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Subject: Electronic Filing -- Docket No. 050494-EI
Attachments: Response.FPLMotiontoDismiss.Aug15.doc

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 050494-EI

In re: Joint Complaint and Petition of the 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 a Decrease in the Rates and Charges of Florida Power & Light Company.

c. Document being filed on behalf of the Florida Retail Federation, the Citizens of the State of Florida, AARP, and the South Florida Hospital and Healthcare Association.

d. There are a total of 8 pages.

e. The document attached for electronic filing is Response to FPL's Motion to Dismiss of the Citizens of the State of Florida, Florida Retail Federation, AARP, and the South Florida Hospital and Healthcare Association.

(see attached file: Response.FPLMotiontoDismiss.Aug15.doc)

Thank you for your attention and assistance in this matter.

Rhonda Dulgar
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Complaint and Petition)	
of the Citizens of the State of)	
Florida, Florida Retail Federation,)	
AARP, Federal Executive Agencies,)	DOCKET NO. 050494-EI
South Florida Hospital and Healthcare)	
Association, and Florida Industrial)	FILED: AUGUST 15, 2005
Power Users Group for a Decrease in)	
the Rates and Charges of Florida)	
Power & Light Company)	
_____)		

RESPONSE TO FPL'S MOTION TO DISMISS OF THE CITIZENS OF THE STATE OF FLORIDA, THE FLORIDA RETAIL FEDERATION, AARP, AND THE SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION

The Citizens of the State of Florida, through the Public Counsel, the Florida Retail Federation ("FRF"), AARP, and the South Florida Hospital and Healthcare Association, pursuant to Rule 28-106.204(1), Florida Administrative Code ("F.A.C."), hereby files their response to Florida Power & Light Company's ("FPL") Motion to Dismiss the Joint Complaint and Petition and Request for Hearing of the 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 a Decrease in the Rates and Charges of Florida Power & Light Company. The consumer representatives identified above are referred to collectively herein as the "Consumer Petitioners" or the "Consumers." The Consumers have asked the Commission to reduce from their present levels the retail rates to be charged by FPL upon the expiration of the

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current Stipulation and Settlement entered into in 2002,¹ and to conduct a hearing on their Joint Complaint and Petition in accordance with Chapters 120 and 366, Florida Statutes.² The Consumers have alleged that FPL's current rates, if allowed to continue in effect, will be unfairly, unjustly, and unreasonably high.

FPL asserts that the Joint Complaint and Petition is a petition for a case that has already begun. Even if true, this is immaterial – the Consumer Petitioners have rights to initiate a rate proceeding, consistent with the Commission's precedents, and to rely on the evidence introduced in a pending rate case, consistent with the Florida Supreme Court's opinion in South Florida Hospital and Healthcare Association v. Jaber, 887 So. 2d 1210, 1214 (Fla. 2004). Given that the Consumer Petitioners may initiate a rate case, and given that they may rely on evidence introduced in a pending rate case, and given that they have properly invoked the Commission's jurisdiction under Chapter 366, Florida Statutes, their Joint Petition is well-founded and well-taken, and FPL's motion to dismiss must be denied. The key point is that, as a matter of law, the allegations and the jurisdictional invocations in the Consumer Petitioners' Joint Complaint and Petition state a cause of action upon which relief may be granted: namely, a reduction in FPL's retail rates to levels that are fair, just, and reasonable within the meaning of Chapter 366, Florida Statutes.

¹ In Re: Review of the Retail Rates of Florida Power & Light Company, Docket No. 001148-EI, “Order Approving Stipulation, Authorizing Midcourse Correction, and Requiring Rate Reductions, Order No. PSC-02-0501-AS-EI (Fla. Pub. Serv. Comm’n, April 11, 2002) (hereinafter the “2002 FPL Stipulation,” the “2002 Stipulation,” or “Stipulation”).

² All references herein to the Florida Statutes are to the 2004 edition thereof.

The Consumer Petitioners are interested in orderly proceedings in which their claims that FPL's base rates and charges must be reduced will be decided. Accordingly, they made clear in their Joint Complaint and Petition that they are willing to litigate their claims in the context of the positions identified in the pending FPL rate case, PSC Docket No. 050045-EI, In Re: Petition for Rate Increase by Florida Power & Light Company, which has been consolidated with Docket No. 050188-EI, In Re: 2005 Comprehensive Depreciation Studies by Florida Power & Light Company, and on the same schedule as established for those consolidated dockets. However, they also made clear that they want a timely decision by the Commission regarding FPL's rates to be effective as of January 1, 2006. The Consumers strongly believe that the evidence shows that FPL's rates should be reduced significantly, and that allowing FPL's existing rates to continue in effect would be unfair, unjust, and unreasonable. Where FPL argues that the Consumers' Joint Complaint and Petition is premature, the Consumers strongly disagree because the current 2002 Stipulation expires in just over 4 months.

In the same vein, the Consumer Petitioners are further willing to have their Joint Complaint and Petition held in abeyance pending the Commission's final decision in Docket Nos. 050045-EI and 050188-EI. However, if those dockets should cease to be, e.g., by FPL's withdrawal of its petitions, the Consumers believe that they are entitled to go forward with the evidence already in hand on the same schedule as presently exists.

The Consumers' allegations of injury are not speculative: the testimony and exhibits already filed in these cases amply demonstrate that FPL's rates and charges, if allowed to remain in effect in 2006, will be unfairly, unjustly, and unreasonably high.

January 1, 2006 is the date upon which the current (2002) stipulation and settlement expires, and accordingly, it represents the first date upon which the Consumers may demand relief from FPL's excessive rates.

The Joint Petitioners do not disagree with FPL regarding the burden of proof in their Joint Complaint and Petition case or in FPL's self-initiated rate case. It is FPL's burden in its self-initiated rate case to demonstrate that its rates should be increased, and it is the Consumers' burden therein to demonstrate that FPL's rates should be decreased. Correspondingly, in the Consumers' Joint Complaint and Petition case, both sides bear the same burdens. The burden of going forward with the evidence could, if FPL were to withdraw its rate increase petition before the hearings, be addressed quite simply by having the Consumers' witnesses go first. This is not an affront to administrative efficiency and the orderly, inexpensive resolution of disputes. The Consumers do not agree with FPL, however, that allowing them to present their case in the current consolidated dockets provides procedural and other advantages – in fact, going forward within the existing schedule effectively precludes the Consumers from having the opportunity to present rebuttal testimony, clearly a detriment. However, the Consumers are willing to forego that opportunity to have the Commission decide their claims for rate relief in a timely way, rather than having to wait for a new schedule that would almost certainly extend into 2006.

Finally, the Consumers disagree with FPL regarding their legal ability to bring rate reduction proceedings. Once the Consumers make a prima facie case for rate reductions, which the Consumers have done, the Consumers are entitled to have the Commission

hold a hearing on their claims and to decide the issues. Even if FPL had not filed its general rate case, the Consumers' Joint Complaint and Petition would have been timely and well-taken because of the imminent expiration of the 2002 Stipulation. In the past, the PSC has initiated general rate proceedings for public utilities upon "complaint" by customers. Additionally, applicable pronouncements of the Florida Supreme Court indicate that the Consumers would, at a minimum, be entitled to petition for further rate relief based upon the record developed in these cases, so administrative efficiency dictates that the Joint Complaint and Petition should be granted now, to the extent necessary to ensure a timely Commission decision for rates to take effect on January 1, 2006, to avoid delays later.

The Consumer Petitioners cited as statutory authority for their Joint Complaint and Petition Sections 120.569, 120.57(1), 366.04(1), 366.05(1), 366.06(1)&(2), and 366.07, Florida Statutes. Section 366.06(2) provides, in pertinent part, that the Commission may consider "upon request made" whether the rates charged by a public utility are fair, just, and reasonable; there is no limitation on who may make such a request. Similarly, Section 366.07 provides that the Commission is to conduct hearings on utility's rates "either upon its own motion or upon complaint." Both of these sections provide ample basis for the Consumer Petitioners' request for a hearing on FPL's rates.

The PSC has initiated general rate cases for public utilities upon complaint by individual customers. In Re: Request by Occidental Chemical Corporation for Reduction

of Retail Electric Service Rates Charged by Florida Power Corporation, 88 FPSC 1:89.³

Here, where it has been more than 20 years since the PSC made substantive decisions determining FPL's rates and where the 2002 Stipulation is expiring, proceedings "upon complaint" or "upon request made" are materially similar: both ask the PSC to conduct formal proceedings, and to make decisions involving disputed issues of material fact, to ensure that a public utility's rates are fair, just, and reasonable. Here, the Consumers have presented testimony and exhibit evidence that demonstrates that FPL's rates should be reduced by at least \$679 million per year, thus bringing their petition clearly within the scope of Occidental Chemical v. Florida Power Corp.

The undersigned has conferred with other intervenors in this case to the extent possible and is authorized to represent that the Attorney General of the State of Florida and the Florida Industrial Power Users Group support this response to FPL's motion to dismiss.

CONCLUSION

The Consumer Petitioners are entitled to petition for rate reductions and for a hearing pursuant to Sections 366.06(2) and 366.07, Florida Statutes. These rights have at least been strongly supported by the Florida Supreme Court in South Florida Hospital. Moreover, administrative efficiency and the fair resolution of the Consumers' claims that significant rate reductions are warranted by the evidence, will be best served by allowing the Joint Complaint and Petition to be held in abeyance pending the Commission's decisions in the pending FPL cases, and to be fully reinstated and processed on the

³ See also In Re: Complaint by Coastal Lumber Company Against Talquin Electric Cooperative, Inc. Regarding Rate Structure, PSC Docket No. 921128-EC (Order No. PSC-93-1784-AS-EC, Fla. Pub. Serv. Comm'n, December 13, 1993).

existing schedule if FPL should withdraw its petition.

RELIEF REQUESTED

WHEREFORE, for the reasons set forth above, the Florida Public Service Commission should **DENY** Florida Power & Light Company's Motion to Dismiss the FRF's Petition To Conduct a General Rate Case and Request for Hearing. However, the Consumer Petitioners do not object to their Joint Complaint and Petition being held in abeyance pending the Commission's votes in the consolidated FPL rate proceedings, to be reinstated and continued in full in the event that FPL were to withdraw its petition for a rate increase.

Respectfully submitted this 15th day of August, 2005.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been served by electronic mail (*) and U.S. Mail on this 15th day of August, 2005, on the following:

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