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Attachments: 4 16 10 FPL Motion for Leave to File Response to SFHHA Response.doc

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 14 pages

e. The document attached for electronic filing is Florida Power & Light Company's Motion for Leave to File Response to South Florida Hospital and Healthcare Association's Response to Florida Power & Light Company's Motion for Reconsideration and Clarification. This document was filed electronically yesterday, in PDF format, with FPL's Motion and Response also attached to the filing e-mail as two separate Word files. Pursuant to request by the Commission Clerk's Office, FPL is resubmitting the Word version as a single file containing both the Motion and Response. There are no revisions to either the Motion or Response.

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by) Docket No: 080677-EI
Florida Power & Light Company)

In re: 2009 depreciation and dismantlement) Docket No. 090130-EI
study by Florida Power & Light Company)

Filed: April 16, 2010

**FLORIDA POWER & LIGHT COMPANY'S MOTION FOR LEAVE
TO FILE RESPONSE TO SOUTH FLORIDA HOSPITAL AND HEALTHCARE
ASSOCIATION'S RESPONSE TO FLORIDA POWER & LIGHT
COMPANY'S MOTION FOR RECONSIDERATION AND CLARIFICATION**

Florida Power & Light Company ("FPL"), pursuant to Rules 25-22.060 and 28-106.204, Florida Administrative Code, hereby moves the Commission for leave to file the response attached hereto as Exhibit 1 (the "FPL Response") in opposition to the portion of the South Florida Hospital and Healthcare Association's ("SFHHA's) Response to FPL's Motion for Reconsideration and Clarification, filed April 8, 2010 (the "SFHHA Response") that is in the nature of a cross-motion for reconsideration. Specifically, FPL moves for leave to respond to the following, which appears on page 4 of the SFHHA Response: "if the Commission authorizes FPL's request to decelerate the amortization of the theoretical depreciation reserve surplus, FPL should be required to compute and defer as a regulatory liability interest at its grossed-up rate of return on the over-recoveries compounded on a monthly basis" (the "SFHHA Proposal"). In support of its Motion, FPL states as follows:

1. Rule 25-22.060(1)(b) provides that, when a party has filed a petition for reconsideration, other parties "may file a response to [the] motion for reconsideration and may file a cross motion for reconsideration. A party may file a response to a cross motion for reconsideration." By virtue of FPL's filing its Motion for Reconsideration and Clarification on

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April 1, 2010 (the “FPL Reconsideration Motion”), the SFHHA and other parties were entitled to file a response and a cross motion for reconsideration. Rule 25-22.060 does not contemplate replies to a response to a motion for reconsideration, but it expressly authorizes a response to a cross motion for reconsideration.

2. The SFHHA Response is styled as only a “response” to the FPL Reconsideration Motion. Indeed, it initially critiques FPL’s proposal that, in the event reconsideration results in an increase or decrease in revenue requirements, the Commission should make a commensurate adjustment to the annual amortization of the theoretical depreciation reserve surplus such that there is no change to base rates. However, the SFHHA Response then goes on to propose on page 4 that, “if the Commission authorizes FPL’s request to decelerate the amortization of the theoretical depreciation reserve surplus, FPL should be required to compute and defer as a regulatory liability interest at its grossed-up rate of return on the over-recoveries compounded on a monthly basis.”

3. There is no mention in the FPL Reconsideration Motion of over-recoveries, regulatory liabilities or accruing interest with respect to the amortization of the theoretical depreciation reserve surplus. In fact, as discussed in the attached FPL Response, there is no mention of those concepts at hearing or in the Commission’s final order in this proceeding. The SFHHA Proposal is as novel as it is wrong-headed. As such, it cannot fairly be viewed as merely a response to the FPL Reconsideration Motion; rather, it is a new request that the Commission reconsider its final order and direct that the amortization of the theoretical depreciation reserve surplus be handled differently than any party has previously requested. The

SFHHA Proposal thus constitutes a cross motion for reconsideration.¹ In fairness and as contemplated by Rule 25-22.060, FPL should be entitled to respond to that portion of the SFHHA Proposal that is in reality a cross motion for reconsideration.²

4. In accordance with Rule 28-106.204(3), Florida Administrative Code, FPL contacted the Office of Public Counsel and counsel for each of the interveners in this docket to determine whether they object to this Motion. FPL is authorized to represent that the Office of Public Counsel, the Office of Attorney General, and SCU-4 take no position on the motion until they have had an opportunity to review it, and reserves their right to file a response. The SFHHA, FIPUG, and South Daytona oppose FPL's Motion and reserved their right to file a response. FPL did not receive a response from the remaining intervenors prior to the filing of this Motion.

¹ Black's Law Dictionary, 2004 edition, defines a "motion" as "[a] written or oral application requesting a court to make a specified ruling or order" and a "cross-motion" as "[a] competing request for relief or orders similar to that requested by another party against the cross-moving party" The SFHHA Proposal is a request for a specified ruling and a competing request for relief that is new and different from any other ruling or relief requested in the proceeding thus far, including the FPL Reconsideration Motion. Thus, as described above, it is appropriate to allow FPL an opportunity to respond. *See also* Rule 28-106.204, Florida Administrative Code ("When time allows, the other parties may, within 7 days of service of a written motion, file a response in opposition").

In a related context, federal courts have allowed sur-replies where the moving party could not otherwise contest matters raised for the first time in the opposing party's reply. *See, e.g., Lopez v. Council on American-Islamic Relations Action Network, Inc.*, 657 F. Supp.2d 104, 108 (D.D.C. 2009) (granting leave to file a sur-reply because it was "helpful to the adjudication" of the motion and not "unduly prejudicial to the defendants").

² FPL is not seeking to file a reply to a response to a motion for reconsideration, an approach that the SFHHA attempted unsuccessfully in Docket No. 001148-EI. *See* Order No. PSC-01-1939-PCO-EI, dated September 25, 2001. Rather, as explained above, a portion of the SFHHA Response argues a new and different point, which would be the proper subject of a cross motion for reconsideration. FPL is entitled by Rule 25-22.060 to respond to that portion of the SFHHA Response that constitutes a cross motion for reconsideration.

WHEREFORE, for the foregoing reasons, FPL respectfully moves for leave to file the response attached hereto as Exhibit 1.

Respectfully submitted,

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EXHIBIT 1

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida Power & Light Company))	Docket No: 080677-EI
In re: 2009 depreciation and dismantlement study by Florida Power & Light Company))	Docket No. 090130-EI
_____)	Filed: April 16, 2010

**FLORIDA POWER & LIGHT COMPANY’S RESPONSE TO
SOUTH FLORIDA HOSPITAL AND HEALTHCARE ASSOCIATION’S
RESPONSE TO FLORIDA POWER & LIGHT COMPANY’S
MOTION FOR RECONSIDERATION AND CLARIFICATION**

Florida Power & Light Company (“FPL”), pursuant to Rule 25-22.060, Florida Administrative Code, hereby files this response in opposition to that portion of South Florida Hospital and Healthcare Association’s (“SFHHA’s) Response to FPL’s Motion for Reconsideration and Clarification, filed April 8, 2010 (the “SFHHA Response”) that is in the nature of a cross-motion for reconsideration. Specifically, FPL hereby responds to the proposal on page 4 of the SFHHA Response that “if the Commission authorizes FPL’s request to decelerate the amortization of the theoretical depreciation reserve surplus, FPL should be required to compute and defer as a regulatory liability interest at its grossed-up rate of return on the over-recoveries compounded on a monthly basis” (the “SFFHA Proposal”). The SFHHA Proposal is unsupported by the record in this proceeding, unprecedented, and at odds with accepted principles of regulatory accounting. In support of its opposition to the SFFHA Proposal, FPL states as follows:

1. In its final order on FPL’s rate request in this docket, the Commission determined that FPL has a theoretical depreciation reserve surplus of approximately \$1,208.8 million. Order

No. PSC-10-0153-FOF-EI, dated March 17, 2010, at p. 81 (“Order 0153”). The parties presented a wide range of proposals at hearing on how that theoretical depreciation reserve surplus should be addressed: FPL proposed that it be flowed back to customers over the remaining lives of the affected assets via the normal functioning of the remaining life depreciation method, while SFHHA, FIPUG and OPC witnesses argued that varying amounts of the surplus should be amortized over a varying number of years, as a credit against depreciation expense. *Id.* at pp. 81-82. The Commission ultimately decided to use the theoretical surplus first to offset FPL’s proposed capital recovery schedules and then to amortize the balance over a four-year period. *Id.* at pp. 86-87.

2. However the theoretical depreciation reserve surplus was to be flowed back, the parties and the Commission consistently took the position that doing so would serve to reduce accumulated depreciation and thus increase Plant in Service. No party suggested, and the Commission did not consider, the possibility that interest would be accrued on the increment of the approved amortization for the theoretical depreciation reserve surplus that was above or below some “correct” level. In fact, there was no testimony that a single, “correct” level of amortization exists.³

3. Now, however, the SFHHA Proposal speaks of “over-recoveries” that would result from any reduction or deceleration in the amount of the reserve surplus amortization and urges the Commission to direct FPL to accrue interest on those “over-recoveries” and defer the interest as a regulatory liability. SFHHA Response at p. 4. The SFHHA Proposal should be rejected for several reasons.

³ Moreover, the level of the theoretical reserve surplus itself is simply a snapshot in time, which changes every time that new depreciation rates are computed. Tr. 6403-04 (Davis).

4. First, as indicated in the recitation above, there is no record support for the SFHHA Proposal. No party even suggested any of the following, each of which is integral and essential to the SFHHA Proposal: (a) that there exists a single, correct level of amortization for the theoretical depreciation reserve surplus; (b) that deviations from this “correct” value would result in “over-recoveries”; (c) that interest should be accrued on the “over-recoveries” that accumulate over time; or (d) that the interest should be recorded as a regulatory liability. In short, the SFHHA Proposal is fashioned out of whole cloth, asking the Commission to adopt a regulatory accounting approach that appears nowhere in the record of this proceeding. The SFHHA Proposal thus constitutes a complete misuse of reconsideration and should be rejected. *See, e.g.*, Order No. PSC-98-0382-FOF-WU, Docket No. 980057-WU, dated March 10, 1998, at p.5 (“a motion for reconsideration is an improper vehicle to request costs not requested, nor even considered by the Commission, in the record of the docket.”).

5. Even if one looked beyond the record of this proceeding, FPL is unaware of any precedent for the regulatory accounting that the SFHHA proposes. Nor does the SFHHA suggest any such precedent. This paucity of precedent exists for a good reason: the SFHHA Proposal is nonsensical.

6. To start with, the SFHHA Proposal presupposes that there is a single, correct level at which the theoretical depreciation reserve surplus should be amortized, and that any deviation from that correct level would result in over-recoveries (or, presumably, under-recoveries). But FPL is aware of nothing that could plausibly be identified as a single, correct level of depreciation credit. To the contrary, here is what the Commission had to say in Order 0153 about the complex and subjective interplay of factors that determine what level of amortization would be approved:

FPL argued that amortization of the remaining reserve surplus over any time period other than the remaining life results in intergenerational unfairness to the ratepayers of yesterday versus those of tomorrow. OPC, on the other hand, argued that the existence of a reserve imbalance indicates that there are intergenerational inequities in that current and past customers paid more than they should have, thereby subsidizing future customers. We agree with OPC's position that intergenerational unfairness already exists, as witnessed by the existence of such a significant reserve imbalance. Therefore, we are of the opinion that amortizing the remainder of the reserve surplus is the most appropriate remedy to eliminate the intergenerational inequity the surplus created. The only question remaining is how long it should take to correct the situation.

Accordingly, we find that the remaining reserve surplus amount of \$894.6 million shall be amortized over a four-year period. This is consistent with our policy with respect to reserve imbalances, which has been to correct them as soon as possible without adversely impacting the company's ability to earn a fair and reasonable return. We find that there is substantial evidence in the record to show that the company's ability to earn a fair and reasonable return will not be adversely affected. Furthermore, our decision is consistent with past orders in which we have amortized reserve imbalances over periods shorter than the remaining life. And we note that we will be reviewing FPL's depreciation reserve again when FPL files its next depreciation study.

Order 0153, at p. 87. Clearly, there is no single, correct level of depreciation credit, and so equally clearly there is no legitimate frame of reference from which to conclude that utilizing a different level of credit results in over-recoveries or under-recoveries.

7. There is likewise no legitimate role for interest with respect to the impact of using different levels of amortization. Whatever level of amortization is used, it will be reflected automatically in future ratemaking calculations via a corresponding impact on accumulated depreciation and hence the level of Plant in Service upon which future rates will be set. For example, if the Commission chooses to lower the rate of amortization for the theoretical depreciation reserve surplus, as FPL has proposed in its Motion for Reconsideration and Clarification, then the result will be that the accumulated depreciation reserve will be higher in future years and hence there will be a lower rate base upon which customers will pay a return. In other words, customers will automatically and directly receive the benefit of a lower

amortization in their future base rates, without any need for the accrual of interest as SFHHA proposes. Accruing interest would amount to customers “double recovering” the future benefits that would result from a present reduction of the amortization rate.⁴

WHEREFORE, for the foregoing reasons, FPL respectfully requests the Commission to reject the SFHHA Proposal.

Respectfully submitted,

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⁴ Conversely, if the SFHHA Proposal were applied even-handedly, it would result in double recovery by a utility in the event that the amortization rate was accelerated. The accelerated amortization would cause an increase in the rate base upon which future rates would be set and, at the same time, an accrual of interest in a regulatory asset that future customers would have to repay.

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