

State of Florida



## Public Service Commission

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**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** December 21, 2004

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Division of Economic Regulation (Slemkewicz, Willis, Kummer, Wheeler, Maurey)  
Office of the General Counsel (C. Keating)

**RE:** Docket No. 041291-EI – Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season that exceed storm reserve balance, by Florida Power & Light Company.

**AGENDA:** 01/04/05 – Regular Agenda: Issues 1, 2 – Decision Prior to Hearing – Motions to Dismiss/Strike – Oral argument not requested, but may be heard at the Commission’s discretion; Issues 3, 4, 5 – Decision Prior to Hearing – Parties May Participate

**CRITICAL DATES:** 01/19/04 (60-Day Suspension Date) – Issue 4

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\GCO\WP\041291.RCM.DOC

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### Case Background

On November 4, 2004, Florida Power & Light Company (FPL) filed a petition seeking authority to recover prudently incurred restoration costs, in excess of its storm reserve balance, related to the hurricanes that struck its service territory in 2004 (Storm Cost Recovery Petition). In its petition, FPL asserts that as a result of Hurricanes Charley, Frances, and Jeanne, FPL incurred extraordinary storm-related costs of approximately \$710 million, net of insurance proceeds, which will result in a negative balance of approximately \$354 million in its storm reserve fund at the end of December 2004. By its petition, FPL proposes to initiate recovery of this estimated deficit through a monthly surcharge to apply to customer bills based on a 24 month recovery period commencing January 1, 2005.

On November 17, 2004, the Office of Public Counsel (OPC) and the Florida Industrial Power Users Group (FIPUG) (collectively, Joint Movants) filed a joint motion to dismiss FPL's Storm Cost Recovery Petition.<sup>1</sup> FPL filed a response to the joint motion on November 24, 2004.

By Order No. PSC-04-1150-PCO-EI, issued November 18, 2004, a hearing schedule and procedures were established to govern the proceeding on FPL's Storm Cost Recovery Petition. By that Order, a formal administrative hearing was set for April 20-22, 2005.

On November 19, 2004, FPL filed a petition in this docket seeking authority to implement its proposed monthly surcharge effective January 1, 2005, or as soon as practicable, subject to refund (Preliminary Surcharge Petition). On December 1, 2004, OPC and FIPUG filed a joint response to FPL's Preliminary Surcharge Petition, asking that it be "denied and/or dismissed." Because this joint response sought affirmative relief by asking the Commission to deny or dismiss the Preliminary Surcharge Petition, FPL filed a response to the joint response on December 3, 2004. FPL treats the joint response as a motion to strike and asks that the Commission deny Joint Movants' request to strike its Preliminary Surcharge Petition, or, alternatively, to accept its Preliminary Surcharge Petition as an amendment to the Storm Cost Recovery Petition.

Issue 1 of this recommendation addresses Joint Movants' motion to dismiss FPL's Storm Cost Recovery Petition. Issue 2 addresses Joint Movants' request to strike or dismiss FPL's Preliminary Surcharge Petition. Issues 3 through 5 address FPL's Preliminary Surcharge Petition.

The Commission has jurisdiction over this matter pursuant to Chapters 120 and 366, Florida Statutes.

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<sup>1</sup> OPC's intervention in this docket was acknowledged in Order No. PSC-04-1171-PCO-EI, issued November 24, 2004. FIPUG was granted intervenor status in this docket by Order No. PSC-04-1207-PCO-EI, issued December 7, 2004.

### **Discussion of Issues**

**Issue 1:** Should the Commission grant OPC and FIPUG's joint motion to dismiss FPL's Storm Cost Recovery Petition?

**Recommendation:** No. The motion to dismiss should be denied. FPL's petition states a cause of action upon which relief may be granted. (C. Keating)

### **Staff Analysis:**

#### **Standard of Review**

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. See id. at 350. In determining the sufficiency of the petition, the Commission should confine its consideration to the petition and documents incorporated therein and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1<sup>st</sup> DCA 1958); Rule 1.130, Florida Rules of Civil Procedure.

#### **OPC and FIPUG's Joint Motion to Dismiss**

In their motion, Joint Movants contend that FPL's Storm Cost Recovery Petition should be dismissed because it fails to state a claim upon which relief may be granted. Joint Movants state that FPL has failed to plead or offer to prove that its storm-related expenses in excess of its storm reserve fund have caused it to earn less than a fair rate of return or its approved earnings.

Joint Movants note that the Commission established a storm reserve fund for FPL through Order No. PSC-93-0918-FOF-EI, issued June 17, 1993, in Docket No. 930405-EI.<sup>2</sup> Joint Movants state that in that order, the Commission acknowledged that hurricane-related expenses were included in base rates and declined to create a 100% pass-through mechanism for recovery of such expenses. Joint Movants further state that the Commission noted that a 100% pass-through mechanism would effectively transfer all risk associated with storm loss directly to ratepayers and would insulate the utility from that risk. Joint Movants assert that the Commission also noted that FPL's proposal at that time did not take into account the utility's earnings or achieved rate of return. Joint Movants contend that FPL, by the surcharge proposed in its Storm Cost Recovery Petition, is essentially asking the Commission to create the same type of pass-through mechanism that the Commission rejected in Order No. PSC-93-0918-FOF-EI.

Joint Movants cite the provisions of Rule 25-6.0143, Florida Administrative Code, which address the treatment of actual expenses from storm damage that exceed the storm reserve fund. In particular, Joint Movants note that the rule states that the balance in the storm reserve fund shall be evaluated at the time of a rate proceeding and adjusted as necessary, but permits a utility

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<sup>2</sup> Order No. PSC-93-0918-FOF-EI is attached to this recommendation as Attachment A.

to petition the Commission for a change in the provision level and accrual rate outside a rate proceeding. Joint Movants argue that because storm damage expenses are part of FPL's base rates, FPL's earnings must be taken into account when evaluating the appropriate amount of storm-related costs, if any, to pass on to customers.

Joint Movants note that in Order No. PSC-93-0918-FOF-EI, the Commission stated that it would address storm-related costs in excess of the storm reserve fund based on a petition filed by FPL. Until that time, the Commission permitted FPL to defer storm damage loss over the amount in the reserve. Joint Movants assert that due to the magnitude of FPL's estimated 2004 storm-related costs, the costs should be thoroughly analyzed. Joint Movants contend that this would best be done in conjunction with FPL's next rate proceeding, allowing for a full picture of FPL's financial situation.

#### FPL's Response

In its response, FPL contends that Joint Movants' motion to dismiss should be denied because it is inconsistent with the Stipulation and Settlement approved by the Commission in Order No. PSC-02-0501-AS-EI, issued April 11, 2002, in Docket No. 01148-EI, In re: Review of the retail rates of Florida Power & Light Company,<sup>3</sup> and because it is based on an incorrect premise that the Commission can grant recovery of storm losses only upon a showing that the utility will not achieve its authorized rate of return. FPL asserts that, when taking all facts contained in its Storm Cost Recovery Petition as true, the joint motion to dismiss does not meet the standard for a motion to dismiss.

FPL notes that both OPC and FIPUG are signatories to the Stipulation and Settlement approved in Order No. PSC-02-0501-AS-EI to resolve the Commission's review of FPL's retail rates in Docket No. 001148-EI. Citing the terms of the Stipulation and Settlement, FPL asserts that in exchange for its agreement to reduce base rates by \$250 million annually and share revenues over a certain threshold (¶¶ 2, 6-7 of the Stipulation), OPC, FIPUG, and the other signatories agreed that FPL would no longer have an authorized return on equity (ROE) range for the purpose of addressing earnings levels (¶ 3 of the Stipulation). FPL notes that paragraph 3 of the Stipulation states in part: "[T]he revenue mechanism herein described will be the appropriate and exclusive mechanism to address earnings levels." Further, FPL notes that the parties agreed to the following language in paragraph 13 of the Stipulation and Settlement, which expressly addresses the storm reserve fund:

In the event there are insufficient funds in the Storm Damage Reserve and through insurance, FPL may petition the FPSC for recovery of prudently incurred costs not recovered from those sources. The fact that insufficient funds have been accumulated in the Storm Damage Reserve to cover costs associated with a storm event or events shall not be evidence of imprudence or the basis of a disallowance. Parties to this Stipulation and Settlement are not precluded from participating in such a proceeding.

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<sup>3</sup> Order No. PSC-02-0501-AS-EI, which includes the Stipulation and Settlement, is attached to this recommendation as Attachment B.

FPL asserts that its Storm Cost Recovery Petition is expressly permitted by paragraph 13 of the Stipulation and Settlement. Further, FPL asserts that Joint Movants' argument that the Storm Cost Recovery Petition should be dismissed on grounds that FPL did not allege how its storm reserve fund deficit would impact its earnings or achieved rate of return ignores that FPL does not have an authorized rate of return during the term of the Stipulation and Settlement and thus does not have an achieved rate of return. FPL states that even if its earnings were relevant, the estimated \$354 million in storm-related costs amounts to approximately one half of FPL's annual net income.

FPL argues that it is a fallacy for Joint Movants to contend that the Commission cannot grant relief without taking earnings into consideration. FPL contends that the only circumstance in which the Commission has ever said that it should review earnings in the context of storm restoration costs was in Order No. PSC-93-0918-FOF-EI,<sup>4</sup> when FPL asked the Commission to establish a cost recovery clause mechanism to operate in perpetuity addressing all future storm costs. FPL claims that if the Commission were to approve recovery of extraordinary storm restoration costs only upon a showing that a utility was not achieving its authorized rate of return, it would create a perverse incentive for utilities facing massive storm restoration efforts and would be inconsistent with the public policy of safe and rapid service restoration.

FPL notes that in Order No. PSC-93-0918-FOF-EI, at page 5, the Commission declined to implement a cost recovery clause mechanism for storm loss recovery "at this time." Instead, the Commission approved a self-insurance mechanism consisting of an annual accrual amount in base rates coupled with the ability to request a specific recovery mechanism in the event of a shortfall. FPL cites Commission orders issued subsequent to Order No. PSC-93-0918-FOF-EI which also indicate that FPL may petition the Commission for relief in cases of catastrophic storm losses.<sup>5</sup>

Finally, FPL challenges Joint Movants' claim that FPL, through its Storm Cost Recovery Petition, seeks to be held risk-free. FPL states that it was not held harmless by the storms because, pursuant to the Stipulation and Settlement, it bears the risk of lost revenues as a result of the hurricanes, which amount to \$38 million. FPL further states that it does not have access to commercial insurance for repair and restoration of physical damage or access to Federal Emergency Management Agency assistance, unlike most other proprietors.

### Analysis and Conclusions

Staff recommends that Joint Movants' motion to dismiss be denied, because FPL's petition states a cause of action upon which relief may be granted.

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<sup>4</sup> See Attachment A.

<sup>5</sup> Order No. PSC-95-1588-FOF-EI, issued December 27, 1995, in Docket No. 951167-EI, In re: Petition for authorization to increase the annual storm fund accrual commencing January 1, 1995 to \$20.3 million; to add approximately \$51.3 million of recoveries for damage due to Hurricane Andrew and the March 1993 storm; and to re-establish the storm reserve for the costs of Hurricane Erin by increasing the storm reserve and charging to expense approximately \$5.3 million, by Florida Power & Light Company; Order No. PSC-98-0953-FOF-EI, issued July 14, 1998, in Docket No. 971237, In re: Petition for authority to increase annual storm fund accrual commencing January 1, 1997 to \$35 million by Florida Power & Light Company.

The Commission has jurisdiction to regulate and supervise each public utility, such as FPL, with respect to its rates and service<sup>6</sup> and has the power to prescribe fair and reasonable rates and charges to be applied by each public utility.<sup>7</sup> The Commission has considerable discretion and latitude in the ratemaking process.<sup>8</sup>

Under this authority and broad discretion, the Commission approved, in April 2002, a Stipulation and Settlement between FPL, OPC, FIPUG, and several other parties to resolve the Commission's then-pending review of FPL's retail rates.<sup>9</sup> Pursuant to paragraph 3 of the Stipulation, FPL would not have an authorized return on equity range during the term of the Stipulation.<sup>10</sup> Instead, as shown in paragraphs 2, 6, and 7 of the Stipulation, the parties agreed that FPL would reduce its base rates by \$250 million and share with its customers any revenues over a specified threshold.

Pursuant to paragraphs 5 and 8 of the Stipulation, the parties agreed that during the term of the Stipulation, FPL would not petition for an increase in its base rates and charges unless its retail base rate earnings fell below a 10% ROE as reported on a Commission adjusted or pro-forma basis on an FPL monthly earnings surveillance report during the term of the Stipulation. However, paragraph 13 of the Stipulation specifically provided that FPL may petition the Commission for recovery of prudently incurred storm-related costs in excess of the funds available in its storm reserve fund and through insurance.

Given the terms of the Stipulation and Settlement, staff does not believe that FPL has failed to state a cause of action by failing to plead that its storm-related expenses in excess of its storm reserve fund have caused it to earn less than a fair rate of return. The Stipulation clearly establishes that FPL will not have an authorized ROE range for the term of the Stipulation and expressly allows for FPL to file a petition for recovery of prudently incurred storm-related costs in excess of its storm reserve fund and insurance coverage.

Further, the language in Order No. PSC-93-0918-FOF-EI, whereby the Commission established a storm reserve fund for FPL but declined to adopt a pass-through mechanism for recovery of storm losses, indicates that the Commission has not foreclosed consideration of a pass-through mechanism similar to the surcharge presently proposed by FPL:

Our vote today does not foreclose or prevent further consideration of some type of a cost recovery mechanism, either identical or similar to what has been proposed in this petition. The Commission could implement a cost recovery mechanism, or

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<sup>6</sup> Section 366.04(1), Florida Statutes.

<sup>7</sup> Section 366.05(1), Florida Statutes.

<sup>8</sup> See, e.g., *Gulf Power Company v. Bevis*, 296 So. 2d 482, 487 (Fla. 1974) ("As pointed out by the Commission, it has considerable discretion and latitude in the rate-fixing process."); and *City of Miami v. FPSC*, 208 So. 2d 249 (Fla. 1968) (stating that the Public Service Commission has considerable discretion in the ratemaking process).

<sup>9</sup> See Attachment B.

<sup>10</sup> Under traditional rate-of-return regulation, the Commission would establish an authorized return on equity range in setting rates for a public utility.

defer the costs, or begin amortization, or such other treatment as is appropriate, depending on what the circumstances are at that time.<sup>11</sup>

Exercising the discretion and latitude afforded the Commission in the process of ratemaking, the Commission has established pass-through mechanisms for certain costs in the form of the continuing fuel and capacity cost recovery clauses and the purchased gas adjustment true-up. It is likewise within the Commission's discretion to consider FPL's proposed surcharge as a means of cost recovery. While the Commission may find that the effects of FPL's storm-related costs on its earnings are relevant to the disposition of FPL's Storm Cost Recovery Petition, FPL does not fail to state a cause of action by failing to address such effects in its petition.

For the reasons set forth above, staff recommends that Joint Movants' motion to dismiss FPL's Storm Cost Recovery Petition should be denied.

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<sup>11</sup> See Attachment A.

**Issue 2:** Should the Commission grant OPC and FIPUG's joint request to strike or dismiss FPL's Preliminary Surcharge Petition?

**Recommendation:** No. The Commission should deny OPC and FIPUG's joint request to strike or dismiss FPL's Preliminary Surcharge Petition. (C. Keating)

**Staff Analysis:** As noted in the Case Background, Joint Movants filed a response to FPL's Preliminary Surcharge Petition, asking that it be "denied and/or dismissed." In effect, Joint Movants' response asks the Commission to strike the petition as an unauthorized pleading or, alternatively, to dismiss the petition on the grounds stated in the Joint Movants' motion to dismiss FPL's Storm Cost Recovery Petition. For the same reasons stated in Issue 1, staff recommends denial of Joint Movants' request to dismiss the Preliminary Surcharge Petition. The remainder of staff's analysis addresses Joint Movants' request to strike the Preliminary Surcharge Petition.

Joint Movants argue that FPL's Preliminary Surcharge Petition should be stricken because, in essence, it is an attempt to amend its Storm Cost Recovery Petition without the necessary approval of the Presiding Officer. Joint Movants contend that the petition is also substantively defective because it prejudices the issues of whether any cost recovery mechanism is necessary and what amount will flow through that mechanism.

FPL contends that its Preliminary Surcharge Petition was not an amended petition but a separate petition seeking approval to implement its surcharge subject to refund. FPL notes that its Storm Cost Recovery Petition sought implementation of its proposed surcharge effective January 1, 2005. FPL states that when the Commission set that petition for hearing in April 2005, FPL realized that it would need to ask the Commission to approve implementation of the surcharge commencing January 1, 2005, subject to refund because the 2005 hurricane season would be upon the company by the time the hearing phase of this docket ends. FPL asserts that its Preliminary Surcharge Petition does not interfere with the schedule for reviewing the prudence and reasonableness of the deficit in FPL's storm reserve fund that is the subject of its Storm Cost Recovery Petition. FPL contends that Joint Movants' argument that the Preliminary Surcharge Petition is an unauthorized pleading is one of form over substance. In the event the Commission determines that the Preliminary Surcharge Petition was effectively an amendment to the Storm Cost Recovery Petition, FPL requests that the Commission accept the Preliminary Surcharge Petition as an amendment.

FPL also contends that its Preliminary Surcharge Petition does not seek to prejudice any issue in this case. Rather, FPL states, the petition seeks to implement the proposed surcharge subject to refund, thus preserving the issues to be addressed at hearing.

Regardless of whether FPL's Preliminary Surcharge Petition is viewed as an amendment to its Storm Cost Recovery Petition or as a separate petition, staff recommends that the Commission deny Joint Movants' request to strike the Preliminary Surcharge Petition.

First, staff does not believe that the Preliminary Surcharge Petition, whether viewed as an amendment or a separate petition, prejudices the issues to be addressed in the April 2005 hearing



concerning FPL's Storm Cost Recovery Petition. As noted in Issue 1, the Commission has considerable discretion and latitude in the ratemaking process. The Commission has approved rate increases subject to refund on numerous occasions while it conducted a thorough review to analyze requested rate increases and establish more permanent rates. This has occurred in base rate proceedings where utilities have requested interim rate increases pending the results of the Commission's determination of permanent rates. In such proceedings, any overearnings that result from the interim rate increases are refunded to customers with interest. This has also effectively occurred in cost recovery clause proceedings where rates are based in part on projections and ultimately "trued-up," with interest, on an annual basis. In cost recovery clause proceedings, any over-recovery of costs is credited to the utility's cost recovery clause balance with interest. The purpose of requiring the utility to hold revenues from such rate increases subject to refund is to ensure that ratepayers are protected in the event that the Commission ultimately decides that a smaller rate increase, or no rate increase at all, is appropriate.

Second, staff does not view FPL's Preliminary Surcharge Petition as an amendment to its Storm Cost Recovery Petition. In the context of base rate proceedings, a utility almost always files a "petition" for interim rate relief separately from its petition for permanent rate relief. Such pleadings have never been treated as procedurally infirm attempts by the utility to amend its petition for permanent rate relief. While staff recognizes that FPL's Storm Cost Recovery Petition seeks relief distinct from the relief sought through a petition to initiate a full base rate proceeding, staff agrees with FPL that Joint Movants' request to strike the Preliminary Surcharge Petition as an unauthorized pleading emphasizes form over substance.

In the event that the Commission determines that FPL's Preliminary Surcharge Petition is effectively an amendment to its Storm Cost Recovery Petition, FPL asks the Commission to grant it leave to make that amendment. The law is clear that leave to amend pleadings should be freely granted in order to allow disputes to be resolved on their merits. At this early point in this proceeding, staff believes that no parties will be prejudiced if FPL is granted leave to amend its Storm Cost Recovery Petition as requested. Thus, if the Commission believes that the petition is an amendment, staff recommends that the Commission grant FPL's request for leave to make the amendment.

For the reasons set forth above, staff recommends that Joint Movants' request to strike or dismiss FPL's Preliminary Surcharge Petition be denied.

**Issue 3:** Should the Commission authorize FPL to implement a preliminary storm surcharge subject to refund?

**Recommendation:** Yes. If the motions to dismiss/strike are denied, FPL should be authorized to implement a preliminary surcharge, subject to refund. This approval would be preliminary in nature and would not prejudge the merits of any issues that may be raised in the evidentiary hearing in this docket, such as the implementation of any surcharge, any amounts to be recovered, or the duration of any surcharge. (Slemkewicz, Willis)

**Staff Analysis:** FPL has requested that it be authorized to implement its proposed surcharge as soon as practicable, subject to refund, rather than sometime after the post-hearing agenda conference currently scheduled for July 5, 2005. In its petition, FPL states that an earlier implementation of the storm surcharge would better match the recovery of the 2004 storm recovery costs with the customers who benefited from those restoration efforts. FPL also notes that its storm damage reserve has been fully depleted, and that it has spent an additional unrecovered amount of \$354 million in excess of the amount that was in the reserve. Unless otherwise authorized by the Commission, FPL can recover this amount and attempt to replenish the storm damage reserve only through its currently authorized storm damage annual accrual of \$20.3 million. FPL further states that prompt implementation of the surcharge would reduce the amount of interest to be recovered, if such recovery is ultimately allowed. Lastly, FPL points out that the later implementation date would occur after the start of the 2005 hurricane season, without FPL having recovered any of its 2004 storm damage costs in excess of its reserve.

Without rendering any opinion on the merits of implementing a surcharge or the reasonableness and prudence of any of the costs to be included, staff believes that FPL has presented reasonable arguments for implementing a surcharge on a preliminary basis. Because FPL's proposed surcharge would be subject to refund with interest, its ratepayers will be fully protected if the Commission, at the conclusion of the evidentiary hearing in this docket, takes final action to deny implementation of a surcharge or to modify the amount of costs to be recovered. Therefore, staff recommends that FPL's petition to implement a preliminary storm surcharge subject to refund should be granted.

**Issue 4:** Should the Commission approve FPL's proposed Original Tariff Sheet No. 8.033?

**Recommendation:** If the Commission approves staff's recommendation in Issue 3, the tariff as filed should be approved and remain in effect until the final order is issued in this docket. The appropriate allocation of the costs to rate classes and the resulting rate factors should be an issue in the hearing scheduled for April. Consistent with the application of interim rates, the tariff should become effective for meter readings on or after February 3, 2005. If the Commission denies FPL's request to implement the storm damage surcharge subject to refund prior to the hearing, the proposed tariff sheet should be suspended, pending the results of the scheduled hearing. (Kummer, Wheeler)

**Staff Analysis:** In Appendix B to its petition, FPL developed proposed per kilowatt hour (kWh) storm surcharge recovery factors by rate class. FPL is requesting to implement the charges for meter readings on or after January 1, 2005, or as soon as practicable thereafter. The factors are contained in FPL's proposed Original Tariff Sheet No. 8.033. FPL is requesting that these factors remain in effect for two years or the time necessary to fully recover the applicable revenue requirements, whichever is less. Implementation of FPL's proposed factors will result in an increase in the monthly residential bill for 1,000 kWh of \$2.09.

Staff has concerns with the method that FPL used to develop the per kWh recovery factors for storm damage. To allocate the costs to the rate classes, FPL first divided its total jurisdictional plant-in-service costs into the following functional areas: production, transmission, distribution, intangible, and general plant. These functionalized plant items costs were then allocated to the rate classes using the same allocation methods used in FPL's most recent rate case filing. The total plant-in-service costs allocated to each class were used to develop percentages which were then applied to the storm recovery costs to derive the factors shown on the proposed tariff. These factors were calculated using actual 2003 calendar year kWh sales by rate class and load research data collected during calendar year 2003.

While staff agrees with the allocation methodology used to divide the plant investment among classes, staff does not believe that plant investment is an appropriate basis to be used to allocate storm related expenses. Use of FPL's method results in an allocation of storm costs to the rate classes in proportion to their cost responsibility for FPL's entire plant. The costs for which FPL seeks recovery, in contrast, were not incurred uniformly across all functional categories. Most of the costs are related to distribution and to a lesser extent transmission, with only a small proportion related to generation assets. FPL's methodology shifts cost recovery away from residential and small commercial customers who benefit from the distribution investment to larger industrial customers who may not even utilize the distribution facilities and who would not normally pay for distribution investment in their base rates. Staff believes it is more appropriate to use an allocation methodology which recognizes the actual costs attributable to each functional cost category.

Based on a preliminary analysis, staff does not believe the allocation factors used by FPL result in a major cost shift. Therefore, staff is recommending approval of the tariff as filed for this preliminary surcharge. However, FPL should be put on notice that the allocation

methodology will be at issue in the upcoming hearing and adjustments may be made on a going-forward basis.

In keeping with the traditional treatment of interim rates, the requested factors should become effective for meter readings 30 days after the Commission's vote. This will allow customers to be aware of the surcharge before it is applied to usage on their bill. If the Commission approves FPL's requested factors at its January 4, 2005 Agenda Conference, the factors should become effective for meter readings on or after February 3, 2005.

If the Commission denies staff's recommendation on Issue 3, the tariff should be suspended, pending the outcome of the hearing. The tariff was filed on November 19, 2004. If the tariff is not suspended, it will go into effect by operation of law 60 days after filing. Suspending the tariff allows the Commission eight months to take final action on the proposed tariff without the tariff going into effect by operation of law. Since the final recommendation after hearing is scheduled for Commission vote at the July 5, 2005 Agenda, a vote at that Agenda would be within this eight month statutory time frame.

**Issue 5:** What is the appropriate security to guarantee the amount collected subject to refund through the storm surcharge?

**Recommendation:** The appropriate security to guarantee the amount collected subject to refund through the storm surcharge is a corporate undertaking. (Maurey)

**Staff Analysis:** FPL has requested it be authorized to collect its proposed storm surcharge effective January 1, 2005, or as soon as practicable, subject to refund. For purposes of this analysis, staff assumed FPL would collect approximately \$92.6 million between January 5, 2005, and the post-hearing agenda conference currently scheduled for July 5, 2005.

The criteria for use of a corporate undertaking include sufficient liquidity, ownership equity, profitability, and interest coverage to guarantee any potential refund. The 2001, 2002, and 2003 financial statements of FPL were used to determine its financial condition. Based on its analysis, staff believes FPL has the financial capability to support a corporate undertaking in the amount proposed.

Docket No. 041291-EI  
Date: December 21, 2004

**Issue 6:** Should this docket be closed?

**Recommendation:** No. This docket should remain open. (C. Keating)

**Staff Analysis:** This docket should remain open for the Commission to take final action on FPL's Storm Cost Recovery Petition.