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**Subject:** Electronic Filing for Docket No. 060038-EI - FPL's Response in Opposition to Intervenor's Joint Motion to Dismiss FPL's Petition

**Attachments:** FPL's Response in Opposition to Joint Motion to Dismiss.FINAL.doc; Exhibit 1.Twomey E-mail.doc

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Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 060038-EI - Petition for issuance of a storm recovery financing order, by Florida Power & Light Company

c. Document being filed on behalf of Florida Power & Light Company.

d. There are a total of 11 pages.

e. The documents attached for electronic filing is Florida Power & Light Company's Response in Opposition to Intervenor's Joint Motion to Dismiss FPL's Petition and Exhibit 1.

(See attached file: FPL's Response in Opposition to Joint Motion to Dismiss.FINAL.doc) (See attached file: Exhibit 1.Twomey E-mail.doc)

Thank you for your attention and cooperation to this request.

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RESPONSE  
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Exh 1  
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BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

In re: Florida Power & Light Company's )  
Petition for Issuance of a Storm Recovery )  
Financing Order )  
\_\_\_\_\_ )

Docket No: 060038-EI  
Filed: February 6, 2006

**FLORIDA POWER & LIGHT COMPANY'S  
RESPONSE IN OPPOSITION TO INTERVENORS'  
JOINT MOTION TO DISMISS FPL'S PETITION**

NOW, BEFORE THIS COMMISSION, through undersigned counsel, comes Florida Power & Light Company ("FPL" or the "Company"), and pursuant to Rule 28-106.204(1), Florida Administrative Code, files this Response in Opposition to the Joint Motion to Dismiss FPL's Petition (the "Joint Motion") filed by the Florida Retail Federation ("FRF"), AARP, and the Florida Industrial Power Users Group ("FIPUG"), collectively the "Intervenors," and in support states:

**Introduction**

1. On January 13, 2006, FPL filed with this Commission a petition requesting that the Commission issue a financing order pursuant to Section 366.8260, Florida Statutes (2005) (the "Petition"), authorizing the issuance of storm-recovery bonds, enabling: (i) recovery of the remaining unrecovered balance of 2004 storm restoration costs currently being recovered through a surcharge related to the 2004 storm season; (ii) recovery of prudently incurred storm-recovery costs related to the four hurricanes that impacted FPL's service territory in 2005; (iii) replenishment of FPL's depleted Reserve; and (iv) recovery of upfront storm-recovery bond financing costs. Alternatively, FPL requested an additional surcharge to recover 2005 storm

costs and begin to replenish the Reserve. FPL's Petition was accompanied by nine pieces of testimony from Company witnesses and outside experts, a draft form of financing order, and extensive documentation supporting the request.

2. On February 2, 2006, the Intervenors filed a motion to dismiss FPL's Petition on grounds the Petition fails to satisfy certain technical requirements of the Uniform Rules of Procedure. The Intervenors' argument that FPL's Petition must be dismissed because it fails to satisfy the Uniform Rules and Chapter 120 is specious and hyper-technical, elevates form over substance, and fails to recognize that the Petition fully complies with all pleading requirements set forth in Section 366.8260 and applicable rules. Commission precedent makes clear that the provisions of the Uniform Rules of Procedure relied on by the Intervenors as support for their Joint Motion apply only to protests of proposed agency action ("PAA") orders and petitions to intervene, but not the Petition filed by FPL. Even if the provisions of the Uniform Rules they cite applied to FPL's Petition, FPL's Petition is still in compliance. The Intervenors' allegations that they are "prejudiced" by not having enough information to make their case borders on the absurd since the Company's filing is replete with information on its restoration efforts during the 2005 hurricane season, the impact the storms had on FPL's electrical infrastructure and on FPL's proposed plan to recover only storm related restoration costs. While the Intervenors claim they are denied sufficient information to make their case, the fact is FPL has filed literally hundreds of pages – 786 pages to be exact -- of information in its petition, attachments, testimony and exhibits. The Intervenors' Joint Motion should be rejected as a frivolous attempt to slow the regulatory process. It is an effort to circumvent a process established by the Florida Legislature that was intended to produce a lower cost methodology of paying for storm repairs.

### **Legal Standard**

3. 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 upon which relief may be granted. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving parties must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. See id. at 350. In determining the sufficiency of the petitions, the Commission should confine its consideration to the petitions and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). All material allegations should be construed against the parties moving to dismiss the petition. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2d DCA 1960).

### **Argument**

4. FPL respectfully requests that the Commission deny the Joint Motion as a matter of law because: 1) the provisions of Rule 28-106.201(2), Florida Administrative Code (“Rule 28-106.201(2)” or the “Uniform Rule”) relied on by the Intervenors do not apply to FPL’s Petition; and 2) even if the provisions of Rule 28-106.201(2) did apply to FPL’s Petition, FPL’s Petition satisfies the standard set forth in the rule. In addition, the Intervenors did not demonstrate there was any defect in FPL’s certificate of service of the Petition, and there was no defect. Taking all facts contained in FPL’s Petition as true, the Intervenors have not met the standard for a Motion to Dismiss.

**I. The Uniform Rule provisions relied on by the Intervenor do not apply to FPL's Petition**

5. As grounds for the Joint Motion, the Intervenor assert that FPL's Petition is facially deficient in violation of Rule 28-106.201(2) in three respects: 1) it contains no statement of disputed issues of material fact; 2) it contains no statement of ultimate facts alleged; and 3) it contains no statement of how the facts relate to the statutes and rules pursuant to which FPL claims to be entitled to relief.<sup>1</sup> However, Commission precedent makes clear that the provisions of the Uniform Rule relied on by the Intervenor do not apply to FPL's Petition. See Order No. PSC-03-0578-FOF-TP, Docket No. 030200-TP, issued May 6, 2003. In Order No. PSC-03-0578-FOF-TP, the Commission denied a Supra Telecommunications and Information Systems, Inc. ("Supra") motion to dismiss an AT&T emergency petition on grounds that AT&T's petition did not comply with the criteria enumerated in Rule 28-106.201(2). The Commission determined that the criteria in the Uniform Rule "relate specifically to a protest of an agency action." See Order No. PSC-03-0578-FOF-TP, p. 7. Because there was no proposed agency action for which AT&T sought review before the Commission, "the information requested in each of the items in Rule 28-106.201(2), Florida Administrative Code, is simply not applicable." See id. (emphasis added).

6. Similarly, here, the information requested in the provisions of the Uniform Rule relied on by the Intervenor is simply not applicable to FPL's Petition. There is no proposed agency action for which FPL seeks review before the Commission. Rather, FPL's Petition seeks

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<sup>1</sup> On the third point, that the Petition contains no statement of how the facts alleged relate to the statutes and rules pursuant to which FPL claims to be entitled to relief, the Intervenor cite to Section 120.54(5)(b)4.f., Florida Statutes. However, by its terms, subsection (5)(b) of Section 120.54(5) applies to the Administration Commission, which adopts the Uniform Rules of Procedure, and not FPL or the Florida Public Service Commission.

action from the Commission based on the Commission's authority under Section 366.8260, Florida Statutes. No relevant or applicable information was omitted from FPL's Petition. Indeed, FPL's Petition sets forth the jurisdictional basis for the requested Commission action, each of the requirements for a petition as set forth in Section 366.8260(2)(a), extensive factual allegations in support of its Petition, and even attaches a draft financing order for the Commission to consider. The omission of information that is not applicable to FPL's Petition clearly cannot render that petition noncompliant with Rule 28-106.201(2).

7. The Intervenors' arguments that FPL's response to Commercial Group's petition to intervene in the rate case and the Commission Staff's recommended dismissal of Common Cause's petition to initiate rulemaking are somehow relevant to FPL's Petition in this proceeding misses the point. With respect to Commercial Group's petition to intervene, Commission rule 25-22.039, related to intervention, provides that petitions to intervene "must conform with Uniform subsection 28-106.201(2). F.A.C." See Rule 25-22.039, Florida Administrative Code (2006). On the other hand, the provisions of the Uniform Rule relied on by the Intervenors are not applicable to FPL's Petition, which is not a petition for intervention. Further, both Commercial Group and Common Cause failed to properly allege standing, which is a jurisdictional defect. For example, Commercial Group filed a 2-page petition to intervene that didn't even state who the "Commercial Group" was, much less allege its substantial interests as required by the Uniform Rule and Rule 25-22.039.<sup>2</sup> The question of standing is not applicable to FPL's Petition and extensive supporting testimony, and Intervenors' contention that FPL's response to Commercial Group and the recommended denial of Common Cause's petition to

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<sup>2</sup> FPL did not oppose Commercial Group's intervention. FPL simply asked for more information in order to know who the "Commercial Group" was and why they were substantially interested in FPL's case.

initiate rulemaking somehow constitutes precedent relative to their Joint Motion is wholly without merit.

**II. Even if the provisions of Rule 28-106.201(2) did apply to FPL's Petition, FPL's petition would satisfy the rule**

8. Even if the provisions of the Uniform Rule applied to FPL's Petition, FPL's Petition would satisfy the standard in the rule because FPL's Petition, at a minimum, is in "substantial compliance," as required by the Uniform Rule. See Rule 28-106.201(4), Florida Administrative Code (2006). The Intervenors acknowledge that the Petition "complies with the content requirements of Section 366.8260, Florida Statutes" (Joint Motion, ¶ 5), but they argue that FPL's petition is deficient because there is no statement of disputed issues of material fact, of ultimate facts alleged, or of how the facts relate to the statutes on which FPL seeks relief.

9. With respect to disputed issues of material fact, the Intervenors acknowledge that FPL's Petition states that FPL is "not aware of any disputed issue of material fact." (Petition, ¶ 3). Nonetheless, the Intervenors, dissatisfied with FPL's assertion, claim that FPL must go further to comply with the rule. (Joint Motion, ¶ 9). They are wrong. The Uniform Rule does not require FPL to go further, and for good reason. It is absurd to suggest that FPL should, in its Petition, try to determine: 1) who will intervene in the case; and 2) what facts, if any, they will dispute, and it is surprising for the Intervenors to suggest that FPL's not doing so is "prejudicial" to their case. (Joint Motion, ¶ 9).

10. Regarding the Intervenors' allegations that FPL's Petition does not include a statement of ultimate facts alleged or a description of how the facts relate to Section 366.8260, the Intervenors' arguments are the ultimate in attempting to elevate form over substance and should be rejected. FPL describes in detail the storm-recovery activities and associated costs

from the 2005 storm season, and sets forth the factual allegations supporting its recommended and alternative methods of recovery. In particular, FPL lays out each of the requirements of Section 366.8260(2)(a), Florida Statutes, regarding the contents of a petition, and presents supporting information for each requirement, demonstrating how the facts relate to the statute pursuant to which FPL requests relief. Further, FPL goes so far as to provide as an exhibit a draft financing order that explicitly sets forth the findings of fact and conclusions of law proposed by FPL.<sup>3</sup> FPL's Petition should not be dismissed merely because it has not separately labeled its statement of ultimate facts and statement of how the facts relate to the law as such. See Order No. PSC-99-2438-PAA-EU, Docket No. 991462-EU (issued Dec. 13, 1999).

### **III. Intervenors' demonstrate no defect regarding service of the Petition**

11. The Intervenors suggest some impropriety relative to FPL's service of the Petition, and the fact that, other than Commission Staff, only the Office of Public Counsel ("OPC") was furnished a courtesy copy on the date the Petition was filed. These assertions have no legal or factual merit. The Intervenors are careful not to assert that there was any legal obligation for FPL to provide them a copy of the filing because there is no such obligation. But the Intervenors' complaint is even more surprising given that, on January 12th, they were made aware that FPL would be filing its Petition the following day, and therefore they had the opportunity to request a courtesy copy. Those who made such a request received a copy. Indeed, OPC and AARP did request a copy of the filing. In addition to serving a courtesy copy to OPC, which is the legislatively established representative of the interests of all customers, including each of the customers represented by the Intervenors, FPL made a copy available for

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<sup>3</sup> In considering a motion to dismiss, a tribunal is required to consider the exhibit attached to and incorporated into the petition. See Fla. R. Civ. P. 1.130(b); Harry Pepper & Assoc. v. Lasseter, 247 So. 2d 736 (Fla. 3d DCA 1971).

AARP and e-mailed AARP a copy almost concurrently with its filing of the Petition with the Commission (Exhibit 1 – copy of e-mail from Nanci Nesmith of FPL to Mike Twomey at 4:26 p.m. January 13th). Yet, now the Intervenors suggest they were prejudiced by not being copied on the filing itself. The Intervenors’ allegations of prejudice are curious given that of the 321 discovery requests that have been served on FPL so far (339 including subparts), not one of the Intervenors has independently served a single discovery request (FIPUG and FRF have only requested copies of the responses to OPC’s requests). The Intervenors’ Joint Motion is a thinly veiled attempt to gain additional time by delaying the proceeding in direct contravention of the legislatively established time frames “thereby diminishing savings to customers which might [otherwise] be achieved.” See Section 366.8260(2)(d), Florida Statutes (2006).

12. FPL is only required to serve a copy of the Petition on parties to the proceeding, and there were no parties at the time of the filing. The Intervenors did not demonstrate that FPL is required to engage in an extensive analysis of who may possibly become parties to the proceeding and serve any potential parties copies of the filing, and there is no such requirement. Yet, the Intervenors suggest that FPL should endeavor to determine who in its universe of customers may wish to become parties to the proceeding and provide any potential parties service of the initial pleading. (Joint Motion ¶ 3). Intervenors’ suggestion has no basis in law and is unworkable. However, as a factual matter, where FPL was requested to provide a copy of its filing, it did so. That some of the Intervenors chose not to ask for a copy places no burden on FPL.

### **Conclusion**

13. Intervenors’ argument that FPL’s Petition must be dismissed because it fails to satisfy the Uniform Rule and Chapter 120 is specious and hyper-technical, elevates form over

substance, and fails to recognize that the Petition fully complies with all pleading requirements set forth in Section 366.8260 and applicable rules. Intervenors overlook or ignore that the criteria in the Uniform Rule on which they rely are not applicable to FPL's Petition. Even if the provisions of the Uniform Rule did apply, the Petition complies with the Rule. The Company's filing is replete with information on its restoration efforts during the 2005 hurricane season, the impact the storms had on FPL's electrical infrastructure and on FPL's proposed plan to recover only storm related restoration costs, and the Intervenors are in no way "prejudiced" in preparing their case. The Joint Motion should be rejected as a frivolous effort to circumvent a process established by the Florida Legislature that was intended to produce a lower cost methodology of paying for storm repairs.

**WHEREFORE**, for the above and foregoing reasons, Florida Power & Light Company respectfully requests that the Commission deny AARP, FIPUG and FRF's Joint Motion to Dismiss FPL's Petition for Issuance of a Storm Recovery Financing Order.

Respectfully submitted,

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By: /s/ Natalie F. Smith  
Natalie F. Smith

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic mail and United States Mail this 6th day of February, 2006, to the following:

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