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Subject: Electronic Filing for Docket No. 050494-EI - Florida Power & Light Company's Motion to Dismiss Joint Complaint and Petition and Response to Joint Motion to Consolidate

Attachments: Motion to Dismiss Joint Complaint and Petition & Response to Joint Motion to Consolidate.8.8.05.doc

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Motion to
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Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 050494-EI

Joint Complaint and Petition and Request for Hearing of Citizens of the State of Florida, Florida Retail Federation, AARP, Federal Executive Agencies, South Florida Hospital and Healthcare Association, and Florida Industrial Power Users Group for decrease in rates and charges of 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 Motion to Dismiss Joint Complaint and Petition and Response to Joint Motion to Consolidate

(See attached file: Motion to Dismiss Joint Complaint and Petition & Response to Joint Motion to Consolidate.8.8.05.doc)

Thank you for your attention and cooperation to this request.

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint complaint and petition and Request for hearing of Citizens of the State of Florida, Florida Retail Federation, AARP, Federal Executive Agencies, South Florida Hospital and Healthcare Association, and Florida Industrial Power Users Group for decrease in rates and Charges of Florida Power & Light Company for rate increase by Florida Power & Light Company.	)	Docket No.: 050494-EI Filed: August 8, 2005

FLORIDA POWER & LIGHT COMPANY'S
MOTION TO DISMISS JOINT COMPLAINT AND PETITION
AND RESPONSE TO JOINT MOTION TO CONSOLIDATE

NOW, BEFORE THIS COMMISSION, through undersigned counsel, comes Florida Power & Light Company ("FPL" or the "Company"), and pursuant to Rule 28-106.204(2), Florida Administrative Code, moves to dismiss the Joint Complaint and Petition and Request for a Hearing ("Joint Petition and Request") of the Office of Public Counsel ("OPC"), the Florida Retail Federation ("FRF"), AARP, the Federal Executive Agencies ("FEA"), the South Florida Hospital and Healthcare Association ("SFHHA") and the Florida Industrial Power Users Group ("FIPUG") (sometimes collectively referred to as "Joint Petitioners"), filed July 19, 2005, and responds to the Joint Petitioners' Motion to Consolidate, also filed July 19, 2005, and in support states:

1. The Joint Petition and Request is "a request for a rate proceeding ... that [has] already begun." See South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1213-14 (Fla. 2004). FPL has already initiated a general rate case and the Commission has scheduled a formal hearing in Docket Nos. 050045-EI and 050188-EI, which is scheduled to begin in two

weeks. Collectively, these Joint Petitioners have filed 15 pieces of testimony supporting their case. The parties have proposed the issues to be decided by the Commission, and, on July 28, 2005, each of the Joint Petitioners filed prehearing statements of position on each of the 161 issues slated for decision in the case. Therefore, the Joint Petition and Request unnecessarily complicates this proceeding. The Joint Petition and Request defeats the purpose of the streamlined administrative process and results in administrative confusion, not administrative efficiency. Joint Petitioners cannot create rights in themselves by prematurely requesting a hearing. FPL has requested rate relief and Joint Petitioners have whatever rights they have pursuant to Chapters 120 and 366, but no more.

2. The Joint Petition and Request is the third in a string of unnecessary and premature requests for a "shadow" rate case and hearing that have been filed in this proceeding. Both FRF and SFHHA filed petitions to conduct a general rate case and requests for a hearing on April 4 and May 6, 2005, respectively. In a June 23, 2005 Staff Recommendation, Commission Staff recommended that the Commission deny FRF's and SFHHA's "substantially similar" petitions to conduct a general rate case and requests for a hearing because the parties could "fully and fairly" represent their interests in the proceeding that had already been initiated. See June 23, 2005 Staff Recommendation, p. 6, Docket Nos. 050045-EI and 050188-EI. FRF and SFHHA each withdrew their requests for a rate case and hearing before the Commission voted on the Staff's recommendation.

3. Soon after FRF and SFHHA withdrew their respective requests for a rate case and hearing, FRF, SFHHA and the other Joint Petitioners filed the Joint Petition and Request asking the Commission to grant Joint Petitioners a rate case and hearing. As they have collectively argued in their 15 pieces of testimony filed in this proceeding and in their positions on the issues

set forth for decision, Joint Petitioners contend that "FPL's rates are unfairly, unjustly, and unreasonably high ... ." See Joint Petition and Request at ¶ 26. The Joint Petitioners request from the Commission the following relief:

> ... the [Joint Petitioners] hereby petition the Commission to protect their members' interests by holding hearings as provided by Chapters 120 and 366, Florida Statutes, and by setting rates for Florida Power & Light Company that are fair, just, reasonable, and not unduly discriminatory. The facts alleged by the Consumers herein, and described in full detail in their witnesses' testimony and exhibits, demonstrate that the Commission should reduce FPL's rates, effective January 1, 2006, as prayed herein. ...
>
> **WHEREFORE**, the Consumer Petitioners respectfully request the Florida Public Service Commission to hold hearings pursuant to Chapters 120 and 366, Florida Statutes, and to issue its order reducing FPL's retail rates and charges to levels that are fair, just, and reasonable, as required by Florida law.

See Joint Petition and Request at p. 22.

4. This Joint Petition and Request is legally insufficient and should be dismissed. A motion to dismiss raises as a question of law, whether the petition alleges sufficient facts to state a cause of action. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard for disposing of motions to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. See id. When making this determination, the tribunal must consider only the petition and reasonable inferences drawn from the petition must be made in favor of the petitioner. See id.

5. Assuming all allegations in the Joint Petition and Request to be true, the Joint Petition and Request should be dismissed because the Joint Petitioners' allegations of substantial interests are based on mere speculation and conjecture. It is well settled that a party is entitled to a hearing under sections 120.569 and 120.57 only if an agency's proposed action will result in injury-in-fact to that party and if the injury is of a type that the statute authorizing the agency

action is designed to prevent. See, e.g., Fairbanks, Inc. v. State, Dep't of Transp., 635 So. 2d 58, 59 (Fla. 1st DCA 1994), review denied, 639 So. 2d 977 (Fla. 1994) ("To establish entitlement to a section 120.57 formal hearing, one must show that its 'substantial interests will be affected by proposed agency action.'"); Univ. of S. Fla. College of Nursing v. State Dep't of Health, 812 So. 2d 572, 574 (Fla. 2d DCA 2002) ("Section 120.57(1), a provision of Florida's Administrative Procedure Act, provides that a party whose 'substantial interests' are determined in an agency proceeding is entitled to have disputed issues of material fact resolved in a formal evidentiary hearing. To qualify as having a substantial interest, one must show that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing and that this injury is of the type or nature which the proceeding is designed to protect.")

6. While Joint Petitioners acknowledge the "substantial interests" test, they make no allegations suggesting that they have suffered or are in immediate danger of suffering any injury at all, much less an alleged injury that is cognizable by the statutes that govern the rate proceeding. Indeed, Joint Petitioners' ultimate contention that "FPL's rates are unfairly, unjustly, and unreasonably high … ." (See Joint Petition and Request at ¶ 26) is nothing more than they have alleged through their direct case submitted in the existing proceeding. Joint Petitioners attempt to conjure some form of incremental substantial interests by speculating that FPL "may decide to withdraw its petition" and "[if] FPL should withdraw its petition for a rate increase in Docket No. 050045-EI" then they may be unable to access and rely on the evidence and testimony that has been filed. See Joint Petition and Request, ¶¶ 21, 22 (emphasis added). Joint Petitioners' speculations are legally insufficient to form the basis for maintaining a proceeding independent of the one already initiated and well underway. See State, Bd. of Optometry v. Florida Soc. of Ophthalmology, 538 So. 2d 878, 881 (Fla. 1st DCA 1988) (holding

petitioners lacked standing to maintain proceeding where the question of whether application of the challenged rule would cause the petitioners an injury of sufficient immediacy and reality was "purely a matter of speculation and conjecture").

7. The relief sought by Joint Petitioners can be advanced in the proceeding initiated by FPL. FPL's petition that initiated this proceeding asked the Commission to set retail rates and charges to levels that are fair, just, and reasonable to be effective January 1, 2006. The dichotomy between FPL and Joint Petitioners is that FPL has argued a rate increase is necessary in order for retail rates and charges to be set at fair, just, and reasonable levels, while Joint Petitioners contend a rate decrease is necessary to achieve that result. The mere fact that the Joint Petitioners are taking a position contrary to FPL in this proceeding is not itself a reason to institute a separate shadow proceeding. As noted by Joint Petitioners, "[t]he Commission is ... presented with the questions (a) whether any rate increases or decreases are justified, and (b) if so, what rates and charges the Commission should fix and determine in order to implement such increases or decreases." See Joint Petition at ¶ 20 (emphasis in original). These questions are ripe for the Commission's consideration in this proceeding, but without the need for the additional "shadow" proceeding now sought by Joint Petitioners. The Commission has expressed no intended course, and proposed no outcome, for FPL's rate case. Nor does the Joint Petition and Request seek a particular outcome not already being asserted and litigated in the current proceeding. Joint Petitioners may fully and fairly represent their interests in the existing proceeding without the need to create layers of shadow proceedings that provide Joint Petitioners some additional process right. See June 23, 2005, Staff Recommendation at 7. Thus, at this time, Joint Petitioners have no legitimate claim to an "injury-in-fact" that entitles them to a hearing.

8. In the unlikely and highly speculative event that FPL were to withdraw its Petition for a rate increase, Joint Petitioners most certainly could petition the Commission to institute a proceeding for the purpose of considering whether FPL's rates were just and reasonable. In support of such a petition, the intervenors could refer the Commission to their direct testimony submitted in this proceeding; thus, they would not be precluded from relying on that material to the extent they chose to do so. Further, and in any event, there is no automatic right to a hearing pursuant to Chapter 366. Rather, the Commission decides pursuant to Section 366.06(2), Florida Statutes, whether a hearing is warranted. Joint Petitioners' suggestion that they are entitled to a hearing as a matter of "statutory right" (Joint Petition ¶ 21) is unsupported by Chapter 366, and the facts alleged by Joint Petitioners do not alter this conclusion.

9. South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210 (Fla. 2004), does not mean that the Joint Petition and Request would secure for Joint Petitioners any additional rights in this Docket that they, otherwise, would not have. The Florida Supreme Court did not find that SFHHA had failed in its request because it failed to ask for a hearing at the outset. See South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210 (Fla. 2004). Rather, it found that the SFHHA was not prejudiced because it could always petition the Commission to find that FPL's rates were unjust and unreasonable. See id. at 1214; see also Order No. PSC-01-1930-PCO-EI, Docket Nos. 001148-EI, 010944-EI, at 9 (issued Sept. 25, 2001). Indeed, the Joint Petition and Request is "a request for a rate proceeding ... that [has] already begun." See South Florida Hospital & Healthcare Ass'n v. Jaber, 887 So. 2d 1210, 1213-14 (Fla. 2004). FPL has already initiated a general rate case, Joint Petitioners have filed 15 pieces of testimony, as well as positions on 161 issues to be decided, and the Commission has already scheduled a formal hearing in this Docket, which is to begin in two weeks.

10. Granting the Joint Petition, in addition to being improper and unnecessary for the reasons explained above, would inappropriately attempt to layer, and ultimately consolidate, two proceedings that would not necessarily lend themselves to the same procedural schedules. There would be fundamental differences in the two proceedings in terms of a shift in the burden of going forward with evidence and the burden of proof as it relates to the allegations in the Joint Petition and Request. Joint Petitioners intend their rate decrease proceeding to be combined with the instant proceeding, as evidenced by their Joint Motion to Consolidate the two. It is fundamental to administrative law that "[a]s in court proceedings, the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." See Balino v. Dept. of Health and Rehab. Serv., 348 So. 2d 349, 350 (Fla. 1st DCA 1977); see also Florida Department of Transp. v. J.W.C. Company, Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); State Dept. of Agriculture and Consumer Serv. v. Strickland, 262 So. 2d 893, 895 (Fla. 1st DCA 1972). Further, "[the] burden of proof in a commission proceeding is always on a utility seeking a rate change, *and upon other parties seeking to change established rates*." See Florida Power Corp. v. Cresse, 413 So. 2d 1187, 1191 (Fla. 1982) (emphasis added, citations omitted); Metropolitan Dade County Water and Sewer Board v. Community Utilities Corp., 200 So. 2d 831, 832 (Fla. 3d DCA 1967) (citing with approval the trial court's finding that the Board, as initiator of the rate proceedings, was the complainant, and as the complainant, it should have carried the initial burden of proof to establish the unreasonableness of the rates)" (citations omitted); see also Taffet v. The Southern Co., 967 F.2d 1483 (11th Cir.) (en banc), cert. denied, 506 U.S. 1021, 113 S.Ct. 657, 121 L.Ed.2d 583 (1992). Were the Joint Petition and Request granted, FPL would be entitled to a much greater opportunity to discover the allegations underlying the Joint Petition and Request that the Company has had in this proceeding, which

could not occur within the existing procedural schedule. Further, the procedure and order of presentation likely would need to change to accommodate a shift in the burden of going forward with evidence and the burden of proof resulting from the Joint Petition and Request. In effect, Joint Petitioners realize certain procedural and other advantages by presenting their case in the current proceeding that they would not necessarily be entitled to in a case initiated by the Commission in response to the Joint Petition and Request.

11. As described above, the Joint Petition and Request for a shadow proceeding unnecessarily complicates this proceeding. FPL has requested rate relief and Joint Petitioners have whatever rights they have pursuant to Chapters 120 and 366, but no more. Joint Petitioners cannot create rights in themselves by prematurely requesting a hearing. The Petition and Request defeats the purpose of the streamlined administrative process and results in administrative confusion, not administrative efficiency.

12. In addition, as noted in FPL's Response to the Motion to Consolidate that was filed on July 26, 2005, there is nothing to consolidate unless and until the Commission grants the Joint Petition and Request and initiates a separate proceeding. Thus, the Motion to Consolidate should be denied as premature and unnecessary. Unless and until the Commission grants the Joint Petition and Request, it is unclear whether consolidation would "promote the just, speedy and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party." See Rule 28-106.108, Fla. Admin. Code (2004). If the Commission grants the Joint Petition and Request, FPL would need additional time to respond to a timely filed motion to consolidate and address any needed changes to the procedural schedule resulting from such consolidation.

WHEREFORE, FPL respectfully requests that the Commission dismiss the Joint Petition and Request and deny the Motion to Consolidate.

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 8th day of August, 2005, to the following:

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