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**Subject:** Filing in Docket No. 060038 - Florida Power & Light  
**Attachments:** Post-Hearing Brief.pdf

ORIGINAL



Post-Hearing Brief.pdf (208 KB)

Attorney General's Post-Hearing Brief and Statement of Issues and Positions- Docket No. 060038

1. Christopher M. Kise, Solicitor General, Office of the Attorney General, PL-01 The Capitol, Tallahassee, FL 32399, (850) 414-3681, is responsible for this electronic filing.
2. The filing is to be made in Docket No. 060038-EI, In Re Florida Power & Light Company's Petition for Issuance of a Storm Recovery Financing Order
3. The filing is made on behalf of Charles J. Crist, Jr., Attorney General, State of Florida.
4. The total number of pages is 26.
5. Attached to this e-mail in PDF format is the Attorney General's Post Hearing Brief and Statement of Issues and Positions.

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03783 APR 28 06

FPSC-COMMISSION CLERK

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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: April 28, 2006

**ATTORNEY GENERAL'S POST-HEARING BRIEF  
AND STATEMENT OF ISSUES AND POSITIONS**

CHARLES J. CRIST, JR., Attorney General, State of Florida ("AG"), pursuant to Rule 28-106.215, Florida Administrative Code ("F.A.C."), and Order No. PSC-06-0301-PHO-EI, hereby files this Post-Hearing Brief and Statement of Issues and Positions.

**I. Introduction.**

FPL seeks to have this Commission ignore the company's failure to prepare adequately for the storm season and to hold FPL harmless from all business risk associated with hurricanes in Florida. One purpose of regulation is to serve as a substitute for competition. In a free and open market, competitive forces would work to ensure a company like FPL adopted the best practices for consumers. If FPL failed to adequately maintain its infrastructure such that hurricane losses were exaggerated, the consumer could choose to continue paying more to an inefficient FPL or move to a more efficient provider. A competitive marketplace would likewise never require the consumer to bear one hundred percent of the business risk. However, since FPL is effectively a government approved monopoly, the consumer has no choice. Therefore, the consumer must, and can only be, protected through proper regulatory oversight.

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The Attorney General's quote from Coach John Wooden at the outset of these hearings says it all: "Those who fail to prepare, prepare to fail." There is no basis on which to justify rewarding FPL for its own failures. While, in the main, FPL has done an admirable job of responding to multiple hurricanes and restoring power safely and rapidly, FPL should not be compensated where its lack of preparation increased the costs of that response and recovery. Those increased costs must remain the responsibility of FPL. This Commission must not permit FPL to prepare to fail and then simply pass the costs of failure on to the consumer.

Additionally, there is absolutely no inherent right enjoyed by a monopolistic entity to foist upon the backs of Florida's consumers the full burden of business risk resulting from hurricanes. FPL unabashedly seeks to recover from the consumer one hundred percent of all storm recovery costs claiming that anything less would be "unfair" and "poor regulatory policy." In the past 24 months, Florida's consumers have been bludgeoned by the human, physical and financial costs resulting from multiple hurricanes. Not only have many suffered personally, but all Floridians have been forced to bear rising recovery costs and insurance cost increases. Additionally, the unprecedented fuel cost increases of the past year have been passed through by FPL one hundred percent to the consumer. Sound regulatory policy must always take into account current circumstances and adapt to an ever changing environment. What has worked in the past is not necessarily the mandate for the future. This Commission must adapt its policies and rulings to take into account the impact on the consumer of an unprecedented

series of hurricanes. Unprecedented events cry out for unprecedented solutions like the sharing concept advocated by Staff witness Jenkins.<sup>1</sup> Indeed, given the impact on Florida's consumers resulting from the events of the past 24 months, the time has come, at least for now, to balance the interests of all concerned. Moreover, given the average consumer's cost of electricity has risen 56% in the past five (5) years, and during that same period that FPL Group has enjoyed a total shareholder return of 40%, any argument that the sharing concept is somehow "unfair" to FPL and/or "poor regulatory policy" is both avaricious and unsupportable.

Finally, in establishing a reserve fund, the Commission should bear in mind lower reserve translates into lower the bond and issuance costs, lower consumer rates and more control maintained in the Commission to oversee storm recovery costs. Additionally, in calculating the amount of the reserve, the Commission must eliminate the "tax" effect (described below in Section III. C. Reserve Level).

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<sup>1</sup>As noted at the hearings, the AG does not believe sharing is either prohibited by or inconsistent with the Stipulation and Settlement Agreement in Docket No. 05-0045-EI (the "Settlement Agreement"). Indeed, despite the participation in the negotiations of a phalanx of FPL attorneys and advisors, sharing was never once mentioned by FPL, nor is there any explicit or implicit reference to sharing in the Settlement Agreement. Given the AG's well known view on sharing, any introduction of this subject matter would have without question altered materially the course of the negotiation. FPL cannot now rely on its own subjective interpretation to contravene the plain language of the Settlement Agreement. Moreover, and most importantly, irrespective of the language in the Settlement Agreement, this Commission is not bound by its terms. The AG therefore urges the Commission to undertake its independent obligation to consider the current circumstances and protect consumers from untoward exposure to FPL's business risk.

## II. Statement of Issues and Positions

As to Issues 1 through 9, 11 through 22, 24 through 26, 34, 36, 38 through 39, 41 through 48, 50 through 53, 55 through 68, 71, 74 through 78, 80 through 82, and 88, the Attorney General adopts and agrees with the position set forth by OPC.

**ISSUE 27:** Did FPL adequately inspect and maintain its distribution and transmission system for deterioration and overloading of poles prior to June 1, 2005? If not, what amount, if any, should be adjusted from the costs that FPL proposes to charge to the storm reserve and recover through securitization or a surcharge?

**AG POSITION:** \*No. The AG adopts and agrees with the position of the OPC. Additionally, this Commission should not permit recovery of costs resulting from inadequate infrastructure maintenance, nor reward FPL for its failure to adequately plan and prepare for the storm season. FPL's position on this issue is based on negligent or arrogant indifference to known risks, incomplete or inaccurate data, and/or a willingness to allow the consumer to absorb infrastructure maintenance costs through the storm docket.\*

**ISSUE 28:** Did FPL adequately control vegetation around its distribution and transmission system prior to June 1, 2005? If not, what amount, if any, should be adjusted from the costs that FPL proposes to charge to the storm reserve and recover through securitization or a surcharge?

**AG POSITION:** \*No. The AG adopts and agrees with the position of the OPC. Additionally, this Commission should not permit recovery of costs resulting from inadequate infrastructure maintenance, nor reward FPL for its failure to adequately plan and prepare for the storm season. FPL's position on this issue is based on negligent or arrogant indifference to known risks, incomplete or inaccurate data, and/or a willingness to allow the consumer to absorb infrastructure maintenance costs through the storm docket.\*

**ISSUE 30:** Did FPL adequately inspect and maintain its distribution and transmission for deterioration and overloading of poles prior to October 23, 2005? If not, what amount, if any, should be adjusted from the costs that FPL proposes to charge to the storm reserve and recover through securitization or a surcharge?

**AG POSITION:** \*No. The AG adopts and agrees with the position of the OPC. Additionally, this Commission should not permit recovery of costs resulting from inadequate infrastructure maintenance, nor reward FPL for its failure to adequately plan and prepare for the storm season. FPL's position on this issue is based on negligent or arrogant indifference to known risks, incomplete or inaccurate data, and/or a willingness to allow the consumer to absorb infrastructure maintenance costs through the storm docket.\*

**ISSUE 31:** Did FPL adequately control vegetation around its distribution and transmission system prior to October 23, 2005? If not, what amount, if any, should be adjusted from the costs that FPL proposes to charge to the storm reserve and recover through securitization or a surcharge?

**AG POSITION:** \*No. The AG adopts and agrees with the position of the OPC. Additionally, this Commission should not permit recovery of costs resulting from inadequate infrastructure maintenance, nor reward FPL for its failure to adequately plan and prepare for the storm season. FPL's position on this issue is based on negligent or arrogant indifference to known risks, incomplete or inaccurate data, and/or a willingness to allow the consumer to absorb infrastructure maintenance costs through the storm docket.\*

**ISSUE 33:** What adjustment, if any, should the Commission make associated with the failure of 30 transmission towers of the 500 KV Conservation-Corbett transmission line and the failure of the six structures on the Alva-Corbett 230 transmission line?

**AG POSITION:** \*The AG adopts and agrees with the position of the OPC. Additionally, this Commission should not permit recovery of costs resulting from inadequate infrastructure maintenance, nor reward FPL for its failure to adequately plan and prepare for the storm season. FPL's position on this issue is based on negligent or arrogant indifference to known risks, incomplete or inaccurate data, and/or a willingness to allow the consumer to absorb infrastructure maintenance costs through the storm docket.\*

**ISSUE 35:** Should the Commission require FPL's storm recovery costs for 2005 be shared between FPL's retail customers and FPL and, if so, to what extent?

**AG POSITION:** \*Yes. FPL has no inherent right to foist upon the backs of Florida's consumers the full cost of storm recovery. Sound regulatory policy must take into account current circumstances and adapt to a changing environment. This Commission must consider the impact on the consumer of an unprecedented series of hurricanes and embrace unprecedented solutions like sharing. Sharing is not inconsistent with nor prohibited by the Settlement Agreement. Even if it were, the Commission is not bound by the Agreement.

**ISSUE 37:** What is the appropriate level of funding to replenish the storm damage reserve to be recovered through a mechanism approved in this proceeding?

**AG POSITION:** \*\$200 million. The AG adopts the position of OPC. A lower reserve means lower bond and issuance costs, lower consumer rates and more Commission control over storm recovery costs. If storm damage exceeds reserve levels, the Commission can address that issue. A negative balance reserve has never impaired FPL's ability to restore power. Additionally, FPL must not profit by collecting taxes from the consumer based on a statutory rate then paying taxes based on a lower effective rate.

### **III. Argument.**

#### **A. Inadequate Infrastructure Maintenance.**

The Attorney General's quote from Coach John Wooden at the outset of these hearings says it all: "Those who fail to prepare, prepare to fail." FPL seeks to have this Commission ignore the company's failure to prepare adequately for the storm season. In a free and open market, if FPL failed to adequately maintain its infrastructure such that hurricane losses were exaggerated, the consumer could choose to continue paying more to an inefficient FPL or move to a better provider. However, since FPL is effectively a government approved monopoly, the consumer must, and can only be, protected through proper regulatory oversight.

There is no basis on which to justify rewarding FPL for its own failures. While, in the main, FPL has done an admirable job of responding to multiple hurricanes and restoring power safely and rapidly, FPL should not be compensated where its lack of preparation increased the costs of that response and recovery. Those increased costs must remain the responsibility of FPL. This Commission must not permit FPL to prepare to fail and then simply pass the costs of failure on to the consumer.<sup>2</sup>

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<sup>2</sup> As noted above, the AG adopts and agrees with the arguments of OPC as to issues 27, 28, 30, 31, and 33. The arguments presented in this section are in support of and supplemental to the OPC position. For the sake of brevity, the AG will attempt to avoid duplication with OPC as to points on these issues.

***FPL ignored obvious indications of a severe storm season.***

In the words of FPL witness Geisha J. Williams, whose arrogance as a witness was exceeded only by her lack of credibility,<sup>3</sup> “[t]he 2004 hurricane season was unprecedented.” (Williams Direct, p. 8, line 13). Also according to Williams, as a direct and proximate result of those 2004 storms, there would have been created new weak conditions in the FPL infrastructure. (R 1445, lines 3-6). Williams also testified that with regards to hurricane information, FPL “pay[s] attention to the National Hurricane Center.” (R 224, lines 3-7). And of course there is no question based on Exhibit 166, that the National Hurricane Center had, prior to the start of the 2005 hurricane season, predicted a 70% probability of an above normal season. (Exhibit 166). Yet Williams’s testimony, indeed the entirety of FPL’s presentation, is devoid of *any* reference to *anything* done specifically by FPL which was in *any* way materially different from *any* other year. Business as usual. FPL knew the 2004 season created “new weak conditions,” and knew from paying attention to the National Hurricane Center of a 70% probability of an above-average storm season, but did nothing different regarding infrastructure maintenance. Williams simply took the position that FPL is “always

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<sup>3</sup> No better example of this arrogance and lack of credibility can be found than her flip-flop description of her 2004 conversation with recognized hurricane expert Dr. Hebert. In her early reference to Dr. Hebert, she describes Dr. Hebert as “a noted hurricane expert and someone whose advice and counsel I’ve always relied on.” (R 229, lines 12-14). But later, when it became obvious she ignored his pre-2004 hurricane season prediction, she claimed his prediction was “almost a folk tale.” (R 238, line 15). Immediately thereafter she conceded FPL did nothing to follow up on Dr. Hebert’s pre-2004 season prediction. (R 241, lines 8-15). As set forth above, the same was obviously true regarding the National Hurricane Center 2005 prediction.

extraordinarily prepared.” (R 234, line 8). Indeed it appears from the record that it was not until after the 2005 storm season ended that FPL began gathering data to assist in determining how to “harden” its infrastructure. (Williams Direct, p. 35, lines 9-15).

***The KEMA Report is flawed.***

The KEMA report, upon which FPL places great weight, is the product either of incomplete or inaccurate data. Dr. Richard Brown testified that KEMA did not undertake any study prior to the start of the 2005 hurricane season. (R 336, lines 7-25). There was therefore no way for KEMA to determine the exact condition of FPL’s infrastructure prior to the start of the 2005 season. (R 337, lines 1-9). Brown also had no way to know whether FPL undertook any additional preventative maintenance measures prior to the start of the 2005 season. (R 337, line 19 - 338, line 1). KEMA’s report is based almost exclusively on data supplied by FPL. (R 334, line 23 - 335, line 14). Indeed, for example with respect to FPL pole maintenance data, KEMA did not audit FPL’s inspection practices to determine if FPL in fact follows its own documented processes. (R 317, lines 1-4). According to Dr. Brown, “We’re assuming that they [FPL] do what they have documented.” (R 317, lines 9-10). So if the FPL data were either incomplete or inaccurate, the conclusions drawn in the KEMA report would be likewise flawed. Garbage in, garbage out. Two examples demonstrate the inherent flaws in the report due to incomplete or inaccurate data.

***Pole deterioration.***

Williams testified that forensics teams inspecting poles post-Wilma simply “recorded the presence of deterioration every time they saw it on a broken pole, irrespective of the role, if any, that deterioration may have played in causing the pole to break.” (Williams Rebuttal, p. 12, lines 16-18). Thus no one, not FPL, not KEMA, made any attempt to collect data as to the effect of deterioration on pole breakage. There would then of course be no way for KEMA to evaluate whether ineffective pole maintenance which led to excessive deterioration would have been the cause of any pole failure. Since FPL did not gather the data, there is no way to tell.

*The loose bolts.*

Better still, however, is the question of the inexplicable loose bolts. Brown testified that based on the FPL post-Wilma data he was provided, he had a high degree of confidence that there was not a loose bolt problem in 2003. (R 338, lines 2-16). But Brown also admitted that post-Wilma, loose bolts were in fact found. (R 338, lines 17-23). When asked how this was possible Brown responded, “I don’t know.” (R 338, line 24 - 339, line 13). Indeed Brown was not the only FPL witness who could not explain this conundrum. FPL witness Jaindl, while admitting loose bolts were discovered post-Wilma (R 1367, lines 12-13), had no explanation for this occurrence. (R 1370, line 7 - 1371, line 15). The only thing all FPL witnesses do know and agree on is that loose bolts were in fact found post-Wilma. Given same, the data provided to KEMA was most certainly incomplete or inaccurate. Brown’s conclusion was based on FPL data which told him the bolts were secure. Since loose bolts were discovered, they must not have

been secure and the data failed to reveal this to KEMA. There is simply no other way to explain this discrepancy between actual occurrence and conclusions drawn from FPL data.

Moreover, Jandl, albeit most certainly unwittingly, revealed an inherent flaw in FPL's bolt inspection process. Although FPL relied on various methods to inspect bolts to determine if they are in fact secure, including without limitation helicopter inspections, Jandl admitted there really is only one way to know for certain. In a classic personification of the phrase "a picture is worth a thousand words," when asked if the bolt/nut assembly sitting on the table in front of her at the hearing was secure, Jandl instinctively reached forward, taking hold of the assembly in her hands. Of course she thereafter agreed the only way to actually know would be to do as she did, place hands on the assembly.<sup>4</sup> (R 1368, line 15 - 1369, line 2). So even though FPL knew, or certainly at least should have known, that prior to the 2005 hurricane season, with new weak conditions resulting from the 2004 storms, and the only true way to determine that bolt/nut assemblies were secure would be a hands on test, FPL still relied on "visual" and "helicopter" inspections or no inspections at all.

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<sup>4</sup> Jandl also described two methods *now* in use to secure bolt/nut assemblies, "peening" and lock nuts. (R 1371, line 16 - 1372, line 3). Neither Jandl nor any other FPL witness offered any explanation as to why these methods were not implemented prior to the start of the 2005 storm season.

**B. Sharing.**

There is absolutely no inherent right enjoyed by a monopolistic entity to foist upon the backs of Florida's consumers the full burden of business risk resulting from hurricanes. FPL unabashedly seeks to recover from the consumer one hundred percent of all storm recovery costs claiming that anything less would be "unfair" and "poor regulatory policy." These claims are meritless.

Staff witness Jenkins has proposed that up to twenty percent of the 2005 storm costs be shared between FPL and FPL customers. (R 1256, lines 8-10; Jenkins Direct p. 4, line 6 - p. 5, line 4). His proposal correctly takes into account unprecedented weather and economic conditions as well as the recent fuel cost increases. (*See* Jenkins Direct, p. 3, lines 1-19). There is no question that in the past 24 months, Florida's consumers have been bludgeoned by the human, physical and financial costs resulting from multiple hurricanes and been forced to bear rising recovery costs and insurance cost increases. Additionally, the unprecedented fuel cost increases of the past year have been passed through by FPL one hundred percent to the consumer. Jenkins's point is a good one: sound regulatory policy must always take into account current circumstances and adapt to an ever changing environment. What has worked in the past is not necessarily the mandate for the future. Therefore, this Commission must adapt its policies and rulings to take into account the impact of an unprecedented series of hurricanes.

The only witness put forth by FPL in opposition to Jenkins' sharing proposal was Mr. Moray P. Dewhurst, FPL's Chief Financial Officer and a substantial FPL Group shareholder. As established at the hearing, Dewhurst testified only as to his personal opinion as CFO. (R 1718, lines 1-2). Dewhurst conceded, among other things, he owns approximately 145,000 shares<sup>5</sup> of FPL Group stock, (R 1727, line 24-1728, line 12) and that he is neither a regulatory expert (R 1725, line 22-1726, line 2), nor a legal expert.<sup>6</sup> (R 1747, lines 14-20).

Dewhurst made five arguments in opposition to sharing. Dewhurst claims sharing (1) violates principles of sound ratemaking, (2) is inconsistent with past regulatory policy, (3) increases investor perception of risk, (4) is inconsistent with storm restoration policy, and (5) is inconsistent with the 2005 Settlement Agreement. (Dewhurst Rebuttal, p. 2). However, as revealed during his cross-examination, none of these arguments present any basis on which to reject sharing. Moreover, given Dewhurst's overwhelming professional and personal bias, his lack of any substantive expertise on the majority of these issues, and his decided belief that the consumer should bear one hundred percent of the cost of storm recovery, his testimony lacks any credibility and is entitled to no

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<sup>5</sup> Based on the 4/21/06 closing price of \$39.34, Dewhurst's direct holdings are worth approximately \$5.7 million dollars.

<sup>6</sup> In contrast to Dewhurst's lack of regulatory credentials, Jenkins has been employed by the Commission for the past 35 years, and is currently the Deputy Director of the Division of Economic Regulation. (Jenkins Direct, p. 2, lines 11-14).

weight.<sup>7</sup>

*Sharing does not violate principles of sound ratemaking.*

As noted above, one purpose of regulation is to serve as a substitute for competition. Like all those charged with establishing and implementing public policy, regulators must consider current circumstances and adapt to an ever changing environment. The impact on the consumer of an unprecedented series of hurricanes cannot and should not be ignored in the process of determining the amount of storm recovery. Unprecedented events call for unprecedented solutions like sharing. Thus contrary to Mr. Dewhurst's position, implementation of sharing under the circumstances presented in this docket is actually consistent with proper ratemaking principles. Moreover, while Mr. Dewhurst does have a substantial professional and financial interest in the outcome of these proceedings, and thus a natural bias against any policy contrary to that interest, he notably lacks any expertise in the area of regulatory policy. As he admits, he is not a regulatory expert, nor does he have any experience as a regulator. (R 1724, line 25-1726, line 2). Under these circumstances, this Commission would be well advised to disregard Mr. Dewhurst's personal opinion as to principles of sound

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<sup>7</sup> This is not a criticism of Dewhurst's character or his accomplishments. His professional and financial success are both noteworthy and laudable. However, respect for those accomplishments does not require the Commission to accord any weight to his opinions on subjects as to which he lacks any expertise and/or objectivity due to his insurmountable personal bias. There is simply no way any person can render an objective opinion regarding matters as to which he or she has a substantial professional (as CFO of FPL) and financial (as owner of \$5.7 million dollars of FPL Group stock) interest.

ratemaking. Indeed the Commission might instead consider the view of an experienced regulator, Rebecca Klein, former Chairman of the Texas Public Utilities Commission. At the hearing, Ms. Klein noted she “would much rather be accused of doing too much on behalf of the ratepayer rather than too little . . . .” (R 1243, lines 19-20).

*Past policy is not a mandate for the future.*

Citing past policy, Dewhurst claims that since sharing was in the past raised and rejected, any “change” would be “grossly unfair.” (Dewhurst Rebuttal, p. 11 lines 10-16). This entitlement mentality presumes the Commission is forever barred from consideration of new and/or alternative solutions which take into account the impact of ever changing conditions. Nonsense. FPL has absolutely no inherent right to forever foist upon the backs of Florida’s consumers the full burden of business risk resulting from hurricanes simply because the sharing concept may not have been appropriate for implementation in the past. Responsible regulators must and should always remain free to adopt unprecedented solutions when faced with unprecedented circumstances. In the past five years, the overall cost of electricity per 1000-Kilowatt hours has risen 56%. (Jenkins Direct, p. 3, lines 14-15). Given Dewhurst’s acknowledgment FPL Group has enjoyed a 5-year (12/31/00 - 12/31/05) total shareholder return of 40% (R 1732, lines 8-11), any argument that the sharing concept is somehow “unfair” to FPL is both avaricious and unsupportable.

*The marketplace will adjust to the regulatory environment.*

Dewhurst claims sharing will increase investor perceptions of risk. (Dewhurst Rebuttal, p. 7, lines 4-9). While there is little doubt introduction of the sharing concept will affect the investment marketplace, there is no way to predict the true impact. Even Dewhurst concedes this point. (R 1738, lines 4-5 (“It’s possible it may be less, it’s possible it may be more.”)). As with all Commission decisions affecting public utilities, the marketplace will process the information and adopt appropriate investment strategies taking into account the new information. Hurricanes are a known risk and cost of doing business in Florida. All Florida businesses face this risk. To date, there has not been any mass exodus by the capital markets in investments in Florida companies, all of which, unlike FPL, have not enjoyed the luxury of passing one hundred percent of the storm risk on to the consumer. There is no reason to believe the imposition of storm cost sharing by this Commission will result in any untoward impact on the utility capital markets. Thus the Commission should err on the side of doing more for the consumer now, rather than less. Should the marketplace response become significant enough to warrant consideration, the Commission can always do so in the future. But Dewhurst’s visions of hobgoblins portending doom in the capital markets should be ignored at this juncture in favor of consumers’ best interests.

***Sharing will not affect FPL's storm recovery efforts.***

Dewhurst agrees that without question post- hurricane, “customers’ interests are best served by focusing on the safe and rapid restoration of power.” (R 1738, line 25 - 1739, line 4). He then points to some disincentive to these interests which would be introduced by the adoption of sharing. (See Dewhurst Rebuttal, p. 13, line 12 - p. 14, line 3). However, Dewhurst again overstates his case. When pressed, Dewhurst failed to say that FPL would in fact do anything contrary to customers’ best interests post-hurricane even if sharing were adopted. (See discussion at R 1739, line 24 - 1743, line 25). Rather, acknowledging that he has responsibility for setting corporate policy (R 1745, lines 3-7) he explicitly stated FPL would not compromise on the safe and rapid restoration of power. (See e.g., R 1743, lines 15-25 (“I don’t believe that Florida Power and Light will . . .”). Even in the absence of Dewhurst’s admissions and his bobbing and weaving on this subject, there is simply no plausible basis on which to conclude FPL would in fact act contrary to consumers’ post-hurricane interests. This is an obviously disingenuous position. Indeed if FPL were to do so, the company would probably need to be more concerned with Commission retaliation and citizen rebellion than with cost sharing.

***Sharing is not at all inconsistent with the Settlement Agreement.***

Although Dewhurst is not a lawyer (R 1747, lines 14-20), and was not present during the multi-party negotiations. (R 1748, lines 14-15), he nevertheless submits his opinion (of course as FPL CFO and shareholder) that sharing would be “completely inconsistent” with and require the Commission to “ignore” the Settlement Agreement.

(Dewhurst Rebuttal, p. 7, lines 15-19). However, Dewhurst could not point to any specific language in the Settlement Agreement supporting his view. To the contrary, he specifically acknowledged the Settlement Agreement contained no reference to sharing. (R 1751, lines 3-8). Rather, Dewhurst claims it is “clearly . . . implied” in paragraph 10 of the Settlement Agreement. (R 1751, line 9).

Setting aside Dewhurst’s substantially self-interested lay reading of a complex legal document, the simple fact remains the Settlement Agreement is devoid of any even remote reference to a prohibition on storm cost sharing. (See MPD-4). Despite the participation in the negotiations of a phalanx of FPL attorneys and advisors, sharing was never once mentioned by FPL, nor is there any explicit or implicit reference to sharing in the Settlement Agreement. Indeed given the AG’s well known view on sharing, any introduction of this subject matter would have without question altered materially the course of the negotiation. If in fact FPL had considered this an important subject for inclusion in the Settlement Agreement, FPL could have insisted on same.<sup>8</sup> FPL was at that time certainly aware of the concept of sharing as applied to storm cost recovery. (R 1751, line 24 - 1753, line 2). But as Dewhurst admitted, he did not even recall any *internal* discussions at FPL about the sharing concept being included as part of the Settlement Agreement, much less anything discussed among all the parties. (R 1755,

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<sup>8</sup> For example, as discussed with Dewhurst during cross-examination (R 1755, lines 8-23), FPL could simply have added the words “or sharing” at the end of the sentence that now concludes “without the application of any form of earnings test or measure” in Settlement Agreement paragraph 10, page 10. (MPD-4, p. 10, paragraph 10, top third of the page).

lines 1-7). Given the large number of sophisticated counsel representing FPL during those negotiations, the burden of any failure to include a specific reference to sharing in the Settlement Agreement should be borne by FPL. FPL cannot now rely on Dewhurst's own biased, non-legal, subjective interpretation to correct this failure.<sup>9</sup>

Finally, and most importantly, irrespective of the language in the Settlement Agreement, this Commission need not parse that language. Even Dewhurst agrees this Commission is not bound by its terms. (R 1749, lines 2-4). The AG therefore urges the Commission to undertake its independent obligation to consider the current circumstances and protect consumers from untoward exposure to FPL's business risk.

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<sup>9</sup> While some have been critical of the Settlement Agreement, the AG believes now as he did then that the Agreement represents an excellent victory for Florida's consumers. Moreover, given the AG's well known views in favor of sharing, the absence of any reference in the Settlement Agreement to sharing of storm cost recovery was not, from the perspective of the AG, mere happenstance. Moreover, also from the AG's perspective, the entire purpose of the inclusion of paragraph 10 in the Settlement Agreement was to leave aside for another day, today, any and all disputes over storm cost recovery, including without limitation, sharing.

**C. Reserve Level.**

The AG supports and agrees with the OPC position as to the appropriate level of the storm reserve. In establishing a reserve fund, the Commission should consider the impact on the consumer and avoid the creation of an excessive reserve. A lower reserve translates into lower bond and issuance costs, lower consumer rates and more control maintained in the Commission to oversee storm recovery costs. Florida may not experience hurricanes which require a large reserve. Moreover, if Florida does experience storm damage that exceeds reserve levels, the Commission has in the past and can in the future deal with those issues as they arise. The lack of any reserve or a negative balance reserve has never to date impaired FPL's ability to safely and rapidly restore power following a hurricane. Indeed the only "negative" impact FPL cites as a result of a negative storm reserve balance is some amorphous "pressure on FPL's balance sheet," whatever that is. (Dewhurst Deposition, Exhibit 171, p. 30, lines 14-20). When establishing the reserve level, the Commission should therefore be mindful first and foremost of the substantial cost impact on the consumer.

***Eliminate the "tax effect."***

In addition to the arguments presented by OPC regarding the reserve balance (adopted but not repeated herein), the Commission must prohibit FPL from profiting from the "tax effect" built into the reserve calculation. The "tax effect" refers to the profit derived by FPL by collecting federal taxes from the consumer based on a statutory rate but ultimately paying out to the federal government based on a much lower effective

rate.

As Mr. Davis acknowledged in his testimony, part of the \$650 million requested reserve represents taxes. When the money comes in from the customer, \$400 million goes to the bonds, and \$250 million goes to pay taxes as the money comes in. (R 572, lines 1-7). To a mathematical certainty, as the reserve level grows, the amount collected for taxes grows. (R 573, lines 6-13). The amount of the taxes collected is calculated by FPL using its statutory 35% federal tax rate. (R 577, lines 10-17). The taxes are collected by the Special Purpose Entity formed for the purpose of the storm reserve, which in turn passes the taxes through to Florida Power & Light Co., which in turn passes the taxes through to FPL Group, the actual ultimate taxpayer. (R 577, line 18- 578 line 10). However, FPL has left out of its reserve calculation the rather significant fact that when FPL Group ultimately pays the taxes, the rate is not the statutory 35%, but rather an effective rate of 23.5%. (R 583, lines 19-25). So even though out of every dollar collected from the consumer FPL claims it must pay 35 cents to the federal government, in reality, FPL winds up paying 23.5 cents (if even that) in actual taxes. As applied to the storm reserve, this “tax effect” would thus result in FPL retaining 11.5 cents of every reserve dollar as profit. This “tax effect” has been the subject of recent public discourse. *See, e.g.,* David Cay Johnston, *Many Utilities Collect for Taxes They Never Pay*, N.Y. Times, March 15, 2006, at A1 (Available on Westlaw at 2006 WLNR 4293810). This is not to say FPL is doing anything illegal or improper regarding its current tax accounting. That question is not before this Commission. Rather, the AG simply

contends that whatever the propriety or lack thereof in the ordinary context, FPL should certainly not be permitted to collect hidden profits from the consumer as part of the establishment of a storm reserve. Thus at a minimum, the Commission, in calculating the amount of the reserve, must eliminate the “tax effect” by utilizing FPL’s effective tax rate of 23.5%.<sup>10</sup>

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<sup>10</sup>Unfortunately, due to an adverse ruling by the Chair, the AG is unable to put forward more specific calculations regarding the impact of the “tax effect” on the storm reserve. The AG planned to question OPC/AARP expert Stewart on this topic. However, the Chair denied the AG a full and fair opportunity to examine this witness even though, as explained at the hearing, (1) the failure to do so in the established, timely order was the result of a simple miscommunication between counsel, (2) FPL did not object to the AG examining the witness out of order, (3) there was absolutely no prejudice to any party that would have resulted from permitting the AG to examine this witness, and (4) the AG was substantially prejudiced in the presentation of his case. Given that witness Stewart provided the AG with the only opportunity to introduce expert testimony on the “tax effect” subject matter, the denial of the right to do so, under the circumstances, amounted to a fundamental denial of due process. The AG therefore respectfully restates and renews his objection to same herein for the record.

**IV. Conclusion.**

Based on all of the foregoing, and on the evidence of record and the presentations by OPC and the AG, the Commission should disallow recovery of FPL storm costs as detailed in the OPC filings. Additionally, the Commission should limit the storm reserve to \$200 million, and eliminate the “tax effect” such that FPL does not profit at the consumers’ expense.

DATED this 28<sup>th</sup> day of April, 2006.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**  
**DOCKET NO. 060038-EI**

I CERTIFY that a true and correct copy hereof has been furnished by United States mail to the following on this 28<sup>th</sup> day of April, 2006.

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