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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida Power & Light Company
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Docket No: 120015-EI

Filed: August 22, 2012

RESPONSE OF OFFICE OF PUBLIC COUNSEL
TO THE MOTION FOR APPROVAL SUBMITTED BY FPL/SFHHA/FIPUG/FEA

The Citizens of the State of Florida, through the Office of Public Counsel (OPC), hereby respond to the Joint Motion[1] For Approval Of Settlement Agreement ("Motion For Approval") submitted by Florida Power & Light Company (FPL), the South Florida Hospital and Health Care Association (SFHHA), the Florida Industrial Power Users Group (FIPUG), and the Federal Executive Agencies (FEA) (collectively, "FPL"). The Commission should reject the Motion For Approval out of hand. The *purported* settlement agreement among (only) FPL, SFHHA, FIPUG, and FEA is a mutually self-enriching exercise in wishful thinking that bears no relationship to the public interest—and has no efficacy as a proposed settlement. Consider:

1. The purported settlement document does not include the participation of OPC[2], which the Florida Legislature created to represent the interests of all ratepayers in Commission proceedings. (The Legislature's wisdom in doing so is made vividly apparent by the eagerness of certain customer groups to withdraw their resistance to FPL's unjustified request for a rate increase in return for concessions by FPL that cost FPL nothing, increase the costs that other customers would be required to pay, and benefit only the

[1] Within this response, OPC will refer to the FPL/SFHHA/FIPUG/FEA pleading as the Motion For Approval. However, as OPC will develop in this response, because the parties to the purported settlement agreement seek substantive changes to FPL's March 2012 petition, attach new tariffs, and do not include representation of all customers, the pleading is in the nature of a petition—and the Commission should treat it as such.

[2] The absence of OPC, as the statutory representative of the Citizens of the State of Florida is sufficient ***alone*** to distinguish the decision in *South Florida Hospital and Healthcare Association v. Jaber,* 887 So. 2d 1210 (Fla. 2004). The SFHHA case is further distinguished by the fact that the underlying PSC docket was a proceeding initiated by the Commission.

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participating customers' narrow parochial interests.) Given the plenary nature of its statutory role, OPC asserts that it is a necessary party to any settlement in revenue requirements cases in which it gives notice of its intervention. Stated another way, the non-FPL signatories are not legally authorized to represent the over 4 million FPL customers who are not their members. For the reasons stated in this response, OPC adamantly opposes the purported settlement agreement.

2. The spurious "purported settlement" represents only a small fraction of FPL's customers. For their participation, SFHHA, FIPUG, and FEA would receive reductions in the rates that FPL proposed to apply to them in its March 2012 petition. The gross reductions they would receive, which in the aggregate amount to at least $50 million annually in base rates, are neatly shifted to, and built into, the increases that other customer classes would pay. Having thus been largely sheltered from the impact of the excessive and exorbitant 10.7% return on equity specified in the purported settlement, these "signatories" were willing to sign the document and help FPL convey the false impression that it is a broadly supported agreement. In the document, the joint movants claim that the disposition of the case they propose is in the public interest, when it is clear that the only interests that FPL and the non-FPL participants pursued were their respective pocketbook interests.

3. The 10.7% return on equity that SFHHA, FIPUG, and FEA are willing to accept (as long as they are substantially shielded from its effect) is far higher than is warranted by the current conditions of capital markets, particularly in light of the effect of FPL's extravagant and (to customers) unnecessarily expensive 59.62% equity ratio, which the purported settlement would not alter, on its overall risk profile. Within the document,

FPL and the signatories agree to increase the late fee that FPL charges from \$5 to \$6.[3] (Paragraph 3(b) of the FPL document.) FPL had to this point proposed a late fee of \$5 in its March 2012 filing. This aspect of the purported settlement is effectively an amendment of its March 2012 petition, its minimum filing requirements, and its proposed tariffs. As late fees are frequently associated with customers who already have difficulty paying their bills timely, the proposal to provide concessions to large corporate customers and require a significant portion of the cost of the concessions to be borne specifically by those customers who can least afford the increases is particularly onerous—and callous.

4. The purported settlement provides for an increase of \$378 million in base rate revenues on January 1, 2013. FPL portrays this as a decrease from the \$516.5 million increase for which it sought authority to place into effect in January 2013. However, an examination of certain provisions reveals that the document may well be designed to enable FPL to receive higher revenues, not fewer, than it would receive under the March 2012 petition – even if the Commission were to approve FPL's original petition without adjustments![4]

    a. The proposed term of the purported settlement is four years, during which FPL would (pursuant to a proposed "generation base rate adjustment," or "GBRA" provision)[5], increase base rates by the annual revenue requirements of three large

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[3] This change accounts for approximately \$10 million in revenue increases. Other offsets in the form of rate increases are found in the purported settlement's various clauses.

[4] A preliminary review of the terms of the purported settlement would allow FPL to potentially recover hundreds of millions of dollars more over the four -year term of the purported settlement agreement than it would recover under its original requested petition over the same time frame.

[5] The "generation base rate adjustment" is the name that FPL applies to its long-standing desire to increase base rates incrementally by the amount of full revenue requirements associated with large new power plants at the time they enter commercial service. Under FPL's concept, FPL would implement the increases automatically, without being required to first demonstrate to the Commission and affected parties that current earnings are not adequate to absorb

generating additions in 2013, 2014, and 2016. By the end of the term sought by FPL, as a consequence of automatic, predetermined and preapproved base rate increases, it appears to OPC that FPL will have increased base rates by over $1 billion per year without an opportunity for the Commission and/or parties to examine whether all of the additional base rate increases are needed to maintain a fair and reasonable return. Based on this provision alone, the purported settlement would grant FPL higher base rates than it sought in its March 2012 petition.

b. In the purported settlement, FPL proposes to increase rates by $378 million, characterized as a difference of $139 million from the $516.5 million in its March 2012 petition, which one would presume at first blush to be related primarily to the application of a return on equity of 10.7% in lieu of the 11.5% that FPL sought in its petition. (For FPL, and assuming no change in capital structure, a difference of 100 basis points in return on equity translates to a difference in revenue requirement of approximately $160 million annually.) However, an examination of the treatment of West County Energy Center Unit 3 ("WCEC 3") in the March 2012 filing and in the purported settlement document indicates that the situation is far less straightforward. Pursuant to the 2010 settlement agreement, FPL collects the revenue requirement of WCEC 3 through the capacity cost recovery clause, but treats those revenues as "base revenues" for purposes of its surveillance reports—including the calculation of its earned return.

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some or all of the increased costs and provide a fair return. The proposal is effectively the equivalent of a "major power plant cost recovery clause" within base rates. The Commission rejected a form of FPL's "generation base rate adjustment" in FPL's last base rate docket. FPL did not even request it in the current case.)

In the March 2012 filing, FPL proposed to move the revenue requirement of WCEC 3 from the capacity cost recovery clause to base rates. Prefiled testimony establishes that the revenue requirement associated with WCEC 3 were built into the total cost of service that FPL included when claiming a revenue deficiency of $516.5 million annually, and that billing determinants were designed to recover that alleged revenue deficiency. (See the prefiled direct testimony of FPL witnesses Deaton at 10-11 and Ousdahl at 23-25.) Those same billing determinants are imported into the purported settlement. In the purported settlement, FPL proposes to continue collecting the revenue requirement associated with WCEC 3 through its capacity cost recovery clause; however, to the extent that the $378 million base rate increase is characterized as a reduction from the originally proposed $516.5 million that includes the revenue requirement of WCEC 3, FPL has not demonstrated that the same revenue requirement for WCEC 3 is not also included within the $378 million base rate increase it proposes to implement if the purported settlement were to go forward—in which case FPL would effectively recover the WCEC 3 costs twice. Even if one assumes, for the sake of argument, that the intent of the signatories is for FPL to collect approximately $165 million[6] of revenue requirement associated with WCEC 3 through the capacity cost recovery clause, and not a second time through base rates, it appears that the $165 million of WCEC 3 revenue requirement being transferred from the base rate filing to the capacity cost recovery clause must be added to the $378 million increase to which the signatories to the

[6] In Docket No. 110001, FPL witness Keith quantified the annual revenue requirement of WCEC 3 to be $166.8 million, based on the application of FPL's currently approved 10% ROE.

purported settlement agreed in order to assess the full impact that the attachment to the Motion For Approval would have on the amount of revenues FPL would collect from customers. Adding the $378 million base rate increase "negotiated" by the signatories to the $165 million that, pursuant to the same purported settlement, apparently is being transferred from the March 2012 base rate filing to the capacity cost recovery clause—but would nonetheless show up on customers' bills—yields $543 million, which is roughly $27 million more than FPL sought in its original March 2012 petition. It appears, therefore, that this provision would also enable FPL to increase its revenues—those generated by base rates and those collected through the capacity clause and treated by FPL and the Commission as base revenues—by an amount greater than it originally sought.

5. The purported settlement refers to an agreed upon 10.7% return on equity which, as stated above, is higher than FPL's required return on equity. Paragraph 8(a), which relates to the generation base rate adjustment that would be applicable to the Canaveral project, states, "the Annualized Base Revenue Requirement shall be as reflected in the 2012 Rate petition and accompanying MFRs." The $173.9 million Canaveral revenue requirement in the March 2012 MFRs was based on the 11.5% return on equity that FPL sought in its petition, not the still-bloated ROE of 10.7% that was negotiated. Further, after filing the petition in March 2012, FPL reduced the estimated Canaveral construction costs in subsequent updates. The reductions are not reflected in the $173.9 million figure of the MFRs. The negotiated provisions of the purported settlement overstate the amount of the Canaveral base rate step increase and would not limit the return on equity to the 10.7% due to the higher return on equity considered in the $173.9 million step increase.

The Canaveral project would generate a revenue requirement based on a return on equity of 11.5% during the four-year term of the purported settlement.

6. In Paragraph 10 of the purported settlement, FPL proposes to employ $200 million of fossil plant dismantlement reserve as a means of managing its earnings during its term, in much the same manner as the existing settlement agreement has enabled FPL to use depreciation reserve surplus. The differences are that the $894 million of reserve surplus that the Commission ordered FPL to return to customers in Order No. PSC-10-0153-FOF-EI: (1) was the subject of a comprehensive depreciation analysis and hearing that was consolidated with the hearing on FPL's last base rate request, and (2) had the effect of reducing base rates by the amount of amortization that was included in FPL's test year during the last base rate proceeding.[7] In contrast, the purported settlement agreement does not provide a basis on which to conclude that the $200 million amount of fossil plant dismantlement reserve nominated by FPL is appropriate for any purpose. Indeed, the terms of the document provide that FPL would be excused from submitting a depreciation/dismantlement study, now due in 2013, until the end of the four-year term of the proposed settlement. More importantly, under FPL's proposal, the $200 million of dismantlement reserve would (at FPL's discretion) be amortized, and FPL's earnings would increase accordingly; however, customers' rates would not be reduced to reflect the resulting lower depreciation expense. The amortization of the $200 million of dismantlement reserve would have the effect of increasing rate base by the same

[7]The purported settlement would also enable FPL to add the unamortized portion of the $894 million remaining at the end of 2012 to the $200 million of dismantlement reserve that could be used in this fashion. The purported settlement refers to the $191 million estimate provided by FPL in its March 2012 filing. Since then, FPL has increased its estimate of the amount that will be unamortized by about $20 million, and OPC witnesses have, through their challenges to 2012 O&M levels, put additional amounts at issue.

amount—an aspect of reversing reserve surpluses which FPL criticizes when OPC advocates that the surplus should be used to lower customers' rates, but to which FPL obviously has no objection when FPL's earnings go up without a corresponding reduction in customers' rates. As is the case with a depreciation reserve surplus, a surplus in dismantlement reserve signifies that the utility has collected too many dismantlement-related dollars from past and current customers. Whether as a function of a depreciation/fossil dismantlement study that coincides with a base rate proceeding or as a settlement reached by all affected parties, when the Commission identifies reserve surpluses that warrant corrective action on a schedule more rapid than the remaining lives of the related assets, the surplus should be returned to customers in a manner that lowers the bills they pay. Only in this circumstance is the corresponding return of the reserve dollars being amortized to the rate base justified.

7. In Paragraph 12 of the purported settlement, FPL proposes a complex "incentive mechanism" that would enable FPL to keep specified portions of profits from transactions that include, in addition to wholesale sales of electricity, certain gas *sales* and gas *storage* transactions, and capacity *releases* of gas *transport* and electric transmission *capacity*. The measure would bring within the electric utility's already cluttered fuel cost recovery clause transactions that are foreign to its purpose—which is to provide timely recovery of volatile costs of *fuel burned to generate electricity.* Particularly abusive is the proposal to flow the cost of "incremental personnel, software, and associated hardware," as well as non-fuel O&M, through FPL's fuel cost recovery clause. In addition to rendering "clause eligible" non-fuel O&M expenses that are unrelated to volatile costs of fuel, the provision would include the entire amount of such

costs, even though customers would receive only a portion of identified "benefits." More fundamentally, with this proposal FPL again is asking the Commission to provide a "bonus" for doing that which it should already be doing to the best of its ability. FPL's monopoly enterprise receives an opportunity to earn a fair return. The opportunity includes the ability to earn, not just the point of ROE on which rates are designed, but the incentive to earn the maximum of the range authorized by the Commission. As part of the "obligation to serve" that FPL accepts in return for its protected retail market and other, risk-reducing advantages[8], it should employ all assets for which its customers pay for the ratepayers' benefit, to the full extent of its ability to do so. Further, it appears—from the provision that would enable FPL to "outsource" the function of "asset optimization"—that FPL would be positioned, under these terms, to hire an outside agent to manage the sales and leases that are part of the mechanism, flow the costs of the agent through the fuel clause, and keep for shareholders a significant portion of the profits that the outsourced entity delivers. Nice work if you can get it—especially if the "outside agent" turns out to be one of FPL's affiliates, which the purported settlement does not preclude! In any event, because it was not part of FPL's petition, there is no ability on the part of the Commission or parties to assess the parameters of FPL's proposal.

8. The purported settlement would favor the signatories[9] while providing FPL revenues in excess of the amount required to provide a fair and reasonable return. OPC believes the right approach to achieving a result that is fair to FPL and all customers generally would

[8]FPL collects more than 60% of its revenues through various cost recovery mechanisms that incorporate true-up features.

[9] The fleeting references to job creation and the economy that the signatories offer as justification for the purported settlement cannot disguise the document's obvious shortcomings. Besides, FPL's President, Eric Silagy, said in prefiled testimony that FPL's relatively low residential rates help "keep Florida competitive economically"—which OPC views as an acknowledgment that its customers' disposable income is a relevant part of the economic picture.

be to focus on reducing FPL's excessive revenue request to a level that will yield a reasonable return, and adhere to the Commission's long-standing policies of overall fairness when allocating a revenue increase (if any). The purported settlement does neither. It was an effort to divert the Commission from its task of hearing all evidence, short-circuit the process, impose self-serving financial provisions, and inject subjects that, because they were not part of the March 2012 petition, are not properly before the Commission. Having voted to proceed with the hearing, and to receive all evidence on all legitimate issues identified in the Prehearing Order with all parties present, the Commission should consider that it effectively rendered the Motion For Approval moot. On the other hand, if the Commission (despite having concluded the evidentiary hearing) were to consider the Motion For Approval, it would be required to conduct new, additional proceedings for the reasons developed below.

9. FPL's purported settlement document adds items and requests that were not part of its original case. FPL's proposed settlement document would authorize several separate base rate increases and clause recovery impacts that collectively would generate revenues that exceed the levels that its originally proposed rates would have generated. In this regard, the Motion For Approval fails to comply with applicable laws and rules. The Motion For Approval is, on its face, a petition seeking the Commission's approval of new rates for FPL's electric service. Section 366.06(1), Florida Statutes, provides that "all applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed...." Among the "rules and regulations prescribed" are Commission Rule 25-6.140, F.A.C., Test Year Notification, and Rule 25-6.043, F.A.C., Investor-Owned Electric Utility Minimum Filing Requirements. The Motion For

Approval is clear on its face that it is a petition for changes in FPL's rates: it actually includes proposed tariff sheets. Moreover, the Motion For Approval and the purported settlement seeks the Commission's approval of additional general base rate increases in future years, specifically in 2014 for the Riviera plant and in 2016—four years from now for the Port Everglades plant. FPL has failed to file a Test Year Notification letter as required by Rule 25-6.140, F.A.C., and it has filed no Minimum Filing Requirements for either a 2014 or 2016 test year. Any proceedings that might be conducted on the Motion For Approval would have to comply with these requirements as well as the requirements of Chapter 366, Florida Statutes, Chapter 120, Florida Statutes, and Chapter 28-106, F.A.C. This would include the filing of full MFRs for the 2014 and 2016 test periods, full discovery by all parties to the proceedings, and hearings in accordance with Chapter 120, Florida Statutes.

10. Finally, granting the Motion For Approval would establish a dangerous precedent. It would not promote *legitimate* settlements. Instead, it would encourage and embolden other utilities that file a petition for a base rate increase to believe that they could wait until the deadline for testimony and discovery has passed, and then unilaterally disrupt and hijack an existing proceeding, impose onerous terms, and inject entirely new subjects into outcomes through the simple (if blatant) expedient of offering concessions to a narrow sector of their customer bases.

WHEREFORE, the Citizens of the State of Florida request the Commission to summarily deny the Motion For Approval and proceed to resolve the issues identified in the Prehearing Order on the basis of the evidentiary record developed in the hearing on the March 2012 petition.

In the event the Commission does not deny or treat as moot the Motion For Approval, the Citizens request the Commission to establish procedures and time frames adequate to enable Citizens to exercise full rights of due process, as described herein.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **RESPONSE OF OFFICE OF PUBLIC COUNSEL TO THE MOTION FOR APPROVAL SUBMITTED BY FPL/SFHHA/FIPUG/FEA** has been furnished by hand delivery on this 22nd day of August, 2012, to the following:

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