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Subject: Docket No. 110309-EI.
Attachments: FIPUG Post Hearing Brief 3.5.12.pdf

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

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b. This filing is made in Docket No. 110309-EI.

c. The document is filed on behalf of Florida Industrial Power Users Group.

d. The total pages in the document are 31 pages.

e. The attached document is Florida Industrial Power Users Group Post-Hearing Brief and Conclusions of Law.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to determine need for Modernization of Port Everglades Plant, by Florida Power & Light Company.	DOCKET NO. 110309-EI FILED: March 5, 2012

THE FLORIDA INDUSTRIAL POWER USERS GROUP'S POST-HEARING BRIEF AND CONCLUSIONS OF LAW

The Florida Industrial Power Users Group (FIPUG), by and through its undersigned counsel, pursuant to Order No. PSC-12-0090-PCO-EI, files its Post-Hearing Brief and Conclusions of Law.

STATEMENT OF BASIC POSITION

FIPUG opposes FPL's Petition for a Determination of Need for 1277 MW (summer) of electricity generated by combined cycle, natural gas-fired units at FPL's existing Port Everglades site in Broward County (the Project). Ignoring a Commission rule that governs adequacy of resources, which states that each utility shall maintain a minimum 15% reserve margin, FPL blindly adheres to a 20% reserve margin and identifies a "need" of 284 MW beginning in the summer of 2016.

In suggesting this "need," FPL did not pursue in earnest any purchase power resources to match its need. FPL did not adjust its wholesale power sales portfolio to retain firm capacity that could have helped meet its identified need. To the contrary, FPL inked a wholesale power sale agreement with Seminole Electric for 200 MW beginning in 2014, contracting away resources that could have filled more than 2/3 of the identified need. FPL did not seriously consider a downsized Project even though FPL admitted in an answer to a Staff interrogatory that a project with only one combustion turbine would be cheaper for ratepayers. FPL did not consider

operating its electric system slightly below a 20% reserve margin, something that it has the ability to do, and has done in the past.

In reality, FPL needs the Project largely to meet the financial projections provided to Wall Street. Specifically, in recent earnings calls with investors, FPL pointed to its continued capital investment in power plants, like the Project, as a key factor in driving its projected future earnings. FPL does not earn a return on purchased power contracts, which were not pursued in earnest. FPL earns a return on equity when it invests capital in assets, like the Project. Thus, FPL super-sized the Project to approximately 1000 MW more than it needs in 2016 so that it can invest nearly $1.2 billion of ratepayer money in the Project. Ultimately, if the Commission approves FPL's Petition, ratepayers will be saddled with increased rates that could have been avoided if FPL had diligently pursued purchase power agreements, not sold off 200 MW of firm power to Seminole Electric, or explored operating slightly below a 20% reserve margin.

The Commission should deny FPL's Petition and direct FPL to explore diligently more cost-effective purchase power options, or downsize the Project so that ratepayers are sheltered from nearly $1.2 billion in costs that will benefit FPL shareholders, not retail ratepayers.

ISSUES AND POSITIONS

ISSUE 1: Is there a need for the proposed modernization of Florida Power & Light's Port Everglades plant, taking into account the need for electric system reliability and integrity, as this criterion is used in Section 403.519(3), Florida Statutes?

FIPUG: *No. At best, FPL has identified only 284 MW of need in 2016. There are more cost-effective and efficient ways to meet this need and FPL failed to pursue such alternatives.*

FPL's identified need in the summer of 2016, that prompted this request for a determination of need, is 284 MW. FPL's proposed Project consists of 1277 MW, over 4½ times what is needed, even accepting FPL's own calculations. Accepting for argument's sake that there is a need for 284 MW, a fact that FIPUG contests, FPL failed to establish and carry its burden of

proof that it needs nearly an additional 1000 MW Project to maintain system reliability and integrity. Put simply, FPL's effort to inflate a small projected need into a mammoth Project should be rejected. Furthermore, for the reasons set forth in Issue 6 below, which are adopted and incorporated herein by reference, FPL can readily manage its system, even with a slight dip below a 20% reserve margin, to provide system reliability and integrity.

As FIPUG demonstrated at hearing, the need for this Project is largely driven not by ratepayer need but by the need of FPL's parent company, NextEra Energy, to grow its business and meet Wall Street earnings projections. It is telling that FPL neglected to perform any critical analysis as to whether it could safely and adequately serve its customers at a reserve margin slightly under 20%. Instead, FPL used a small 284 MW reserve margin deficit beginning in 2016 and a 20% reserve margin to propose a massive capital investment of nearly $1.2 billion for 1277 MW of power. The Chairman of FPL, Lew Hay, told Wall Street during a recent investors' call that NextEra Energy's earnings "growth for the next few years will be driven primarily by growth at Florida Power and Light, where are investments are fundamentally substituting capital for fuel." (FIPUG Exhibit No. 42, p. 7 of 12).

FPL acknowledged that it earns **no** money when it executes a purchase power contract. (Tr., 210, l. 12-15). Instead, FPL earns a return on its invested capital only when it builds projects itself. (Tr., 210, l. 5-11). Additionally, FPL earns no money on the fuel it purchases, terming that charge a pass through. (Tr., 210, l. 21-22). Thus, put simply, substituting capital for fuel, as Mr. Hay described to investors, enables FPL to increase its earnings. The additional capital grows FPL's rate base, enabling FPL to earn additional funds on an expanded rate base. (FIPUG Exhibit No. 42, p. 6) FPL is the primary driver of its parent company's growth, while its

non-regulated company, NextEra Energy Resources, faces "challenging" financial times and circumstances. (FIPUG Exhibit No. 42, p. 2)

Recognizing that it is not in FPL's financial interests to execute purchase power agreements with renewable energy producers or others, FPL has worked to shed purchase power obligations and largely not replaced them. FIPUG Exhibit No. 41, a composite of FPL's power purchase agreements from 2006 to 2011, reveals that FPL reduced its "other purchases," a purchased power component of the 10-Year Site Plan. This exhibit lists purchases from third party producers and shows that FPL reduced those purchases by 1202 MW, going from 1357 MW purchased in 2006 to 155 MW in 2011. This dramatic reduction in purchased power agreements can hardly be attributed to third-party power producers not wishing to do business with FPL, the largest utility in Florida, and one of the largest utilities in the country. It can be attributed to a shift in FPL's business strategy to reduce purchase power contracts, deals that make FPL no money, and instead create a need for new or repowered plants in which FPL can invest capital and earn a return. Exhibit No. JEE-1 clearly demonstrates this fact. It shows FPL with 28.9% reserve margin in 2015, a surplus of 1,894 over the voluntary 20% reserve margin. In 2016, the reserve margin dramatically disappears to 18.7%, creating a "need" of 284 MW that prompted FPL to propose this jumbo-sized 1277 MW project.

FPL further "created" this need to justify its Project by agreeing to sell 200 MW of firm energy to Seminole Electric Company beginning in the summer of 2014 under a long-term agreement. If FPL were concerned about serving its retail load, it would have retained these 200 MWs to serve its retail load, and not sold Seminole Electric Company 200 MWs under a long-term purchase power agreement beginning in the summer of 2014. (Tr., 238, l. 3-10).[1]

[1] FIPUG's efforts to explore whether FPL exacerbated its summer 2016 need by entering into this and other contracts was thwarted, something to which FIPUG takes exception. (Tr., 239, l. 2-p. 241, l. 9). This inquiry was related to

Further, notwithstanding Mr. Silva's view that the interests of FPL's shareholders and FPL's customers always align as detailed below, this Commission, having adjudicated a multitude of cases in which consumer interests are adverse to FPL's interests, must closely examine the record and facts to ensure that ratepayers are protected. As detailed below, the fact that FPL did not even identify four renewable energy projects near its load center, much less timely inquire as to the availability of these resources to meet its need, demonstrates that FPL did not meet its burden to show that the Project is needed or that there are no renewable resources available to less expensively fill FPL's projected need. The Commission should deny FPL's petition for need determination.

ISSUE 2: Are there any renewable energy sources and technologies or conservation measures taken by or reasonably available to Florida Power & Light Company which might mitigate the need for the proposed modernization of Florida Power & Light's Port Everglades plant?

FIPUG: *Yes. FPL failed to explore the availability of alternative projects. Alternate projects are available to meet FPL's need (if any).*

It is readily apparent that FPL did not adequately explore the availability of renewable energy resources that could be used to address its need. Cross examination of Mr. Silva clearly demonstrates the inadequacy of FPL's efforts to identify renewable resources:

> BY MR. MOYLE:
>
> Q. You would agree with me, before I get into some specifics of your testimony, that the interest of Florida Power and Light, the interest of Florida Power and Light's shareholders, and the interest of the consumers are not always aligned, correct?
>
> A. No, I would not agree with you.

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the need for FPL's Project, and while not expressly identified as an issue, the Commission has a long history and practice of allowing questions about issues that are "subsumed" into broader issues. These questions clearly relate to whether there is a need for FPL's proposed Project – Issue 1.

Q. So that then you would -- the converse of that would be that the interest of the shareholders, the stockholders of Florida Power and Light, that their interests always are aligned with the interest of the consumers, you would agree with that?

A. To the best of my knowledge, yes.

Q. So, you know, the fact that when FPL has a rate case, or even today that consumer interests are here voicing opposition, that doesn't change your testimony that you just gave that the interest of FPL's consumers are always aligned with the interest of FPL's stockholders?

A. No, it does not change my opinion. Whenever we proceed with an evaluation of alternatives, our view, certainly my view is always how can we do this so that it's the best alternative for the customer. And the support that I get from my management is that that is what also benefits the shareholder.

Q. Let me direct you to Page 30, l. 8 of your testimony. You're asked the question is there any existing generator owned by a third party in Miami-Dade or Broward County, and you answered no. What is an existing generator?

A. A generating plant that produces electricity. In this case, the question is broad to ask is there any generator from whom we could purchase power that is located within Miami-Dade and Broward County.

Q. And you believe the answer to that is no?

A. Yes.

Q. Are you aware that you all previously had purchased power agreements with two waste-to-energy facilities in Broward County?

A. Yes, that is correct.

Q. Okay. And are you aware that those two facilities are still located in Broward County?

A. Yes, I'm aware of that. I am also aware that when the existing contracts that FPL had with those facilities expired, FPL approached those facilities seeking to renew those contracts, and they rejected our approach not because we were not offering sufficient monies, but because they wanted to, in essence, play the market. They wanted to sell their power to the highest bidder on any given day. So they simply asked us to wheel their power, but they would not be entering into contracts with us. So we did not renew the contracts as a result of their decisions.

Q. Isn't there a facility also in Miami-Dade that you all previously had a contract with, the waste-to-energy facility in Miami-Dade?

A. I am not familiar with that facility. During the period in which I have been involved in resource planning, that facility has always been also selling independently rather than selling to us.

Q. Okay. And that is the Dade-Montenay facility, is that right?

A. That's correct.

Q. Okay. So then the answer to the question on Page 30 really should be yes, rather than no. You would agree with that, correct? Because the question is is there an existing generator owned by a third-party in Miami-Dade or Broward County, and I think you have talked about two owned by Wheelabrator and one owned by Montenay or Covanta. I mean, so really there are existing generators owned by third-parties in Broward County and Miami-Dade, correct?

A. Yes, it is correct. And they were not reflected in the answer because they had -- at least in the case of the ones in Broward, which were more substantial in size comparable to our need, they had already rejected our offers to continue to sell power to us. (Tr. 186, l. 8-189, l. 9).

FIPUG suggests that Mr. Silva's credibility is suspect. He testified that the interests of FPL and its shareholders always align with the interests of consumers and FPL ratepayers. Making this statement requires Mr. Silva, who has worked for FPL for 34 years, to ignore the multitude of cases in which the Office of Public Counsel and FIPUG have intervened in opposition to FPL. (Tr. 211, l. 20-24). Specifically, it requires him to ignore FPL's recent rate case, during which numerous groups opposed FPL's effort to raise its rates. (Docket No. 080677-EI). It also requires him to ignore FIPUG's very intervention in this case. Furthermore, despite Mr. Silva's unambiguous sworn testimony that there were no third party generators located in Broward or Miami-Dade Counties, when questioned, Mr. Silva admitted this testimony was incorrect. (Tr. 189, l. 4).

The evidence clearly establishes that FPL did not explore in earnest the availability of additional renewable energy resources. Mr. Silva said FPL could not come to terms with the two

waste-to-energy facilities in Broward County. However, he testified that it had been "a couple of years" since he engaged in discussions with the Broward waste-to-energy facilities. (Tr. 190, l. 5). Thus, his first-hand knowledge about the availability of these resources was severely limited. Mr. Silva also failed to identify another renewable resource in Miami-Dade County in his direct testimony, a waste-to-energy facility. (Tr. 188, l. 10-189, l. 3). Mr. Silva said that this was an independent facility, and apparently he just assumed that it was not available to provide FPL with renewable energy, because the record is silent. (Tr. 188, l. 13). Mr. Silva did not identify the Florida Crystals facility, a 145 MW renewable energy facility, in his direct testimony. When questioned about whether the Florida Crystals facility was available to provide firm power to FPL, Mr. Silva assumed, without having had any recent discussions with the company, but basing his assumption on discussions that took place five years ago, that Florida Crystals was not interested in providing firm power. (Tr. 220, l. 11-222, l. 11).

Surely more is required, when determining whether renewable energy resources might be available to mitigate the need for the Project, than the failure to identify four existing renewable resources located in same area where FPL is proposing its Project, and then to declare during cross-examination, that those facilities are not available based on discussions that apparently took place years ago (Florida Crystals, North Broward, and South Broward) or because information is simply unknown about a renewable facility in Dade County. With FPL's ample resources, it could have easily investigated whether renewable power was available to mitigate the need for the Project. It failed to conduct such an investigation in earnest, and thus, FPL has failed to carry its burden of proof on this point. The Commission should deny FPL's Need Determination, or defer ruling on it, and direct FPL to explicitly explore whether renewable resources are available to mitigate the need for FPL's $1.2 billion Project.

ISSUE 3: Is there a need for the proposed modernization of Florida Power & Light's Port Everglades plant, taking into account the need for adequate electricity at a reasonable cost, as this criterion is used in Section 403.519(3), Florida Statutes?

FIPUG: *No. FIPUG adopts its arguments and proposed findings of fact set forth in Issues 1 and 6.*

ISSUE 4: Is there a need for the proposed modernization of Florida Power & Light's Port Everglades plant, taking into account the need for fuel diversity, as this criterion is used in Section 403.519(3), Florida Statutes?

FIPUG: *No. The proposed Project does not provide fuel diversity. To the contrary, it increases FPL's reliance on natural gas.*

FPL's proposed project does not adequately consider fuel diversity. As pointed out in Issue 2, FPL largely ignored the possibility of furthering its fuel diversity by contracting with renewable resources. There is no evidence that FPL even contacted renewable resources in Miami-Dade, Broward and Palm Beach County at the point in time when FPL was working on the Project need determination.

FPL is already more heavily dependent on natural gas than any other Florida investor-owned utility. (Tr. 99, l. 18-24). Now, with this need determination petition and others like it, FPL wants to further increase its reliance on natural gas. (Tr. 201, l. 13-202, l. 23). The Legislature directed the Commission to consider fuel diversity when making a need determination decision. Approving FPL's request furthers FPL's reliance on natural gas, something that this Commission and FPL will likely regret when, in the future, natural gas prices increase significantly. Furthermore, if Florida is ever going to increase its renewable resources, this Commission must take a leadership role by denying FPL's need determination based on its failure to adequately consider renewable resources and the need for fuel diversity.

ISSUE 5: Will the proposed modernization of Florida Power & Light's Port Everglades plant provide the most cost-effective source of power, as this criterion is used in Section 403.519(3), Florida Statutes?

FIPUG: *No. FPL has not shown that this Project is the most cost-effective. This is particularly the case as FPL has failed to explore other alternatives and because it proposes to meet a 284 MW need with a 1277 MW project.*

FPL failed to carry its burden of proof to establish that its proposed Project is the "most cost- effective source of power." In addition to not adequately exploring whether purchase power options, including purchases from renewable resources were available for less money, FPL admits that its Project is not the most cost effective available when responding to Staff's interrogatories.

Rather than super size the project to 1277 MW to meet 284 MW of need, as FPL proposes, Staff rightly asked FPL to run the numbers assuming not three combustion turbines, as FPL proposes, but one. Staff also asked FPL to assume that carbon costs will not be imposed, a fair assumption given where that issue currently stands on the state and national political stage. FPL witness Silva admitted that such environmental costs are not present. (Tr. 249, l. 10-250, l. 6). This scenario, which results in a reserve margin slightly less than FPL's voluntary 20% reserve margin, but more than the 15% minimum established by Commission rule, saves ratepayers approximately $29 million.[2] (*See*, Attachment 1 hereto).

In these difficult economic times, $29 million in savings to ratepayers should not be disregarded, but embraced. The Commission should deny FPL's need determination because it is not the most cost-effective source of power available.[3]

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[2] FPL's response to Staff Interrogatory No. 93, Attachment 1, provides a cumulative present value figure of $113,371,000 using the assumptions described above. Exhibit No. JEE-3, p. 1 of 1, lists a cumulative present value for the Project of $142,911,000. The difference between these two figures is $29,040,000.

[3] FIPUG was not permitted to question witness Silva, FPL's system planning witness, about the reserve margin, a key ingredient of any need determination. As explained in Issue 6, Rule 25-6.035, Florida Administrative Code, establishes a 15% reserve margin. A Commission Order, accepting a stipulation, recognized a voluntary reserve margin for FPL of 20%. (Order No. PSC-99-2507-S-EU, Attachment 2). FIPUG intended to pose a series of questions to FPL witness Silva to explore the relationship between these two reserve margins figures, something contemplated by the Order itself. FIPUG argued in its opening statement cost savings could be realized by ratepayers if a reserve margin of less than 20% was used. *See*, Tr.177, l. 4-l. 23. FIPUG wanted to establish that FPL previously operated its electric system safely and reliably at a 15% reserve margin, and to explore whether the Project could be delayed or other, less expensive generating assets used, if a reserve margin of less than 20% was used. FIPUG was not permitted to ask reserve margin questions, a ruling to which FIPUG takes exception. (Tr. 230, l. 20-234, l. 8).

ISSUE 6: Can FPL adequately serve its projected energy load without the modernized Port Everglades project?

FIPUG: *Yes. FPL can adequately serve its load without the modernized Port Everglades project. FPL did not explore in earnest whether it could avoid the need to build a 1277 MW, $1.2 billion project by simply operating for a brief period of time below a 20% reserve margin. The testimony is devoid of any meaningful analysis that closely examines this option. Evidence which suggests that this option should have been explored in earnest abounds.*

First, the Commission has a rule on point that is instructive. Rule 25-6.035, Florida Administrative Code, entitled "Adequacy of Resources" should not be ignored when the Commission considers FPL's Petition. This rule states in pertinent part:

> (1) Each electric utility shall maintain sufficient generating capacity, supplemented by regularly available generating and non-generating resources, in order to meet all reasonable demands for service and provide a reasonable reserve for emergencies. Each electric utility shall also coordinate the sharing of energy reserves with other electric utilities in Peninsular Florida. **To achieve an equitable sharing of energy reserves, Peninsular Florida utilities shall be required to maintain, at a minimum, a 15% planned reserve margin.** (emphasis added)

Thus, the Commission has recognized that a minimum 15% reserve margin must be maintained by utilities in Peninsular Florida, such as FPL, so that "adequate resources" exist "to meet all reasonable demands for service and provide a reasonable reserve for emergencies. FPL conveniently avoids **any** mention of this on point Commission rule in its testimony or petiton, apparently ignoring the rule because it undermines FPL's request for approval of its expensive Project.

Rule 25-6.035 also directs that, when determining adequacy of resources, i.e., a utility's need for a new power plant, that a utility consider "regularly available generating and non-generating resources" along with its generating assets. FPL failed to present sufficient evidence that it adequately considered regularly available generating and non-generating resources when analyzing the need for its proposed Project.

While FPL cursorily comments on projected demand side management (DSM) in witness Enjamio's testimony (Tr. 154, l. 4-12), this is legally insufficient for the purposes of meeting the rule requirement identified above. Further, there is insufficient evidence suggesting FPL considered "regularly available generating resources" when contemplating its proposed Project.

Finally, the rule directs that "[e]ach electric utility shall also coordinate the sharing of energy reserves with other electric utilities in Peninsular Florida." This directive is express: utilities shall coordinate with each other regarding sharing of energy reserves. Such an inquiry makes sense -- coordination before significant expense is undertaken could save ratepayers money. A rule interpretation that suggests coordination only occur after physical plant is constructed is not logical and would disadvantage ratepayers. There is no evidence that FPL explored any coordination of sharing energy reserves with other utilities before launching its need determination petition. Did Progress Energy Florida or Tampa Electric Company have additional capacity available that could be used by FPL to avoid charging ratepayers for a $1.2 billion Project? Maybe. The record is silent, and FPL was obligated to explore this possibility in earnest. FPL's failure to adquately follow Rule 25-6.035 is another reason for the Commission to direct FPL to try again with its need determination.

Ignoring Rule 25-6.035, FPL bases its case on Order No. PSC-99-2507-S-EU. (Tr. 157; Attachment 2). Respectfully, FPL should have read this Order, which approved a stipulation, more closely. On page 4, the Order recites a provision found in the Stipulation which states:

> [T]he Commission shall retain the ability and discretion to consider all facts and circumstances applicable to a given utility and/or peninsular Florida. Further, with respect to the evaluation of the adequacy of reserves in penisular Florida, the Commission may employ any methodology and consider any facts and circumstances it deems appropriate, subject to applicable legal requirements.

The stipulation attached to Order No. PSC-99-2507-S-EU also provides "Nor shall said adoption or approval [of 20% reserve margin stipulation] be deemed to create any presumption with respect to any proposals for adding generating capacity...."

In this case, FPL relies on Order No. PSC-99-2507-S-EU to create a presumption that the Project is needed. FPL direct testimony to establish that it considered operating below the 20% voluntary reserve margin, but above the Commission's 15% reserve margin, is all but non-existent. Indeed, contrary to the express terms of the reserve margin stipulation approved by the Commission, FPL relied wholly on the 20% reserve margin to create a presumption that its Project was needed. FIPUG's efforts to question FPL about whether it considered operating below the 20% reserve margin, and to develop "facts and circumstances" for the Commission's consideration, power that the Commission expressly reserved unto itself as described above, was improperly prevented by the Commission. (*See*, Tr. 230, l. 20-234, l. 8). While FIPUG takes exception to this ruling, evidence suggests that if the Commission denied FPL's Petition, it would still be able to operate its electric system above the 15% reserve margin criteria set forth by PSC rule until 2021. (*See*, Exhibit No. JEE-1, p. 1 of 2).

The Commission is obligated to follow its properly adopted rules. *See*, *Vantage Healthcare Corp. v. ACHA*, 687 So.2d 306, 307 (Fla. 1st DCA 1997). The Commission cannot rely upon unadopted policy statements of general applicability without going through rulemaking. An agency statement that is the equivalent of a rule must be adopted in the rulemaking process. *See* section 120.54(1)(a), Florida Statutes. *See also, Christo v. State Department of Banking and Fin.*, 649 So.2d 318 (Fla. 1st DCA 1995); *Florida League of Cities v. Administration Comm'n,* 586 So.2d 397 (Fla. 1st DCA 1991). The 15% minimum reserve margin has been adopted as a rule;

the 20% reserve margin FPL relies on in this case to justify its Project has not been adopted as a rule.

ISSUE 7: Based on the resolution of the foregoing issues, should the Commission grant Florida Power & Light Company's petition to determine the need for the proposed modernization of Florida Power & Light's Port Everglades plant?

FIPUG: *No. For the reasons and proposed findings of fact set forth above, the Commission should deny FPL's petition to determine the need for the Project.*

ISSUE 7: Should this docket be closed?

FIPUG: *Yes.*

PROPOSED CONCLUSIONS OF LAW

Pursuant to section 120.57(1), Florida Statutes, FIPUG submits the following Proposed Conclusions of Law.

1. FPL did not meet its burden of proof to establish that the Project is needed in accordance with section 403.519, Florida Statutes, and applicable Commission rules.

2. FPL did not establish that it adequately considered whether renewable energy resources were available to mitigate the need for the Project.

3. FPL did not establish that the Project was the only viable option to meet the Commission's 15% reserve margin criteria as set forth in Rule 25-6.035, Florida Administrative Code.

4. It was error to prevent FIPUG from questioning FPL witness Silva about planning reserve margins and the related need for the Project given the following: The Commission's Rule 25-6.035, Florida Administrative Code, establishes a minimum 15% reserve margin for utilities; the Commission's Order No. PSC-99-2507-S-EU, a copy of which is attached hereto as Attachment 2, approved a voluntary reserve margin of 20% for some utilities but expressly reserved to the Commission the jurisdiction to consider "all facts and circumstances applicable to a given utility;" and the express language of the stipulation that the Commission's approval of the stipulation shall not be deemed to create any presumption with respect to any proposals for adding generating capacity. FIPUG should have been permitted to cross examine witness Silva on reserve margin and it was error to not allow such cross examination.

5. It was error for the Commission to admit the pre-filed testimony of FPL witnesses Gnecco, Morley, Stubblefield, Kosky, Modia, and Enjamio without those witnesses being present to affirm the testimony and without those witnesses being subjected to cross examination.

Indeed, with exception of witness Gnecco, who was expressly excused by the Prehearing Officer, the operative Prehearing Order in this case stated: "Testimony of all witnesses to be sponsored by the parties (and Staff) has been prefiled and will be inserted into the record as though read **after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to timely and appropriate objections.**" (Order No. PSC-12-0063-PHO-EI, at 3, emphasis added). FIPUG objected to this testimony being entered into evidence because these witness were not at the hearing and the testimony was not sworn or affirmed as required by section 120.569(2)(g), Florida Statutes. Furthermore, all of this improperly admitted testimony constitutes hearsay and is not admissible under an evidentiary exception to the hearsay exclusion rule found in section 120.57(1)(c), Florida Statutes.

6. It is error for the Commission to rely on Exhibit Nos. 1-40 as these exhibits consisted of interrogatory answers and related material of witnesses who were not present at the hearing. The documents are hearsay that cannot be used as the sole basis for making a finding of fact, and are not admissible under an evidentiary exception to the hearsay exclusion rule. *See*, section 120.57(1)(c), Florida Statutes. *See also, Sunshine Chevrolet Oldsmobile v. Unemployment Appeals Commission,* 910 So. 2d. 948, 951 (2nd DCA 2005).

WHEREFORE, for the foregoing reasons, findings of fact and conclusions of law, the Commission should deny FPL's Petition for a Need Determination.

s/ Jon C. Moyle, Jr.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing The Florida Industrial Power Users Group's Post-Hearing Brief and Conclusions of Law has been furnished by electronic mail and U.S. mail on the 5th day of March, 2012, to the following:

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s/ Jon C. Moyle, Jr.

Jon C. Moyle, Jr.

Q.
Please update FPL's response to staff Interrogatory No. 59, assuming no CO2 costs.

A.
See attached tables.

Please note that the Resource Plan requested by Staff's First Set of Interrogatories No. 59 is not acceptable from a reliability perspective because it does not meet FPL's 20% reserve margin criterion, which the Commission has approved as the minimum required reserve to maintain the necessary level of system reliability. Therefore, any comparison between the CPVRR of the resource plan from Interrogatory No. 59 and the other four resource plans listed on the table below does not consider equal levels of system reliability and does not constitute a meaningful economic comparison.

ATTACHMENT 1

Table 93-A
GFCT Resource Plan- Revenue Requirements
Assuming the removal of the two CTs in 2016
No CO2 Costs

	(1)	(2)	(3)	(4)	(5)	(6)
	Annual Revenue Requirements *(Generation Capital)* ($millions, 2011 $)	Annual Revenue Requirements *(Transmission Capital)* ($millions, 2011 $)	Annual Revenue Requirements *(O&M)* ($millions, 2011 $)	Annual Revenue Requirements *(Fuel)* ($millions, 2011 $)	Annual Revenue Requirements *(Environmental)* ($millions, 2011 $)	*Total* ($millions, 2011 $)
2011	0	0	0	3,250	-11	3,239
2012	0	0	1	3,434	-5	3,430
2013	0	0	1	3,433	-8	3,426
2014	0	0	1	3,665	-7	3,659
2015	0	0	1	3,972	-8	3,966
2016	0	0	11	4,741	-8	4,744
2017	0	0	3	5,207	-8	5,202
2018	0	0	3	5,630	-8	5,625
2019	128	4	27	5,963	-9	6,111
2020	210	6	46	6,550	-9	6,803
2021	203	6	47	7,182	-9	7,428
2022	195	5	52	7,462	-10	7,704
2023	188	5	50	7,375	-11	7,607
2024	181	5	51	7,975	-11	8,201
2025	174	5	56	8,811	-11	9,035
2026	374	16	93	9,103	-11	9,575
2027	505	24	124	9,535	-11	10,176
2028	571	23	143	9,850	-12	10,575
2029	782	22	191	10,148	-13	11,131
2030	964	21	237	10,608	-13	11,817
2031	1,083	20	273	11,064	-14	12,426
2032	1,296	19	329	11,761	-14	13,391
2033	1,674	18	419	12,899	-15	14,995
2034	1,917	18	489	13,584	-15	15,993
2035	2,018	17	536	14,046	-16	16,601
2036	2,333	16	625	15,176	-16	18,135
2037	2,578	16	710	15,783	-16	19,070
2038	2,668	15	763	16,310	-17	19,739
2039	2,875	14	843	16,972	-17	20,688
2040	3,046	14	925	17,518	-18	21,485
2041	3,133	13	987	18,122	-18	22,237
2042	3,348	12	1,079	18,857	-18	23,278
2043	3,653	12	1,192	19,930	-19	24,769
2044	3,957	12	1,312	20,793	-19	26,055
2045	4,121	11	1,411	21,494	-19	27,018
2046	4,332	11	1,523	22,247	-20	28,093
2047	4,498	11	1,632	23,047	-20	29,167
CPVRR	7,846	88	2,282	103,797	-141	113,871

ATTACHMENT 1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Generic investigation into the aggregate electric utility reserve margins planned for Peninsular Florida.	DOCKET NO. 981890-EU ORDER NO. PSC-99-2507-S-EU ISSUED: December 22, 1999

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

APPEARANCES:

JAMES D. BEASLEY and LEE WILLIS, Ausley & McMullen, Post Office Box 391, Tallahassee, Florida 32302, appearing on behalf of Tampa Electric Company.

JOSEPH A. McGLOTHLIN, McWhirter, Reeves, McGlothlin, Davidson, Dekker, Kaufman, Arnold & Steen, 117 South Gadsden Street, Tallahassee, Florida 32301, appearing on behalf of Reliant Energy Power Generation.

VICKI GORDON KAUFMAN and JOHN MCWHIRTER, McWhirter, Reeves, McGlothlin, Davidson, Dekker, Kaufman, Arnold & Steen, 117 South Gadsden Street, Tallahassee, Florida 32301, appearing on behalf of the Florida Industrial Power Users Group.

GARY L. SASSO, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Post Office Box 2861, St. Petersburg, Florida 33731, appearing on behalf of Florida Power Corporation.

MATTHEW M. CHILDS, Steel, Hector & Davis, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301, appearing on behalf of Florida Power & Light Company.

DEBRA SWIM, Legal Environmental Assistance Foundation, 1115 North Gadsden Street Tallahassee, Florida 32301, appearing on behalf of Legal Environmental Assistance Foundation (LEAF).

ATTACHMENT 2

ROY YOUNG, Young, van Assenderp and Varnadoe, P. A., P. O. Box 1833, Tallahassee, Florida 32302-1833, appearing on behalf of the City of Lakeland and Kissimmee Utility Authority.

PAUL SEXTON, Thornton Williams & Associates, 215 South Monroe Street, Suite 600-A, Tallahassee, Florida 32301, appearing on behalf of the Florida Reliability Coordinating Council, Inc.

JON C. MOYLE, JR. Moyle, Flanigan, Katz, Kolins, Raymond & Sheehan, 210 South Monroe Street, Tallahassee, Florida 32301, appearing on behalf of PG&E Generating Company.

ROBERT SCHEFFEL WRIGHT, Landers & Parsons, 310 West College Avenue, Tallahassee, Florida 32302, appearing on behalf of Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P.

FREDERICK M. BRYANT, General Counsel, Florida Municipal Power Agency, 2010 Delta Boulevard, Tallahassee, Florida 32315, appearing on behalf of Florida Municipal Power Agency.

THOMAS J. MAIDA, III, Foley & Lardner, Post Office Box 508, Tallahassee, Florida 32302, appearing on behalf of Seminole Electric Cooperative.

KENNETH A. HOFFMAN, Rutledge, Ecenia, Underwood, Purnell and Hoffman, P. O. Box 511, 215 South Monroe Street, Suite 420, Tallahassee, Florida 32302-0551, appearing on behalf of the City of Tallahassee.

MICHAEL B. WEDNER, Office of General Counsel, 117 West Duval Street, Suite 480, Jacksonville, Florida 32202, appearing on behalf of Jacksonville Electric Authority.

ROBERT V. ELIAS, GRACE JAYE and COCHRAN KEATING, FPSC Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, appearing on behalf of the Florida Public Service Commission Staff.

ORDER APPROVING STIPULATION

BY THE COMMISSION:

During our reviews of the Ten Year Site Plans filed in 1997 and 1998, we expressed concerns about the adequacy of the reserve margins planned for Peninsular Florida. At the December 15, 1998, Internal Affairs meeting, we directed staff to open this docket to consider the reserve margins planned for Peninsular Florida electric utilities.

By Order No. PSC-99-1274-PCO-EI, nineteen issues were identified for consideration in this proceeding. The investor-owned utilities, the cooperative utilities, several municipal utilities, the various intervenors, and Commission staff filed testimony concerning these issues. The hearing was scheduled for November 2nd and 3rd, 1999.

At the outset of the hearing, Florida Power & Light Company (FPL), Florida Power Corporation (FPC), and Tampa Electric Company (TECO), presented a proposal designed to settle the case; addressing what they believe are the Commission's major concerns. By the proposal, these three utilities stipulated to voluntarily adopting a twenty percent reserve margin planning criterion. Each of these three utilities would achieve the twenty percent level by the summer of 2004. Further, pursuant to the proposal, no decisions would be made concerning the specifically enumerated issues, and the docket would be closed. FPL, FPC, and TECO would be the only utilities adopting the twenty percent criteria.

Other parties argued in support of and against the proposal. The Florida Industrial Power Users Group (FIPUG) requested additional time to present a counter-proposal. The hearing was continued until November 30, 1999, and the parties were directed to attempt to reach a negotiated settlement. FIPUG offered a counter-proposal on November 17, 1999. No settlement was reached.

At the continued hearing, we considered both proposals. After discussion, FPL, FPC, and TECO agreed to further modifications to their proposal. A document incorporating these agreed-upon changes was filed on December 15, 1999. A copy of this document (hereinafter the "Stipulation") is included in this Order as Attachment A and is incorporated herein by reference. FPL, FPC, and TECO have each agreed to achieve a planned twenty percent

reserve margin by the summer of 2004. In response to concerns expressed by some of the other parties, each utility has agreed to make a good faith effort to notify the Commission if it opts to modify the twenty percent criterion. The three utilities signing the Stipulation further acknowledge in paragraph 9 at page 4 that

> the Commission shall retain the ability and discretion to consider all facts and circumstances applicable to a given utility and/or peninsular Florida. Further, with respect to the evaluation of the adequacy of reserves in peninsular Florida, the Commission may employ any methodology and consider any facts and circumstances it deems appropriate, subject to applicable legal requirements.

We approve the Stipulation agreed to by Florida Power & Light Company, Florida Power Corporation, and Tampa Electric Company. It addresses the basic concern about the adequacy of planned reserve margins for Peninsular Florida. Collectively, these three utilities plan for approximately 80 percent of the Peninsular Florida load. Thus, a twenty percent planning criterion adopted by these three utilities is a significant increase over the fifteen percent criterion currently employed.

Further, we will convene a workshop to receive and consider information regarding how distributed resources, both demand and supply-side, may be used to meet Florida's energy service reliability needs. In addition, we will convene a workshop for the consideration of the appropriate relationship between the non-firm load of an individual utility and the total reserves required to maintain the utility's appropriate reserve margin.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the Stipulation agreed to by Florida Power & Light Company, Florida Power Corporation, and Tampa Electric Company, which is included in this Order as Attachment A and is incorporated by reference herein, is approved. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 22nd day of December, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This

filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Generic investigation into the aggregate electric utility reserve margins planned for Peninsular Florida

Docket No. 981890-EU

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STIPULATION

WHEREAS, the Florida Public Service Commission initiated this proceeding regarding reserve margins of Peninsular Florida utilities in December 1998; and

WHEREAS, subsequent to that date Staff and parties identified certain issues to be addressed and procedures to be followed; and

WHEREAS, Florida Power & Light Company (FPL), Florida Power Corporation (FPC), and Tampa Electric Company (TECO) (collectively, the IOUs) have asserted, and continue to assert, that the scope of the proceeding has been expanded beyond the intent of the Commission, and that the procedural posture of this proceeding is such that the Commission cannot lawfully take formal action that would affect their substantial interests at this time; and

WHEREAS, in Orders No. PSC-99-1274-PCO-EU and No. PSC-99-1716-PCO-EU the Commission overruled the IOUs' procedural objections, clarified the scope of the docket, identified specific issues to be addressed, and confirmed its intent to conduct a formal evidentiary proceeding in this docket and take the actions it deems appropriate; and

WHEREAS, Reliant Energy Power Generation, Inc (Reliant Energy), Florida Industrial Power Users Group (FIPUG), PG&E Generating Company (PG&E), the Legal Environmental Assistance Foundation, Inc. (LEAF), and Duke Energy North America, LLC, and Duke Energy New Smyrna Beach Power Company, Ltd., LLP (Duke Energy), (hereinafter referred to as Intervenors), filed Petitions to Intervene in which they alleged the actions contemplated by the Commission in this docket would affect their substantial interests; and

WHEREAS, the Commission granted Intervenors' petitions to intervene, and Intervenors have participated as full parties to the proceeding; and

WHEREAS, on October 29, 1999, FPC, acting on behalf of the IOUs, submitted to the Commission Staff a proposal for the resolution of the issues in this proceeding; and

WHEREAS, upon receipt of the proposal the Commission continued the hearing scheduled for November 2, 1999 and convened on that date a conference of all parties for the purpose of discussing the proposal of the IOUs; and

WHEREAS, upon consideration of the IOUs' proposal, without waiving their respective litigation positions and for the purposes of compromise and settlement, the undersigned, representing all of the parties to this proceeding that have been identified by the Commission or allowed by Commission to intervene, have decided to prepare this Stipulation, and present it to the Commission for the purpose of concluding this docket.

NOW, THEREFORE, the parties stipulate and agree as follows:

1. The IOUs will each voluntarily adopt a minimum reserve margin planning criterion of twenty percent (20%).

2. The twenty percent (20%) reserve margin planning criterion will be a minimum; no maximum or cap will be represented or implied by this criterion.

3. No utility other than the three IOUs identified hereinabove is agreeing to adopt a twenty percent (20%) reserve margin planning criterion by virtue of this Stipulation.

4. The IOUs will calculate the minimum twenty percent (20%) reserve margin by employing their current methodology; i.e., Reserve Margin (%) = [(Total Firm Capacity – Peak Firm Demand)/Peak Firm Demand] x 100, where Total Firm Capacity will be based on generating capacity owned by the IOUs or capacity for which there is a firm commitment to these IOUs and

where Peak Firm Demand means total demand reduced by demand side resources.

5. *The IOUs will undertake to implement the twenty percent reserve margin criterion* over a transition period of four years, meaning that they will plan to achieve a twenty percent (20%) reserve margin by the Summer of 2004.

6. The IOUs agree to adopt the twenty percent (20%) reserve margin planning criterion with the good faith intention of maintaining that planning criterion for the indefinite future, but each IOU must reserve the prerogative individually to modify its planning criteria to adapt to relevant circumstances. By the same token, it is understood that the Commission remains free to initiate an investigation or to take other appropriate action to review and to respond to any changes that the IOUs may make in the future regarding their planning criteria.

7. Should any IOU exercise its prerogative to change its twenty percent (20%) minimum reserve margin planning criterion discussed herein, such IOU will make a good faith effort to provide notice of the change to the Commission.

8. Neither the adoption by the IOUs of the minimum twenty percent (20%) planning criterion nor the approval of this Stipulation by the Commission shall be deemed to create any presumption that capacity additions must be through any particular mix of generation and/or demand-side resources. Nor shall said adoption or approval be deemed to create any presumption with respect to any proposals for adding generating capacity or create a presumption that a generating capacity addition proposed by any entity is not needed. All current and future proceedings under the Electrical Power Plant Siting Act, including those for the consideration of merchant plants, and all statutes, rules, regulations, and policies bearing on the Commission's determination of need for new generation (including the need determination criteria in § 403.519, Florida Statutes); the IOUs' obligation to solicit proposals for generating capacity; and the

obligations of the IOUs to otherwise prudently avail themselves of reasonably available conservation alternatives and cost-effective resource options; and the obligations of the IOUs to best serve their retail customers through their respective resource planning processes, are unaffected by this Stipulation and the approval thereof.

9. The parties acknowledge that for all regulatory purposes, the Commission shall retain the ability and discretion to consider all facts and circumstances applicable to a given utility and/or peninsular Florida. Further, with respect to the evaluation of the adequacy of reserves in peninsular Florida, the Commission may employ any methodology and may consider any facts and circumstances it deems appropriate, subject to applicable legal requirements.

10. The Commission is encouraged to take the following actions in conjunction with the approval of this Stipulation:

A. Convene a workshop, with the participation and the assistance of the Regulatory Assistance Project, to receive and consider information regarding how distributed resources, both demand and supply-side, may be used to meet Florida's energy service reliability needs, to be followed by any additional proceedings and/or actions relative to this matter that the Commission deems appropriate.

B. Convene a workshop for the consideration of the appropriate relationship between the non-firm load of an individual utility and the total reserves required to maintain the utility's appropriate minimum reserve margin, to be followed by any additional proceedings and/or actions relative to this matter that the Commission deems appropriate.

11. The parties enter into this Stipulation for the purpose of effecting a compromise and of achieving closure of this docket. By its participation in this Stipulation, no party expresses its endorsement of any individual provision included by any other party.

12. By entering this Stipulation, no party waives any position it has taken with respect to any aspect of this proceeding or any of the issues identified in this proceeding or any other proceeding. Further, no party waives the right and opportunity to petition the Commission to institute any action designed to provide any relief deemed appropriate or desirable by that party at any time.

13. The parties to this Stipulation agree that, by approving this Stipulation, the Commission does not waive its right and ability, pursuant to governing law, to initiate any proceeding or take any action for which it has requisite jurisdiction and authority.

14. In the event the Commission declines to approve this Stipulation in its entirety, it shall become null and void.

AGREED this 14th day of December 1999.

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