

LAW OFFICES
Messer, Caparello & Self
A Professional Association

Post Office Box 1876
Tallahassee, Florida 32302-1876
Internet: www.lawfla.com

November 4, 2005

BY ELECTRONIC FILING

Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

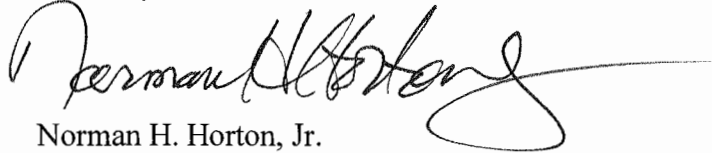
Re: Docket No. 050001-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Public Utilities Company in this docket is an electronic version of Florida Public Utilities Company's Response to Office of Public Counsel's Motion for Summary Final Order, or In the Alternative, Motion to Defer Ruling Until Services Hearing Held.

Thank you for your assistance with this filing.

Sincerely,



Norman H. Horton, Jr.

NHH/amb
Enclosures
cc: Ms. Cheryl Martin

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost)
Recovery Clause)
_____)

Docket No. 050001-EI
Filed: November 4, 2005

**RESPONSE TO OFFICE OF PUBLIC COUNSEL’S MOTION FOR
SUMMARY FINAL ORDER, OR IN THE ALTERNATIVE,
MOTION TO DEFER RULING UNTIL SERVICES HEARING HELD**

COMES NOW, Florida Public Utilities Company (“FPUC” or “the Company”) by and through undersigned counsel and files this Response to Office of Public Counsel’s Motion for Summary Final Order, or In the Alternative, Motion to Defer Ruling Until Services Hearing Held and as basis would state:

1. On November 1, 2005, Office of Public Counsel (“OPC”) filed its Motion for Summary Final Order or in the Alternative, Motion to Defer Ruling Until Service Hearing Held. OPC does not cite the authority for the Motion for Summary Final Order but presumably it would be Section 120.57(1)(1), Florida Statutes, which provides:

Any party . . . may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories and admissions on file together with affidavits, if any, that no genuine issue as to any materials fact exists and that the moving party is entitled as a matter of law to the entry of a final order . . .

This standard is reflected in Rule 28-106.204 (4), Florida Administrative Code, allowing for a summary final order whenever there is no genuine issue as to any material fact. The Rule permits seven (7) days for a response to a Motion for Summary Final Order, which in this case would be, November 8, 2005.

2. In seeking entry of a summary final order, the burden to establish that there is no genuine issue of material fact is with the movant, OPC. Indeed, as this Commission has recognized on several occasions “. . . the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact.” In Re: Complaints by Ocean Properties, Ltd., et al. against Florida Power and Light Co. concerning thermal demand meter error, Order No. PSC-04-0992-PCO-EI, issued October 11, 2004. In Re: Application for amendment of certificates Nos. 570-W and W96-S to add territory in Charlotte County by Florida Water Services, et al., Order No. PSC-98-1538-PCO-WS, issued November 20, 1998 both citing Green v. CSX Transportation, Inc., 626 So.2d 974 (Fla. 1st DCA 1993). In applying the standard, every possible inference must be drawn against the moving party. Gainsco v. ECS/Choicepoint Services 853 So.2d 491 (Fla. 1st DCA 2003) Green v. CSX Transportation, *id.*

3. In its Motion, OPC states that “there is no genuine issue of material fact regarding the future rate surcharge that FPUC is requesting as set forth in its petition and prefiled testimony.” (Motion, p. 2). OPC further argues that because the FPUC proposal does not provide for tracking customers that may move from the area before the benefit accrues, and no provision to ensure that customers who did not pay the surcharge do not receive a benefit, the proposal results in unjust and unreasonable rates. There is no authority cited for this conclusion, only argument. In fact, the motion is little more than factual argument and falls far short of meeting the criteria for a summary final order.

4. FPUC asserts that there are material facts in dispute. As an example, in its proposal, FPUC has included an amount to be added to the fuel adjustment factor as the

“additive” for this proposal. In separate motions involving discovery, OPC has taken the position that they require access to fuel procurement contract documents that FPUC considers confidential in order to evaluate the proposal. OPC cannot have it both ways — they cannot argue that there are no genuine issues of materials facts and at the same time request the production of documents so that facts can be established. As the Commission noted in Orders PSC-04-0992 and PSC-98-1538, a summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law, citing Moore v. Morris 475 So.2d 666 (Fla. 1985) There are issues to be decided in this proposal.

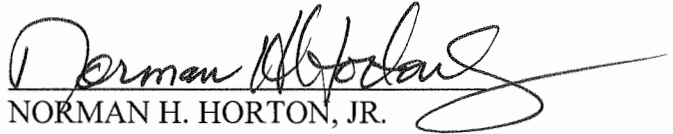
5. The OPC argues that the proposal results in rates that are unjust and unreasonable, but fail to state how. FPUC has proposed to add the same amount to accounts and treat all customers the same. There is no discrimination as to classes or categories of customers. If the position of OPC is that the Commission cannot allow a surcharge, that position is disproved by the fact that the Commission has previously approved surcharges and their existence has been upheld. The Action Group v. Deason, 615 So.2d 683 (Fla. 1993); City of Tallahassee v. Florida Public Serv. Comm., 441 So.2d 620 (Fla. 1983). Without some explanation by OPC as to why the proposed rates are unjust and unreasonable, the Commission should give little if any weight to the argument. Indeed, FPUC would assert that the proposed rates are just and reasonable. In this case, all customers are treated equally, there is no discrimination. The additive reflects the inclusion of something that is known and is consistent with requirements of this Commission that there be no revenue increase of benefit to FPUC even though the additive is a projected number, it is consistent with the fuel recovery factor which has a projected component to it.

6. OPC's assertion that there are no genuine issues of material facts is simply not accurate given the position taken by OPC with respect to discovery. See Order No. PSC-05-1108-PCO-EI entered November 3, 2005, denying FPUC's Motion for Protective Order. This alone is sufficient to demonstrate that the facts are not so crystallized as to warrant a summary final order.

7. The Commission has long recognized that granting a summary final order is an extreme step; especially when there are policy considerations and when the public interest is involved. Although some might argue that the public interest would be served by granting the Motion filed by OPC. However, FPUC asserts that granting the Motion, which would foreclose any consideration of the merits of the proposal, is a greater threat to the public interest. Consequently the Motion should be denied.

8. As an alternative, OPC has requested that a decision be deferred until service hearings are held. This request is merely a rehashing of its request to spin off this issue which was denied at the prehearing conference. Delaying a decision serves no purpose and only adds to the time and expense of this issue. The Commission scheduled and held customer meetings. Notices of those meetings were mailed to all customers along with ads in newspapers of general circulation in the service areas. A time has been set for customers to appear and present comments in this hearing and OPC has noted their intent to offer written comments from customers as an exhibit in this docket. Thus, the public has had and will have ample opportunities to be heard. Comments from the public are important and of value but there is no meaningful purpose to be served by deferring a ruling on this proposal until a further service hearing can be held and that request should also be denied.

Respectfully submitted this 4th day of November, 2005.

A handwritten signature in black ink, appearing to read "Norman Horton, Jr.", with a long horizontal flourish extending to the right.

NORMAN H. HORTON, JR.
MESSER, CAPARELLO & SELF, P. A.
Post Office Box 1874
Tallahassee, FL 32302- 1876
(850) 222-0720

Attorneys for Florida Public Utilities Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served by electronic mail (*) and/or U. S. Mail this 4th day of November, 2005 upon the following:

Adrienne Vining, Esq.*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd., Room 370
Tallahassee, FL 32399-0850

John Butler, P.A.
Squire, Sanders & Dempsey, LLP
200 South Biscayne Boulevard, Suite 4000
Miami, Florida 33131-2398

Patricia Ann Christensen*
Associate Public Counsel
Office of the Public Counsel
c/o The Florida Legislature
111 West Madison St., Rm 812
Tallahassee, FL 32399-1400

Mark Hoffman, Esq.
Legal Department
CSX Transportation
500 Water Street, 14th Floor
Jacksonville, FL 32202

Timothy J. Perry, Esq.
McWhirter, Reeves, Davidson Kaufman
& Arnold, P.A.
117 S. Gadsden St
Tallahassee, FL 32301

Ms. Angela Llewellyn
Administrator, Regulatory Coordination
Tampa Electric Co.
P.O. Box 111
Tampa, FL 33601-0111

James A. McGee, Esq.
Progress Energy Florida, Inc.
P.O. Box 14042
St. Peterburg, FL 33733-4042

John W. McWhirter, Esq.
McWhirter, Reeves, Davidson Kaufman
& Arnold, P.A.
400 N. Tampa Street, Suite 2450
Tampa, FL 33602

Jon C. Moyle, Jr.
Moyle, Flanigan, Katz, Raymond & Sheehan, P.A.
118 N. Gadsden Street
Tallahassee, FL 32301

Gary Perko, Esq.
Hopping, Green Sams and Smith
P.O. Box 6526
Tallahassee, FL 32314

Ms. Susan D. Ritenour
Secretary and Treasurer
Gulf Power Company
One Energy Place
Pensacola, FL 32520-0780

Jeffrey A. Stone, Esq.
Russell A. Badders, Esq.
Beggs & Lane Law firm
P.O. Box 12950
Pensacola, FL 32591-2950

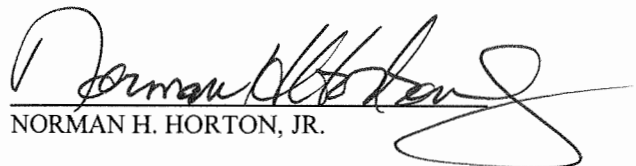
William G. Walker, III
Florida Power & Light Company
215 S. Monroe St., Suite 810
Tallahassee, FL 32301-1859

Lee L. Willis, Esq.
James D. Beasley, Esq.
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302

Robert Scheffel Wright
John Thomas LaVia, III
Landers & Parsons, P.A.
P.O. Box 271
Tallahassee, FL 32302

Lieutenant Colonel Karen White
Major Craig Paulson
AFCESA/ULT
139 Barnes Drive
Tyndall Air Force Base, FL 32403

Michael B. Twomey
P.O. Box 5256
Tallahassee, FL 32314-5256


NORMAN H. HORTON, JR.