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**Sent:** Thursday, February 02, 2006 4:09 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Fwd: Electronic Filing - -Docket 060038-EI

**Attachments:** JointMotiontoDismissFPL'sPetition.Feb02.doc



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>>> Rhonda Dulgar 2/2/2006 4:08:47 PM >>>  
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b. Docket No. 060038-EI

In re: Florida Power & Light Company's Petition for Issuance of a Storm Recovery Financing Order.

c. Document being filed on behalf of the Florida Retail Federation, the Florida Industrial Power Users Group and AARP.

d. There are a total of 11 pages.

e. The document attached for electronic filing is Consumers' Joint Motion to Dismiss FPL's Petition.

(see attached file: JointMotiontoDismissFPL'sPetition.Feb02.wpd)

Thank you for your attention and assistance in this matter.

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Florida Power & Light Company's )  
Petition for Issuance of a Storm ) DOCKET NO. 060038-EI  
Recovery Financing Order ) FILED: FEBRUARY 2, 2006  
\_\_\_\_\_ )

CONSUMERS' JOINT MOTION TO DISMISS FPL'S PETITION

The Florida Retail Federation ("FRF"), AARP, and the Florida Industrial Power Users Group ("FIPUG"), collectively the "Consumers," pursuant to Chapter 120, Florida Statutes,<sup>1</sup> and Rule 28-106.204, Florida Administrative Code ("F.A.C."), and by and through their respective undersigned counsel, hereby move to dismiss FPL's petition for issuance of a storm recovery financing order ("FPL's Petition") for failure to comply with the pleading requirements of Chapter 28-106, F.A.C., and Chapter 120, Florida Statutes. In further support of this Joint Motion, the Consumers state as follows.

BACKGROUND

1. This proceeding was initiated by the filing of FPL's Petition on Friday, January 13, 2006. FPL's Petition asks the Commission to issue a "storm recovery financing order," pursuant to Section 366.8260, Florida Statutes, authorizing FPL to issue storm recovery bonds, and to implement surcharges, sufficient to raise approximately \$1.7 billion from its captive customers. Of

<sup>1</sup> All references herein to the Florida Statutes and to the Florida Administrative Code are to the 2005 editions thereof.

this amount, approximately \$1.5 billion is "new money" and the remaining \$200 million is for recovery of amounts already approved by the Commission in connection with FPL's 2004 storm restoration costs. FPL's Petition also asks, in the alternative, for authorization to implement more "conventional" surcharges to recover FPL's request for the \$1.5 billion in "new money" pursuant to the Commission's general ratemaking authority under Chapter 366.

2. There was no certificate of service attached to FPL's Petition; thus, none of the Consumers was served in legal terms. The Office of Public Counsel was furnished a courtesy copy on the date that FPL filed its Petition. The FRF was not served at all, with a courtesy copy or otherwise; the FRF's counsel obtained a copy from OPC's attorney on January 17, 2006; the other Consumers also obtained their copies subsequent to the date of filing.

3. FPL's Petition is subject to Chapter 120 and the Uniform Rules of Administrative Procedure, particularly Chapter 28-106, which applies to decisions affecting substantial interests. It is clear that the substantial interests of FPL and of all of the Consumers will be directly and substantially affected by the Commission's actions in this case.

4. The Public Counsel's intervention was acknowledged by a Commission Order issued on January 19, 2006. The FRF, AARP,

and FIPUG have all filed petitions to intervene upon which the Commission has not yet acted. The Prehearing Officer issued the Order Establishing Procedure in this case on January 26, 2006.

5. Although FPL's Petition apparently complies with the content requirements of Section 366.8260, Florida Statutes, FPL's Petition fails to comply with Section 120.54(5)(b)4., Florida Statutes, and Rule 28-106 in several substantive and material respects. Nothing in Section 366.8260 suggests that utilities taking advantage of that statute are exempt from the otherwise applicable requirements of law. Moreover, Rule 28-106.101, F.A.C., declares that Chapter 28-106, F.A.C. "appl[ies] in all proceedings in which the substantial interests of a party are determined by the agency . . ." with defined exceptions, none of which applies to FPL's Petition in the instant docket.<sup>2</sup>

6. The procedural deficiencies of FPL's Petition are prejudicial, and if the Commission were to allow FPL's Petition to go forward on the already-accelerated time schedule for this case, the Consumers strongly believe that such action would deprive the Consumers, and all of FPL's captive customers, of due process, and that it would constitute a departure from the essential requirements of law.

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<sup>2</sup> Chapter 25-40, F.A.C., identifies the provisions of the Commission's rules that are exceptions to the Uniform Rules of Procedure. Chapter 25-40, F.A.C., has no exception applicable to FPL's Petition.

7. Specifically, FPL's Petition is deficient on its face in the following ways.

- a. FPL's Petition contains no statement, as required by Rule 28-106.201(2)(d), F.A.C., of disputed issues of material fact.
- b. FPL's Petition contains no statement, as required by Rule 28-106.201(2)(e), F.A.C., of ultimate facts alleged.
- c. FPL's Petition contains no statement, as required by Section 120.54(5)(b)4.f, Florida Statutes, of how the facts alleged relate to the statutes and rules pursuant to which FPL claims to be entitled to relief.

8. In a similar context last year, FPL sought to have the Commission require an intervenor in its rate case re-file its petition to intervene for various pleading deficiencies cited by FPL. See In Re: Petition for Rate Increase by Florida Power & Light Company, PSC Docket No. 050045-EI, "Florida Power & Light Company's Response to Commercial Group's Petition to Intervene" filed March 31, 2005. FPL's "response" asked the Commission to require the Commercial Group "to refile its Petition to Intervene and attempt to comply with the applicable Commission rules, the Uniform Rules of Procedure and Florida law." Id. at 3. Among other things, FPL's "response" noted the following as deficiencies in the Commercial Group's petition to intervene:

- a. the omission of the Commercial Group's address and telephone number;
- b. the petition's failure to include a "demonstration that Commercial Group is entitled to participate in

the proceeding or that its substantial interests will be affected;"

- c. the omission of the required statement of when or how the petitioner received notice of the agency action;
- d. the petition's failure to include "statements regarding disputed issues of fact, ultimate facts alleged, or facts or rules requiring reversal." Id.

Relevant to the instant situation, FPL went on to state the following:

Though certain of these uniform rule requirements may seem trivial, they nonetheless have force and the Commission is directed to dismiss a petition that is not in substantial compliance with Rule 28-106.201(2). See Rule 28-106.201(4), Florida Administrative Code (2004).

Id.

9. The deficiencies of FPL's Petition are prejudicial. Here, FPL's attempt to explain away its omission of the required statement of disputed issues of material fact, by simply stating that it is not aware of any such disputed issues, is unreasonable. FPL had a similar docket last year that required a three-day hearing and the Commission's determination of numerous disputed issues. As reflected in the Prehearing Order in that case, and as also reflected in the Commission Staff's recommendation in that case, there were more than 30 issues to be decided by the Commission. In this case, FPL is asking for new relief, pursuant to a new statute, which necessarily raises new issues, e.g., whether FPL's request for "securitization"-

type recovery of storm-related costs is the most cost-effective and equitable method for recovery of such costs. The key point is that FPL made no attempt whatsoever at identifying disputed issues of material fact. This is a serious deficiency, and FPL's Petition should be dismissed, without prejudice, such that FPL can, assuming it wishes to do so, file a proper petition. FPL's failure to include the required statement of ultimate facts alleged is also a serious deficiency.

10. While the Consumers might be able to guess at what the disputed issues are (indeed, in compliance with the Uniform Rules, the Consumers identified anticipated disputed issues of fact in their petitions to intervene), and while the Consumers might be able to glean at least some of the alleged ultimate facts that FPL expects to prove in its efforts to recover its requested \$1.7 billion, FPL has failed to identify the issues and likewise failed to provide the "concise statement of the ultimate facts alleged," as required by the Rules. This is prejudicial in that it leaves the Consumers guessing at what the issues are: it is not the Consumers' job to guess, it is FPL's job to plead as required by the Rules. FPL has failed to do its job, and the Commission must accordingly dismiss FPL's Petition.

11. In a somewhat analogous context, also last year, the Commission Staff recommended that the PSC dismiss Common Cause's petition to initiate rulemaking regarding regulated utility

entertainment and ex parte communications because Common Cause did not allege standing. As a national organization, Common Cause has members in Florida who have legitimate interests in prohibiting inappropriate communications. If Common Cause's failure to allege standing could be used as grounds to dismiss its petition, then FPL's failures to include the required statements of disputed issues of material fact and ultimate facts alleged, which are more serious deficiencies, are grounds for dismissal of FPL's Petition in the instant proceeding.

12. Reading subsection 366.8260(2) (b) *in pari materia* with subsection 366.8260(2) (a), indicates the Legislature's intent that proceedings under this statute shall begin with a petition and shall be disposed of in accordance with the provisions of Chapter 120, except that the provisions of this section, to the extent applicable, shall control. This statutory language certainly leads to the conclusion that dockets initiated pursuant to Chapter 366.8260 are subject to Chapter 120, and accordingly to the provisions of the Uniform Rules of Procedure, unless clearly preempted by Section 366.8260. There is of course, no such preemption: the "petition content" provisions of subsection 366.8260(2) (a) are not applicable to the procedures to be followed in proceedings, including the filing and procedural content of the utility's petition. Moreover, by their own terms, the Uniform Rules control: as noted above, Rule



28-106.101, F.A.C., declares that Chapter 28-106, F.A.C.

"appl[ies] in all proceedings in which the substantial interests of a party are determined by the agency" with defined exceptions, none of which applies to FPL's Petition in the instant docket.

13. Additionally, there can be no question that the provisions of Section 366.8260, Florida Statutes, do not apply to FPL's alternative request for relief, and accordingly, the full complement of the Uniform Rules of Procedure apply to that request.

14. The Consumers will adamantly resist any motion by FPL for leave to re-file its Petition on a *nunc pro tunc* basis, or for leave to amend its Petition, unless any such motion specifically asks the Commission to grant extensions of all scheduled events in the Order Establishing Procedure that are equal to or greater than the number of days between the initial filing date of FPL's defective Petition and the date on which FPL files a properly compliant petition. FPL cannot avail itself of the time schedule set forth in the statute without following the rules. To allow FPL to do so would work extreme prejudice against the Consumers by requiring the Consumers to prepare for a case without the benefit of the information that Florida law - Chapter 120, Florida Statutes, and the Uniform Rules of Procedure - requires FPL to provide.

## CONCLUSION

FPL's Petition is facially deficient under the requirements of the Uniform Rules of Procedure and under Chapter 120. Accordingly, as FPL stated last year, "these uniform rule requirements . . . have force and the Commission is directed to dismiss a petition that is not in substantial compliance with Rule 28-106.201(2)."<sup>3</sup> FPL's Petition is not in substantial compliance; the Petition's omissions of the required statements of disputed issues of material fact and of ultimate facts alleged, in particular, are substantive and prejudicial. The Commission must dismiss FPL's Petition, without prejudice to FPL's filing a new petition. Filing such new petition will restart the statutory clock on FPL's requests for storm cost recovery pursuant to Section 366.8260, Florida Statutes.

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<sup>3</sup> See, *infra*, Florida Power & Light Company's Response to Commercial Group's Petition to Intervene in Docket 050045-EI at page 2.

RELIEF REQUESTED

WHEREFORE, for the reasons set forth above, the Florida Retail Federation, AARP, and the Florida Industrial Power Users Group, representing a substantial number of FPL's captive customers, respectfully move the Commission to issue its order dismissing FPL's Petition, without prejudice.

Respectfully submitted this 2<sup>nd</sup> day of February, 2006.

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I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss has been furnished by electronic Mail and U.S. Mail this 2nd day of February, 2006, to the following:

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