BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for increase in rates by Florida Power & Light Company	)	DOCKET NO.: 080677-EI
	)	FILED: July 2, 2009

MOTION TO DISMISS
FLORIDA POWER & LIGHT COMPANY'S
PETITION FOR RATE INCREASE

The City of South Daytona, Florida, by and through its undersigned counsel, hereby moves that the Florida Public Service Commission ("Commission" or "PSC") dismiss the petition of Florida Power & Light Company ("FPL") in this docket and in support of this motion states as follows:

1. This proceeding commenced on March 18, 2009, with the filing of a petition for a permanent rate increase by FPL.

2. FPL is engaged in business as a public utility providing electric service as defined in Section 366.02, Florida Statutes, and is subject to the jurisdiction of this Commission.

3. FPL provides electric service to approximately 4.5 million retail customers in all or part of 35 Florida Counties.

4. FPL has requested an increase in base retail rates and charges to generate $1.044 Billion in additional gross annual revenues, effective January 4, 2010. This increase would allow FPL to earn a return on shareholder equity of up to 13.5%.

5. FPL based its request on a projected test year ending December 31, 2010. This projected test year necessarily includes speculative forecasts of cost increases as well as billions of dollars of plant which FPL alleges shall be placed into service by December 31, 2010.

6. FPL also has requested a $247.4 Million (for a total of $1.3 Billion) increase in base retail rates and charges for a subsequent test year with such requested rates to be effective January 2011. Again, this increase would allow FPL to maintain a return for its shareholders equity of up to 13.5%.

7. FPL's subsequent test year will not end until December 31, 2011. This projected test year on top of the first projected test year necessarily includes speculative forecasts of cost increases as well as billions of dollars of plant which FPL alleges shall be placed into service by December 31, 2011.

8. Florida law does not authorize the Florida Public Service Commission to establish rates for Florida Power & Light Company (FPL), an electric utility, on the basis of test years projecting costs and investments more than two years out into the future.

9. Florida law unambiguously authorizes the Florida Public Service Commission to establish rates for water utilities on the basis of test years projecting costs and investments two years or more out into the future.

10. Section 367.081(2), Florida Statutes, which establishes the PSC's ratemaking process for water utilities states as follows: ***"For purposes of [water utility rate] proceedings, the commission shall consider utility property, including land acquired or facilities constructed or to be constructed within a reasonable time in the future, not to exceed 24 months after the end of the historic base year used to set final rates unless a longer period is approved by the commission, to be used and useful in the public service..."***

11. Thus, section 367.081(2) expressly authorizes the PSC to set water utility rates based on a projected test year.

12. Section 367.081(3) must be contrasted with Section 366.06(1), which establishes the PSC's ratemaking process for electric utilities.

13. Section 366.06(1) states as follows: ***"The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public..."***

14. Thus, section 366.06(1) expressly authorizes the PSC to set electric utility rates based only on an historic test year using "actual" costs and investments, "actually" used and useful in the public service and honestly and prudently "invested" by the public utility.

15. Sections 366.06(1) and 367.081(2) are clear and unambiguous. In fact, by reading the two sections together, it is beyond credulity to argue that the Legislature intended to allow electric rates to be set based upon projected costs and investments. Section 366.06(1) refers only to "actual" costs "invested" and "actually" used and useful in the public service. The term "actual" has only one common meaning and thus can only be construed as referring to historic, known costs and investments.

16. It has been suggested that the Florida Supreme Court authorized the PSC to use projected test years for electric utilities in Public Counsel v. FPSC and Florida Power Corporation, 425 So.2d 534 (Fla. 1982). However, this suggestion lacks merit.

17. In Florida Power, the Supreme Court noted, "[i]nasmuch as Public Counsel has not challenged the projected test year concept generally and the Commission has concluded that an adequate basis has been provided for analysis of the projected test year, we find this portion of his argument to be without merit." 425 So.2d at 537.

18. **Unlike the Public Counsel's challenge in Florida Power, this Motion challenges the projected test year concept as specifically applied by FPL in this proceeding.**

19. FPL's Petition requests a $1.3 Billion rate increase on the basis of projected costs and investments which may be made by FPL over a period of more than two years into the future. When the evidentiary hearing is concluded in this proceeding, more than two years of projected and speculative costs and investments will still remain in the projected test year used by FPL.

20. These facts are clearly distinguishable from the facts in Florida Power, where the "projected" test year approved by the PSC and upheld by the Supreme Court had already become an "historic" test year by the time that evidentiary hearings were held. As noted by the Supreme Court, "[t]he projected test year 1980 in the case sub judice had become an historic test year by the time the full hearings were commenced in January of 1981."

21. In fact, when read in its entirety, the Florida Power decision invites the Public Counsel or other interested party, like the City of South Daytona, to challenge the use of a projected test year where projections have not become historic "actual" costs and investments by the time hearings are held.

22. Citing Carson v. Miller, 370 So.2d 10 (Fla. 1979), the Supreme Court instructed that the "rule in Florida is that where the language of the statute is so plain and unambiguous as to fix the legislative intent and leave no room for construction, the courts should not depart from the plain language used by the legislature." Florida Power, 425 So.2d at 541-42. The Court continued, "[i]n addition, another controlling tenet of statutory construction is the rule that words of common usage, when used in a statute, should be construed in their plain and ordinary sense." Id. at 542, *citing* Tatzel v. State, 356 So.2d 787 (Fla. 1978). These rules of statutory construction remain in place to this day.

23. As noted above, a comparison of the language used by the Legislature in Section 367.081(2) specifically authorizing rates to be established using projected costs and investments

to the language in section 366.06(1), expressly limiting the PSC's authorization to set electric rates using only "actual" and "invested" costs clearly and unambiguously establishes the Legislature's knowledge of the difference between the historic and projected test year concepts.

24. In fact, the legislative history of section 367.081(2) confirms that prior to the amendment of the section in the early 1990s, the Legislature limited the PSC's rate setting authority to historic test years for water and wastewater utilities. This fact is confirmed from a review of PSC water and wastewater rate proceedings prior to amendment of the statute wherein it appears that only historic test years were authorized.

25. The Legislature never has amended section 366.06(1) to authorize the PSC to set electric rates based on a projected test year.

26. These facts are not to suggest that the Legislature has been draconian to electric utilities. To the contrary, instead of authority to receive rates based on a projected test year, the Legislature has provided the PSC with authority to provide electric utilities expedited rate increases in a number of ways without the necessity of even filing a rate petition with the PSC. These rate "clause" adjustments have been viewed across the United States as favorable to Florida's electric utilities. With each rate "clause" adjustment appearing on Floridian's bills has been the same justification put forth by FPL that expedited rate relief reduces its risk of utility operations and thus reduces FPL's costs of securing capital from lenders and shareholders.

27. Rate clauses authorized by the Legislature and appearing on FPL's bills include the fuel cost clause, the environmental cost recovery clause, the conservation cost recovery clause and the nuclear capacity cost recovery clause. In addition, as noted in FPL's petition in this proceeding, FPL is authorized by the PSC to make additional adjustments to its rates through a Base Rate Adjustment approved to settle FPL's last rate request in Docket No. 050045.

28. The legislative changes made to section 367.081(2) authorizing projected test years for water utilities and the Legislature's addition of various sections to the Florida Statutes authorizing electric utilities to raise rates through a number of rate clauses without having to file a rate petition and without having to undergo an evidentiary hearing, establishes that the Legislature is capable of making its intent very clear when it comes to detailing how the PSC is authorized to set utility rates.

29. The Legislature has never authorized the PSC to set electric rates based upon projected costs and investments.

30. FPL's entire rate petition is premised on an alleged need for a $1.3 Billion rate increase allegedly to compensate the utility for alleged costs and investments that it might make in projected test years 2010 and 2011 and to provide FPL shareholders up to a 13.5% return on their investment in FPL stock.

31. Unlike the Supreme Court decision in Florida Power, where the "projected" test year used was an "historic" year by the time hearings were concluded, when the evidentiary hearing scheduled for this proceeding is concluded, FPL's projected costs and investments will still be forecast for more than two years into the future.

FOR THE FOREGOING REASONS, THE CITY OF SOUTH DAYTONA moves that the Public Service Commission dismiss the petition filed by FPL in this docket.

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 and U.S. Mail to the service list below, on this 2nd day of July, 2009.

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