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Sent: Thursday, July 28, 2005 4:28 PM
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Subject: Electronic Filing for Docket No. 050045-EI / Docket No. 050188-EI - Florida Power & Light
 Company's Response to the Office of Public Counsel's Motion to Strike, Motion in Limine and
 Alternative Motion for Leave to File Rebuttal Testimony

Attachments: FPL's Response to Motion to Strike, Motion in Limine and Alternative Motion for Leave to File
 Rebuttal Testimony.doc



FPL's Response
to Motion to St..

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 050045-EI / Docket No. 050188-EI

In re: Petition for rate increase by Florida Power & Light Company In re: 2005
 Comprehensive Depreciation Studies by Florida Power & Light Company

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

d. There are a total of 11 pages.

e. The document attached for electronic filing is Florida Power & Light Company's Response
 to the Office of Public Counsel's Motion to Strike, Motion in Limine and Alternative
 Motion for Leave to File Rebuttal Testimony

(See attached file: FPL's Response to Motion to Strike, Motion in Limine and Alternative
 Motion for Leave to File Rebuttal Testimony.doc)

Thank you for your attention and cooperation to this request.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by)
Florida Power & Light Company.)

Docket No: 050045-EI

In re: 2005 comprehensive depreciation)
study by Florida Power & Light Company.)

Docket No. 050188-EI

Filed: July 28, 2005

FLORIDA POWER & LIGHT COMPANY'S RESPONSE TO THE OFFICE OF PUBLIC COUNSEL'S (OPC'S) MOTION TO STRIKE, MOTION IN LIMINE AND ALTERNATIVE MOTION FOR LEAVE TO FILE REBUTTAL TESTIMONY

NOW, BEFORE THIS COMMISSION, through undersigned counsel, comes Florida Power & Light Company ("FPL" or the "Company"), and pursuant to Rule 28-106.204(1) and 28-106.202, Florida Administrative Code, files this response to OPC's Motion to Strike, Motion in Limine and Alternative Motion for Leave to File Rebuttal Testimony filed July 21, 2005, and in support states:

1. OPC's Motion to Strike and Motion in Limine (sometimes collectively referred to as the "Motion") should be denied. When the Commission granted OPC's motion to consolidate this rate case and depreciation proceeding, the Commission said it did so because it would "ensure that our findings on appropriate depreciation rates can be incorporated into the rates established in the rate case." See Order No. PSC-05-0499-PCO-EI, p. 3, Docket Nos. 041291-EI, 050045-EI and 050188-EI (issued May 9, 2005). Otherwise, "both the annual depreciation expense and the accumulated depreciation reserve could be misstated for the purpose of setting future base rates." See *id.* Now OPC seeks to undo the Commission's purpose in granting OPC's Motion to Consolidate the rate case and depreciation dockets. OPC asks the Commission

to disregard FPL's updated depreciation study filed on July 1, 2005 because the update was "unauthorized" and the procedural schedule does "not allow or contemplate such a filing." See July 21 Motion at ¶ 12. OPC's claims are unfounded. FPL's updated filing is required by Commission rule because FPL's March 2005 filing included both forecasted and actual data for 2004, while the rule requires year-end data. See Rule 25-6.0436(6)(g), Florida Administrative Code ("F.A.C.") (the "Depreciation Rule"). Further, it is routine practice for companies to file updates to their original depreciation filings just before depreciation rates are set, even where depreciation and base rate proceedings are not consolidated. Permitting FPL to update its depreciation study enables the Commission to incorporate the appropriate depreciation rates into the rates established in the rate case and ensure that both the annual depreciation expense and the accumulated depreciation reserve are not misstated for the purpose of setting future base rates. See Order No. PSC-05-0499-PCO-EI, p. 3, Docket Nos. 041291-EI, 050045-EI and 050188-EI (issued May 9, 2005). OPC's position, on the other hand, attempts to drive a particular base rate outcome.

2. It was no surprise to OPC and other parties that FPL filed its updated depreciation study, and OPC has ample opportunity to evaluate and address FPL's updated depreciation study within the existing procedural schedule. OPC has made arrangements to depose FPL Witness K. Michael Davis on August 9, and will have the opportunity to cross-examine Mr. Davis regarding the updated study at the Commission's scheduled hearing in this matter. In addition, FPL is responding to OPC discovery related to the updated study, and FPL will copy OPC and the other parties on its answers to Staff's interrogatories addressing the updated study. Also, Staff held an informal meeting related to the updated study on July 20, 2005 to present to all parties the results of their analysis to date of the updated study. Despite the fact OPC has ample opportunity to

address the updated study within the existing schedule, FPL does not object to OPC filing supplemental testimony addressing the updated depreciation study on August 15, 2005, as requested by OPC, provided FPL has an opportunity to file supplemental rebuttal testimony on August 19, 2005, to the extent necessary.

Background

3. A 2002 Commission Order required FPL "to file its next depreciation study by October 31, 2005, with an implementation date of January 1, 2006, for new depreciation rates ... See Order No. PSC-02-1103-PAA-EI, pp. 4-5, Docket No. 020332-EI (issued August 12, 2002) (emphasis added) (the "2002 Order"). To comply with the Commission's 2002 Order, and to satisfy the rule requirement that a depreciation study be submitted no later than the filing date of the Company's Minimum Filing Requirements ("MFRs" or "MFR") where the Company proposes "an effective date coinciding with the expected date of additional revenues initiated through a rate case proceeding", FPL submitted a depreciation study on March 17, 2005 necessarily based on forecasted and actual data for 2004. In the transmittal letter attached to the March 17, 2005 filing, FPL advised all the parties that it would be updating this initial filing with 2004 actual results and other known changes.

4. FPL filed its rate case petition, MFRs and supporting testimony on March 22, 2005. FPL's Petition for Rate Increase expressly asked that updates to the depreciation study be taken into account in setting base rates. Paragraph 24, page 14, of the Petition for a Rate Increase, provides in pertinent part as follows:

The depreciation rates used in FPL's 2006 test year are the result of a depreciation study that was filed in March 2005 to satisfy the requirements of Order No. PSC-02-1103-PAA-EI and to comply with Rule 25-6.0436, F.A.C. FPL requests that the Commission recognize the effect on the 2006 test year results of any adjustment(s) that it makes to the depreciation study.

See FPL's Petition for Rate Increase, ¶ 24 (filed March 22, 2005).

5. On March 29, 2005, OPC filed a motion asking the Commission to consolidate the depreciation and base rate proceedings, as well as the proceeding related to recovery of extraordinary 2004 storm restoration costs. The Commission granted OPC's motion to consolidate the rate case and depreciation dockets, but it did "not believe that consolidation of the storm cost recovery docket with these dockets [was] warranted."¹ Regarding consolidation of the rate case and depreciation dockets, the Commission found as follows:

Consolidation of the depreciation study docket and the rate case will ensure that our findings on appropriate depreciation rates can be incorporated into the rates established in the rate case. Currently, the depreciation study docket is scheduled to be addressed without a hearing as proposed agency action at an agenda conference shortly before the rate case hearing begins. If our proposed agency action concerning the appropriate revised depreciation rates is protested, a final decision might not be rendered in sufficient time to incorporate the revisions into the rate case. **As a result, both the annual depreciation expense and the accumulated depreciation reserve could be misstated for the purpose of setting future base rates.** This situation can be avoided if the depreciation study docket and the rate case docket are consolidated to allow both dockets to proceed on the same hearing track.

See Order No. PSC-05-0499-PCO-EI, p. 3, Docket Nos. 041291-EI, 050045-EI, 051088-EI,
issued May 9, 2005.

6. On May 13, 2005, FPL filed Supplemental Direct Testimony of Witness Davis in support of the depreciation study. Witness Davis stated that the March 2005 depreciation study would be updated "to incorporate actual plant and reserve balances as of December 31, 2004, with these balances rolled forward to December 31, 2005." See K. Michael Davis Supplemental Direct

¹ The Commission permitted OPC to file supplemental testimony addressing the depreciation study in the context of the storm proceeding and FPL filed supplemental rebuttal testimony.

Testimony, p. 4, filed May 13, 2005. He said "FPL does not expect the update to change the new depreciation rates appreciably, if at all."

7. On July 1, 2005, the Company filed an updated depreciation study. As stated above, the initial depreciation study filed in March 2005 was necessarily based on forecasted and actual data for 2004. The July 1, 2005 study updated 2004 projected activity with actual results. The updated depreciation study also includes the effects of revised retirement units for nuclear and fossil (as FPL Witness Davis discussed in his cross examination in Docket No. 041291-EI), and a separate capital recovery schedule for the replacement of approximately 2.6 million meters related to the automated meter reading project. Also, the updated study reflects the effects of FPL completing the unitization of the Sanford and Fort Myers combined cycle units (placed in service in prior years). Finally, the updated study reflects allocation of the entire bottom line reserve deficit to the nuclear function, instead of the nuclear, transmission and distribution functions.

Argument

8. OPC's argument that FPL's updated depreciation study should be stricken or excluded from evidence is unfounded. Despite the relevance and value to the case of FPL's updated depreciation data, OPC's motion asks the Commission to disregard the updated study because it was not addressed in the Commission's procedural order or Commission rules. Administrative proceedings are not subject to the same strict evidentiary standards used in trial courts. The evidentiary standard that applies to motions to strike and motions in limine, not cited by OPC, is found in Section 120.569(2)(g), *Florida Statutes*, which states that "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be

admissible, whether or not such evidence would be admissible in a trial in the courts of Florida.”

(emphasis added). A motion in limine may not be used to summarily dismiss a portion of a party's case or as a motion for summary judgment. See Buy-Low Save Centers, Inc. v. Glinert, 547 So. 2d 1283 (Fla. 4th DCA 1989) (“use of a motion in limine is improper when it is used to do more than merely exclude irrelevant or improperly prejudicial evidence”); Brock v. G.D. Searle & Co., 530 So. 2d 428, 431 (Fla. 1st DCA 1988) (“trial courts should not allow motions in limine to be used as unnoticed motions for partial summary judgment or motions to dismiss”). OPC's attempt to dismiss the updated depreciation study through the Motion to Strike and Motion in Limine should be rejected.

9. There is no prejudice to the parties in considering the updated FPL depreciation study within the existing procedural schedule. No great effort is required to see the changes between the March 2005 depreciation study and the updated depreciation study. Certainly there are no changes to the updated study that will overcome or alter the differences of opinion between the parties. In his critique of FPL's March 2005 depreciation study, OPC Witness Michael Majoros had ten areas of discrepancy related to the Company's proposed remaining service lives and he criticized the overall methodology used by the Company for calculating net salvage values used in depreciation rates. The updated study would have little, if any, effect on Mr. Majoros' position. There was no change to proposed average service lives between the two studies, and there were minor changes in average remaining lives.

10. The March 2005 study was based on forecasted and actual data. The Depreciation Rule provides that depreciation filings “shall contain all calculations, analysis and numerical data used in the design of the depreciation rate for each category of depreciable plant [and] [n]umerical data shall include plant activity (gross additions, adjustments, retirements, and plant

balance at **end of year**) as well as reserve activity (retirements, accruals for depreciation expense, salvage, cost of removal, adjustments, or transfers and reclassifications and reserve balance at **end of year**) for each year of activity from the date of the last submitted study to the date of the present study.” See Rule 25-6.0436(C)(g), F.A.C. (emphasis added). In his Supplemental Direct Testimony, filed May 13, 2005, FPL witness K. Michael Davis promised FPL would “update the 2005 Study to incorporate actual plant and reserve balances as of December 31, 2004, with these balances rolled forward to December 31, 2005.” See K. Michael Davis, Supplemental Direct Testimony, p. 4, filed May 13, 2005.

11. It is routine practice for FPL and other utilities to file an updated depreciation study closer to the time depreciation rates are set. The fact that this depreciation proceeding has been combined with the rate case should not alter that practice. For example, the majority of FPL’s present depreciation rates were approved in Docket No. 971660-EI, Order No. PSC-99-0073-FOF-EI, issued January 8, 1999. There, FPL filed its 1997 Depreciation Study on December 26, 1997. On March 31, 1998, FPL filed an updated depreciation study to reflect actual plant and reserve balances as of December 31, 1997. The updated study was not contested. The Commission issued proposed agency action Order PSC-99-0073-FOF-EI, which became final after two protests were withdrawn.

12. Contrary to OPC’s suggestion that permitting the Commission to consider the updated study amounts to “squandering state resources,” consideration of FPL’s updated depreciation study promotes administrative efficiency, especially in the context of a revenue requirements proceeding. Permitting FPL to update its depreciation study enables the Commission to incorporate the appropriate depreciation rates into the rates established in the rate case and ensure that both the annual depreciation expense and the accumulated depreciation

reserve are not misstated for the purpose of setting future base rates. See Order No. PSC-05-0499-PCO-EI, p. 3, Docket Nos. 041291-EI, 050045-EI and 050188-EI (issued May 9, 2005). OPC's position, on the other hand, attempts to drive a particular base rate outcome. As noted above, in its Petition for a Base Rate Increase, FPL asked the Commission to recognize the effect on the 2006 test year results of any adjustments made to its March 2005 depreciation study.

13. FPL's updated depreciation study comes as no surprise to OPC or other parties to this case because FPL has been informing OPC and other parties that it would file an updated depreciation study from the date the original depreciation study was filed in March 2005. After FPL filed its updated depreciation study on July 1, 2005, Commission Staff contacted FPL to ask FPL whether FPL would respond to discovery addressing the updated depreciation study even if the discovery was served after July 11, 2005, which was the last day for timely serving discovery in the rate case. FPL agreed to respond to Staff discovery addressing the updated depreciation study, provided the discovery was served before July 15, 2005, and Staff served discovery on July 12. FPL received no such request from OPC.

14. OPC will not be prejudiced if its Motion to Strike and Motion in Limine is denied. OPC has made arrangements to depose FPL Witness Davis on August 9, and will have the opportunity to cross-examine Mr. Davis at the hearing regarding the updated study at the Commission's scheduled hearing in this matter. In addition, FPL is responding to OPC discovery related to the updated study, and OPC and the other parties will receive copies of FPL's answers to Staff's interrogatories addressing the updated study. Also, Staff held an informal meeting related to the updated study on July 20, 2005 to present to all parties the results of their analysis to date of the updated study. Finally, as mentioned above, FPL does not object to OPC filing supplemental testimony addressing the updated depreciation study on August 15,

2005, as requested by OPC, provided FPL has an opportunity to file supplemental rebuttal testimony on August 19, 2005, to the extent necessary.

Conclusion

15. FPL's updated depreciation study should not be excluded or stricken from this proceeding. As the Commission contemplated when it granted OPC's motion to consolidate the rate case and depreciation dockets, FPL's updated depreciation study will enable the Commission to "ensure that [the] findings on appropriate depreciation rates can be incorporated into the rates established in the rate case." See Order No. PSC-05-0499-PCO-EI, p. 3, Docket Nos. 041291-EI, 050045-EI and 050188-EI (issued May 9, 2005). The Depreciation Rule requires year-end data, and the updated study comports with routine Commission practice in the setting of depreciation rates. The fact that this depreciation proceeding has been consolidated with the rate case should not alter that practice. There is no danger of unfair prejudice to OPC because there has been and will be ample opportunity to consider and address the updated study. FPL is not opposed to OPC's Alternative Motion for Leave to File Supplemental Testimony on August 15, 2005, addressing the updated depreciation study, provided FPL has an opportunity to file Supplemental Rebuttal Testimony on August 19, 2005, to the extent necessary.

WHEREFORE, FPL respectfully requests that the Commission deny OPC's Motion to Strike and Motion in Limine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and by United States Mail this 28th day of July, 2005, to the following:

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