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VIA FEDERAL EXPRESS

January 22, 1991

**ORIGINAL
FILE COPY**

Mr. Steve C. Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

Re: Docket No. 200796-31

Dear Mr. Tribble:

I am enclosing for filing in the above docket the original and fifteen (15) copies of Florida Power & Light Company's Response to Nassau Power Corporation's and Public Counsel's Motions to Strike.

Very truly yours,



John T. Butler

- ACK JTB:565
- AFA Enclosure
- APP
- CAF cc: Parties of Record
- CMU
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Power &
Light Company for Inclusion of
the Scherer Unit No. 4 Purchase
in Rate Base, Including an
Acquisition Adjustment

Docket No. 900796-EI
Filed: 1/23/91

**FLORIDA POWER & LIGHT COMPANY'S
RESPONSE TO NASSAU POWER CORPORATION'S
AND PUBLIC COUNSEL'S MOTIONS TO STRIKE**

Nassau Power Corporation ("Nassau") and Public Counsel have both filed motions to strike Part II(E) and Appendix II of the Brief and Post-Hearing Statement of Issues and Positions ("the brief") of Florida Power & Light Company ("FPL" or "the Company"). In Part II(E) and Appendix II of its brief, FPL presents a cost per kilowatt hour ("kWh") comparison of the alternatives analyzed in this docket for the years 1994 through 2018. FPL responds to the motions to strike as follows:

I. FPL'S COST PER KILOWATT HOUR COMPARISON OF THE ALTERNATIVES IS A REASONABLE RESPONSE TO CHAIRMAN WILSON'S REQUEST THAT FPL SHOW THE COST OF ENERGY DELIVERED TO FPL'S LOAD CENTER FOR EACH ALTERNATIVE

1. Paragraph 3 of Nassau's motion to strike asserts the following: "FPL suggests that Chairman Wilson requested that FPL's witness Mr. Waters provide cost per kWh information" for the various alternatives analyzed by FPL in this docket. This statement is not true.

2. What the Company stated in its brief is that Chairman Wilson "inquired of FPL's witness Mr. Waters about the cost for electricity delivered to FPL's load center by the

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various supply-side alternatives under consideration." FPL's Brief at 27 (citing Tr. 625 and 1038-40 to support its characterization of Chairman Wilson's comments). This statement does not suggest, and was never meant to suggest, that Chairman Wilson asked for a cost per kWh comparison of the alternatives under consideration.

3. FPL presented a cost per kWh comparison because it believes that this comparison best answers the question of which alternative delivers energy to FPL's load center at the lowest cost. Unlike other comparisons, a cost per kWh comparison accounts for the difference in output levels in each alternative analyzed.

4. Any comparison that does not account for the different capacity factors or output levels of the different units being considered unfairly skews the comparison; it would not be an "apples-to-apples" comparison. Nassau presented just such a skewed comparison in Exhibit No. 25, and FPL's witness Mr. Waters pointed out its deficiencies. In that exhibit, Nassau ignored the fact that the standard offer contract is based on a capacity factor of 70% while the Scherer Unit No. 4 purchase option is based on an 85% capacity factor -- the output level at which FPL intends to run the plant. Nassau tried to avoid this explicit difference in capacity factors by hypothesizing in Exhibit No. 25 that Scherer Unit No. 4 will only operate at a 70% output level. As explained in detail in FPL's brief, Nassau's comparison proves nothing. See FPL's Brief at 46-48 (citing Mr. Waters' critique of Exhibit No. 25).

Artificially constraining Scherer Unit No. 4's capacity factor to perform a cost comparison completely ignores a critical factor and a principal reason why FPL wants to purchase the plant in the first place.

**II. FPL'S COST PER KILOWATT HOUR
COMPARISON IS NOT NEW EVIDENCE**

5. Both Public Counsel's and Nassau's primary argument in support of their motions to strike is that the cost per kWh comparison contained in Appendix II and summarized in FPL's brief constitutes new evidence. This argument is incorrect.

6. FPL's cost per kWh comparison is derived exclusively from record evidence. The costs for each alternative are contained in the record, as are the capacity factors for each alternative. FPL provided in footnotes in Appendix II the record references for every bit of information used to create its cost per kWh comparison.

7. The only information not in the record is the bottom line of Appendix II -- the cost per kWh values. However, these cost per kWh values cannot reasonably be argued to constitute new evidence. They are derived by simply dividing the total yearly nominal dollar costs for each alternative by the yearly output for each alternative. As such, they are merely a compilation and summation of record evidence.

8. Common arithmetic calculations involving record evidence are routinely performed by attorneys in presenting damages theories in closing arguments to juries and judges, and

by factfinders themselves in reaching their verdicts. See, e.g., Reef Buick, Inc. v. Southeast Warranty, Inc., 558 So.2d 455, 456-57 (Fla. 4th DCA 1990) (Responding to the appellant's claim that there was no record basis supporting the jury's award of damages, the court stated: "While we do not have (nor should we) the benefit of the jury's calculations in arriving at the figure of \$329,029, such an award would not be inconsistent with calculations that eliminated the first thirteen months of the contractual period, and then subtracted out appropriate amounts because of the percentage breakdown of warranty placements, and because of failure to consider fixed overhead. In short, appellant simply has not sustained its burden of establishing reversible error . . . as to the amount of damages awarded.").

9. An example of how damages are frequently derived from record evidence in civil litigation matters illustrates the point that FPL's cost per kWh comparison is not new evidence. Assume that a plaintiff in a lawsuit presents evidence that her damages are \$100,000. Assume too that the defendant presents evidence that it has already paid the plaintiff \$40,000 in partial satisfaction of her damages. Using Public Counsel's and Nassau's reasoning, the Court should strike any argument by the defendant's attorney that the plaintiff is only entitled to \$60,000 in damages because the \$60,000 figure, derived by simple arithmetic, was not itself introduced into the record. Such an argument has no merit whatsoever.

10. The Commissioners' remarks during the hearings in this docket support FPL's position. First, Chairman Wilson

acknowledged that the information he was looking for concerning the cost of delivering energy to FPL's load center might be in the record; his concern was that the information was not immediately available to him "on a piece of paper" that clearly demonstrated the information. Tr. 1040. FPL submits that the sources of the information for which Chairman Wilson was looking are in the record and that the Company's cost per kWh comparison is an attempt to present the Commission with a summary of that record evidence as it relates to the cost of delivering energy to FPL's load center for each alternative. Second, after Nassau posed an objection to a document Mr. Waters handed out reflecting a cents per kWh comparison, the following exchange on the record (Tr. 547-48) occurred:

CHAIRMAN WILSON: Let me ask you a question, what is this [cents per kWh comparison]?

WITNESS WATERS: That's really just --

CHAIRMAN WILSON: It may make a difference.

WITNESS WATERS: That's just translating the numbers that I've given you, total dollars, dividing them by the total production. As Commissioner Gunter said, there's so many gigawatt hours out of each unit. I've just taken total dollars and divided by the output of the unit and I get these numbers.

COMMISSIONER GUNTER: Well, I can do the same thing. I can take the size of the unit that you have. I can take your capacity factors and run the math. I was just trying to get from doing that. I can do that and cross-walk to see if these figures come to be the same. You know, that's not a terribly difficult thing to do, but I was just trying to get out of manually calculating it myself, but I would use those assumptions of those capacity factors alone.

CHAIRMAN WILSON: Is that what you've done here?

WITNESS WATERS: Yes, sir, I've taken those capacity factors and I've divided into the total dollars to get those numbers.

CHAIRMAN WILSON: So the ---

WITNESS WATERS: So there's no new numbers here, I've just taken one column and divided by another to show it a different way.

This exchange clearly demonstrates that a cost per kWh comparison involves nothing more than presenting evidentiary material in a different form by performing a simple arithmetic calculation using that material.

11. Performing calculations similar to those performed by FPL in preparing its cost per kWh comparison is clearly appropriate in a brief. Indeed, it is a lawyer's job to take record evidence, analyze it, and present it in a manner that supports his or her client's position. FPL's cost per kWh comparison is just that -- a compilation of record evidence, involving a simple arithmetic calculation for each alternative, reduced to an one-page summary. See FPL's Brief at 28 and Appendix II. This information is not new evidence.

III. NASSAU'S OTHER ARGUMENTS ARE WITHOUT MERIT

12. In support of its motion to strike, Nassau relies on the fact that it objected at the hearings, albeit prematurely, to the admissibility of a document handed out by FPL witness Mr. Waters containing a cents per kWh comparison. Nassau's Motion at ¶ 2. Although it is not clear in the record what the legal basis was for the objection, the transcript suggests that Nassau was objecting to the admissibility of this document because it was new evidence, "something that we're

seeing for the first time." Tr. 546. Nassau argues that permitting FPL to present a cost per kWh comparison in its brief (1) enables FPL to "circumvent" the fact that the Commission would have had to rule on Nassau's objection if FPL had attempted to introduce Mr. Waters' document as evidence, and (2) precludes Nassau from being able to cross-examine Mr. Waters on this document, as Nassau states it would have done, if the Commission overruled the objection at the hearings. Nassau's Motion at ¶ 2. Nassau's motion to strike, therefore, clearly implies that FPL is now trying to get into evidence -- in the form of Appendix II -- a document that Nassau objected to and which FPL did not introduce as evidence at the hearings.

13. The fundamental flaw in Nassau's argument is the assumption on which the argument is premised -- the assumption that the document Mr. Waters handed out at the hearings is the same as the cost per kWh comparison compiled and summarized in Appendix II. In fact, the two documents are not the same. The document Mr. Waters handed out contained only the resultant unit cost values for the alternatives, and only through the year 2000. The document contained no supporting data, and no cross-references to other exhibits already admitted, that explained to the reader the basis for the unit cost values reflected in the document. In contrast, Appendix II provides all the supporting data needed to verify the accuracy of the cost per kWh for each alternative and, more importantly, the record citations for all the supporting data. Therefore, while there may have been a good legal basis for Nassau objecting to

the document Mr. Waters handed out at the hearings as constituting new evidence, that objection is totally irrelevant in determining whether a completely different document -- Appendix II -- should be considered by the Commission.

14. Nassau also argues that allowing FPL to present a cost per kWh comparison in its brief prejudices Nassau because (1) "much more than 'simple arithmetic' is involved" and (2) because Nassau did not have the opportunity to "test with cross-examination the assumptions, premises, and methodologies underlying FPL's calculations and conclusions" as it claims it would have done at the hearings if its objection was indeed overruled. See Nassau's Motion at ¶¶ 2 and 5. These arguments are unfounded because, as pointed out above, FPL's cost per kWh comparison is based entirely on record evidence and involves only a single common arithmetic calculation for each alternative. Nassau had every opportunity to cross-examine FPL's witnesses on the assumptions, premises and methodologies underlying the cost and capacity factor information for each alternative that was used to derive this comparison. If Nassau disputed the data supporting the costs or capacity factors, it should have cross-examined FPL's witnesses when those costs and capacity factors were introduced into evidence. The only appropriate inquiry concerning the cost per kWh comparison is whether or not FPL accurately divided the costs for each alternative by the capacity factors for each alternative. Neither Public Counsel nor Nassau has challenged FPL's performance of that arithmetic exercise.

15. As specific examples of topics it allegedly would have explored on cross-examination if the cost per kWh comparison was introduced at the hearings, Nassau raises in its motion "(1) the effect of the fact that FPL did not apply present value concepts here, contrary to its own fundamental approach elsewhere; (2) the effect of the assumed capacity factors, in light of the fact that when Nassau pursued unit-specific costs, FPL's witness insisted that the units compared be assigned equal capacity factors; and (3) the effect of the same controversial assumptions concerning Scherer fuel costs that colored other economic comparisons." Nassau's Motion at ¶ 5.

16. In response to Nassau's first example of potential areas of cross-examination, FPL would point out that it presented in its exhibits information concerning costs on the basis of both "nominal dollars" and "present value dollars" for each alternative. See, e.g., Exs. 20 and 35. Nassau had ample opportunity to explore the effect of using these two bases for stating the dollar values of the costs at the time the exhibits containing them were introduced.

17. In response to Nassau's second example, FPL notes that the capacity factors used in calculating the cost per kWh are all in the record. Again, therefore, Nassau should have challenged those assumptions when the pertinent exhibits were introduced or testimony was given. Moreover, FPL would point out that its witness did not "insist" that the alternatives be assigned equal capacity factors when their costs are being

compared. Mr. Waters simply stated that Nassau's comparison was inaccurate because it artificially constrained the intended output level of Scherer Unit No. 4.

18. Finally, in response to Nassau's third example, FPL would note (1) that the record is replete with reasons why FPL's fuel costs assumptions are reasonable, and (2) that the intervenors, including Nassau, did conduct extensive cross-examination of FPL's witness Mr. Silva concerning the effect of FPL's fuel cost assumptions for Scherer Unit No. 4 on the various economic comparisons performed by the Company. Since FPL's fuel cost assumptions for the Scherer plant would have the identical effect on all economic comparisons -- including the cost per kWh comparison -- Nassau's claim that it is prejudiced by not being able to conduct further cross-examination on those assumptions has no merit whatsoever. Here, as in the other examples, Nassau has absolutely no reasonable basis to suggest that it was prejudiced by the presentation of the cost per kWh comparison in FPL's brief because it is absolutely clear that Nassau's concerns all relate to the underlying data -- all of which is in the record -- and not the accuracy of FPL's arithmetic calculation.

IV. PUBLIC COUNSEL'S OTHER ARGUMENTS ARE WITHOUT MERIT

19. In support of its incorrect argument that FPL's cost per kWh comparison is new evidence, Public Counsel states that the intervenors had no opportunity to contest (1) the accuracy of the "fuel costs, transmission costs, or capacity

factors used to derive" the costs per kWh comparison; or (2) the relevancy of FPL's simple arithmetic. Public Counsel's Motion to Strike at ¶¶ 1 and 2.

20. Public Counsel's first argument concerning the alleged inability to contest the "fuel costs, transmission costs, or capacity factors" used to derive the cost per kWh comparison is wrong because, as explained above, all this information is in the record. Public Counsel had every opportunity to challenge the accuracy of the underlying data. He cannot now claim that a presentation of that data in the form of a cost per kWh comparison precluded him from doing so.

21. Public Counsel's second point is similarly without merit. While Public Counsel apparently acknowledges that FPL's cost per kWh comparison was derived using simple arithmetic (see Public Counsel's Motion at ¶ 3), he suggests the information is irrelevant. If the Commission feels that the cost per kWh comparison is not useful, this would affect only the weight the Commission should give to the comparison, not its admissibility. More importantly, Public Counsel's assertion is fundamentally incorrect. The cost per kWh comparison is obviously relevant to the issues in this docket. In fact, one suspects that Public Counsel and Nassau have moved to strike FPL's cost per kWh comparison precisely because it is not only relevant but significant information.

V. CONCLUSION

22. The record is clear that the Commission inquired on at least two occasions as to the cost of delivering energy to FPL's load center for each alternative under consideration in this docket. FPL has attempted to respond to this inquiry in its brief by compiling and summarizing the record evidence in the form of a cost per kWh comparison of the alternatives. The comparison is nothing more than a one-page summary of the costs for each alternative -- information which is in the record -- divided by the capacity factor for each alternative -- information which is also in the record. This comparison is not, and cannot reasonably be argued to constitute, new evidence. In fact, presenting record evidence in an intelligible manner is a principal purpose of a brief.

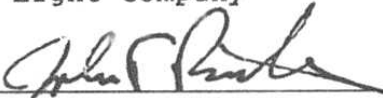
23. The cost per kWh comparison reflected in Appendix II to FPL's brief is not essential information for the Commission to approve FPL's petition in this docket. FPL has based its case primarily on a comparison of the present value of revenue requirements of the various alternatives, and it has shown that purchasing Scherer Unit No. 4 is the best alternative on that basis. Nonetheless, as stated by the Commission on several occasions throughout the hearings, the primary goal of the Commission and all the parties is to decide what is in the best interest of the ratepayers. See, e.g., Tr. 1040. If the Commission concludes that the cost per kWh comparison in Appendix II will be useful to it in achieving this goal, it is fully entitled to rely on that comparison for the reasons stated above.

WHEREFORE, FPL respectfully requests that the
Commission deny Public Counsel's and Nassau's motions to strike.

Respectfully submitted,

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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Docket No. 900796-EI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Power & Light Company's Response to Nassau Power Corporation's and Public Counsel's Motions to Strike has been served by U.S. Mail this 22nd day of January, 1991 on the following:

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