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.

The document consists of a total of three pages including the certificate of service.

Parties to this docket will be served with a hard-copy of this document this evening.

Mike Twomey

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OPC \_\_\_\_\_

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1/10/2005

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FPSC-COMMISSION CLERK

ORIGINAL

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

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Docket No. 041291-EI

Filed: January 10, 2005

**TWOMEYS' MEMORANDUM ADOPTING  
JOINT MEMORANDUM OF OPC AND FIPUG  
ADDRESSING ISSUE OF STATUTORY AUTHORITY**

As directed by the Commission during the Agenda Conference of January 4, 2005, Thomas P. Twomey and Genevieve E. Twomey (the "Twomeys"), by and through their undersigned counsel, submit their memorandum of law adopting the Joint Memorandum of the Office of Public Counsel ("OPC") and the Florida Industrial Power Users Group ("FIPUG") 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 of claimed storm damage costs prior to holding a Section 120.57(1), F.S. evidentiary hearing on FPL's petition and making a finding that the surcharge revenues are necessary, reasonable and prudent and otherwise legally recoverable pursuant to Florida Law. While the Twomeys' adopt OPC's and FIPUG's excellent memorandum without exception, they do so because of a computer failure halting the timely preparation of their separate memorandum.<sup>1</sup> In addition to the

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<sup>1</sup> The undersigned's computer "crashed" around noon last Friday while opening a BellSouth PDF file in the Lifeline docket, a failure related to the PDF program, not BellSouth's file. The computer was finally revived Sunday, but with the complete loss of the draft memorandum, which could not be timely reconstituted.

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FPSC-COMMISSION CLERK

adoption of the OPC/FIPUG memorandum, the Twomeys' readopt the oral argument of their counsel made at the January 4, 2005 Agenda Conference consideration of this issue.

**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?

**Twomeys' Position:** No. Under Chapters 120 and 366, Florida Statutes, and Article I, Section 9, Florida Constitution, the Commission must conduct an evidentiary hearing on FPL's request and make the requisite factual and legal findings prior to ruling on FPL's request to change its rate. The Commission's findings must be supported by competent, substantial evidence of record.

**Conclusion**

The Commission should recognize its statutory limitations, put the brakes on the effort to deny customers a hearing and proceed to hearing as scheduled. There is no "record" evidence in this case to suggest that either FPL or its customers will be harmed by following what has historically, and with good legal reason, been the path of notice, hearing, final order with findings of fact and conclusions of law, all supported by competent, substantial evidence.

Respectfully submitted,

/s/ Michael B. Twomey

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of this document has been

furnished to the following this 10<sup>th</sup> day of January, 2005, by U.S. Mail and email:

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/s/ Michael B. Twomey  
Michael B. Twomey