

Ruth Nettles

080677-EI

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Subject: Electronic Filing \ Docket #080677-EI \ FPL's Response in Opposition to FIPUG's N/Change of Position on Issue 94
Attachments: 9.28.09.FPL Opposition to FIPUG's Changed Position on Issue 94.pdf

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 080677-EI
In Re: Application for Increase in Rates by Florida Power & Light Company

c. The Document is being filed on behalf of Florida Power & Light Company.

d. There are a total of 5 pages

e. The document attached for electronic filing is Florida Power & Light Company's Response in Opposition to FIPUG's Notice of Change of Position on Issue 94

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DOCUMENT NUMBER-DATE

09971 SEP 28 8

FPSC-COMMISSION CLEAR

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for increase in rates by)
Florida Power & Light Company)
_____)

Docket No. 080677-EI

Filed: September 28, 2009

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO FIPUG'S
NOTICE OF CHANGE OF POSITION ON ISSUE 94**

Florida Power & Light Company ("FPL") hereby files this response in opposition to the Notice of Filing Change of Position that the Florida Industrial Power Users Group ("FIPUG) filed on March 20, 2009, purporting to change its position on Issue 94 to "yes." For the reasons discussed below, FIPUG should not be permitted to change its position at this late date in the proceeding.

1. Issue 94 reads as follows, on page 92 of the prehearing order (Order No. PSC-09-0573-PHO-EI):

Should an adjustment be made for FPL's Aviation cost for the test year?

A. For the 2010 projected test year?

B. If applicable, for the 2011 subsequent projected test year?

The Office of Public Counsel ("OPC") took "no position" on Issue 94 at the prehearing conference, and FIPUG's position was "agree with OPC."

2. Consistent with standard Commission practice, the order establishing procedure in this docket (Order No. PSC-09-0159-PCO-EI) provides the following on page 6, under the heading "Waiver of Issues," regarding the obligation of parties to take an affirmative position on issues by the time of the prehearing conference:

Unless a matter is not at issue for that party, each party shall take a position on each issue by the time of the Prehearing Conference or by such later time as may be permitted by the Prehearing Officer. If a party is unable through diligence and good faith efforts to take a position on a matter at issue for that party, it shall explicitly state in its Prehearing Statement why it cannot take a position. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain "no

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position at this time” prior to hearing and thereafter identify its position in a post-hearing statement of issues. *In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue, and the party’s position shall be shown as “no position” in the Prehearing Order.* When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement. Commission staff may take “no position at this time” or a similar position on any issue without having to make the showing described above.

(Emphasis added)

3. FIPUG neither sought nor received permission at the prehearing conference to take “no position at this time.” Rather, FIPUG expressly adopted OPC’s “no position.” Accordingly, consistent with the order establishing procedure, FIPUG has waived Issue 94.

4. FPL recognizes that extraordinary circumstances might justify a party’s change from “no position” after the prehearing conference. For example, decisively important evidence could be adduced at hearing that was not available at the time of the prehearing conference. However, there is no new information about FPL’s aviation costs that could plausibly justify such an exception for FIPUG. The flight logs that are the subject of Exhibit 481 have been available to all parties since well before the prehearing conference.¹ If FIPUG had intended to use the logs as a basis to take a position on Issue 94, it clearly had adequate time to do so. There likewise has been no change in FPL’s position or testimony on Issue 94 that could justify FIPUG’s belated change.

WHEREFORE, Florida Power & Light Company respectfully requests that the Commission deny FIPUG’s request to change its position to “yes” on Issue 94.

¹ The logs from 2007 through 2009 to date were included in the response to Request No. 113 in OPC’s Second Request for Production of Documents, which FPL served on April 20, 2009. FPL subsequently responded on August 10, 2009 to Request No. 59 in Staff’s Sixth Request for Production of Documents with logs for 2006 and additional available logs in 2009.

Respectfully submitted,

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By: /s/ John T. Butler
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically this 28th day of September, 2009, to the following:

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