ORIGINAL

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Subject: Docket No. 041393-EI

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Docket No. 041393-EI

Progress Energy Florida's Request for Official Recognition

34 pages

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of two unit power sales agreements with Southern Company Services, Inc. for purposes of cost recovery through capacity and fuel cost recovery clauses, by Progress Energy Florida, Inc.	DOCKET NO. 041393-EI SERVED: May 24, 2005

PROGRESS ENERGY FLORIDA'S
REQUEST FOR OFFICIAL RECOGNITION

PROGRESS ENERGY FLORIDA, INC. (PEF), by and through its undersigned counsel, pursuant to Section 120.569(2)(i) and Sections 90.202-.203 Florida Statutes (F.S.), hereby requests that the Commission take official recognition of Thomas K Churbuck's Post-Hearing Statement of Issues and Positions, Brief, and Proposed Findings of Fact and Conclusions of Law ("Churbuck's Post-Hearing Brief") on Issue No. 14C in Docket No. 040001-EI. In support of this request, PEF states:

1. Section 120.569(2)(i), F.S., authorizes requests for official recognition so long as the parties are notified and given an opportunity to examine and contest the material. Pursuant to Section 90.202(6), "[a] court may take judicial notice of . . . records of any court of this state [.]" This provision has been relied upon by administrative tribunals to allow official recognition of briefs in a previous case. See Order Granting Additional Motion for Official Recognition, OHM Remediation Services Co. v. DOT, DOAH Case No. 00-0495BID (May 4, 2001) (copy attached as Exhibit A hereto). See also, Order No. PSC-04-1044-FOF-TP (Commission order granting official recognition of the Federal Communication Commission's briefs filed in U.S. Telecommunications Assn. v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

2. As an official record of a governmental agency of this State, Churbuck's Post-Hearing Brief in Docket No. 040001-EI (attached as Exhibit B) is a proper subject of judicial

notice or, in administrative parlance, official recognition under Section 90.202(6), F.S. Churbuck's Post-Hearing Brief is relevant to the disposition of this proceeding because it may aid the Commission in interpreting the policy established in Order No. PSC-05-0084-FOF-EI for review of Unit Power Sales (UPS) Agreements of the type at issue in this proceeding. In that order, the Commission stated that its approval of FPL's UPS Agreements was "based upon the evidence presented at the hearing and in consideration of the parties' post-hearing briefs." Id.. at 5 (emphasis added). Churbuck's Post-Hearing Brief elucidates specific issues raised in that case, many of which have been raised by intervenor in this proceeding, including but not limited to potential relevance of a transmission System Impact Study[1] and pending FERC investigations of whether Southern Company excercises market power.[2] As such, Churbuck's Post-Hearing Brief may aid the Commission in interpreting its order regarding FPL's UPS agreements. **See** Macnamara v. Kissimmee River Valley, 648 So.2d 155, 164 (Fla. 2d DCA 1994) ("the court takes judicial notice of the Governor's brief from the Supreme Court records as an aid in interpreting the Martinez decision[.]").

WHEREFORE, Progress Energy Florida respectfully requests official recognition of Thomas K Churbuck's Post-Hearing Statement of Issues and Positions, Brief, and Proposed Findings of Fact and Conclusions of Law ("Churbuck's Post-Hearing Brief) on Issue No. 14C in Docket No. 040001-EI

[1] See, White Springs Prehearing Statement, at p. 3 (Fact Issue #4) and p. 4 (Fact Issue #6) and Churbuck Post-Hearing Brief, at pp. 3-5.

[2] See, White Springs Prehearing Statement, at p. 4 (Question of Law #2) and Churbuck Post-Hearing Brief, at pp.10-11.

RESPECTFULLY SUBMITTED this 24th day of May, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Progress Energy Florida's Request for Official Recognition have been provided by e-mail and by U.S. Mail, postage pre-paid, on May 24th, 2005, to the following:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

METCALF & EDDY, INC., Petitioner, vs. STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, Respondent, and WRS INFRASTRUCTURE AND ENVIRONMENT, INC., Intervenor.	)	Case No. 00-0494BID
OHM REMEDIATION SERVICES CORP., Petitioner, vs. STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, Respondent, and WRS INFRASTRUCTURE AND ENVIRONMENT, INC., Intervenor.	)	Case No. 00-0495BID

Exhibit A

ORDER GRANTING ADDITIONAL
MOTION FOR OFFICIAL RECOGNITION

On April 20, 2001, OHM Remediation Services Corporation ("OHM") filed its Additional Motion for Official Recognition as part of its response to the Department's Motion for Official Recognition. In its motion, OHM requests that, if official recognition is taken of the opinion and mandate of the Third District Court of Appeal in OHM Remediation Services Corp. v. State of Florida, Department of Transportation and WRS Infrastructure and Environment, Inc., DCA Case No. 3D99-2989 (Fla. 3d DCA March 7, 2001), official recognition also be taken of the answer briefs filed by the Department of Transportation ("Department") and WRS Infrastructure and Environment, Inc. ("WRS") in that appeal. On April 25, 2001, an order was entered officially recognizing the opinion and mandate of the Third District Court of Appeal.

WRS filed a response to OHM'm motion within the time specified in Rule 28-106.204(1), Florida Administrative Code, in which it stated that it had no objection to OHM's request for official recognition of the answer briefs; the Department did not file a response within the specified time. Because the records of Florida courts may be officially recognized pursuant to Section 90.202(6), Florida Statutes, and because there has been no objection to recognition of the subject documents, OHM's

Additional Motion for Official Recognition is granted, and the Answer Briefs filed by the Department and by WRS in the case of OHM Remediation Services Corp. v. State of Florida, Department of Transportation and WRS Infrastructure and Environment, Inc., DCA Case No. 3D99-2989, are hereby officially recognized in this proceeding.[1]

DONE AND ORDERED this 4th day of May, 2001, in Tallahassee, Leon County, Florida.

Patricia Hart Malono

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of May, 2001.

ENDNOTE

[1]/ WRS raised in its Response to OHM's Response to DOT's Motion for Official Recognition, and Additional Motion for Official Recognition an issue collateral to the question of official recognition but an issue that, nevertheless, merits comment. In its response, WRS asserts that the opinion of the Third District Court of Appeal is "law of the case" with respect to the issue of whether the Department violated Section 120.57(3)(c), Florida Statutes, by re-evaluating the proposals of OHM and WRS while the WRS bid protest was pending and that the decision of the Third District Court of Appeal "now governs at the trial court level and throughout subsequent stages of the case." WRS acknowledges, however, that the doctrine of "law of the case"

applies only to subsequent proceedings in the same case after an issue or issues in the case have been decided on appeal.

The instant case is not the same case that was presented to the Third District Court of Appeal in OHM's appeal from the Department's Final Order: **The case decided by the Third** District Court of Appeal involved the bid protest filed by WRS, FDOT Case No. 99-0218, which was dismissed by the Department's Final Order; the instant case involves the bid protest filed by OHM, FDOT Case No. 99-0246. As a result, it would appear that the law of the instant case is not established in the Department's Final Order in FDOT Case No. 99-0218 as a result of the per curiam affirmance of that order by the Third District Court of Appeal in DCA Case No. 3D99-2989. The parties are, however, free to include argument on this issue in their proposed findings of fact and conclusions of law.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor	))))	DOCKET NO. 040001-EI

THOMAS K. CHURBUCK'S POST-HEARING STATEMENT OF ISSUES AND POSITIONS, BRIEF, AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to PSC Order No. PSC-04-1087-PHO-EI issued November 4, 2004, Thomas K. Churbuck ("Churbuck") files his Post-Hearing Statement of Issues and Positions, Brief, and Proposed Findings of Fact and Conclusions of Law.

Florida Power and Light Company ("FPL") is asking the Florida Public Service Commission to approve now three contracts with subsidiaries of the Southern Company totaling 955 MW. Energy and capacity under the contracts are not to be delivered until June 1, 2010. FPL based its case for approval upon certain benefits, the realization of which FPL admitted is dependent on future events. FPL's case was based on certain assumptions and predictions about present circumstances and future events which may or may not be accurate.

Thomas K. Churbuck is an intervenor in the proceeding. Mr. Churbuck's brief is also based upon certain assumptions and predictions about present circumstances and future events[1].

Only time will tell whether some or all of FPL's and Mr. Churbuck's assumptions and predictions come to pass.

[1] Mr. Churbuck's brief, while relying in part on facts adduced at hearing supported by record cites, is written from the perspective of one reviewing the UPS Agreements in the year 2014, when the energy and capacity represented by the Agreements will have been provided for approximately four years.

Dateline: Tallahassee, Florida
November 10, 2014
Perfect Storm Advisory Number

IMMEDIATE WARNING

This Perfect Storm Advisory Warning is for residents of Florida residing within the Florida Power & Light electric service territory. It provides the latest update and information concerning the Perfect Storm. Those in the impacted area, from Miami up the coast to Daytona Beach, and across the state to Ft. Myers north to Bradenton, are urged to take immediate steps to prepare for the impact of the Perfect Storm. The financial damage expected to be inflicted upon FPL ratepayers is significant, and those who can evacuate to other electric service territories within Florida are encouraged to do so immediately. All FPL ratepayers who are not able to evacuate to other electric service territories should immediately begin emergency budgeting, as the impacts of the Perfect Storm are certain and unavoidable.

HISTORICAL TRACKING INFORMATION AND ANALYSIS

Forecasters have been tracking the Perfect Storm for over ten years, since it first formed during the summer of 2004. The first public filing was made with the Florida Public Service Commission on September 9, 2004 by Mr. Tom Hartman, FPL's Director of Business Management for Resource Assessment and Planning. (TR 480/11-14, Hartman Direct, page 1). Mr. Hartman's testimony traced the storm's origins to previous negotiations with Southern Company, which resulted in three voluminous contract documents (TR Exhibit 13, Contract for Scherer Unit 3, TR Exhibit 14, Contract for Harris Unit 1 and TR Exhibit 15, Contract for Franklin Unit 1, hereinafter "UPS Agreements") being inked effective August 11, 2004. (TR 584/12 – 21).[2] Below you will find the complete storm history. A review of this tracking information should serve to warn future ratepayers and Commissions about future disasters.

WHAT HAPPENED AFTER PSC APPROVAL OF THE UPS AGREEMENTS

Transmission Rights and Required System Upgrades

Delivery of energy under the UPS Agreements did not start until June 1, 2010. (TR 503/4-7). A number of things occurred after the January 4, 2005 Commission approval of the UPS Agreements that further inflated the costs of these contracts and proved FPL's assumptions wrong. On January 28, 2005, Southern Transmission took action on FPL's rollover rights request. When appearing before the Commission, FPL did not know for certain when Southern would act on the roll-over rights request or what that action would be as it had not received the System Impact Study from Southern Transmission associated with its rollover request. (TR 651/25 – 652/12). After the roll-

[2] Cites to the hearing transcript will be given in this manner. For example, "TR 408" means hearing transcript, page 408; "TR 584/12-21" means hearing transcript, page 584, lines 12-21; "TR 651/25-652/12" means hearing transcript, page 651, line 25 through page 652, line 12; and "TR Ex. 18", or "Ex. 18" when "TR" is already given earlier in the cite, means Exhibit 18 to the hearing transcript.

over rights were approved, FPL's redirect request, which could not be entered into the Southern OASIS transmission queue because the roll-over request had not been approved, was posted on OASIS. However, a number of other requests seeking transmission from the Southeastern Reliability Council ("SERC") into FPL service territory were posted on OASIS before FPL's redirect request was posted (Exhibit 20, Mr. Hartman's rebuttal testimony, Exhibit TLH 8), including requests to transmit a total of 3,828 MW of energy from the SERC into FPL's service territory.[3] In the rush to get the 2004-05 Commission to approve the UPS deal, FPL overlooked the requirements of section 22.2 of the Southern Open Access Transmission Tariff, even though FPL witness Hartman admitted that Section 22.2 addressed redirecting FPL's rolled over point-to-point transmission. (TR 653/3-11) This section indicates that redirect requests will be treated as new requests and will follow the queuing and study process set forth in Section 17 of the Southern Open Access Transmission Tariff.

Section 17 states that requests are considered in the order in which they are posted on the OASIS website. Given that FPL's redirect requests are behind over 3,828 MW of other requests seeking transmission from SERC into the FPL service territory over the FPL-Southern-Jacksonville Electric Authority Interface, and a majority of those other customers elected to take transmission service from Southern Transmission, FPL was offered transmission contingent upon the construction of system upgrades on the Southern Transmission system.

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[3] Requested by SOCO-Source: Plant Scherer 4; 1125 MW requested by SWE-Source: Plant Wansley, 150 MW requested by SWE-Source: Plant Bowen, 150 MW requested by SWE-Source: Plant Branch, 150 MW requested by SWE-Source: Plant Scherer, 100 MW requested by TZEA-Source: LLEA LLC, 100 MW requested by TZEA-Source: LLEA LLC, 100 MW requested by TZEA-Source: LLEA LLC, 100 MW requested by TZEA-Source: LLEA LLC, 100 MW requested by TZEA-Source: LLEA LLC, 700 MW requested by CALP-Source: Hillabee, 66 MW requested by EXGN-Source: HEARDCOTNSK, 100 MW requested by MSCG-Source: Plant Miller; 100 MW requested by MSCG-Source: Plant Miller, 649 MW requested by SOCO-Source: Scherer-4.

The Southern Transmission redirect request, once completed, indicated a need to make significant transmission upgrades to accommodate FPL's redirect request. While FPL told the Commission a $200 million transmission upgrade cost would not be acceptable (TR 656/24 – 657/3), it left open the possibility that significant transmission costs could be added to the cost of the UPS contracts. (TR 656/13-23). Additional questioning related to additional costs due to transmission system upgrades was objected to due to FPL's concern about revealing information that could harm it in future transmission negotiations. (TR 656/6-13). However, despite this objection, Mr. Hartman made it quite clear that a potential large cost item of the UPS Agreements was not pinned down with certainty. (TR 654/16 – 655/5).

As only Southern Transmission could fix the transmission costs, despite FPL's belief that the transmission upgrades would not be significant, the $108 million cost figure that Southern Transmission calculated for transmission upgrades surprised FPL. The significant upgrade costs, despite being mitigated somewhat by a confidential provision in the contracts (TR 654 /16 – 655/5), still resulted in additional costs to a project that FPL admitted was between $69 and $93 million dollars more expensive than FPL's self-build option. (TR 494/14-18). Nevertheless, the Commission approved the UPS agreements, even though the potential costs of transmission upgrades were not known at the time (TR 654/16 – 655/5). Remarkably, there was no requirement that FPL bring back for Commission approval the increased costs related to these transmission upgrades.[4]

[4] These costs turned out to be greater than the $16 million "round off error" referenced by Mr. Hartman when comparing the cost differential between FPL constructed and operated combined cycle units compared to Southern's 790 MW of combined cycle power. (TR p. 944 1.1-8)

"Arbitrage Value"

FPL's case before the Commission was premised on FPL's efforts to see beyond the horizon, something that is not easily done, and FPL's view proved to be inaccurate. The "arbitrage" value, something that FPL said weighed heavily in favor of Commission approval of the UPS Agreements, turned out to be illusory, as market conditions changed considerably. FPL admitted that the arbitrage value depended on a number of variables, including the market conditions in SERC and the Florida Reliability Coordinating Council ("FRCC"), and the price of coal-fired generation being less than the price of gas-fired generation. (TR 565/3-12; TR 567/5-568/2) During cross examination, FPL admitted that the arbitrage value it asked the Commission to rely upon was "somewhat uncertain", and could not be guaranteed. (TR 565/3-23). FPL also acknowledged that the "arbitrage" value of the UPS Agreements were dependent upon the price of coal-fired generation being less than the price of gas-fired generation. (TR 566/13-25). Despite FPL's testimony that it could not guarantee any arbitrage due to the transmission rights associated with the UPS Agreements, the Commission was nevertheless swayed by FPL's projected arbitrage savings.

There is a saying about fuel forecasts that the only thing certain about them is that they will be wrong. Predicting the future of markets is difficult, especially as one gets further away in time from the date of the predicted market conditions. (TR 662/24 – 663/2) FPL Witness Hartman acknowledged that in the fall of 2004, three separate Liquefied Natural Gas projects were in development to bring natural gas into the Southeast Florida market. (TR 620/1-8). Two of the three projects were successfully completed, including one project in which FPL Group, the parent of FPL, had an interest. (TR 621/11-14) These two projects, both completed before 2010, provided additional natural gas supply to Southeast Florida, worked to reduce sharply the cost of delivered

natural gas into FPL's service territory. The expanded Gulfstream natural gas pipeline also provided additional natural gas supply to FPL. (TR 301/14-16). Marked improvements in natural gas extraction technology and combustion turbine technology advancements, combined with the discoveries of additional natural gas reserves in the Gulf of Mexico, the construction of the Alaska natural gas pipeline, and new LNG facilities being sited in the Bahamas, resulted in natural gas being comparable in price to coal beginning in the spring of 2010.

Natural gas continues to be the fuel of choice due to: 1) its abundant supply; 2) its price being competitive with coal; and 3) reduced environmental impacts when compared to coal. The arbitrage value FPL touted in 2004 evaporated when the natural gas market shifted as described. The arbitrage value further diminished as price differentials between SERC and FRCC moderated due to an increase in the number of MWs that moved into Florida as a result of transmission upgrades in SERC and FRCC (TR 808/22 – 809/17; Ex. 53). This dramatic shift was not reflected in forecast models used during the summer of 2004[5].

FPL also placed great value in retaining the transmission rights over the FPL–Southern-Jacksonville Electric Authority interconnection. FPL witness Hartman, when questioned about the "benefits" and their relative importance indicated that "a lot of the benefits hinge upon the availability of transmission in SERC. So since they are all dependent on that, that's probably the most important . . . ." (TR 592/19-21). The transmission rights were valuable at the time because of a transmission constraint "bottleneck" that existed at the FPL-Southern-Jacksonville Electric Authority tie near Jacksonville, Florida. (TR525/.7 – 526/1). However, in 2005, efforts were made to remove this "bottleneck" by establishing another significant interconnection link between

[5] Forecasting models have been improved and updated, and are likely to more accurately predict significant swings in natural gas pricing than those used in 2004.

the SERC region and the FRCC region. Securing property rights to an abandoned railroad right of way facilitated siting the new 500 kV transmission line that linked the Georgia Power transmission system with the Progress Energy Florida, Incorporated transmission system. Establishing another significant interconnection between FRCC and SERC spurred increased energy trades between these two regions, and greatly diminished the value of the transmission rights tied to the FPL-Southern-Jacksonville Electric Authority interconnection. The new 500 kV transmission line project was completed in the fall of 2009. In addition, numerous upgrades, which had been identified in 2004, on the transmission system in SERC and FRCC were completed, adding significant internal transmission system capacity. Thus, little, if any, benefit associated with firm transmission rights on the FPL-Southern-Jacksonville Electric Authority was realized since transmission was readily available between SERC and FRCC beginning in the fall of 2009.

Change in Law Risk

The 2004 PSC hearing at which the UPS Agreements were considered took place shortly after President George W. Bush was elected to serve a second term as President. In the months following his re-election, President Bush released his Clear Sky Initiatives under which progressive reductions in emissions would be accomplished through national trading of emissions credits. This had the effect of requiring old coal generators, such as the Georgia Power/Gulf Power Scherer Plant, to increase its prices in order to pay for the emissions credits required to operate or to pay for installation of new updated technology to reduce air pollution.

It was not until the spring of 2009, after President Bush returned to Texas, that his successor and the One Hundred and Eleventh Congress decided the Clean Air Act Amendments of 1977 needed further review and updating. Considerable technological

advancements were realized in air pollution abatement. Congress required all fossil fuel power plants, including coal-fired and natural gas fired, to install this new, expensive technology to reduce air pollution. The Scherer plant, which FPL witness Hartman told the Commission in 2004 was disputing whether it was subject to new source review, (TR 665/1-16), was required to spend $88 million to comply with the new amendments to the federal Clean Air Act. Pursuant to section 13.1 of the UPS Agreements, a significant portion of the cost of installing this new technology at the three units represented by the UPS Agreements was borne by FPL ratepayers. (TR 665/20 – 667/7). While FPL's proposed Purchased Power Agreements provided with its most recently issued Request for Proposal ("RFP") shifted prospective change in law costs to the Seller of power, Southern, capitalizing on either its market power advantage or superior negotiating skills, managed to shift the change in law risks squarely to FPL ratepayers. (TR 667/8 - 668/16).[6]

Finally, bills are pending before the 2014 Congress that would impact water quality requirements for power plants with National Pollution Discharge Elimination System ("NPDES") discharge permits. Those bills have cleared the first committee of reference in both the House and Senate, but have not made it to the Rules Committee in either body. Indications are that water quality legislation may pass both the House and Senate sometime this spring. Should the Clean Water legislation become law as expected, the strengthened discharge levels will result in significant costs to most large fossil fueled power plants, such as those represented by the UPS Agreements. However, the charges associated with any changes to the Clean Water Act would not be passed

[6] FPL stated that cost associated with the contract was a pass-through to its ratepayers, thus, FPL's ratepayers, not its stockholders, were obligated to pay for these expensive improvements to the UPS plants required by the 2009 Congress. (TR 661/13-662/7). FPL stockholders, insulated from this significant cost in the UPS Agreement, and protected contractually in other PPAs where the seller assumed this risk, were somewhat protected from the financial impact of the 2009 Clean Air Amendments. However, many questioned how Florida ratepayers were saddled with the expense of paying to clean up certain power plants in Georgia.

through to FPL ratepayers this year. Those costs would be passed through in the 2015 fuel and purchase power docket.

FERC Market Power Investigation

The FERC market power investigation into Southern was completed in early March of 2007. The 2004 Commission was aware that Southern failed one of FERC's indicative market power tests, as Mr. Hartman admitted this on the witness stand (TR 635/25 – 636/15) and witness Dismukes elaborated on the FERC market power investigation. (TR 793/7 – 795/14). While Mr. Hartman tried to minimize the impact of this admitted failure by pointing out that Southern had passed some 600 other screens, he was not aware that FERC had recently issued Southern a deficiency letter which sought additional information from Southern. (TR 636/24 - 638/8; Ex. 67). The 2004 Commission reviewed this matter, but failed to require FPL, as a condition of PSC approval of the UPS deal, to seek contract modification of UPS regulatory section 12.3.1 to give FPL ratepayers, if FERC found market power, the lower of cost based rates or the UPS contract pricing. This would prove to be costly.

The FERC market power investigation moved forward after the November 2004 hearing at which the UPS Agreements were presented for approval. The FERC market power investigation included a review of whether Southern was impermissibly linking or tying highly desired power products with products less desirable. While the Florida Commission was not reviewing specifically the issue of market power, it did have evidence before it that Southern "linked" the 165 MW of coal fired generating capacity from Scherer with 790 MW of gas-fired capacity. (TR 632/1 – 633/9). Presumably concerned about this tying or linking arrangement, PSC staff inquired directly whether FPL was paying a premium for the Southern combined cycle gas units. (TR 760/12-15). While FPL told staff it was not paying a premium, FPL also indicated that its own

combined cycle gas units were projected to be approximately 2% less expensive than the comparable Southern gas product. (TR 634/3-15). Thus, the question is not whether a premium was being paid, as it clearly was, but rather how much of a premium FPL agreed to pay for the Southern gas fired combined cycle energy. FERC also investigated whether Southern impermissibly used its transmission system to enhance business opportunities.

After years of FERC filings, litigation, appeals, and more litigation, FERC concluded that Southern had market power in the Southern SERC region and its market based rate authority was revoked. FERC also ordered that cost based rates be paid in all situations in which contracts were negotiated in the presence of market power. While a number of purchasing utilities were able to have their purchase power contracts reformed immediately as a matter of law based on the FERC market power decision, the UPS Agreements required FPL to make FERC filings in support of the "Original Economic Benefit" of the 2004 UPS deal. (TR 642/6 – 643/16) (TR Ex. 13, 14, 15 Regulatory Article). Wanting to keep the payments flowing from the over-market-priced UPS Agreements, Southern employed, not surprisingly, a legal strategy designed to retain the "Original Economic Benefit" of the UPS Agreements. FPL, despite these UPS contracts being significantly over-priced compared to 2014 market prices, said it was contractually barred from seeking cost-based rates at this time. The UPS Agreements obligated FPL to support the efforts of Southern to keep the pricing set forth in the UPS Agreements (TR Ex. 13, 14, 15 Regulatory Article).

Ups Agreements and Upcoming 2014 Purchased Power and Fuel Adjustment Hearing

The upcoming Purchased Power and Fuel Adjustment Hearing is scheduled for November 12, 13 and 14, 2014. FPL will again ask the PSC to allow it to recover from its ratepayers the higher than market costs of the UPS Agreements. When contacted

about the upcoming fuel and purchase power adjustment hearing, a FPL spokesperson declined to engage in "Monday morning quarterbacking." A PSC spokesperson was more forthcoming, and explained that the UPS deal was approved unconditionally back in 2004 and that none of the current Commissioners considering the 2014 fuel adjustments served on the Commission then. She described it as "unfortunate" that the UPS deal was approved so far in advance of its effective date, particularly in light of the changed energy markets in FRCC and SERC. She added that current Commissioners feel somewhat constrained from prying into the UPS matter. Relying on the Order Approving UPS Contracts issued in January 2005, FPL continues to state that the 2014 Commission has no choice but to pass through the UPS costs to FPL ratepayers.

In response to repeated press inquiries, the PSC Chairman's office issued a statement earlier this month in which he questioned the public policy implications of one Commission impairing the ability of a future Commission to rule freely on matters before it. The statement also recounts a conversation about the UPS contracts the Chairman had with the Governor. The substance of the Chairman's conversation with the Governor was disclosed in the statement pursuant to the Commission's ex parte rule. The Chairman's statement read as follows:

> "The Governor appointed me to be a fair regulator and to call it like I see it. I try to balance fairly the interest of the ratepayers with the interests of the regulated utilities. The Governor recently wanted to know more about the UPS Agreements and their "automatic approval" that he read about in the press. I explained to the Governor that I had little choice but to approve the excessive costs associated with the controversial UPS agreements due to the actions of

the 2004 Commission. The Governor questioned how I could be bound by actions a PSC Commission took ten years ago when he knows from working with the Legislature that one Legislature is not able to bind a future Legislature[7]. I indicated that FPL had supplied me with a copy of the January 2005 UPS Agreement Approval Order and an excerpt of the 2004 hearing transcript[8], and clearly the 2004 Commission approved the UPS contracts in a way tantamount to a prudence review. I question the wisdom of such action, and would surely refrain from acting in a way to bind my successors, particularly without overwhelming commercial justification demonstrated by a competitive bidding process. However, I believe, regrettably, that I have no choice but to approve and pass along to FPL ratepayers these above-market costs. The only positive I see is that these Agreements expire in December of 2015."

In a related development, the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) presented its review of the UPS Agreements to House Speaker Michael Bennett earlier this week. Bennett, who served as the Chairman of the Senate Communications and Utilities Committee in 2004, had written a letter to the

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[7] Jacksonville Electric Authority v. Department of Revenue, 486 So.2d 1350 (Fla 1st DCA 1986) (It is beyond the constitutional power of one legislature to bind another.)

[8] Commissioner Deason: Mr. Hartman, I'm looking to determine what – when you say "approval of the FPSC," what do you envision? To what extent of an approval are you looking for? Unconditional approval? Under any circumstance?

FPL Witness Hartman: My understanding of what we're asking is, we're asking that whenever we incur costs under this contract, which will be in 2010, we can basically recover those costs from our customers because we're entering into it on our customers' best interest. **If the power costs whatever it costs, then fine. We recover it from the customers . . . .**" (emphasis added) (TR 661/1–25)

2004 Commission urging them to separately consider the UPS Agreements and their implications from other issues that were customarily addressed in the fuel docket. (TR 15/13 – 17/7). The OPPAGA report presents an extensive review of the UPS contracts and is set forth in part below.

OPPAGA Report On UPS Agreements; Lessons Learned

Pursuant to a joint request from the Speaker of the House and the President of the Senate, OPPAGA investigated the circumstances surrounding the approval of the UPS Agreements by the Florida Public Service Commission in 2004. This report was requested on June 6, 2013 following the end of the regular 2013 Legislative session. To prepare this report, OPPAGA staff relied heavily on the record of the administrative hearing held on November 8 and 9, 2004 to which it cites throughout the report.

FPL filed with the Commission on September 9, 2004 testimony supporting its request for approval of the UPS Agreements. (TR 480). An evidentiary administrative hearing was held two months later pursuant to section 120.57(1) and 120.569, Florida Statutes.

An FPL ratepayer, Mr. Tom Churbuck, who, unlike most FPL ratepayers, had specialized knowledge about the electric power industry, intervened in the 2004 fuel and purchased power rate proceeding. Mr. Churbuck was the President of Power Systems Mfg., LLC, a subsidiary corporation of the Calpine Corporation, an independent power producer in the business of developing and operating power plants in the Southeastern United States. The interests of Mr. Churbuck, a FPL ratepayer, in receiving the lowest cost power available in the market, were questioned by FPL. FPL, worked hard to get the 2004 Commission to take its eye off the ball. At hearing, FPL questioned Mr. Churbuck's expert witness, David Dismukes, extensively about his knowledge of or involvement with Calpine Corporation. (TR 833/5 - 838/8). FPL completely disregarded

the substance of Mr. Dismukes well-reasoned testimony during its cross-examination. (TR 838/10 – 839/6). Unfortunately for future ratepayers, so did the 2004 Commission and staff, as the UPS Agreements were recommended for approval as presented and subsequently approved on January 4, 2005.

The Commission refused efforts of Public Counsel, representing all the ratepayers of Florida, the Florida Industrial Power Users Group, representing large industrial consumers of electricity, and Mr. Churbuck to separate the issue of UPS contract approval from other issues in the docket. These parties argued, to no avail, that more time was needed to carefully and thoroughly review and analyze the complex issues related to the UPS Agreements. (TR 17/24 – 21/13). The Commission also found, without comment or question, after FPL admitted during cross examination to contacting only three power providers out of a list of twenty two, and neglecting to issue a Request for Proposal, that FPL had adequately explored other market options before signing the UPS Agreements. (TR 602/14 – 605/20, TR 787/18-23, TR 948/16 – 949/17). Thus, the sole remaining issue for which briefs were solicited and the 2004-05 Commission had to decide was:

14(C): Should the PSC approve the three UPS Agreements between FPL and Southern Company for cost recovery purposes?

Mr. Churbuck set forth the following position in his post-hearing brief:

> No. FPL's "evidence" of benefits associated with the UPS contracts, presented while FERC was investigating issues related to Southern's market power, was speculative and unsupportable. FPL's self-build option would have saved ratepayers over $150 million dollars (2004 NPV) based on FPL's own estimates, before FPL sought to deduct

speculative UPS "arbitrage" benefits that it admitted may never be realized.[9]

OPPAGA has reviewed FPL's claims of benefits and concludes that FPL's claims were overstated, based on assumptions that turned out not be accurate, and in one case, apparently misrepresented. The following section of the OPPAGA report lists the benefits FPL asked the Commission to rely upon, and OPPAGA's analysis of each claimed benefit.

Benefit One - FPL will maintain 165 MW of firm coal capacity. (TR 504/7-9). FPL was able to retain 165 MW of coal fired generation under the UPS Agreements approved by the Commission. However, the benefit of maintaining 165 MW of firm coal capacity was of insignificant value given the following:

a. It represented less than 1% of FPL's generation portfolio (TR. 573/11 – 14).

b. The negotiations for "renewal" of the UPS agreements, during which FPL sought to retain as much of the existing 930 MW of coal-fired generation as possible, went against FPL in that it lost over 80% of the existing coal fired capacity in the UPS Agreements, securing only 165 MW of coal-fired generation. (TR 571/15 – 572/18; TR 669/20 – 670/23).

c. At the time the UPS contracts were considered by the 2004 Commission, FPL was and had been investigating a solid fuel facility in Florida that would have been considerably larger than 165 MW. (TR 578/24 – 579/6). FPL's own coal-fired facility could be completed in seven years, providing an in-service date of

[9] Active opposition to approval of the UPS Agreements was registered by another intervenor besides Mr. Churbuck, Florida Industrial Power Users Group ("FIPUG").

the fall of 2011. (TR 576/7-10). While FPL acknowledged that power was available for sale in the FRCC market, it did not investigate "bridging" the time period from summer of 2010 (power delivered under UPS Agreements) until the fall of 2011 (potential in-service date of FPL coal-fired facility) with a short term purchased power agreement. (TR. 579/7 – 580/1.) Furthermore, FPL failed to consider, as an option, self-building its own coal-fired generating facility rather than executing the UPS Agreements. (Tr. 581/8-10).

d. Other companies, including LS Power Development, LLC, a witness in the UPS case, were working to develop coal-fired facilities in SERC that would have provided more than 165 MW of coal fired capacity to FPL. (TR 865/4-14). The coal-fired generation being developed in SERC by LS Power Development, LLC, along with the Big Cajun II unit, totaled over 3,330 MW and would likely have been available by the summer of 2010, the commencement date for power deliver under the UPS Agreements. (TR 877/7 – 882/8; Ex. 52).

e. Fuel prices are known to swing and become quite variable. (TR 788A/17-789/1). The differential in coal prices compared to gas prices moderated.

Benefit Two – FPL will receive rights of first refusal for additional firm coal fired capacity and energy from Southern's Miller and Scherer units. (TR 488/10-12).

As another "key benefit" for asking the Commission to approve the UPS Agreements, FPL indicated that it will receive rights of first refusal for additional firm

coal-fired capacity from Southern's Miller and Scherer units. (TR 740/22 – 741/14). FPL asked the Commission to rely on "rights of first refusal" that it secured for the ability to purchase coal from the Scherer unit and the Miller unit.

Mr. Hartman took the stand and affirmed his pre-filed testimony. (TR 467/14-17). Counsel for Mr. Churbuck objected to portions of Mr. Hartman's testimony describing the rights of first refusal based on section 90.952, Florida Statutes, the best evidence rule, and section 120.57(1)(c), Florida Statutes, hearsay being used to establish a fact not otherwise in evidence. That objection was overruled. (TR 474/12 – 477/16). Mr. Hartman testified that he did not have the right of first refusal agreements with him when he took the witness stand on Monday, November 8, 2004. (TR 548/10 – 15). The following day, PSC staff requested the Rights of First Refusal. (TR 741/15-19). Not wanting to subject Mr. Hartman to cross examination on the Rights of First Refusal, FPL offered to make the Rights of First Refusal available as a late-filed exhibit and suggested it would be filed the day after the conclusion of the trial. (TR 741/20 – 742/3). Counsel for Mr. Churbuck again objected, suggesting that providing after trial a key document containing the facts about which FPL witness Hartman testified was unfair. Providing the Rights of First Refusal after hearing also made cross examination on the documents impossible. Only after counsel for Mr. Churbuck voiced objection to the documents being provided after the hearing, did FPL produce redacted copies of the Rights of First Refusal to all parties. (TR 742/11-25; Ex. 69).

The "Scherer Right of First Refusal".

Mr. Hartman testified that he was familiar with the rights of first refusal, and that he had witnessed FPL executing them. (TR 767/5-18). Nowhere in Mr. Hartman's direct pre-filed testimony did he make any material distinction between the respective rights of first refusal related to the Scherer contract as being anything other than a right of first

refusal. When asked at hearing to describe his general understanding of a right of first refusal, Mr. Hartman testified "a general right of first refusal to me would be if somebody has a deal, they bring it to us first and we can either accept it or reject it." (TR 937/6-8). However, in reviewing the Scherer Right of First Refusal, Mr. Hartman admitted that it was not really a right of first refusal, but merely provided FPL with a back up position in the event a deal already signed by Southern and an unidentified third party did not go through. (TR 938/6 – 10; Ex. 69). This point was omitted in Mr. Hartman's direct pre-filed testimony, and only became known after FPL was asked to provide a redacted copy of the Scherer right of first refusal.

This discrepancy revealed during cross-examination about one of the benefits upon which FPL asked the Commission to rely in approving the UPS contracts should have made the Commission leery about other "benefits" FPL cited to the Commission in seeking advance approval of these contracts. Additionally, FPL admitted that it paid nothing for these "rights of first refusal". (TR 610/10-16). It is black letter law in Florida that in order for a contract to be enforceable, the contract must be supported by consideration. Frissell v. Nichols, 144 So. 431 (Fla. 1927); PRK Kwik Food Stores, Inc. v. Tenser, 407 s0.2d 216 (Fla. 2nd DCA 1981), pet. for rev. denied, 415 So.2d 1361 (Fla. 1982) (Binding contract requires consideration.) Thus, these contracts are not enforceable as a matter of law, since FPL admits "nothing" was paid for these "rights". (One also questions the value the Southern Company placed on these rights, if no consideration was paid for them.) Finally, FPL admitted that the value of the "rights of first refusal" was dependent on a number of other variables, (including the need for these resources in 2010 by Alabama Power Company's retail customers, i.e. native load), none of which FPL investigated prior to asking the Commission to approve the UPS

Agreements, and admitted that the value was uncertain and could be worthless. (TR 556/7 – 558/6).

Benefit Three – Ability to retain 930 MW of interface capability over the Southern-FPL transmission interconnection. (TR 488/12-14)

FPL suggested that it should be able to retain the ability to transmit electricity over the FPL-Southern-Jacksonville Electric Authority interface. However, FPL could not assure the Commission that this would indeed occur, as Southern Transmission was still in the process of studying FPL's request for roll-over rights. (TR 651/25 – 652/2). FPL had until 2010 to request roll-over rights, and the granting or denial of such rights was not dependent on securing power from the Southern Company or its subsidiaries.

FPL's request for re-direct rights had not been posted on OASIS, and Sections 22.2 and 17 of the Southern OASIS tariff required that all redirect requests be considered in the order in which they were received. Thus, the Commission was aware at the time it made its decision that: 1) FPL had not secured firm transmission rights; 2) Sections 17 and 22.2 of the Southern OASIS tariff were in place and provided that redirect requests would be treated as all other requests for firm, point to point service; 3) others had applied prior to FPL's redirect request for firm point to point service in a flow path similar to flow path FPL was seeking; 4) the impact of FPL's redirect request on the Southern Transmission system was unknown; 5) costs associated with any required facilities upgrades was unknown; 6) the value FPL ascribed to "arbitrage" was dependent on the relative market conditions in SERC and FRCC remaining largely unchanged for 10 plus years (2004 hearing compared to 2015 contract termination date) and was not certain; 7) FPL could have obtained these transmission benefits, assuming it selected any provider that was along a similar flow path as the original UPS Agreement or that delivered power to a point on the Southern transmission system that was along a

similar flow path as the original UPS Agreement; and 8) the benefits of retaining this transmission capacity over the FPL-Southern-Jacksonville Electric Authority interface were only beneficial to the extent that the FPL-Southern-Jacksonville Electric Authority interface remained the key interface between FRCC and SERC, such that the addition of another significant interface between SERC and FRCC would devalue considerably the benefit extolled by FPL. The value of the transmission benefit was overstated.

Benefit Four – FPL will obtain the equivalent of firm gas transportation adequate for 790 MW of generation on a separate gas transmission network independent of the two that serve Florida. (TR 488/15-18).

FPL asked the Commission to approve the UPS Agreements in part because 790 MW of gas-fired generation was fueled by a gas transmission network independent of the Florida Gas Transmission system or the Gulfstream system. (TR 504/17- 505/2). FPL could not put a value on this benefit or rank or quantify it in any meaningful manner. (TR 542/30 – 543/23). This benefit was of marginal value when one recognized that Peninsular Florida had been served adequately by the FGT system for years before the Gulfstream system became operational. (TR 801/12 – 21). The Gulfstream natural gas transportation system provided additional reliability to the residents of Peninsular Florida. Additionally, three Liquified Natural Gas projects planned for the Bahamas were in development when FPL asked the Commission to weigh the benefit of 790 MW of energy from a gas system independent of either FGT or Gulfstream. (TR 802/1-12). These Bahamas based projects all planned to provide natural gas to Southeast Florida and FPL's service territory. Expert witness Dismukes testified that natural gas supply and diversity would increase in Florida before 2010. (TR 802/1-12). Thus, the benefit of 790 MW of gas-fired generation, which was more costly than FPL's own self-build natural

gas projects (TR 634/3-20), was of little value and should not have been relied upon in approving the UPS Agreements.

Benefit Five - FPL's access to firm transportation on the Southern system will enable FPL to obtain firm capacity and/or purchase market energy from outside Florida, thus enhancing FPL's electric system reliability. (TR 488/19-22).

This benefit was not wholly dependent on the UPS Agreements, but could have been available if FPL actively investigated the SERC market for other generation options that would have received roll-over transmission rights. (TR 799/17-21). Thus, there was nothing unique about the UPS agreements as it related to this benefit FPL asked the Commission to consider. Additionally, in a docket opened to review utility reserve margins, Docket No. 981890, the Commission had previously accepted an agreement to which FPL was a party that increased reserve margin requirements from 15% to 20%, a decision that made FPL's electric system more reliable. Thus, FPL's claim of increased reliability due to retaining firm transmission on the Southern system was of debatable value, and if there was any such value, it was not dependent on the UPS Agreements, but could have been realized in other ways.

Benefit Six FPL will be able to defer making a long term commitment (self-build or long term purchase), which likely would be gas-based, thus preserving a certain amount of flexibility to consider new non-gas technologies over the next ten years. (TR 489/1-4).

As with all the other "benefits", FPL failed/refused to rank this benefit that it asked the Commission to consider in approving the UPS Agreements. (TR 542/20 – 543/23). Additionally, there was a paucity of evidence about this "benefit", how it could be realized or its value. FPL admitted that it was actively considering and working on a solid fuel project (TR 578/24 – 579/6), so it was disingenuous for FPL to suggest that it

would be hindered in considering non-gas technologies over the next ten years unless the UPS Agreement was approved. If this "benefit" were so significant, one would expect FPL to regularly and routinely seek short term (3 to 5 year capacity and energy arrangements) contracts with others rather than construct new power plants. There was no evidence in the record that FPL sought in any other context these type of short term arrangements and the associated "flexibility benefit" it asked the Commission to rely upon in approving the UPS Agreements. The value of this benefit was speculative and of marginal value at best.

OPPAGA SUMMARY

Based upon the review of the record before the Florida Public Service Commission in 2004, the "benefits" FPL asked the Commission to rely upon were uncertain, premature, ill-defined, and speculative. FPL could not rank the "benefits" and made no effort to quantify these "benefits"[10], yet asked the Commission to evaluate the so called "benefits" of the UPS Agreements to eclipse between $69 and $93 million dollars in ratepayer savings. The Commission and its staff accepted all of FPL's evidence and the assumptions upon which FPL's case rested. While FPL witness Hartman indicated it would be "foolish" for FPL shareholders to shoulder the risks associated with the UPS Agreements absent Commission approval, he did not believe it would similarly be foolish for FPL ratepayers to face the risks presented by the UPS Agreements. (TR 659/11-24).

Accurately predicting the future is fraught with peril. Using predictions of events and circumstances nearly 6 years into the future as the basis to pre-approve the UPS

[10] FPL witness Hartman admitted that the benefits could be quantified based on assumptions made, but made no effort to quantify the benefits for the Commission before asking for approval. (TR–592 l. 2 – 8)

Q. Okay. Are they unquantifiable?

A No, they could be quantified. However, they would take a number of assumptions that make the quantified analysis dependent entirely upon the assumptions you make.

Q. Okay. But you haven't undertaken to quantify the benefits; correct?

A. No. That's correct.

Agreements was an FPL invitation that the 2004 Commission should have politely declined.

CHURBUCK CONCLUDING FORECAST

The cases presented by FPL and by Thomas Churbuck are similar in that both strive to forecast future events that will impact the economics of the UPS Agreements during the 2010 to 2015 timeframe. Churbuck has attempted to paint a picture viewed from the year 2014, and has tried to consider circumstances and possibilities in a broad fashion. FPL's picture of the 2010 to 2015 timeframe is based on a more narrow and limited outlook. FPL failed to consider seriously things such as: 1) improvements to FRCC and SERC transmission systems, including the possibility of additional transmission interconnecting SERC and FRCC; 2) changes in law that would affect the price of the UPS Agreements; 3) self-building its own coal-fired facility instead of moving forward with the UPS Agreements; 4) the possibility that Southern may have exercised market power in securing the UPS Agreements; 5) issuing a Request for Proposal for the energy and capacity represented by the UPS Agreements; 6) power projects in construction or development in SERC or FRCC; 7) coal-priced power; 8) delivered power; 9) other existing providers of energy in the SERC region; 10) existing providers of energy in the FRCC region, 11) cogenerators.

FPL, in effect, used only one storm tracking model in asking the Commission to approve the UPS Agreements and never authorized reconnaissance flights to gather additional data. It is a well-known and accepted fact in meteorology that the use of reconnaissance flights and numerous models result in more accurate storm forecasts. The Commission should refuse to activate its emergency operations center now. Instead, the Commission should deny at this time FPL's request to approve the UPS Agreements for cost recovery purposes without prejudice to subsequently review these contracts or similar contracts at a point in time closer to 2010.

Respectfully submitted this 1st day of December, 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail without an asterisk this day the 1st day of December, 2004.

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