Diamond Williams 080677-EI

From: Butler, John [John.Butler@fpl.com]

Sent: Friday, August 13, 2010 2:57 PM

To: Filings@psc.state.fl.us

Subject: Electronic Filing / Docket 080677-EI / FPL's Response in Opposition to OPC's Request for Oral Argument Out of Time

Attachments: 8.13.10 FPL's Response in Opposition to OPC's Request for Oral Argument Out of Time.pdf; 8.13.10.FPL Response in Opposition to OPC's Request for Oral Argument Out of Time.doc

Electronic Filing

a. Person responsible for this electronic filing:

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

c. Documents are being filed on behalf of Florida Power & Light Company.

d. There are a total of 11 pages in the attached document.

e. The document attached for electronic filing is Florida Power & Light Company's Response in Opposition to OPC's Request for Oral Argument Out of Time

Thank you for your attention and cooperation to this request.

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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: August 13, 2010

FLORIDA POWER & LIGHT COMPANY'S
RESPONSE IN OPPOSITION TO
OPC'S REQUEST FOR ORAL ARGUMENT OUT OF TIME

Florida Power & Light Company ("FPL") hereby files this Response in Opposition to the "Request for Oral Argument Out of Time" filed by the Office of Public Counsel ("OPC") on August 11, 2010. In support, FPL states as follows:

1. OPC's "Request for Oral Argument Out of Time" (the "Request") should be denied because it violates Commission rules and governing law. Though styled as a mere request for oral argument, the substance of OPC's Request introduces at the eleventh hour new, complex and substantive post-record analysis for the Commission to consider in reaching its decision on reconsideration – information that OPC itself admits "does not definitively prove ... that the Commission overstated depreciation expense in its Final Order." (OPC Request, ¶ 9). While OPC acknowledges that its pleading is made "out of time," OPC suggests that its tardiness is excusable because its consultant did not review the relevant Staff work papers until after the deadline for filing a response to FPL's Motion for Reconsideration, which was April 8, 2010. However, Staff e-mailed its work papers to OPC on May 5, 2010 [see Lisa Bennett May 5, 2010, e-mail attached as Exhibit 1], and the last meeting with Staff concerning those work papers was held on May 11, 2010; both events took place *more than three months ago*. OPC's Request, filed after such a lengthy, unexplained delay and a mere six days before the Commission is scheduled to consider the Staff's recommendation on reconsideration at its August 17, 2010

Agenda Conference, must be denied as untimely, particularly in light of OPC's attempt to use the Request as a vehicle for injecting new, substantive post-record considerations that OPC itself admits prove nothing. Irrespective of FPL's disagreement with OPC's Request, FPL strongly agrees with OPC's position that whatever adjustments (if any) are made to revenue requirements, the difference should be offset by changing the reserve surplus amortization rate rather than changing the base rates currently in effect. Approval of this approach, as recommended by Commission Staff, will ensure that FPL's reconsideration and clarification requests are addressed with no change in rates charged to customers and no change in revenues to FPL.

2. OPC's Request is facially deficient as a request for oral argument. Rule 25-22.0022, F.A.C., provides that a "request for oral argument shall state with particularity why oral argument would aid the Commissioners, the Prehearing Officer, or the Commissioner appointed by the Chair to conduct a hearing in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument." OPC's Request does neither. Nothing is alleged about how oral argument would aid the Commissioners, only how it would aid OPC in presenting untimely, post-record information to them. And no estimate is given of the amount of time requested for oral argument -- possibly out of concern that conceding how long it would take to present, explain and debate the new information would cast the Request in a deservedly bad light.

3. In any event, the Commission's rules do not give it discretion to entertain a request for oral argument or accept additional evidence at this late date. Rule 25-22.0022, F.A.C., provides in relevant part as follows:

> Oral argument *must* be sought by separate written request filed *concurrently with the motion on which argument is requested* ... . Failure to timely file a request for oral argument *shall constitute waiver thereof.*

See 25-22.0022(1), F.A.C. (2009) (emphasis added). The Commission's rule is clear – untimely requests for oral argument are not permitted.[1] There is no provision for excusable delay. Thus, OPC's Request must be denied and not considered.[2]

4. Though the doctrine of equitable tolling may have application in circumstances "when equitable circumstances have prevented a timely filing" or when the party "has been misled or lulled into inaction, [or] has in some extraordinary way been prevented from asserting his rights"[3], none of those considerations exist here. There is no basis for accepting OPC's Request, given the extreme passage of time and OPC's lack of diligence in pursuing its inquiry during the months in which it has had access to the information upon which the Request is based.

5. Despite purporting merely to seek oral argument, OPC's Request is in fact an invitation for the Commission to re-open the record to consider post-record information with

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[1] The Commission is bound to follow its own rules. *See, e.g., Parrot Heads, Inc. v. Dept. of Business & Professional Reg.*, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999) ("An administrative agency is bound by its own rules ... ."); *Cleveland Clinic Florida Hospital v. Agency for Health Care Admin.*, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996); *Marrero v. Dept. of Professional Reg.*, 622 So. 2d 1109, 1111 (Fla. 1st DCA 1993) ("The [agency] is bound to comply with its own rules until they have been repealed or otherwise invalidated ... .").

[2] OPC acknowledges that its pleading is untimely, but suggests that the Commission has discretion to come up with a hybrid procedure for addressing an untimely filed argument even if it is not timely raised in a motion for reconsideration. However, informal agenda conference participation on motions for reconsideration is prohibited. Rule 25-22.0021(3), F.A.C. Therefore, the Commission's rules are clear that it does not have discretion to develop a free-form procedure for hearing new arguments on reconsideration that were not timely filed. Prohibiting complex, new arguments from being raised for the first time in oral argument on a motion for reconsideration makes sense as a practical matter because, otherwise, the Commissioners and Staff would be placed in the untenable position of having to discern and determine whether the newly raised arguments were included in the evidentiary record and whether the due process rights of the parties have been satisfied.

[3] *Machules v. Department of Administration*, 523 So. 2d 1132, 1134 (Fla. 1988).

respect to its decision on FPL's test year depreciation expense.[4] OPC has cited no legitimate basis for reopening the record in this proceeding, and the specific relief sought by OPC is prohibited by governing law and Commission precedent. *See Lawnwood Medical Center, Inc. v. Agency for Health Care Administration*, 678 So. 2d 421, 424 (Fla. 1st DCA 1996) (reversing agency decision where agency reopened the record to take selective official recognition for the purpose of making additional findings of fact, "to allow a party to produce additional evidence after the conclusion of an administrative hearing below would set in motion a never ending process of confrontation and cross-examination, rebuttal and surrebuttal evidence, a result not contemplated by [Chapter 120], *citing Collier Medical Ctr., Inc. v. Department of HRS*, 462 So. 2d 83, 86 (Fla. 1st DCA 1985)); *Florida Dept. of Transportation v. J.W.C. Company, Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981) (reversing agency decision, finding "no provision in the statutes or the rules of procedure ... authorizing or permitting an agency head to 'reopen' a hearing); Order No. PSC-05-0312-FOF-EI, Docket No. 031033-EI (issued March 21, 2005) (denying motion to reopen the record to take selective evidence after a final order had been issued and stating in part: "[i]f we wished to reopen the record of this proceeding ... we would first need to determine that the [new evidence] represented a change in circumstances so significant that our Final Order was no longer in the public interest [and] we would then be required to allow all parties the opportunity to present evidence concerning the relevance of [the new evidence] and the weight to be afforded it.").

6. OPC has itself warned the Commission in this very proceeding against the slippery-slope perils of re-opening the record, as it now seeks to do. In its April 8, 2010

[4] "Courts should look to the substance of the motion and not the title alone." *De Memdoza v. Board of County Commissioners*, 221 So. 2d 797 (Fla. 3d DCA 1969), *citing Sodikoff v. Allen Parker Co.*, 202 So. 2d 4 (Fla. App. 1967).

response to FPL's Motion for Reconsideration and Clarification, OPC opposed the Commission's consideration of rating agency reports attached to FPL's Motion because they were "extra record documents":

> If the Commission were to entertain FPL's request to consider its 'exhibits', OPC would wish a similar opportunity to counter with these extra record documents. Clearly, to allow one party to cite matters outside the record would lead to competing requests from other parties. It is therefore with good reason that decisionmakers are limited to the record that was closed following a proceeding in which due process was afforded to all parties.

OPC's Response to FPL's Motion for Reconsideration and Clarification, dated April 8, 2010. OPC is now seeking to do exactly what it so strongly argued against in its April 8 response.

7. Beyond these fatal procedural defects, OPC's Request likewise holds no water substantively. The Request suggests an extraordinary, unprecedented standard for review of a motion for reconsideration: that the movant bears no burden of proof with respect to the issues on which reconsideration is sought. For the movant to bear no burden of proof would be absurd, and adoption of such a standard could have dramatically adverse consequences for the Commission's practice in ruling on reconsideration motions. Surely, OPC would argue strenuously against the application of its own standard in an instance where reconsideration would result in a rate increase or increased revenue requirements for a utility. That OPC would take such an extreme position with respect to FPL's Motion for Reconsideration at this late date is evidence of the opportunistic and frivolous nature of its Request.

8. The potential defects in the calculation of depreciation expense suggested by Mr. Pous are similarly without merit. FPL does not believe it is appropriate to respond in kind to OPC's Request by proffering additional post-record information, particularly since OPC itself is unsure whether its argument is correct (OPC Request, ¶ 9). However, FPL can assure the Commission that, after reviewing Mr. Pous' affidavit and comparing it to Order PSC-10-0153-

FOF-EI ("Order 0153") and the Staff depreciation work papers that were provided to FPL and OPC, FPL has confirmed the following:

a. Contrary to the suggestion in Paragraph 6 of the Pous affidavit, the Staff workpapers show that the 12/31/2009 Estimated Investment and Estimated Reserve balances that were used to determine the theoretical depreciation reserve surplus have been properly adjusted to reflect removal of the corresponding estimated investment and reserve amounts shown on the capital recovery schedules set forth in Table 1 of Order 0153 (pages 24-25).[5] Furthermore, those same workpapers show that, as adjusted for removal of the capital recovery schedule amounts, the theoretical depreciation reserve positions by account add up to the total reserve surplus of $1.208 billion that the Commission determined in Order 0153 (Page 81).

b. Contrary to the suggestion in Paragraph 7 of the Pous affidavit, the Commission correctly determined the annual amortization of the theoretical depreciation reserve surplus by dividing the full amount of surplus available for amortization (*i.e.*, $894.6 million)[6] by the four years over which it is to be amortized. *See* Order 0153, page 87. This calculation yielded the annual amortization of $223.6 million (*i.e.*, $894.6 million ÷ 4 = $223.6) that is reflected on Table 24 in Order 0153 (page 168).

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[5] As shown on Table 1, the Total Unrecovered Costs for the capital recovery schedules of $314.2 million is comprised of 12/31/09 Estimated Investment of $774.6 million, less 12/31/09 Estimated Reserve of $569.3 million, plus Estimated Cost of Removal of $108.9 million. The Commission directed FPL to transfer $314.2 million of the theoretical depreciation reserve surplus to offset this Total Unrecovered Costs balance for the capital recovery schedules. *See* Order 0153, page 86.

[6] As discussed in Paragraph 8(a) above, the Commission properly excluded the portions of plant balances that would be subject to capital recovery amortization when it determined the total theoretical depreciation reserve surplus of $1.208 billion. Consistent with its decision to offset the capital recovery amounts with reserve surplus rather than to amortize their recovery as a test year expense, the Commission then properly reduced the total reserve surplus to be amortized by $314.2 million, resulting in a net amount to be amortized of $894.6 million. *See* Order 0153, page 86.

9. Irrespective of FPL's disagreement with the legality and merits of OPC's Request, FPL strongly agrees with OPC's position that whatever adjustments (if any) are made to revenue requirements, the difference should be offset by changing the depreciation reserve surplus amortization rate rather than changing the base rates currently in effect. Approval of this approach, as recommended by Commission Staff, will ensure that FPL's reconsideration and clarification requests are addressed with no change in rates charged to customers and no change in revenues to FPL.

WHEREFORE, for the foregoing reasons, FPL respectfully requests the Commission to deny OPC's Request for Oral Argument Out of Time.

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 13th day of August, 2010, to the following:

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EXHIBIT 1

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From:	Lisa Bennett [LBENNETT@PSC.STATE.FL.US]
Sent:	Wednesday, May 05, 2010 3:31 PM
To:	Barry Richard; Brian P. Armstrong Esq. ; Cecilia Bradley Esq.; J. R. Kelly ; J. Spina; Leon, Jack; John LaVia; John McWhirter; Butler, John; Jon C. Moyle Jr.; Joseph Mcglothlin, Esq.; jyarbrough@southdaytona.org; K. Wiseman; L. Purdy; Lino Mendiola; mbraswell@sugarmansusskind.com; Mark F. Sundback; Mary Smallwood; Meghan Griffiths; Ross, Mitch; Smith, Natalie; Rick Melson; Robert A. Sugarman; Schef Wright ; Scott E. Simpson; Shayla McNeill; sda@trippscott.com; Stephen Stewart; Susan Clark; TPerdue@aif.com; Vicki Gordon Kaufman ; Litchfield, Wade
Cc:	Pat Lee; Betty Gardner
Subject:	Docket No. 080677, FPL Reconsideration Request
Attachments:	staff composite rates.xls; Copy of FPL Working file for Pat L (2).xls; Depreciation Expense2.betty.xls

Attached are staff's workpapers as we discussed in today's meeting.

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EXHIBIT 1