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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

98 NOV -4 PM 4:31

In Re: Joint Petition for )
Determination of Need for an )
Electrical Power Plant in Volusia )
County by the Utilities Commission, )
City of New Smyrna Beach, Florida, )
and Duke Energy New Smyrna Beach )
Power Company Ltd., L.L.P. )

DOCKET NO. 981042-EM RECORDS AND REPORTING
FILED: November 4, 1998

PETITIONERS' MOTION TO STRIKE PORTIONS OF PREFILED DIRECT
TESTIMONY OF FLORIDA POWER CORPORATION'S
WITNESS, VINCENT M. DOLAN

The Utilities Commission, City of New Smyrna Beach, Florida,
("UCNSB" or "Utilities Commission") and Duke Energy New Smyrna
Beach Power Company, Ltd., L.L.P. ("Duke New Smyrna"),
collectively referred to as "Petitioners," pursuant to Uniform
Rule 28-106.206, Florida Administrative Code ("F.A.C.") hereby
move to strike portions of the prefiled direct testimony of
Vincent M. Dolan. In support of this motion, Petitioners say:

1. On October 12, 1998, Intervenor, Florida Power
Corporation ("FPC") filed with the Commission in this docket the
direct testimony and exhibits of Vincent M. Dolan. Portions of
Mr. Dolan's testimony constitute his legal opinion, as to the
interpretation of prior Commission rulings, federal law and
Florida statutory provisions. Mr. Dolan's legal arguments should
be stricken. Legal arguments are not the proper subject for
testimony.

2. FPC's attempt to boot-strap legal arguments into this
evidentiary proceeding, in the guise of direct testimony, is
inappropriate. In In re: Investigation Into the Appropriate

ACK
AFA 2
APP
CAF
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EAG Futrell
LEG 3
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SEC 1
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PPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

12402 NOV-4-98 000878

PPSC-RECORDS/REPORTING

Rate Structure for Southern States Utilities, Inc. for all Regulated Systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties, 94 FPSC: 3:724, (hereinafter "Southern States"), Commissioner Julia L. Johnson, serving as prehearing officer, addressed a similar attempt to offer legal opinion as expert testimony, and Commissioner Johnson stated:

It has not been Commission practice to allow expert testimony on legal issues. I concur. The most appropriate place for legal discussion is in a post-hearing filing, such as a brief, where all of the parties have equal opportunity to present case law and argument in support of their position on the issue. Cross-examination of a witness on legal opinion is not contemplated by Section 120.57, Florida Statutes, which provides for a fact finding proceeding. Legal argument is more appropriately reserved for argument of counsel in a party's brief.

Id. at 3:726. In Southern States, Commissioner Johnson granted a motion to strike the legal analysis from the prefiled testimony. The same rationale applies in this case. FPC will have ample opportunity to raise all legal arguments<sup>1</sup> in its post-hearing filing. It would be fundamentally inappropriate to require Petitioners to cross-examine Mr. Dolan on the legal issues addressed in his direct testimony and more fully described below:

3. Accordingly, the following portions of Mr. Dolan's testimony should be stricken as inappropriate legal opinion:

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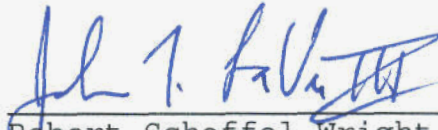
<sup>1</sup>In fact, FPC has already made most of the legal arguments that appear in Mr. Dolan's testimony in its Motion to Dismiss Proceeding, filed in this docket on September 8, 1998.

- a. Page 6, line 4 (beginning with the word "[t]he") through line 6 (ending with the word "permitted").
- b. Page 6, line 10 (beginning with the word "[e]ven") through line 17.
- c. Page 11, line 7 through page 12, line 20.
- d. Page 14, line 16 (beginning with the phrase "not only") through line 17 (ending with the word "is").
- e. Page 14, line 22 (beginning with the word "will") through line 23 (ending with the word "they").
- f. Page 16, line 6 (beginning with the word "[f]ederal") through line 21.
- g. Page 21, line 12 (beginning with the word "[t]he") through line 19.
- h. Page 23, line 2 (beginning with the word "that") through line 3 (ending with the word "law").

4. The parties of record in this proceeding take the following positions on this motion: FPL, FPC and FECA oppose it, and LEAF does not oppose it. Petitioners' counsel has attempted to obtain Staff's and TECO's positions, but was unsuccessful.

WHEREFORE, the Utilities Commission, New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P. request that the Commission strike as legal opinion the above-cited portions of the direct testimony of Vincent M. Dolan.

Respectfully submitted this 4th day of November, 1998.



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and

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Company Ltd., L.L.P.

**CERTIFICATE OF SERVICE**  
**DOCKET NO. 981042-EM**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (\*) or by United States Mail, postage prepaid, on the following individuals this 4th day of November, 1998:

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