

Matilda Sanders

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 Subject: Electronic Filing for Docket No. 041291 / FPL's Response in Opposition to the Office of Public Counsel's Motion to Hold Proceeding in Abeyance, or in the Alternative, Reschedule the Hearing, adopted by the Florida Industrial Power Users Group

Attachments: FPL's Response in Opposition Motion to Delay Proceeding 2-22-05 e-filing.doc; Exhibit A to FPL's Response in Opposition to Motion to Delay Proceeding 2-22-05.pdf

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 SEC 1
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FPL's Exhibit A to
 se in Opposit's Response I

Electronic Filing

a. Person responsible for this electronic filing:
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b. Docket No. 041291
 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. Documents being filed on behalf of Florida Power & Light Company.

d. There are a total of 22 pages in the attached documents.

e. The documents attached for electronic filing is Florida Power & Light Company's Response in Opposition to the Office of Public Counsel's Motion to Hold Proceeding in Abeyance, or in the Alternative, Reschedule the Hearing, adopted by the Florida Industrial Power Users Group.

(See attached file: FPL's Response in Opposition Motion to Delay Proceeding 2-22-05 e-filing.doc)

(See attached file: Exhibit A to FPL's Response in Opposition to Motion to Delay Proceeding 2-22-05.pdf)

Thank you for your attention and cooperation to this request.

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Response Exhibit A
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*****Matilda Sanders*****

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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: February 22, 2005

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO THE
OFFICE OF PUBLIC COUNSEL'S MOTION TO HOLD PROCEEDING IN
ABEYANCE, OR, IN THE ALTERNATIVE, RESCHEDULE THE HEARING,
ADOPTED BY THE FLORIDA INDUSTRIAL POWER USERS GROUP**

NOW, BEFORE THIS COMMISSION, through undersigned counsel, comes Florida Power & Light Company ("FPL" or the "Company"), and pursuant to Rule 28-106.204(1), Florida Administrative Code, files this Response in Opposition to the Office of Public Counsel's ("OPC's") Motion to Hold Proceeding in Abeyance, or in the Alternative, Reschedule the Hearing ("Motion to Delay"), adopted by the Florida Industrial Power Users Group ("FIPUG"), and in support states:

Introduction

OPC's¹ Motion to Delay should be denied. FPL's Amended Petition does two simple things: 1) it updates the Company's estimate of storm restoration costs, as provided for in FPL's original petition, and routinely done as part of the true-up process in fuel clause proceedings; and 2) it proposes to extend the recovery period by 12 months, or such shorter period as may be sufficient to recover the Storm Reserve Deficit, without any other changes. OPC and FIPUG, as evidenced by their pleadings, their discovery, and their testimony, have approached the issues in

¹ References to OPC's Motion to Delay are also intended to apply to FIPUG's Notice of Adoption of OPC's Motion to Delay, filed February 11, 2005.

this case on the basis of types or categories of costs charged to the Reserve, accounting and regulatory principles, contract interpretation, and public policy. In fact, to date, a grand total of 3 of OPC's interrogatories and one production of documents request have solicited information about FPL's October 31, 2004 estimate of Storm Recovery Costs.² Nothing about the updated estimate or FPL's request to extend the recovery period prejudices either their approach to this case or the positions they have taken. Significantly, there is no change to the types or categories of costs charged to the Storm Reserve, no change to the recovery mechanism, and no change to the allocation of the proposed surcharge among classes of customers. Yet OPC asserts that it now must discover FPL's case anew as a result of the updated numbers. There is no basis for OPC's contentions.

OPC's allegations of prejudice are undermined by its own actions. Since FPL informed OPC of the updated estimate on January 20, OPC appears to have made a conscious effort to avoid discovering the reasons for the increase in the estimate in an attempt to lay a foundation for the Motion to Delay. Soon after FPL informed OPC of the updated estimate, OPC asked to depose the FPL employee who prepared the storm estimates. FPL acceded to the request. This employee was deposed on January 28, 2005, and not one question was asked about the updated estimate. Further, it has been more than one month since FPL informed OPC of the updated estimate, and OPC has not propounded even a single discovery request about the updated estimate. Then OPC comes to the Commission claiming it needs three months to conduct

² As discussed in greater detail in the body of this pleading, based on the updated estimate, FPL updated its responses to 3 OPC interrogatories and one production of documents request, as well as 6 interrogatories from other parties and Staff, and served the updated responses on all parties on February 18, 2005.

discovery and file testimony on the updated estimate when the positions in its affirmative case are not even impacted by the updated estimate.

When FPL informed OPC of the updated estimate, or even when FPL contacted OPC to learn its position on FPL's Motion to file an Amended Petition and Supplemental Direct Testimony, OPC could have asked for additional time to file its testimony in order to address the updated estimate (as it negotiated for additional time to file testimony in the Progress Energy Florida Storm Docket No. 041272-EI). Instead, OPC chose not to pursue the issue in deposition even after requesting the opportunity to do so, and did not issue a single discovery request relative to the update estimate. Perhaps planning to use the Amended Petition to attempt to delay the hearing, OPC elected to go ahead and file its testimony, with placeholders in it to be supplemented at a later time. In asking this Commission to delay the hearings in this matter, therefore, OPC must be seen as having sat on its rights. OPC's failure to conduct the discovery it now claims it needs when it had the opportunity should not be entertained as a reason to prejudice the Company by delaying proceedings that will allow the Commission to resolve the Company's petition and to settle important questions in advance of the next storm season, something that is in the interest of everyone concerned, including the State of Florida, local government, and Floridians as a whole.

Further, OPC's claim that the proceeding should be held in abeyance until FPL's storm recovery cost numbers are final is a red herring raised for the first time in the Motion to Delay. Everyone, including OPC, realized that the number first presented was based on the best information available at the time and that, as more information became available, the number would change. OPC and the other parties to this Docket, as well as Staff, proceeded with the case. Discovery was served and answered. Staff proceeded with its Audit. Now, having

conducted discovery, taken depositions and filed its testimony, perhaps unhappy with its case, OPC is searching for yet another way to upend the process. This time, the vehicle is the Motion to Delay.

OPC purposefully makes much more of the Company's filing in its attempt to paint a dramatic seascape of change to justify its request for a delay. OPC's actions and positions in this proceeding to date are wholly inconsistent with longstanding public policy in the state of Florida, endorsed at all levels of government, favoring prompt and safe restoration of electric service following the storms that inevitably and unavoidably affect the citizens of Florida. OPC's positions are jeopardizing this important policy.

In any event, in the interest of calming OPC's concerns regarding the relative firmness of the updated estimate, FPL is willing to agree to limit recovery of storm restoration costs through the proposed surcharge to the amount by which the updated estimate of \$890 million (\$886 million jurisdictional) exceeds the amount of the Storm Reserve. In other words, if the actual amount incurred exceeds \$890 million, FPL would not to seek to recover those costs through the proposed surcharge mechanism. If the final costs are less than \$890 million (\$886 million jurisdictional), the mechanism requested by FPL both in its original and its Amended Petition ensures that the surcharge ends as soon as the Storm Reserve Deficit is recovered, so that no more than the actual costs would be recovered.

Background

1. On February 4, 2005, FPL filed a Motion for Leave to File Amended Petition and Supplemental Direct Testimony ("Motion for Leave") accompanied by FPL's Amended Petition for Authority to Recover Prudently Incurred Storm Restoration Costs Related to the 2004 Storm Season That Exceed the Storm Reserve Balance ("Amended Petition") and Supplemental Direct

Testimony and Exhibits of Witnesses K. Michael Davis, FPL's and Controller and Chief Accounting Officer, and Rosemary Morley, FPL's Rate Development Manager. FPL requested leave to amend its original petition by requesting that the Storm Recovery Surcharge be applied for an additional 12-month period, for a total of 36 months, or such shorter period as is necessary to recover the Storm Reserve Deficit, the updated estimate of which is \$533 million (jurisdictional). The additional recovery period is proposed to enable the Company to recover the Storm Reserve Deficit in a reasonable period of time without raising the amount of the proposed monthly surcharge. The requested amendment would not alter the proposed level of the Storm Restoration Surcharge, the proposed allocation of the Surcharge, or the methodology by which costs were booked to the Storm Reserve.

2. On February 10, 2005, OPC responded in opposition to FPL's Motion for Leave to File Amended Petition and Supplemental Direct Testimony, and filed its Motion to Delay. OPC argues that its ability to present its case "would be severely hampered by the amended petition under the current schedule" (Motion to Delay at ¶ 4). OPC asserts that it must conduct extensive discovery on FPL's updated Storm Cost Recovery estimate to determine whether the change in FPL's estimate is valid. OPC argues that FPL has not presented sufficient evidence in support of the \$180 million change in the estimate of storm restoration costs, and it states that "due process at a minimum requires" that the Commission give OPC approximately three months to conduct such discovery and prepare Supplemental Direct Testimony responsive to the \$180 million change in the Storm Reserve Deficit that FPL seeks to recover. FIPUG filed a Notice of Adoption of OPC's Motion to Delay on February 11, 2005.

3. FPL disagrees with the Motion to Delay. FPL's Amended Petition does two simple things: 1) it updates the Company's estimate of storm restoration costs something that

was always contemplated in connection with this proceeding, and routinely done in fuel clause proceedings; and 2) it proposes to extend the recovery period by 12 months, or such shorter period as may be sufficient to recover the Storm Reserve Deficit. There was no change to the categories of costs charged to the Reserve, to the mechanism for recovery, or to the allocation of the proposed surcharge among classes of customers. FPL has no doubt that regardless of the time, place, or means of the Company's update to the storm cost estimate, OPC would have objected. OPC's pretext in this instance for objecting to a simple and necessary amendment to FPL's petition in order to give place to the updated estimate in this proceeding should be rejected.

4. A history of OPC and FIPUG's positions in this docket is revealing. First, OPC and FIPUG argued to dismiss FPL's petition to recover its storm restoration costs because FPL failed to allege how the deficit in the Storm Reserve would impact its earnings. Relying on its ratemaking authority, the Commission rejected OPC and FIPUG's Motion to Dismiss and determined that FPL did not fail to state a cause of action by failing to address the effects of its storm-related costs on its earnings and Commission rejected OPC and FIPUG's motion to dismiss. See Order No. PSC-05-0187-PCO-EI, p. 6, Docket No. 041291-EI (issued Feb. 17, 2005). Not dissuaded, OPC and FIPUG next moved to strike FPL's separate request to implement the Storm Recovery Surcharge on a preliminary basis subject to refund after the hearing in this matter. That time, their hyper-technical argument was that FPL was attempting to amend its original pleading without the Pre-Hearing Officer's approval. Again, the Commission denied OPC's and FIPUG's motion. See id. at 8. Still, OPC and FIPUG were undeterred in their resolve. At the January 4, 2005, Agenda Conference where the Commission considered the Motion to Dismiss and the request for a preliminary surcharge, OPC and FIPUG strayed from the

arguments presented in their Motion to Dismiss and Motion to Strike and latched on to the oral arguments of the Twomeys' counsel that the Commission lacked authority to implement a surcharge subject to refund. OPC and FIPUG argued that the Commission lacked authority to approve the storm surcharge subject to refund. Yet again, the Commission rejected OPC and FIPUG's arguments. See id. at 14.

5. Now, in the Motion to Delay, OPC and FIPUG are using FPL's Amended Petition and Supplemental Direct Testimony as a reason to push the Commission to delay its hearing in this matter. OPC's Motion to Delay is just its latest attempt to obstruct the conduct of a fair and open process. OPC's arguments that it will be prejudiced unless the hearing is delayed for some period of time for OPC to conduct discovery and that due process requires that the hearing be delayed are disingenuous, unsupported by case law, and undermined by OPC's own actions in consciously avoiding discovery of the reasons underlying the estimate. While not required by due process under the facts and circumstances of this case, OPC could be afforded an opportunity to file testimony addressing the narrow points in FPL's Supplemental Direct Testimony without delaying the hearing that is scheduled for April 20-22, 2005. OPC should be serving discovery now to prepare its supplemental testimony and, if OPC's Motion to Delay is denied, FPL commits to respond to discovery that addresses the points in the Amended Petition (the 12 months extended recovery period or the updated estimate) within 10 days instead of the 20 days for responses allowed in the Order Establishing Procedure. Should the Commission grant OPC the opportunity to file supplemental direct testimony, FPL suggests that such testimony be due on March 14, 2005, with additional rebuttal testimony directed to OPC's supplemental testimony due from FPL on March 25, 2005. In such case, FPL would respectfully suggest that the due date for prehearing statements be changed from March 22 to March 31.

6. Also, the argument that the Commission should wait until FPL has final accurate numbers is a red herring raised for the first time in the Motion to Delay. FPL commits to expensing any costs that exceed the updated estimate of \$890 million (\$886 million jurisdictional), and FPL's proposed mechanism for recovery provides that the surcharge will end as soon as the Storm Reserve Deficit is recovered.

7. OPC's Motion to Delay undermines the overarching public policy in the State of Florida to promote and encourage safe and rapid storm restoration. Viewed cumulatively, OPC's pleadings and actions in this matter, if adopted or approved by the Commission in this docket, would send a clear message that public utilities in Florida should revisit their entire approach to storm restoration: that they should be procuring insurance coverage at whatever the cost to customers, that they should be taking into account their earnings situation in every decision regarding resource deployment and acquisition in post-storm situations, and that they should not take employees who perform back-office functions away from their regular duties to deploy them on the front lines of storm restoration activities. OPC's actions in seeking a delay in the procedural schedule of this docket, as well as other tactics and positions advanced in this docket, do not comport with the public policy of this State that public utilities be positioned and act to restore power as quickly as possible in the wake of the major storms to which Florida and its residents are prone.

OPC is Not Prejudiced

8. OPC is not prejudiced by the Amended Petition or the existing procedural schedule. First, OPC cannot reasonably argue that it believed FPL's \$710 million estimate (\$707 million jurisdictional) to be final. From the very beginning, FPL's number has been an estimate and has been labeled as such. It was always intended that the estimate of storm restoration costs

would be updated – whether upward or downward. Just like a number of other cost recovery items, FPL proposed that the final numbers would be subject to true-up. Further, OPC and others in this docket, as evidenced by their pleadings, their discovery, and their testimony, have approached the issues in this case on the basis of types or categories of costs charged to the Reserve, accounting and regulatory principles, contract interpretation, and public policy. Nothing about the updated estimate or FPL’s request to extend the recovery period prejudices either their approach to this case or the positions they have taken.

9. In any event, as noted above, FPL is willing to calm OPC’s concerns regarding the relative firmness of the updated estimate. Specifically, FPL is willing to agree to limit recovery of storm restoration costs through the proposed surcharge to the amount by which the updated estimate of \$890 million (\$886 million jurisdictional) exceeds the amount of the Storm Reserve. In other words, if the actual amount incurred exceeds \$890 million, FPL would not to seek to recover those costs through the proposed surcharge mechanism. If the final costs are less than \$890 million, the mechanism requested by FPL in its Amended Petition ensures that the surcharge ends as soon as the Storm Reserve Deficit is recovered, so that no more than the actual costs would be recovered.

10. That OPC’s Motion to Delay is a disingenuous attempt to manipulate and impede the progress of this docket is further evidenced by OPC’s failure to conduct any discovery whatsoever on the updated estimate in the more than one month period since OPC was informed of the updated estimate. OPC’s own actions demonstrate that it made a conscious decision to do so as early as the deposition of Robert Adams, the FPL employee who prepared the estimate of storm restoration costs. Soon after FPL informed OPC of the updated estimate, OPC contacted FPL and asked FPL to make the person who prepared the estimates of storm costs, Mr. Robert

Adams, available for deposition on January 28, 2005 and circulated a Notice of Deposition to that effect (a copy of which is attached as Exhibit A). Further, OPC made arrangements to have its witness, Mr. Majoros, able to participate in the deposition by telephone. FIPUG cross-noticed Mr. Adams' deposition. Despite having asked to take Mr. Adams deposition soon after FPL informed OPC of the updated estimate and allowing its accounting witness to listen, OPC either neglected to or consciously refused to ask Mr. Adams even one question about the facts underlying the updated estimate. In fact, FIPUG asked no questions at all. The same is true for the deposition of FPL Witness Davis, which also occurred on January 28, 2005. Not a single question about the updated estimate was asked.

11. OPC asserts in its Motion to Delay that the exhibit FPL provided during Mr. Davis' deposition, also taken on January 28, 2005, which provided a breakdown of categories of costs relative to the \$890 million estimate, is also insufficient to cure alleged prejudice to OPC because OPC did not have time to prepare questions on the exhibit. First, the depositions of Mr. Adams and Mr. Davis occurred more than one week after FPL notified OPC of the updated estimate, which was adequate time to prepare at least basic questions directed at the updated estimate. This was not done. Second, the depositions ended significantly earlier than 5 p.m. There was plenty of time for OPC to take a break and confer among the two attorneys and one technical staff member present at the deposition, as well as the accounting witness listening on the phone, to come up with even one question to ask about the updated estimate. Instead, OPC accepted the exhibit without question and ended the deposition early. Further, to come up with questions about the exhibit could hardly be difficult given that the only thing that changed between the exhibit attached to Mr. Davis' testimony filed in November and the updated exhibit was numbers. The categories of costs were the very same. Now, based on its Motion to Delay,

it would seem that OPC is insinuating it wants these same witnesses available for deposition again to ask questions on the \$180 million change in the estimate when answers to the questions on categories of costs asked about the \$710 million earlier estimate apply equally to the updated estimate and despite ending the depositions early the first time.

12. OPC has ample time to conduct extensive discovery on the updated estimate. Pursuant to the Order Establishing Procedure, Order No. PSC-04-1150-PCO-EI (issued November 18, 2004), the discovery cut-off date in this Docket is April 8, 2005. April 8, 2005 is 77 days from January 21, 2005, the day FPL informed OPC of its updated estimate. Assuming no intentional delay in seeking discovery, that is enough time to serve and receive responses to at least three rounds of discovery. It is unreasonable to argue that at least three rounds of discovery, as well as 77 days during which to conduct depositions, is not ample time to discover the reasons for the \$180 million update to FPL's storm cost estimate.

13. Further, OPC's argument that it needs an opportunity to conduct "extensive discovery" on the updated estimate is undermined by the actions taken since FPL updated its estimate. Since FPL informed OPC of its updated storm cost estimate more than one month ago every indication is that OPC made a conscious decision to avoid discovering the facts underlying the difference between FPL's earlier estimate and the updated estimate in an apparent attempt to lay a foundation for this Motion to Delay. In the more than one month since FPL published its updated estimate of storm costs, not one party to this docket has taken the opportunity to propound a single discovery request directed at the update. Yet, now, OPC claims it needs an additional three months on top of the almost seven weeks remaining in the discovery phase of the docket to do just that!

14. Apart from the fact that OPC and FIPUG have had ample time to conduct discovery on the updated estimate, the credibility of the assertion that they must conduct extensive discovery on the updated estimate is undermined by their litigation of this case. To date, FPL has responded or is in the process of responding to a total of 113 interrogatories and 58 requests for production of documents, including 44 interrogatories and 21 requests for production of documents from OPC and 8 interrogatories and 26 requests for production of documents from FIPUG. This discovery was in addition to the Commission's Staff's audit of FPL's storm costs. To date, a grand total of 3 of OPC's interrogatories and one production of documents request have solicited information about FPL's October 31, 2004 estimate of Storm Recovery Costs of \$710 million (\$707 million jurisdictional). Only one of FIPUG's requests have solicited such information, except to the extent FIPUG asked for copies of documents made available to Staff or OPC. Unless OPC and FIPUG's discovery on the \$180 million increase in the Storm Reserve Deficit is dramatically more extensive than its discovery of the \$710 million estimate, the argument that they are prejudiced by allowing the case to proceed without additional time for "extensive discovery" contradicts their actions thus far in this Docket.

15. Despite its apparent attempts to avoid discovery of evidence about the updated estimate to try to lay a foundation for its Motion to Delay, OPC has already received a substantial amount of information about the updated estimate. As stated above, outside of the audit conducted by Staff, very little discovery served in this Docket thus far has related to FPL's estimate of storm restoration costs. As reflected in the testimony filed by OPC, OPC's focus has been on the categories of costs charged to the Storm Reserve, accounting principles, and FPL's budgeted amounts of certain cost categories. Regardless, FPL's responses to OPC's Fourth Set of Interrogatories were served after FPL's estimate of storm restoration costs were updated, and

FPL's answers to that set of interrogatories relate to the \$890 million estimate. Additionally, OPC has been served with copies of answers to the other parties' discovery. For discovery to which responses were provided after January 21, 2005, FPL's responses are based on the updated estimate.

16. Additionally, on its own initiative, FPL undertook to determine which discovery responses required updating based on the change in the estimate. Of the 113 interrogatories and 58 requests for production of documents, FPL identified only 9 interrogatories, the responses to which might reasonably be thought to require updating based on the new estimate. FPL updated those 9 interrogatories and served the answers on all parties to this Docket on February 18, 2005. Additionally, FPL identified only one production of document request that required updating, and FPL made the updated documents responsive to that one request, OPC's First Request for Production of Documents, Request Number 1, available to the parties on February 18, 2005. Request Number 1 of OPC's first set asked for "all work papers and documents used to develop FPL's estimates for storm recovery in this docket." In addition, FPL provided several documents as late-filed exhibits to the deposition of Mr. Adams. Among the late-filed exhibits was Rob Adams Late Filed #10 ("Regular & Overtime Payroll charged to Storm Reserve"), which is related to the updated estimate. None of the updated answers served on February 18 would alter the substance of any testimony filed by OPC in this docket. To the extent that the amounts of a particular costs category or component have changed, OPC's position presumably remains unchanged other than to note, as a matter of arithmetic, the corresponding change in the amounts reflected their recommendations.

17. Further, the testimony of OPC's Witness Michael Majoros, filed on February 8, 2005 was apparently filed in contemplation of being supplemented at a later time. When FPL

contacted OPC to learn whether it would oppose FPL's Amended Petition, OPC could easily have sought to negotiate an extension of time to file direct testimony to give it time to address the updated estimate, as it did in the parallel Progress Energy Florida storm cost recovery Docket No. 041272. Instead, presumably knowing that it would file the Motion to Delay and in its latest attempt to derail this docket, OPC elected to file its direct case with placeholders for supplemental testimony.

18. OPC's Motion to Delay is further undermined by the positions it has taken in its affirmative case. The updated Storm Reserve Deficit does not impact OPC's affirmative case. FIPUG didn't even file testimony in the docket. If FIPUG's position in joining in the Motion to Delay is that it should be able to file testimony some months from now directed at the \$890 million estimate when it didn't even choose to file testimony directed to the \$710 million estimate, that notion should be rejected as patently unfair. FIPUG will continue to be able to serve discovery on FPL until the April 8, 2005 discovery cut-off date in the Order Establishing Procedure, Order No. PSC-04-1150-PCO-EI.

19. Where OPC has opposed the Company's recovery of storm costs, it has been based on regulatory principle and policy. For example, OPC Witness Majoros summarizes his "opinion regarding FPL's proposed Storm Cost Recovery Surcharge" as follows:

First, FPL has improperly moved O&M expenses to the storm fund that customers already bear through the base rates they pay. Second, FPL apparently intends to include all storm-related capital expenditures in its recovery claim.

See Majoros Testimony, p. 10, lines 23-26. Mr. Majoros' opinions on FPL's Storm Cost Recovery Surcharge will equally apply to the updated estimate, as will OPC's position regarding the application of the 10 percent return on equity language from the Stipulation and Settlement in

Docket No. 001148-EI that is referenced both in the testimony of Mr. Majoros and in that of OPC Witness James Rothschild. FPL's Amended Petition only changes the amount of money in the categories OPC argues should not be eligible for recovery. Therefore, OPC's argument that it must conduct extensive discovery on the updated estimate has merit only if OPC's litigation position will be different with respect to an \$890 million estimate of storm restoration costs than it was with a \$710 million estimate, a conclusion that simply cannot reasonably be reached based on the positions OPC has taken in this case.

20. As a variation on its general theme of obstruct and delay, OPC is using FPL's Amended Petition (which updates the storm cost estimate and asks for additional time for recovery) as an opportunity to argue for the very first time that FPL's affirmative case is lacking. Notwithstanding the delinquency of OPC's arguments, as a substantive matter, it is incontrovertible that FPL is not required to file minimum filing requirements with its petition for recovery of the Storm Reserve Deficit. Instead, FPL has filed extensive testimony of Ms. Whalen, documenting the Herculean effort and prudence of the actions it took in undertaking the largest electric service restoration efforts in a single storm season in the history of the United States, and having safely and expeditiously restored power to millions of customers. With respect to the amount and manner of accounting for the storm restoration costs, the Company filed testimony of its chief accounting officer, Mr. Davis, affirming the initial estimate of costs associated with that effort, identifying those costs by category, and concluding that the costs were booked to the Storm Reserve in accordance with a Commission-approved accounting methodology. Moreover, the Commission undertook an extensive audit of FPL's costs and methodology. No one, until now, has suggested that the Company should have filed more paper. Yet, more interesting is the fact that nowhere in the testimony of OPC's witnesses is there any

allegation that the hundreds of pages of discovery made available to and reviewed by OPC were somehow insufficient in terms of documenting the amount or reasonableness of the costs incurred.

21. OPC's bald assertion that due process requires that the hearing be delayed, with no supporting case law, is undermined by the facts and circumstances of the case, as detailed above. It is axiomatic that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Hadley v. Department of Administration*, 411 So. 2d 184, 187 (Fla. 1982) (determining "[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").

22. While not required by due process under the facts and circumstances of this case, OPC could be afforded an opportunity to file testimony addressing the narrow points in FPL's Supplemental Direct Testimony without delaying the hearing scheduled for April 20-22, 2005. OPC should be serving discovery now to prepare its supplemental testimony and, if OPC's Motion to Delay is denied, FPL commits to respond to discovery that addresses the Amended Petition (the 12 months extended recovery period or the updated estimate) within 10 days instead of the 20 days for responses allowed in the Order Establishing Procedure. Should the Commission determine OPC should have the opportunity to file supplemental direct testimony, FPL suggests that such testimony be due on March 14, 2005, with an opportunity for FPL to file additional rebuttal testimony directed to OPC's supplemental testimony to be due on March 25,

2005. In such case, FPL would respectfully suggest that the due date for prehearing statements be changed from March 22 to March 31, 2005.

OPC's Motion to Delay Ignores State Policy

23. Viewed cumulatively, OPC's pleadings and actions in this matter,, if adopted or approved by the Commission in this docket, would send a clear message that public utilities in Florida should revisit their entire approach to storm restoration: that they should be procuring insurance coverage at whatever the cost to customers, that they should be taking into account their earnings situation in every decision regarding resource deployment and acquisition in post-storm situations and that they should not deploy salaried company personnel in the storm restoration effort. OPC's actions in seeking a delay in the procedural schedule of this docket, as well as other tactics and positions advanced in this docket, do not comport with the public policy of this State that public utilities be positioned and act to restore power as quickly as possible in the wake of the major storms to which Florida and its residents are prone.

Conclusion

24. The Motion to Delay should be rejected as another attempt by FIPUG and OPC to manipulate and obstruct the conduct of this proceeding. OPC's contrived claims of prejudice are undermined by its own actions. FPL's Amended Petition (which updates the numbers and period for recovery) in no way prejudices OPC's and FIPUG's litigation of the case, as amply demonstrated by their entire approach to the case thus far, including the discovery they already have conducted, or not conducted, and by the positions they have taken in pleadings and testimony.

WHEREFORE, for the above and foregoing reasons, Florida Power & Light Company respectfully requests that the Commission deny the Motion to Delay.

Respectfully submitted this 22nd day of February, 2005.

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By: s/ Natalie F. Smith
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Fla. Bar No. 470200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response in Opposition to the Office of Public Counsel's Motion to Hold Proceeding in Abeyance, or in the Alternative, Reschedule the Hearing ("Motion to Delay"), adopted by the Florida Industrial Power Users Group, has been furnished electronically and by United States Mail this 22nd day of February, 2005, to the following:

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