Eric Fryson

From: Roberts, Brenda [ROBERTS.BRENDA@leg.state.fl.us]

Sent: Friday, August 17, 2012 4:20 PM

To: Filings@psc.state.fl.us

Cc: Rehwinkel, Charles; Mcglothlin, Joseph; Christensen, Patty; Merchant, Tricia; Noriega.Tarik; Woods, Monica; Algenol; Brian Armstrong; Caroline Klancke; Charles Milsted; Dan Larson; Glen Gibellina; John Moyle (jmoyle@moylelaw.com); John T. Butler (John.Butler@fpl.com); John T. LaVia (jlavia@gbwlegal.com); John W. Hendricks; Keino Young; Ken Hoffman (Ken.Hoffman@fpl.com); Kenneth L. Wiseman; Larry Nelson; Linda S. Quick; Lisa M. Purdy; Mark F. Sundback; Peter Ripley; Schef Wright (schef@gbwlegal.com); Thomas Saporito; Vickie Gordon Kaufman (vkaufman@moylelaw.com); W. Rappolt; Wade Litchfield; White, Karen; William C. Garner, Esq.

Subject: E-filing (Dkt. No. 120015-EI)

Attachments: 120015 Repsonse of OPC & FRF to Joint Motion to Suspend.pdf

Electronic Filing

a. Person responsible for this electronic filing:

Joseph A. McGlothlin, Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
mcglothlin.joseph@leg.state.fl.us

b. Docket No. 120015-EI

In re: Petition for rate increase by Florida Power & Light Company.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 11 pages.

e. The document attached for electronic filing is the Response of Office of Public Counsel and Florida Retail Federation to Joint Motion to Suspend Hearing.

Thank you for your attention and cooperation to this request.

Brenda S. Roberts
Office of Public Counsel
Telephone: (850) 488-9330
Fax: (850) 488-4491

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida Power & Light Company
_____/

Docket No: 120015-EI

Filed: August 17, 2021

RESPONSE OF OFFICE OF PUBLIC COUNSEL AND FLORIDA RETAIL FEDERATION TO JOINT MOTION TO SUSPEND HEARING

The Citizens of the State of Florida, through the Office of Public Counsel (OPC), and the Florida Retail Federation (FRF) submit their joint response to the Joint Motion to Suspend Procedural Schedule ("Motion to Suspend") filed by Florida Power & Light Company (FPL), South Florida Hospital and Health Care Association (SFHHA), Florida Industrial Power Users Group (FPIUG), and Federal Executive Agencies (FEA) (collectively, "FPL") on August 15, 2012.[1] The "settlement" to which the pleading refers is a document (hereinafter, the "FPL Document" or "purported settlement") that only FPL, SFHHA, FIPUG, and FEA have executed. OPC and FRF assert that, in view of the filing of the Motion to Approve Settlement Agreement, the interests of fairness require the Commission to suspend the hearing scheduled to begin on August 20, 2012; however, they oppose the procedures and time frames for treating the purported settlement agreement suggested in the Motion to Suspend. **Because the existing settlement agreement now in force prohibits FPL from implementing any revised base rates prior to the termination of the agreement (December 31, 2012), this case is not subject to the "eight month statutory clock."** Therefore, the Commission has the ability to suspend the

[1] In view of the timing of the Motion To Suspend relative to the hearing scheduled to begin on August 20, 2012, OPC and FRF filed their Joint Initial and Preliminary Response to Motion to Suspend Hearing on August 16, 2012. The instant filing constitutes the full response of OPC and FRF to the Motion To Suspend. While OPC and FRF have expedited their response voluntarily, they do not waive, and expressly reserve, the procedural rights afforded to them by the Florida Administrative Procedure Act and applicable procedural rules.

hearing scheduled for August 20, 2012 and develop a time frame that will enable it to exercise the appropriate deliberations while observing parties' due process rights.

Logic and the interests of fairness require a suspension of the hearing scheduled for August 20, 2012. OPC and FRF are not parties to the purported settlement agreement that is the subject of the Motion For Approval. OPC and FRF believe the maneuver is regrettable, and intend to demonstrate procedural and substantive flaws in the initiative of the four signatories to the document. However, now that the Motion For Approval is pending before the Commission, it makes no sense to proceed with the hearing scheduled for August 20, 2012 until the Commission has disposed of the Motion For Approval. Using the typical situation, in which all parties participate in a proposed settlement, as an illustration: The Commission would not proceed to hear the case and possibly waste extensive resources and labors (its own and those of the parties) when it had before it a motion that could potentially obviate the need for a hearing. The situation pending before this Commission differs from the "normal" example, in that there is disagreement among the parties' positions on the Motion For Approval; however, the same logic and rationale apply. Absent a suspension or continuance of the hearing for the purpose of addressing the Motion For Approval, parties would have to devote substantial time and precious resources to an intensive and demanding evidentiary hearing at the same time they would be required to respond to a "settlement agreement" that appears to be every bit as controversial and disputed as the hearing on FPL's petition.

The situation does not lend itself to a "dual track." Nor should parties be required to litigate their positions on FPL's petition at the same time the details of a proposed settlement among fewer than all parties are "on the table." This in and of itself is prejudicial to the parties

that did not sign the FPL settlement.[2] It makes no sense to proceed to hearing on the petition and brief the issues in the usual way when parties and Commissioners know the Motion For Approval is pending before the Commission. Just as the Commission would not rule on the issues in the Prehearing Order before dealing with the purported settlement that theoretically could render its labors moot, it should not hear evidence on those issues while the Motion For Approval is pending before it. Again, OPC and FRF intend to oppose the Motion For Approval. However, as long as the Motion For Approval has not been ruled upon, the purported settlement document submitted by four of the eleven parties is now the "elephant in the room." The Commission should remove it from the room before beginning the evidentiary hearing on FPL's petition.

The Motion to Suspend, as currently framed, fails to provide for the procedural rights of OPC, FRF, and other parties that are guaranteed by Chapter 120, Florida Statutes: The Motion to Suspend recites that it is filed contemporaneously with a Motion to Approve Settlement. Of eleven intervenors who have been granted party status, only three have participated in the "purported settlement." When considering the Motion to Suspend and the Motion For Approval, the Commission should bear in mind that the three Intervenors among the "joint movants" comprise only a minute fraction of FPL's customers. The Office of Public Counsel, which the Florida Legislature created to represent all ratepayers in proceedings conducted by the Commission, is among the eight Intervenors who have not executed the purported "settlement." See, Section 350.0611, Florida Statutes. Given its statutory role, in cases (such as this docket) in

[2] As will be developed below, the signatories to the FPL Document committed contractually to support the FPL document in any proceeding affecting its substance. Among other things, the FPL Document creates tension between the positions of the signatories on the issues in the Prehearing Order and the FPL Document that the Commission and parties, including FRF and OPC, cannot currently gauge, and that can be resolved only by disposing of the Motion For Approval before beginning the evidentiary hearing on FPL's March 2012 filing.

which OPC has given notice of its intervention, OPC asserts it is a necessary party to any settlement that would fully and finally resolve all revenue requirements in a rate case.[3]

The Florida Administrative Procedure Act, Chapter 120, Florida Statutes, governs the proceedings before the Commission, including the parameters of a suspension in the current hearing schedule for the purpose of addressing the Motion For Approval. The suspension must provide (1) an adequate opportunity, consistent with the provisions of Section 120.57(1), Florida Statutes, and Chapter 28-106, Florida Administrative Code, for OPC and FRF to present the reasons why they refuse to settle on the basis of the highly unfavorable terms of the FPL document, and (2) an alternative procedural schedule that will enable OPC and FRF to present their evidence and argument on FPL's base rate request without being prejudiced by the disruption that would be associated with a suspension and hiatus in the hearing dates or by having the Motion For Approval "pending" while a hearing was being conducted. The time frames and procedures suggested in the Motion to Suspend are inadequate for the purpose of conducting a technical hearing in this matter.

First deficiency: The one day "hearing" on August 30, 2012 to consider "any arguments or evidence regarding the FPL Document" is inadequate. Without conceding that the concept of an evidentiary hearing on the Motion For Approval is appropriate in this circumstance, the Motion To Suspend does not identify the person or persons who would provide "evidence" in support of the FPL Document. For reasons that will be developed more fully in the response by OPC and FRF to the Motion For Approval, the FPL Document introduces several subjects that

[3] OPC was a party to the settlement that led to the opinion in *South Florida Hospital and Health Care Association v. Jaber, 887 So. 2d 1210(Fla. 2004)*. Further, that case involved a limited proceeding that the Commission initiated, and which the Commission therefore exercised more control over, than a docket involving a petition filed by a utility in which OPC has intervened as a party

were not encompassed in FPL's March 2012 petition[4]. OPC and FRF must have a reasonable opportunity to conduct discovery on these subjects if they remain part of the purported settlement to which OPC and FRF are expected to respond.

Second deficiency: the reference to a "hearing" is vague. While the Motion to Suspend contemplates the August 30, 2012 "hearing" could include "evidence," the proponents of the FPL Document do not identify the witness or witnesses who would support the proposal. It is not reasonable to expect OPC and FRF (and other affected parties) to arrive on August 30 to participate in an undefined, unstructured "hearing" without an opportunity to first depose any such witness or witnesses prior to any evidentiary proceeding and prepare accordingly. The time frame suggested in the Motion To Suspend is facially inadequate to evaluate what amounts to a comprehensive change to the filing that FPL originally made in this docket.

Third deficiency: FPL is trying to stampede the Commission and parties. Similarly, and putting aside the fundamental problems created by absence of the rudiments of due process to the parties and the lack of the most basic guarantees of Chapter 120, Florida Statutes, the suggestion that the Commission could issue a bench decision on August 30 or the following day—presumably without the benefit of a thoroughly reasoned, written staff recommendation—amounts to nothing more than a demand for a "rush to judgment."

Fourth deficiency: The alternative hearing schedule proposed within the Motion to Suspend is inadequate. This case has been conducted pursuant to a schedule that was established in the Order Establishing Procedure, Order No. PSC-12-0143-PCO-EI, that the Commission issued in March 2012. Currently, the Commission has set aside ten days for the evidentiary

[4] The Commission has imposed "minimum filing requirements" on FPL and other petitioning utilities for the purpose of providing advance notice of the substance of relief requested and to enable parties to evaluate the proposals. The impacts of matters such as the proposed changes to the treatment of wholesale transactions on revenues and costs have not been reflected in FPL's filing and, without discovery, cannot be evaluated by OPC and FRF.

hearing on FPL's base rate proceeding In the Motion To Suspend, FPL abruptly asks the Commission to establish an alternative hearing schedule that contemplates evidentiary hearings on September 19-21, 24, and 27-28—a total of six days. This proposal is inadequate on its face. Further, when in May 2012 OPC suggested that the Commission break the logjam created by the then-current schedules for the FPL rate case and Docket No. 120009-EI (nuclear cost recovery) by moving one or the other to the dates that are the subject of the Motion to Suspend, OPC's suggestion was rejected—emphatically—on the grounds that the dates were already filled and therefore were unavailable for that purpose.[5] OPC and FRF believe that at least 10 hearing days should be reserved for the purpose of conducting a technical hearing in this matter. Further, any suspension must afford OPC and FRF sufficient time to ensure their witnesses are available for the rescheduled evidentiary hearing. Also, the alternative schedule must include provisions for post-hearing briefs, staff recommendation, and decision date that are sufficient for the purpose of resolving a major rate case filed by the largest electric utility in the State.

Pursuant to the terms of the existing settlement agreement that is now in force, the "eight month statutory clock" is inapplicable to this situation. The Commission is under no pressure to agree to the unrealistic time frames of the Motion To Suspend. FPL is prohibited by the terms of the existing settlement agreement from placing new base rates into effect prior to January 1, 2013. Therefore, the otherwise applicable statutory "eight month clock" effectively has been superseded by the settlement. Further, the same settlement provides that the existing rates shall continue in effect until the Commission has approved new rates. The Commission should take into account, also, that, by introducing a request for new subjects, FPL has effectively amended

[5] OPC met with FPL, other Intervenors, and the Commission Staff on May 16, 2012, and May 25, 2012 to discuss how to adjust schedules in Docket Nos. 120015-EI and 120009-EI. OPC requested the Commission Staff to move the FPL rate case hearing from August 2012 to mid-September 2012. FPL opposed the request. Staff informed OPC that its suggestion would be impossible to implement, because the dates were unavailable. The only difference between then and now is that FPL is the party now proposing the dates.

its case in this docket. At a minimum, the Motion For Approval and the attached FPL Document constitutes a constructive waiver of any additional time requirements that would otherwise be applicable. In short, the Commission's ability to provide a time frame for the suspension that affords OPC, FRF, and other parties their full procedural rights is not impinged in this instance by a "statutory clock."

The FPL Document constitutes a new filing for timing purposes. FPL filed its MFRs and supporting direct testimony on March 19, 2012. Part of the theme of the case FPL filed was that it was "clean" and had relatively few issues compared to the prior case. At the time of filing, the Commission established August 20-24, 27-31, 2012 for the evidentiary hearing on FPL's filing. FPL has filed testimony of many witnesses supporting the MFR schedules that are the foundational evidentiary element of its request for rate relief. The OPC and FRF have prepared the presentation of our respective cases and evidence based on the case as FPL filed it and based upon the resulting understanding of which parties are aligned with respect to the evidence and positions they are advancing.

At 5:15 P.M. on August 15, 2012 – a mere two business days before the scheduled beginning of the hearing on the March filing – FPL has filed the FPL Document containing a purported settlement on terms wildly different from the "clean" case that was originally filed. This purported settlement materially amends terms of the original filing, proposes revenue shifts inconsistent with the March filing, proposes a novel and complex asset sharing mechanism, proposes two Generation Base Rate Adjustments ("GBRAs") affecting 2014 and 2016, proposes an increase in the late payment charge and adds rate increases and mechanisms affecting recovery in fuel and capacity cost recovery clauses – all of which are not part of the March filing. Effectively, the FPL Document constitutes an effort to present a new rate case filing.

This new filing is unaccompanied by supporting MFRs, supporting testimony, or notice to customers. Yet, FPL basically wants the Commission and parties who did not execute the FPL Document to "process" this very different filing by August 31. The prejudice to OPC and FRF is as obvious as the necessity of a suspension of the scheduled hearing. At a minimum, the FPL Document constitutes a constructive waiver of the time frames that would attend a new rate case filing.

With respect to the alignment of parties, two provisions of the FPL document are worth noting.

Paragraph 15 provides in relevant part:

***

> The Parties further agree that they will support this Agreement and will not request or support any order, relief outcome or result in conflict with the terms of this Agreement in any administrative or judicial proceeding relating to, reviewing, or challenging the establishment, approval, adoption, or implementation of this Agreement or the subject matter hereof...

Paragraph 16 provides in relevant part:

***

> Any person or entity that executes a signature page to this Agreement shall become and be deemed a Party with the full range of rights and responsibilities provided hereunder, notwithstanding that such person or entity is not listed in the first recital above and executes the signature page subsequent to the date of this Agreement, it being expressly understood that the addition of any such Party(ies) shall not disturb or diminish the benefits of this Agreement to any current Party.

Together, these provisions indicate that the FPL Document represents a modification of the March filing, that FPL is contractually obligated to advocate it before the Commission, and that it cannot advocate anything differently than what is in the FPL Document proposal – the March filing notwithstanding. FPL has likewise enlisted the other signatories and committed

them to the same advocacy responsibility. Until the Commission disposes of the Motion For Approval, the Commission and non-signatories such as OPC and FRF would not be able to gauge the alignment and/or participation of the signatories during the hearing on the March 2012 base rate request. This creates an impossible situation for these Parties, including OPC and FRF, in conducting their case.

More fundamentally, in this circumstance the Commission should find that it is no longer obligated to provide a schedule that facilitates what is now just a desire -- rather than a statutorily guaranteed right – by FPL to implement rates by January 1, 2013.

For the foregoing reasons, OPC and FRF request the Commission to suspend the hearing scheduled to begin on August 20, 2012 and establish procedures and time frames for the disposition of the purported settlement that respect the due process rights of OPC, FRF and other affected parties.

Joseph A. McGlothlin
Associate Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330

Attorney for the Citizens of the
State of Florida

Joe McGlothlin for
Robert Scheffel Wright
John T. LaVia

c/o Gardner Bist Wiener Wadsworth
Bowden Bush Dee LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, FL 32308

Attorneys for the Florida Retail
Federation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **RESPONSE OF OFFICE OF PUBLIC COUNSEL AND FLORIDA RETAIL FEDERATION TO JOINT MOTION TO SUSPEND HEARING** has been furnished by electronic mail and/or U.S. Mail on this 17th day of August, 2012, to the following:

Caroline Klancke
Keino Young
Florida Public Service Commission
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

John T. Butler
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420

Ken Hoffman
R. Wade Litchfield
Florida Power & Light Company
215 South Monroe Street, Suite 810
Tallahassee, FL 32301-1858

Kenneth L. Wiseman
Mark F. Sundback
J. Peter Ripley
Andrews Kurth LLP
1350 I Street, NW, Suite 1100
Washington, DC 20005

Daniel R. and Alexandria Larson
06933 W. Harlena Drive
Loxahatchee, FL 33470

Charles Milsted
AARP, Associate State Director
200 West College Avenue
Tallahassee, FL 32301

Vickie Gordon Kaufman
Jon C. Moyle
c/o Moyle Law Firm
118 North Gadsden Street
Tallahassee, FL 32301

Robert Scheffel Wright
John T. LaVia
Gardner Law Firm
1300 Thomaswood Drive
Tallahassee, FL 32308

Karen White
Federal Executive Agencies
c/o AFLOA/JACL-ULFSC
139 Barnes Drive, Suite 1
Tyndall Air Force Base, FL 32403

Thomas Saporito
6701 Mallards Cove Rd., Apt. 28H
Jupiter, FL 33458

John W. Hendricks
367 S. Shore Drive
Sarasota, FL 34234

Linda S. Quick, President
South Florida Hospital and
Healthcare Association
6030 Hollywood Blvd., Suite 140
Hollywood, FL 33024

Quang Ha, Paul Woods, Patrick Ahlm
Algenol Biofuels, Inc.
28100 Bonita Grande Drive, Suite 200
Bonita Springs, FL 24135

Mr. Larry Nelson
312 Roberts Road
Nokomis, FL 34275

William C. Garner
Brian P. Armstrong
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, FL 32308

Mr. Glen Gibellina
7106 28th Street East
Sarasota, Florida 34243

Joseph A. McGlothlin
Associate Public Counsel