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Subject: Electronic Filing for Docket No. 060038-EI - Florida Power & Light Company's Motion for Reconsideration and Request for Clarification of Order No. PSC-06-0464-FOF-EI

Attachments: FPL Motion for Reconsideration and Request for Clarification FINAL June 6 2006.doc



FPL Motion for Reconsideration...

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 39 pages.

e. The document attached for electronic filing is Florida Power & Light Company's Motion for Reconsideration and Request for Clarification of Order No. PSC-06-0464-FOF-EI.

(See attached file: FPL Motion for Reconsideration and Request for Clarification FINAL June 6 2006.doc)

Thank you for your attention and cooperation to this request.

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FPSC-COMMISSION CLERK

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Florida Power & Light Company's)	Docket No. 060038-EI
Petition for Issuance of a Storm Recovery)	Filed: June 6, 2006
Financing Order)	
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**FLORIDA POWER & LIGHT COMPANY'S MOTION
FOR RECONSIDERATION AND REQUEST FOR CLARIFICATION
OF ORDER NO. PSC-06-0464-FOF-EI**

Florida Power & Light Company ("FPL"), pursuant to Rule 25-22.060, Florida Administrative Code, and Section 366.8260, Florida Statutes, hereby petitions for reconsideration or clarification of certain portions of Order No. PSC-06-0464-FOF-EI, dated May 30, 2006 ("Order 0464" or "Financing Order") addressing matters associated with the issuance of storm-recovery bonds. FPL does not seek reconsideration or clarification of matters associated with the amount of storm-recovery costs authorized for approval and the related policy issues. FPL seeks reconsideration of those portions of Order 0464 as follows: Findings of Fact 35, 64, 77, 81, 95, 105, 114.b., 116 and 127, and the related Ordering provisions (the "Reconsideration Matters"). Such matters correspond generally to Issues 51, 53, 61, and 74B, as set forth in the Staff's recommendation ("Staff Recommendation") issued May 8, 2006 in this proceeding ("Reconsideration Matters"). FPL also requests clarification of Order 0464 as follows: Findings of Fact 81, 82, 112, 114.b., 116, 123, 126 and 135 and Conclusions of Law 28 and 30, which generally correspond to Issues 51, 53, 61 and 74B as set forth in the Staff's recommendation ("Clarification Matters"). FPL respectfully requests that the Commission amend Order 0464 to revise its determination as to the Reconsideration Matters consistent with the positions, supporting evidence and arguments discussed below, and that the Commission

14

6/7/06

DOCUMENT NUMBER-DATE

04873 JUN-06 08

provide clarification regarding its ruling as to the Clarification Matters set forth below. Further, FPL requests expedited treatment of the Reconsideration Matters and Clarification matters set forth herein, such that an efficient and low cost financing can proceed with all practicable, deliberative speed in a collaborative manner, to best position FPL and its customers for another potentially active hurricane season. The grounds for FPL's Motion and Request are as follows:

INTRODUCTION

On April 18, 2006, the Commission issued Order No. PSC-06-0301-PHO-EI, the prehearing order in this proceeding. The prehearing order identified 85 issues for resolution. Following hearings on April 19-21, 2006, the Commission Staff issued its recommendation on May 9, 2006, which addressed each of those issues separately. At its special agenda conference on May 15, 2006, the Commission resolved each of the issues separately, and Order 0464 was intended to reflect the results of the Commission's resolution of the issues.¹ The Commission's decision rejected many of FPL's positions relative to matters of policy and procedure as they related to the issues in this case and, instead, accepted arguments advanced by the Office of Public Counsel and others. Although FPL disagrees with the outcome of certain issues, the Company accepts the Commission's indication that these questions were answered in this proceeding only with respect to the costs at issue in this docket. Accordingly, FPL does not seek reconsideration of such issues in this proceeding.

¹ Order 0464 does not refer to the issues identified in the prehearing order by number. For ease of reference, therefore, the headings for each Reconsideration Matter in the Bases for Reconsideration section below will refer to the paragraph number(s) in Order 0464 where the issue is discussed. In addition, because Staff's recommendation and the Commission's deliberations were structured around the issue numbers, FPL believes it will be useful to continue referencing the issue numbers in the context of its discussion of the Order and the matters for which reconsideration is sought.

However, FPL takes this opportunity, provided under Section 366.8260(2)(b)1.b. and Commission rules, to seek reconsideration of certain other matters and to have Order 0464 revised, consistent with the record of this proceeding and with applicable legal principles.

The financing of storm restoration costs has not been undertaken before by any utility in Florida. It is critical that FPL, as issuer, understand the process, and the requirements imposed on it in connection with this financing. To that end, there are several aspects of Order 0464 that create significant uncertainty and unduly and unnecessarily constrain the bond issuance process in ways that FPL does not believe were contemplated by section 366.8260, Florida Statutes., sometimes referred to hereinafter as the "securitization statute" or "Section 366.8260." Effectively, FPL's Motion for Reconsideration and Request for Clarification seeks to have those uncertainties and constraints ameliorated on an expedited basis such that an efficient and low cost financing can proceed with all practicable, deliberative speed in a collaborative manner, to best position FPL and its customers for another potentially active hurricane season.

Most of the Reconsideration Matters raised by FPL in this petition relate to portions of the Financing Order that introduce new standards, findings and concepts that were not included in the Staff's May 8 recommendation on FPL's petition for storm cost recovery and, thus, were not voted on by the Commission at its May 15, 2006 special agenda conference to consider FPL's request. While FPL does not request reconsideration of all provisions of Order 0464 not voted on by the Commission, it does seek reconsideration of a limited number of critical provisions, including those that impose obligations on FPL that simply cannot be met, or that could jeopardize FPL's ability to secure bankruptcy opinions critical to the bond issuance. In addition, FPL requests reconsideration of those portions of the Financing Order that were not voted on and that result in elevating the Commission's financial advisor to a status above that of

the other members of the Bond Team in direct contravention of the collaborative approach supported by FPL and required by other provisions of the Financing Order. Certain of these provisions delegate a degree and scope of responsibility to the financial advisor that goes well beyond the legislature's directive, the Commission's vote and the Commission's current contract with the financial advisor. As presented in supporting evidence and argument on the Reconsideration Matters in Section 2 below, FPL also requests reconsideration of certain provisions of the Financing Order that lack record support and would be detrimental to the bond issuance and implementation of storm-recovery charges.

Finally, FPL requests that the Commission provide clarification regarding certain language included in the Financing Order so that the Bond Team and others may properly understand the intent of such provisions before proceeding with the proposed financing.

For ease of reference, FPL has included a list of the Reconsideration Matters and Clarification Matters in summary form below.

Summary of Reconsideration Matters

1. The transaction must be structured to “effectively eliminate for all practical purposes and circumstances any credit risk associated with the storm-recovery bonds.” (finding of fact 81, p. 31)
 - This was not voted on by the Commission and cannot be done.
 - Potential investors can and should independently decide, based upon their reading of facts and legal analysis in the prospectus, whether the storm-recovery bonds have any credit risks (Indeed, the prospectus will list numerous “risk factors”).

2. The fourth ordering paragraph on p. 50 provides that “storm-recovery charges shall be in amounts sufficient to *guarantee the timely recovery* of FPL’s storm-recovery costs and financing costs ... (including payment of principal and interest on the ... bonds).”

- This was not voted on, has no record support, has never been required in other utility bond issuances in other jurisdictions and cannot be achieved.
- Circumstances entirely outside FPL’s control, such as delinquencies caused by economic or regional emergencies, could prevent timely payment.

3. The role of the PSC’s financial advisor exceeds the statute, the PSC’s vote and the Commission’s existing contract with Saber Partners.

- The vote and the existing contract with the financial advisor envision that the financial advisor would have an advisory role on the Bond Team (e.g., Staff Rec. p. 211, contract with Saber, paragraphs 8-10). In the Order, there is no limitation on the activities of the financial advisor payable from bond proceeds.
- Particularly troublesome language not voted on: the Commission may be *represented by* “[staff, designated commissioner,] the Commission’s financial advisor, and the Commission’s outside legal counsel *as these representatives deem appropriate*” and “the Commission’s financial advisor will advise *and represent the Commission on all matters relating to the structuring, marketing and pricing of the storm-recovery bonds.*” (pp. 7, 56, 57).
- Even assuming this language could be read to comply with the law on delegations of authority, it gives the financial advisor and outside counsel the right to define their own scope of services and discretion as to how and when to act.

4. The requirement to certify that each tranche of bonds meets the lowest cost objective was not voted on and is not in customers' best interests as it could lead to higher storm-recovery charges. (e.g., finding of fact 105, p. 36)

- The vote required certifications that the structure, marketing and pricing of the bonds resulted in the lowest overall storm-recovery charge –the order does not require certification that the upfront issuance costs are lowest cost, just that the individual tranches achieved the lowest interest rate. (Staff Rec. p. 181)
- Decisions could be made that lower the cost of individual tranches of debt but raise the overall storm recovery charge because it could result in higher upfront issuance costs.
- The Commission's financial advisor, as a member of the Bond Team, is a key participant in the evaluation of competitive bids and the selection of transaction participants such as underwriters, underwriters' legal counsel, trustee, etc. The Commission's financial advisor should be required to be accountable for these costs as well as the interest rate on the bonds because these costs affect the overall charge.

5. Denying FPL the ability to recover incremental amounts associated with servicing and administering the bonds could jeopardize the needed bankruptcy opinions (paragraphs 114b. and 116, pp. 38-39).

- It is uncontroverted in the record that FPL in its role as servicer and administrator must be adequately compensated for the services provided in order to create a bona fide arm's length relationship between FPL and the SPE.
- The order on reconsideration should provide that any incremental costs associated with FPL's role as servicer or administrator are subject to future recovery as part of a base

rate proceeding in which parties would have the opportunity to contest whether any such amounts are prudently incurred, incremental costs.

6. There is no record evidence to support the requirement that partial payments on a bill be allocated first to storm recovery charges (Order pp. 29, 55 – Issue 61). The only record evidence supports pro-rata allocation. (Tr. 463 Davis).

- To accommodate this requirement, FPL’s current billing system will require substantial modification at a cost of more than \$1.5 million and a 9-12 month delay in implementation of the charge.

Summary of Clarification Matters

1. That certain language in the Financing Order may reflect conclusions and judgments of the Commission and not of FPL, and that the inclusion of any such statements in the offering materials must be consistent with the duties and potential liabilities of the issuer and FPL under federal securities laws.

- The SEC has consistently required that conclusory statements and opinions be deleted from offering documents and is concerned about statements that appear to be “puffing” a security. Disclosure about an offered security should provide the potential investor with the factual information necessary to make an informed investment decision.

2. That the Commission can authorize the bonds to be issued even without the financial advisor’s certification. Otherwise, the Financing Order could permit the financial advisor to hold up the issuance of bonds, irrespective of Commission preference. (finding of fact 135, p. 43; 4th ordering paragraph, p. 57; last ordering paragraph, p. 58 top of p. 59)

3. That, while the annual servicing and administration fees must be applied to the Reserve per the Commission vote, the Commission’s decision in paragraphs 114b and 116 is not

intended to require FPL to deposit all moneys received pursuant to the Servicing and Administration Agreements into the Reserve (i.e., moneys received by FPL from the SPE as reimbursement for expenses paid to third parties, such as audit fees or SEC filing fees). Otherwise, this could jeopardize the needed bankruptcy opinions because these are expenses that FPL would be paying on the SPE's behalf for which it would not receive reimbursement, which is inconsistent with an arm's length transaction. (4th ordering paragraph, p. 57)

4. That the requirement that the Indenture trustee invest the funds in Subaccounts in "short-term, high quality investments with minimum management and other fees" (e.g., p. 10) does not constrain the Bond Team to considering only management and other fees when selecting the trustee. (finding of fact 112)

- The Bond Team will be charged to select a trustee that it believes will meet the standard of providing the lowest overall costs, and they should not be constrained by isolating one component (management fees) of the services to be provided by the trustee.

ARGUMENT

1. **The Standard for Reconsideration.**

The Commission recently recited the following standard for review on reconsideration:

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So.2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and

susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

In re: Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light. Docket No. 000824-EI; Order No. PSC-01-2313-PCO-EI, November 26, 2001.

As will be shown below, Order 0464 overlooks or failed to consider important points of fact and/or law in addressing each of the Reconsideration Matters.

2. Reconsideration Matters

A. The Financing Order imposes new standards and obligations on FPL that were not voted on and, in any event, cannot be met. (finding of fact 81; 4th ordering paragraph on p. 50)

The provisions of the Financing Order requiring FPL to structure the transaction to effectively eliminate credit risk for all practical purposes (paragraph 81 of the findings of fact) and ordering that the storm-recovery charges shall be in amounts sufficient to *guarantee* the timely payment of principal and interest on the storm-recovery bonds (p. 50 of the Ordering Paragraphs) introduce entirely new standards that are not contemplated by the securitization legislation, were not a part of the staff recommendation, and were not voted on by the Commission. In fact, these requirements were not even proposed in the record as so-called "best practices" by Saber Partners, and have not been required in any other bond issuance completed to date. They are brand new requirements that FPL is reading about now for the first time in Order 0464. The fact that the Commission did not vote on such requirements or standards warrants deletion of the provisions requiring that the transaction be structured to effectively eliminate credit risk for all practical purposes and circumstances and requiring that the charges shall be in amounts sufficient to guarantee the timely payment of principal and interest on the bonds from Order 0464, on reconsideration. But even beyond that, for the reasons discussed below these

provisions should be stricken because they establish standards that are too vague to effectively be applied and simply cannot be attained.

1. The transaction cannot be structured to be credit risk-free and FPL should not be ordered to do so.

The Financing Order directs FPL to structure the transaction to effectively eliminate credit risk, and states that storm recovery charges shall be in amounts sufficient to guarantee timely payment of principal and interest on the storm-recovery bonds. This directive was not voted on by this Commission and cannot be accomplished. Specifically, paragraph 81 of the findings of fact in the Financing Order provides as follows:

We find that this True-Up Mechanism together with the broad based nature of the State Pledge set forth in Section 366.8260(11), Florida Statutes, constitute a guarantee of regulatory action for the benefit of investors in storm-recovery bonds, and we anticipate that stress case analyses will show that these features will serve to effectively eliminate for all practical purposes and circumstances any credit risk associated with the storm-recovery bonds (i.e., that sufficient funds will be available and paid to discharge all principal and interest obligations when due). *We direct that this transaction be structured to achieve this result.*

See Order 0464, p. 31(emphasis added). In Issue 61, the Staff's recommendation on which this Commission voted provided that the Financing Order should include

[a] finding that the Commission anticipates stress case analyses will show that the broad nature of the State pledge under Section 366.8260(11), Florida Statutes, and the automatic true-up mechanism under Section 366.8260(2)(b)2.e. and 4., Florida Statutes, will serve to effectively eliminate for all practical purposes and circumstances all credit risk associated with the storm-recovery bonds;

See Staff Recommendation, Issue 61, p. 181. The question of whether FPL should be directed to structure the transaction to effectively eliminate credit risk was not proposed by anyone in this proceeding, is not reflected in the record and, most important, was not voted on by the Commission --yet the Financing Order directs that it be done.

Even apart from the fact that the Commission did not vote to direct FPL to structure the transaction to *effectively eliminate for all practical purposes and circumstances all credit risk*, FPL simply cannot comply with such a vague and imprecise directive. The Commission suggests that all “credit risks” can be addressed by stress tests, but, as the language in paragraph 81 of the Order reflects, the Commission has not yet seen any stress tests that “show that these features [state pledge and true-up mechanism] will serve to effectively eliminate ... any credit risk”. Indeed no stress case analysis will show that credit risk is effectively eliminated. To the extent that the guarantee of regulatory action, through the State Pledge and the true-up, do not serve to eliminate all credit risks, FPL cannot independently do so.

The standard to which FPL will be held accountable (i.e., to eliminate *for all practical purposes and circumstances all credit risk* associated with the transaction) is so vague and imprecise as to make it impossible for FPL to know when it has complied. There is no record evidence or other analysis that substantiates or illuminates what is meant by this standard. There is no objective standard to which FPL can refer for guidance. If AAA ratings from the nationally recognized credit rating agencies do not adequately attest to the credit risks (or lack thereof) attached to the storm-recovery bonds, FPL has no way to determine what further steps are required to eliminate credit risks. FPL should not be held to a vague and ill-defined standard – especially one that was not voted on by the Commission.

It is one thing for the Commission to make a finding that it anticipate[s] stress tests will show credit risk has been eliminated, but an entirely different matter for the Commission to direct FPL to structure the transaction to effectively eliminate credit risk. It is the investment community, and not the Company, the Commission, or the Commission’s financial advisor, that should and will decide based on the prospectus, the credit ratings assigned by the rating agencies

and their analysis, and other available information, whether the transaction has been structured to effectively eliminate credit risk. The prospectus will accurately describe the strong credit qualities of storm-recovery bonds. However, the prospectus will (and must) also contain a description of numerous “risk factors”; any of which could result in a default in the timely payment of the storm-recovery bonds. For example, the recent CenterPoint transaction included over 12 pages of risk factors in its prospectus. These factors for the proposed offering would include, but are not limited to, acts of the Florida legislature or the Florida commission required to address public emergencies; inaccurate forecasting of consumption; unanticipated customer delinquencies; and the bankruptcy of FPL. The investment community will decide, based upon their reading of facts and legal analysis in the prospectus, whether the storm-recovery bonds have any credit risks. This is an entirely subjective judgment, and one which can never be stated with certainty.

An issuer such as FPL, and even the Commission for that matter, should not substitute its judgment for that of the investor by making such statements, either explicitly or implicitly through the adoption of these requirements or standards. Such a standard, or statement by FPL, that all credit risk has been effectively eliminated merely exposes FPL, as well as the issuer under its control, to unnecessary securities law liabilities in the event of a default on the storm-recovery bonds. It is not disputed anywhere in the record that FPL as the “control party” under applicable securities law is responsible for complete and appropriate disclosure of the bond issuance. If anything goes wrong with the bonds, investors will look to FPL to satisfy their perceived losses. Thus, as the responsible party under securities law, FPL, and not an outside financial advisor without such liability, must have ultimate control over the language that will be included in the prospectus and should not be held to standards that effectively require FPL to

supply or accede to a judgment as to the relative risk of the security, supplanting the market's role in that respect.

In addition, by ordering FPL to structure a credit risk-free transaction, the Commission may make FPL liable to the bondholders and to others if the storm-recovery bonds are not paid on a timely basis. Such a liability is inconsistent with the "non-recourse" nature of the storm-recovery bonds and the "true sale" analysis expressly contemplated by the securitization statute. Section 366.8260(5)(c)2.d. provides that this necessary true sale characterization may be adversely affected by indemnification or other obligations imposed upon FPL based solely upon the "customers' inability to timely pay all or a portion of the storm-recovery charges." Yet, the Financing Order could have the effect of imposing upon FPL precisely this type of indemnification obligation if FPL can be held accountable for failing to achieve a credit risk-free transaction, as evidenced by any default on the storm-recovery bonds.

FPL requests that the portions of finding of fact 81 that were not included in the Staff Recommendation and voted on by the Commission be deleted from the Financing Order. Alternatively, FPL suggests that the language could be modified to direct that the transaction be structured "so that stress test analyses are at least sufficient to satisfy the requirements for 'triple A' ratings from Moody's, Fitch and Standard and Poor's, or to satisfy such more stringent requirements as determined appropriate by the Bond Team." With this alternative language, the actual results of stress tests could be presented in the prospectus so that prospective investors can draw their own conclusions with respect to the credit risk associated with storm-recovery bonds. If this alternative approach is rejected, then FPL requests that the Commission at least clarify that the direction to structure a credit risk-free transaction is not intended to constitute a payment guarantee on the storm-recovery bonds by FPL, nor may a violation of such directive give rise to

any legal actions against FPL. This statement will ensure that the true-sale analysis is not jeopardized by the language in finding of fact 81, and that the required bankruptcy opinions can be delivered. Further, the Commission should state in the Financing Order that the approval by the Bond Team of the transaction shall constitute conclusive proof that the transaction has been structured as required by the Financing Order.

2. FPL cannot guarantee timely payment of principal and interest on the storm-recovery bonds and should not be ordered to do so.

Similarly, the Financing Order also states that “storm-recovery charges shall be in amounts sufficient to *guarantee the timely recovery* of FPL’s storm-recovery costs and financing costs detailed in this Financing Order (including payment of principal and interest on the storm-recovery bonds).” *See* Order 0464, p. 50 (emphasis added). This also was not voted on by the Commission and, again, cannot be achieved under the terms of the Financing Order. While the Commission voted to approve a “true-up mechanism that commits the Commission to periodically adjust the storm recovery charge that supports the storm-recovery bonds to whatever level is necessary to pay the bonds’ principal and interest on time,” (Staff Recommendation, Issue 61, pp. 182-83), the Commission specifically determined that its guarantee of regulatory action “does not make the state or the Commission liable in any way for repayment of the bonds.” (Staff Recommendation, Issue 61, p. 188). Similarly, FPL cannot guarantee that setting, collecting and adjusting storm recovery charges alone will *guarantee* timely payment of the storm-recovery bonds. As noted in Finding of Fact 70 on page 28 of Order 0464, the mechanism for computing and adjusting the Storm Bond Repayment Charge and the Storm Bond Tax Charge is “formula-based.” Circumstances entirely outside the control of FPL, such as delinquencies caused by economic or regional emergencies, could prevent timely payment. As the Staff Recommendation at page 188 acknowledged, the guarantee of regulatory action voted

on by the Commission – to implement the true-up mechanism in order to ensure repayment of principal and interest over the approximately 12-year bond amortization period – is entirely different from the guarantee that storm recovery charge collections will necessarily be sufficient to assure the timely payment of the storm-recovery bonds.

The requirement of a guaranteed payment on page 50 of the Ordering Paragraphs should be stricken because it was not voted on and is unnecessary in light of the guarantee of regulatory action associated with the true-up mechanism. At a minimum, FPL requests that the Commission clarify that the sentence in question does not constitute a payment guarantee of the storm-recovery bonds by FPL.²

In considering the matters in this section 2.A, it is noteworthy that not only were these requirements and the applicable language not voted on by the Commission (and, therefore, cannot properly be reflected as conditions in the Order), there is in fact no support in the record of any requirement for a sponsoring utility to structure the storm-recovery bonds to effectively eliminate all credit risk or for the utility to structure the bonds to guarantee timely repayment. These are new requirements that FPL is seeing now for the very first time, embedded within Order 0464. Indeed, to the contrary, of the 34 customer-backed bond issuances to date, there has not been an issuance in which such requirements have applied to the sponsoring utility. These regulatory requirements could have a chilling effect on this and other such financings in Florida.

B. The Financing Order establishes a role for the Financial Advisor that exceeds the scope of the PSC's vote. (findings of fact 35, 64, 127; 5th ordering paragraph p. 56; 2nd-5th ordering paragraphs p. 57)

² FPL points out that the requirement that charges be sufficient to guarantee timely payment of principal and interest on the securitization bonds has not to the best of FPL's knowledge been required of bond issuances to date and has not prevented low cost in the previous issuances.

The Commission should reconsider Order 0464 with respect to the role and responsibilities of its financial advisor as described therein. The Financing Order goes well beyond the Commission's vote and appears to delegate to the Commission's financial advisor the ultimate control with respect to the day-to-day activities of the Bond Team and the terms and administration of its contract with the Commission, contrary to the role of the Bond Team as discussed by the Commission at its Special Agenda leading up to its vote, and contrary to the clear and fundamental principles of delegated authority in Florida administrative law.

The Commission's vote envisioned that the financial advisor would have an advisory role on the Bond Team. Specifically, Staff recommended that "day-to-day participation in Bond Team activities [would be] through Commission staff, advised by the Commission's financial advisor and outside counsel, with a designated Commissioner to resolve any disputes." *See* Staff Recommendation, p. 211 (Issue 74B). Beyond the advisory role on the Bond Team, Staff recommended, and the Commission voted, that the financial advisor: 1) would "be an active participant in rating agency presentations"; and 2) would deliver a lowest cost certification the first day after pricing. *See id.* pp. 181, 188 (Issue 61), pp. 208-216 (Issue 74B). Finally, the Commission voted that the statutory language in Section 366.8260(2)(b)2.j. limiting the activities of the Commission's financial advisor and counsel that are eligible for payment from the bond proceeds to those associated with subparagraph [2.] (issuance of the financing order) and subparagraph 5 (review of the bond issuance costs 120 days after issuance) did not operate as a limitation on the activities eligible for payment from the bond proceeds so long as the Commission required active participation of the financial advisor and counsel after the issuance of the Financing Order and before the 120-day review of issuance costs. *See id.* p. 211 (Issue 74B).

The current contract with the financial advisor envisions a similar advisory role. The financial advisor was to “[r]eview documents associated with the final bond issuance, monitor the actual solicitation of the bonds, and determine whether all reasonable and customary due diligence has been performed on the part of the IOU, the IOU’s counsel, the IOU’s bond underwriter, and the IOU’s financial advisors.” *See* November 14, 2005 contract, ¶ 8. Also, the advisor was to “[p]rovide updates on the status of the bond issuance and information on market conditions as directed by the AGENCY’S Project Manager” and “[p]rovide a statement of ... opinion as to the fairness or reasonableness of the timing of the sale, the gross underwriting spread, and the pricing of the storm-recovery bonds.” *See id.* ¶¶ 9-10.

Instead, and in marked contrast to the foregoing, the role of the financial advisor in the Financing Order has been elevated to something well above that of “advisor”. Any restraint or limitation on the activities of the financial advisor that are eligible for recovery from bond proceeds that may have been intended by the Legislature, the current contract, or this Commission’s vote are conspicuously absent from the Financing Order. On the one hand, the Order states that “[a]ll tasks performed by any consultant or counsel at the request of this Commission or Commission staff pursuant to this Order ... to the extent such expenses are eligible for compensation and approved for payment under the terms of such party’s contractual arrangements with this Commission (which may be modified by any amendment entered into at this Commission’s sole discretion), shall be treated as ‘financing costs’ for purposes of determining storm-recovery charges.” *See* Order 4064, p. 49 (finding of fact 35); *see also* pp. 26-27 (finding of fact 64); pp. 56-57 (ordering paragraphs). Putting aside whether it is proper for the Order to establish by irrefutable presumption that *all* tasks its outside financial advisor and counsel *may* be asked to do by the Commission or Commission staff meet the statutory

requirements allowing for the payment of such costs to be made from bond proceeds and thus recovered from customers,³ the operation of this provision is even more problematic when considered with other provisions in Order 0464. Read alone, this language may imply some restriction on the activities eligible for recovery from bond proceeds based on the contract with the Commission or the activities authorized and approved by the Commission or Staff. However, the Order also provides that, as part of the Bond Team process, this Commission may be *represented* by “a designated Commissioner, designated Commission personnel, the Commission’s financial advisor, and the Commission’s outside legal counsel, *as these representatives deem appropriate.*” See Order 0464, pp. 7, 56 (ordering paragraph) (emphasis added). That ordering paragraph goes on to state that “[a]s a member of the Bond Team, the Commission’s financial advisor will advise *and represent the Commission on all matters relating to the structuring, marketing, and pricing of the storm-recovery bonds.*” See *id.* p. 56 (ordering paragraph). Further, the Financing Order provides “[o]ur financial advisor will represent this Commission in all aspects of the marketing process and shall be an active and visible participant in the actual pricing process in real time.” See *id.* pp. 41 (finding of fact 127), 57.⁴

FPL and the underwriters are ordered to provide “timely information to the Commission’s financial advisor as needed to enable the Commission’s financial advisor to fulfill

³ It is difficult to understand why the potentially substantial costs of an outside financial advisor and counsel should be afforded such special treatment, effectively being insulated through Order 0464 from any question or scrutiny outside of the staff charged with administering their contracts, when such costs ultimately are recoverable from customers and, in that sense, are no different than any other costs included in the storm-recovery charges.

⁴ Much of this additional language elevating the financial advisor’s role in the bond issuance process was added subsequent to the informal meetings held on May 26 -27 and was not discussed at those meetings.

its obligation to advise the Commission and to deliver its certificate that the lowest-cost objective has been achieved.” *See id.* p. 57 (ordering paragraph).

Apart from substantial ambiguity and uncertainty associated with what is meant by directives such as the financial advisor is to be an “active participant” and what information is “needed to enable the Commission’s financial advisor to fulfill its obligation,” which alone renders such language legally defective, by ordering that the financial advisor and legal counsel are to *represent this Commission as these representatives deem appropriate in all matters related to the structuring, marketing, and pricing of the bonds*, there is no apparent limit on the authority of the financial advisor and legal counsel to act on the Commission’s behalf or on what they may be able to represent to the financial and regulatory community in terms of their authority. This goes well beyond the current contract and the Commission’s vote. Indeed, the language of the Financing Order and the new status of the financial advisor cut across the entire concept of a “Bond Team” and effectively give the financial advisor and outside counsel controlling authority over the day to day activities of the Bond Team and the issuance process.

Even assuming that the authority granted to the financial advisor in this Order could be read to comply with the law on delegations of authority, such subtleties will not be apparent to the investment community and other governmental bodies. Moreover, these provisions are inconsistent with the constraints of the current contract and render the Financing Order internally inconsistent. Though the Order states that only activities authorized by the contract are eligible for payment from bond proceeds, the leverage the financial advisor and legal counsel have bestowed upon themselves as part of the Financing Order gives the Commission no latitude to retreat from the language of the Financing Order when it renegotiates its contract with the financial advisor and counsel. Because the Order provides that the financial advisor (and legal

counsel) may represent the Commission as deemed appropriate by the financial advisor and outside counsel in all matters related to structuring, marketing and pricing of the bonds, the advisors have been given control over their role in the bond issuance process, their participation on the Bond Team, and, effectively, how the contract is amended and administered. They have the right to define their own scope of services and discretion as to how and when to act.

FPL requests that the Financing Order be amended to include only the language reflected in the Staff Recommendation and voted on by the Commission.⁵ In that respect, the financial advisor would not act independently of Staff except in certain specifically identified circumstances. The Commission should have the ultimate control over the terms and conditions of its contracts with the financial advisor and outside counsel, and such advisors should not be authorized to represent the Commission as they alone deem appropriate. The Commission, through the Prehearing Officer, should have the ability to direct the efforts of its financial advisor and outside counsel in the bond issuance process.

C. The requirement that FPL, the bookrunning underwriter(s) and the Commission's financial advisor are required to certify that each tranche of storm-recovery bonds meets the lowest cost objective is inconsistent with the Commission's vote and not in customers' best interests. (findings of fact 95, 105; fourth ordering paragraph p. 57)

Paragraph 105 of the findings of fact is inconsistent with the Staff Recommendation and the Commission vote and is not in the customers' best interests. *See* Order 0464, p. 36. The Staff's recommendation on Issue 61 provided that "the financing order should require fully accountable certifications from the lead underwriter(s), FPL, and the Commission's financial advisor that the actual structure, marketing, and pricing of the storm-recovery bonds in fact

⁵ In addition to paragraph 105 of the findings of fact, language in paragraph 95 of the findings of fact on page 34 (requiring that *each series* of storm-recovery bonds result in the lowest overall charge) and the fourth ordering paragraph on page 57, (requiring certifications after the pricing of *each series* of bonds) would need to be amended to reflect the Staff

resulted in the lowest storm recovery charges consistent with then-prevailing market conditions and the terms of the financing order and other applicable law.” *See* Staff Recommendation, p. 181. This exact language appears several times in the Staff Recommendation. The Commission voted on and accepted this standard. Instead of tracking the language the Commission approved, however, the Financing Order provides a different standard, seen by FPL for the very first time after the evidentiary record had closed and after the Commission had voted. Paragraph 105 of the findings of fact states:

We find that FPL, the bookrunning underwriter(s), and this Commission’s financial advisor each are required to certify that the structuring, marketing, and pricing of *each tranche of storm-recovery bonds of each series in fact achieved the lowest cost objective*. Floating rate bonds and interest rate swap agreements may be utilized to the extent agreed and approved by the Bond Team pursuant to the procedures set forth in Finding of Fact 136. If such a structure is utilized, the certificates delivered by FPL, the bookrunning underwriter(s), and this Commission’s financial advisor should confirm that the net interest costs taking into account the interest rate swap agreement(s) and the risks associated with those agreements achieved the lowest cost objective

See Order 0464, p. 36 (emphasis added). The italicized language requiring certifications that “each tranche” of storm-recovery bonds meet the lowest cost standard is new. Utilizing a tranche-by-tranche analysis complicates, and in application could frustrate, fulfilling the lowest cost objective. Moreover, the overall standard itself is inconsistent with the Staff Recommendation and Commission vote that required that the actual structure, marketing, and pricing of the storm-recovery bonds in fact resulted in the lowest storm recovery charges *consistent with then-prevailing market conditions and the terms of the Financing Order and other applicable law*. Even putting aside, for the moment, the fact that this standard was not voted on by the Commission (and, therefore, is not properly included in the Financing Order),

Recommendation and Commission vote. As stated above, the lowest cost evaluation should relate to the total storm-recovery charge.

this form of certification is an inappropriate standard for FPL or the Commission's financial advisor who are charged as members of the Bond Team to achieve the lowest overall cost (including transaction costs). The goal of the Bond Team should be to obtain the *lowest storm recovery charge*, not the *lowest cost on each tranche of bonds* to the exclusion of the impact of other costs. Under this new standard, appearing for the first time in the Financing Order, decisions could be made that lower the cost of individual tranches of debt but raise the overall storm recovery charge to FPL's customers. This would not be in FPL's customers' best interests as it could lead to higher storm-recovery charges. A lowest cost certification was a highly contested issue in this case. The vote required certifications that the actual structure, marketing, and pricing of the storm-recovery bonds in fact resulted in the *lowest storm recovery charges* consistent with then-prevailing market conditions and the terms of the Financing Order and other applicable law. This standard recognizes that there are often trade-offs between spending additional up-front transaction costs and obtaining lower interest rates on the bonds. However, the Financing Order does not require certifications that the upfront issuance costs are lowest cost, just that the individual tranches achieved the lowest interest rate. Under this standard, the Commission's financial advisor will have no responsibility or incentive to control transaction costs. For example, there may be a push to consider a more extensive marketing program for the bonds. The form of certification reflected for the first time in the Financing Order would prevent the Bond Team from taking into consideration the fact that a more extensive marketing program will likely increase transaction costs, may outweigh the potential benefits of lower interest rates and may actually result in a higher storm recovery charge for FPL's customers because the certification does not include the impact of transaction costs.

Under the Financing Order, only FPL is held accountable for ensuring that the upfront bond issuance costs are the lowest overall costs consistent with market conditions. The financial advisor, as a member of the Bond Team, is a key participant in the evaluation of competitive bids and the selection of transaction participants such as underwriters, underwriters' legal counsel, and the Indenture trustee. The Commission's financial advisor should also be required to be accountable for these costs as well as the interest rate on the bonds. Paragraph 105 also requires a separate certification related to interest rate swap agreements that "the net interest costs taking into account the interest rate swap agreement(s) and the risks associated with those agreements achieved the lowest cost objective". In addition to the fact that the Commission never voted to require a separate certification related to interest rate swaps, the certification requires the monetary calculation of the risks associated with swap agreements. It implies that there is an objective way to measure the risks in dollar terms, such that a conclusion can be drawn that the total cost, including the "cost" associated with these risks, is lower than the total cost of the more conventional fixed-rate bonds.

FPL is unaware of a method to place a monetary value on these risks. There are at least three ways in which FPL's customers could be exposed to having to make up cash shortfalls due to an interest rate swap agreement: shortfalls resulting from a counterparty's default, those resulting from a termination of the contract (which may be for reasons other than a default), and those resulting from a mismatch between the balance of the bonds and the notional amount of the swap (in the event that principal is not paid down exactly as scheduled). While these risks should be considered in making a decision to utilize interest rate swaps within the financing structure, the dollar "cost" of those risks is impossible to quantify.

The certification included in the Staff Recommendation and voted on by the Commission, which requires that the actual structure, marketing, and pricing of the storm-recovery bonds in fact resulted in the lowest storm recovery charges consistent with then-prevailing market conditions and the terms of the Financing Order and other applicable law, would take into account the effect of any interest rate swap decision. The Commission should reconsider its Order and revise the certification language in the order on reconsideration to be consistent with the language in the Staff's Recommendation and the Commission's vote.

D. Denying FPL the ability to recover incremental amounts associated with servicing and administering the bonds could jeopardize the needed bankruptcy opinions. (findings of fact 114.b. and 116)

The Commission's conclusion on pages 38-39 (paragraphs 114.b. and 116) of the Order that FPL cannot recover incremental amounts over and above the servicer and administration set-up fee should be reconsidered as a matter of law. FPL believes the Financing Order overlooks or fails to consider the fact that preventing FPL from recovering incremental costs associated with servicing and administering the bonds pursuant to FPL's agreements with the SPE could be detrimental to bankruptcy law opinions that are needed to accomplish the storm-recovery bond issuance and would be inconsistent with other securitization transactions.

FPL will be the initial servicer pursuant to an agreement with the SPE. FPL's duties, rights and obligations as servicer are set forth in substantial detail in the form of servicing agreement. Tr. 673, Ex. 35 (Olson). For example, as servicer, FPL will have day-to-day responsibility for calculating, billing, and collecting the Storm Bond Repayment Charges and remitting the collections to the trustee for deposit into the collection account. *Id.* Also, the servicer will prepare, file, and process the periodic Storm Bond Repayment Charge true-up adjustments required by Section 366.8260 and the Financing Order. *Id.*

It would be unprecedented for a Commission to deny the sponsoring utility acting in its role as “Servicer” the opportunity to recover actual costs associated with servicing and administering customer-backed bonds. It is uncontroverted in the record of this proceeding that FPL in its role as servicer and administrator must be adequately compensated for the services provided, in order to create a *bona fide arm’s length relationship between FPL and the SPE and thereby preserve the integrity of the bankruptcy remote structure of the SPE*. Tr. 674 (Olson). In an arm’s length transaction, it is presumed that parties will ensure that all actual costs can be recovered. Therefore, to ensure FPL is able to obtain the requisite bankruptcy opinions to effectuate the securitization, FPL as servicer must be paid an amount that is deemed to cover its *actual costs* of performing these functions during the term of the financing. *Id.* FPL suggests that this legal infirmity with the Financing Order can be remedied by amending the order to provide that any incremental costs associated with FPL’s role as servicer or administrator of the storm-recovery bonds will be subject to recovery as part of FPL’s retail base rate proceedings. This would not prejudice the amount, reasonableness, or prudence of any incremental costs subject to approval by the Commission, but would acknowledge that reasonably and prudently incurred incremental costs associated with servicing and administering the bonds are eligible for recovery through base rates. Parties to any such base rate proceeding would have the opportunity to contest whether any such amounts are prudently incurred, incremental costs.

E. There is no record evidence to support the requirement that partial payments on a bill be allocated first to storm recovery charges and such an allocation could jeopardize the needed bankruptcy opinions. (finding of fact 77; second ordering paragraph p. 55)

The Commission should reconsider its decision to require FPL to allocate partial payments received from customers first to the storm-recovery charge because there is no record support for this decision, and this decision will result in substantial cost and delay associated

with implementation of the Storm Charge. *See* Order 0464, pp. 29, 55. The only evidence on the subject of allocation of partial payments is found in the direct testimony of FPL Witness Davis, which provides “that partial payments will be allocated to Storm Bond Repayment Charges in the same proportion that such charges bear to the total bill.” Tr. 463 (Davis). There is absolutely no evidence in the record concerning priority application of partial payment or supporting the Commission’s conclusion that such priority application is needed “[t]o protect the interests of customers” or achieve the lowest cost objective. *See* Order 0464, p. 29 (finding of fact No. 77). Had Staff or the parties wished to contest the matter of allocation of partial payments on a pro rata basis, they should have done so in their testimony. They were silent.⁶ The issue first arose when the Staff Recommendation on Issue 61 concluded, without discussion or analysis, that “[t]he financing order should include ... [a]n ordering paragraph directing that partial payments shall be allocated first to storm recovery charges, including past due storm recovery payments.” Staff Recommendation, p. 181.

FPL’s billing system allocates customer payments on a pro rata basis. To accommodate the directive that partial payments be first allocated to storm recovery charges, FPL’s current billing system will require substantial modification. These modifications involve a complete rewrite of FPL’s payment application system with an implementation cost likely to exceed \$1.5 million and a delay in implementation of the storm recovery charge of 9 to 12 months. None of these costs were included in the estimate of upfront costs set forth in FPL’s petition for

⁶ In fact, at an informal workshop prior to the filing of FPL’s initial petition, the Commission’s financial advisor provided a presentation which described FPL’s proposed pro-rata allocation method as a “[c]ompromise between [the]needs of investors and utility” indicating that it “[p]laces [the] least tension on Bankruptcy “true sale” opinion.” The presentation went on to state that “[t]he goal in this area should be to work within the framework of the Utility’s existing systems and data processing infrastructure and modify system requirements to the extent possible to avoid unnecessary resource commitments and expense.”

authorization to issue storm-recovery bonds, and would need to be recovered through a charge against the Reserve or some other form of incremental recovery.

Furthermore, the application of payments on this priority basis could make it more difficult and expensive to obtain the necessary bankruptcy and lien opinions required by the rating agencies. This is because such a preferential application of funds could result in storm-recovery bondholders being given a priority over FPL's creditors, raising potential bankruptcy concerns.

While the Financing Order permits a pro-rata application of funds if the Bond Team determines that a priority application will result in "undue delay and cost" (Financing Order, p. 55), leaving such a determination to the Bond Team is not appropriate, in light of the lack of any record. A pro rata allocation of partial payments should be included in the order on reconsideration because it is the only allocation method supported by the record. If the Commission determines that FPL must receive the approval of the Bond Team, FPL believes a pro rata allocation of partial bill payments should be approved provided FPL demonstrates that the allocation of partial payments first to storm recovery charges will substantially delay implementation of the storm recovery charges. If included, the Commission should order the Bond Team to resolve this issue as part of the business at its first meeting.

3. Clarification Matters

A. The Commission should clarify that certain language in the Financing Order may reflect conclusions and judgments of the Commission and not the Company and that the inclusion of any such statement in the offering materials must be consistent with the duties and potential liabilities of the issuer and FPL under federal securities laws.

The Commission has reached certain legal conclusions in the Financing Order which are intended to enhance the possibility of obtaining favorable risk weighting treatment for the storm-recovery bonds by foreign regulators. The Commission has also included in the Financing Order

descriptive language about the credit qualities and credit mechanisms supporting the storm recovery bonds. FPL anticipates that the Commission, upon the advice of its financial advisor, will request that certain of such statements be included, in whole or in part, in the prospectus and other marketing materials relating to the storm-recovery bonds.

It was uncontroverted in the record that the issuer has direct liability under federal securities laws for statements in the prospectus and other marketing materials. It was also uncontroverted that FPL, as a “control person”, has potential liability under federal securities laws. Moreover, while the financing order and the financing documents may permit the issuer to recover from ratepayers the costs of securities law litigation, federal law may preempt any ability for the issuer to be indemnified for damages resulting from potential federal securities law liability. Furthermore, neither the financing order nor the financing documents provide for the payment to FPL of legal costs or indemnification in connection with any securities law litigation.

Accordingly, FPL requests that this Commission clarify on reconsideration that to the extent the Commission or its advisors request such statements (or any other statements) be included in the offering documents, FPL shall be entitled to reflect such statements as statements of the Commission, not of FPL, and to include such statements to the extent, and in such manner and in such context, as the issuer, as the registrant under the federal securities laws and in its sole discretion, believes to be consistent with its duties and obligations under applicable securities laws and as FPL, as the “control person” believes in its sole discretion will not subject itself to undue potential liability.⁷

⁷ The offering materials must comply with applicable Securities and Exchange Commission disclosure requirements, and must not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading. See Section 11(a) and Section 12(a)(2) of the Securities Act of 1933, as amended, and Rule 10-(b)-5 promulgated under the Securities Exchange Act of 1934, as amended.

It is FPL's intent that the SPE issuer will include in its prospectus and related marketing materials as many statements about the positive credit qualities of the storm-recovery bonds as are reasonable and appropriate in order to help market the storm-recovery bonds to investors, and thus achieve the lowest cost objective. However, the lowest-cost objective is defined by the Commission to subsume compliance with "applicable law", including applicable federal securities laws. FPL believes that the disclosure process contemplated should be approached in a manner consistent with the high standards FPL always follows in connection with disclosure materials relating to the offering of securities. As a general matter, the SEC encourages communications with investors in a clear and concise manner, and disclosure about an offered security should be factual and informative. The objective is to provide the potential investor with the factual information necessary to make an informed investment decision. Superlatives may be viewed not as informing the potential investor, but rather as diverting the potential investor's attention from the facts in favor of conclusory statements (which often are opinions). The staff of the SEC's Division of Corporation Finance has consistently, over the years, required conclusory statements and opinions to be deleted or to be supported by specific factual sources, and they are properly concerned about statements that appear to be "puffing" the security.

B. The Commission should clarify that it can allow the bonds to be issued even without the financial advisor's certification. (finding of fact 135, p. 43; 4th ordering paragraph, p. 57; last ordering paragraph, p. 58 top of p. 59)

FPL, further, requests that the Commission clarify that it has the discretion to decide not to issue a stop order and thereby allow the bonds to be issued even without the financial advisor's certificate to the extent the Commission deems it is in the customers' best interests to do so or determines that the financial advisor's certificate has been unreasonably withheld.

Otherwise, the Financing Order could permit the financial advisor to hold up the issuance of bonds, irrespective of Commission preference, by providing that the deal may not move forward without the financial advisor's certificate. *See, e.g.*, Order 0464, p. 7 (providing "[t]his Financing Order grants authority to issue storm-recovery bonds and to impose and collect storm-recovery charges only if the final structure of the transaction and the procedures followed comply in all respects with the standards and procedures set forth herein); p. 57 ("the financial advisor shall provide a certification to this Commission no later than 5:00 p.m. Eastern Time on the first business day after actual pricing of each series of storm-recovery bonds as to whether the structuring, marketing, and pricing of that series of storm-recovery bonds has achieved the lowest-cost objective and all other criteria established in this Financing Order.")

C. The Commission should clarify that FPL is not required to deposit all moneys received pursuant to the Servicing and Administration Agreements (such as reimbursements of expenses paid by FPL on behalf of the SPE) to the Reserve. (findings of fact 114.b. and 116)

FPL also requests clarification that, while the annual servicing and administration fees must be applied to the Reserve per the Commission vote, the Commission's decision in paragraphs 114.b and 116. (pp. 38-39) is not intended to require FPL to deposit all moneys received pursuant to the Servicing and Administration Agreements into the Reserve (i.e., moneys received by FPL from the SPE as reimbursement for expenses paid to third parties, such as audit fees or SEC filing fees). The Staff Recommendation on Issues 51 and 53 (pp. 163-64, 167-68) required that the full amount of the annual servicing and administration fees be applied to the Reserve. The Financing Order appears to go further and provides that "FPL shall apply to the Reserve *all* amounts it will receive under the [Servicing and Administration Agreements] for its services." *See* Order 0464, pp. 38-39. FPL requests clarification that, consistent with the Commission vote, it is only required to apply the annual servicing and administration fees

received pursuant to the Servicing and Administration Agreements to the Reserve, but not other amounts, such as reimbursements from the SPE for amounts paid to third parties by FPL on the SPE's behalf (e.g., SEC filing fees, audit fees). Otherwise, this could jeopardize the needed bankruptcy opinions for the reasons discussed in Section 2.D. above because these are expenses paid by FPL on behalf of the SPE for which FPL would not be reimbursed, which is inconsistent with an arm's length transaction.

D. The Commission should clarify that the requirement that money be invested in investments with minimum management fees is not intended to constrain the Bond Team to only consider management and other fees in selecting the Indenture trustee. (finding of fact 112)

The Commission should clarify its decision with respect to authorized investments for money in the General Subaccount, Capital Subaccount and Excess Funds Subaccount. The Financing Order provides that monies in these accounts "will be invested by the Indenture trustee in short-term high-quality investments with minimum management and other fees." *See* Order 0464, pp. 10, 11, 37 (finding of fact 112). This is another requirement that was not voted on by the Commission, but appears in the Financing Order. This money (including investment earnings thereon) will be used by the Indenture trustee to pay principal and interest on the storm-recovery bonds and other components of repayment requirement. While it is important to control fees and costs, it is equally important that the investments earn the highest return possible while minimizing risk. Moreover, any asset management fees and costs will likely be part of an annual fee payable to the Indenture trustee. The selection of the Indenture trustee will be the subject of a competitive solicitation conducted by the Bond Team, and will include evaluation of all of the costs of the trustee including asset management fees, upfront acceptance fees, on-going maintenance fees, caps on upfront and ongoing legal expenses, required indemnities, and so on, as well as potential quality of service. The Bond Team will be charged with selection of the

trustee from qualified applicants that they believe will provide the lowest overall cost. The Bond Team should not be further constrained by isolating one component of the services to be provided by the trustee.

Parties' Positions on this Motion and Request

In accordance with Rule 28-106.204(3), Florida Administrative Code, FPL contacted the parties to this proceeding to learn whether they objected to FPL's Motion and Request. FPL is authorized to represent that the Office of Public Counsel, AARP, the Florida Industrial Power Users Group and the Federal Executive Agencies are not opposed to FPL's Motion and Request. The Florida Retail Federation takes no position on FPL's Motion and Request. The Office of the Attorney General takes no position at this time.

Conclusion

The Financing Order should reflect the Commission's vote and, in the areas reflected in FPL's arguments above, should be reconsidered and revised to the extent it does not do so. In particular, FPL requests that the Commission delete or revise the numerous provisions of Order 0464 identified by FPL that were not voted on by the Commission, are not in the customers' best interests, would expose FPL to additional liability, and/or are not based on record evidence. As stated above, certain of these provisions could jeopardize FPL's ability to secure the bankruptcy opinions needed to accomplish the storm-recovery bond issuance, and others require the transaction or charges to be structured in a way that cannot be accomplished and impose standards that are too vague to effectively apply. Other provisions the Commission should reconsider include those related to the financial advisor and outside counsel, and should be reconsidered to the extent the Order goes beyond the Commission's vote and gives these advisors the right to define their own scope of services and discretion as to how and when to act.

FPL also respectfully requests that the Commission clarify matters as requested herein so there is a better understanding of the Commission's intent as FPL and the Bond Team endeavor to complete the issuance of storm-recovery bonds. Further, FPL requests expedited treatment of the Reconsideration Matters and Clarification Matters set forth above, such that an efficient and low cost financing can proceed with all practicable, deliberative speed in a collaborative manner, to best position FPL and its customers for another potentially active hurricane season.

In summary form, the matters on which FPL seeks reconsideration and or clarification are as follows:

Summary of Reconsideration Matters and Requested Relief

1. The transaction must be structured to “effectively eliminate for all practical purposes and circumstances any credit risk associated with the storm-recovery bonds.” (finding of fact 81, p.

31)

- This was not voted on by the Commission and cannot be done.
- Potential investors can and should independently decide, based upon their reading of facts and legal analysis in the prospectus, whether the storm-recovery bonds have any credit risks (Indeed, the prospectus will list numerous “risk factors”).
- On reconsideration, the language “[w]e direct that this transaction be structured to achieve this result” should be stricken from finding of fact 81.

2. The fourth ordering paragraph on p. 50 provides that “storm-recovery charges shall be in amounts sufficient to *guarantee the timely recovery* of FPL's storm-recovery costs and financing costs ... (including payment of principal and interest on the ... bonds).”

- This was not voted on, has no record support, has never been required in other utility bond issuances and cannot be achieved.

- Circumstances entirely outside FPL’s control, such as delinquencies caused by economic or regional emergencies, could prevent timely payment.
- On reconsideration, the language “storm-recovery charges shall be in amounts sufficient to guarantee the timely recovery of FPL’s storm-recovery costs and financing costs detailed in this Financing Order (including payment of principal and interest on the storm-recovery bonds).” should be stricken from the fourth ordering paragraph on page 50.

3. The role of the PSC’s financial advisor exceeds the statute, the PSC’s vote and the Commission’s existing contract with Saber Partners.

- The vote and the existing contract with the financial advisor envision that the financial advisor would have an advisory role on the Bond Team (e.g., Staff Rec. p. 211, contract with Saber, paragraphs 8-10). In the Order, there is no limitation on the activities of the financial advisor payable from bond proceeds.
- Particularly troublesome language not voted on: the Commission may be *represented by* “[staff, designated commissioner,] the Commission’s financial advisor, and the Commission’s outside legal counsel *as these representatives deem appropriate*” and “the Commission’s financial advisor will advise *and represent the Commission on all matters relating to the structuring, marketing and pricing of the storm-recovery bonds.*” (pp. 7, 56, 57).
- Even assuming this language could be read to comply with the law on delegations of authority, it gives the financial advisor and outside counsel the right to define their own scope of services and discretion as to how and when to act.

- On reconsideration, the language in the Financing Order should be stricken to the extent it is not consistent with the Staff Recommendation and the Commission’s vote at the May 15 Special Agenda Conference (findings of fact 35, 64, 127; 5th ordering paragraph p. 56; 2nd-5th ordering paragraphs, p. 57)
4. The requirement to certify that each tranche of bonds meets the lowest cost objective was not voted on and is not in customers’ best interests as it could lead to higher storm-recovery charges. (e.g., finding of fact 105, p. 36)
- The vote required certifications that the structure, marketing and pricing of the bonds resulted in the lowest overall storm-recovery charge –the order does not require certification that the upfront issuance costs are lowest cost, just that the individual tranches achieved the lowest interest rate. (Staff Rec. p. 181)
 - Decisions could be made that lower the cost of individual tranches of debt but raise the overall storm recovery charge because it could result in higher upfront issuance costs.
 - The Commission’s financial advisor, as a member of the Bond Team, is a key participant in the evaluation of competitive bids and the selection of transaction participants such as underwriters, underwriters’ legal counsel, trustee, etc. The Commission’s financial advisor should be required to be accountable for these costs as well as the interest rate on the bonds because these costs affect the overall charge.
 - On reconsideration, the language “of each tranche of storm-recovery bonds of each series in fact achieved the lowest cost objective” in finding of fact 105 on page 136 should be revised to be consistent with the Commission’s vote, and related language about “each series” should be stricken in finding of fact 95 on page 34 and the fourth ordering paragraph on page 57.

5. Denying FPL the ability to recover incremental amounts associated with servicing and administering the bonds could jeopardize the needed bankruptcy opinions (paragraphs 114b. and 116, pp. 38-39).

- It is uncontroverted in the record that FPL in its role as servicer and administrator must be adequately compensated for the services provided in order to create a bona fide arm's length relationship between FPL and the SPE.
- The order on reconsideration should provide that any incremental costs associated with FPL's role as servicer or administrator are subject to future recovery as part of a base rate proceeding in which parties would have the opportunity to contest whether any such amounts are prudently incurred, incremental costs.

6. There is no record evidence to support the requirement that partial payments on a bill be allocated first to storm recovery charges (Order pp. 29, 55 – Issue 61). The only record evidence supports pro-rata allocation. (Tr. 463 Davis).

- To accommodate this requirement, FPL's current billing system will require substantial modification at a cost of more than \$1.5 million and a 9-12 month delay in implementation of the charge.
- On reconsideration, the Commission should revise the language in finding of fact 77 on page 29 and the second ordering paragraph on page 55 to reflect that pro rata allocation of storm-recovery charges are approved consistent with the record in this proceeding.

Summary of Clarification Matters and Requested Relief

1. On reconsideration, the Commission should clarify that certain language in the Financing Order may reflect conclusions and judgments of the Commission and not of FPL, and that the

inclusion of any such statements in the offering materials must be consistent with the duties and potential liabilities of the issuer and FPL under federal securities laws.

- The SEC has consistently required that conclusory statements and opinions be deleted from offering documents and is concerned about statements that appear to be “puffing” a security. Disclosure about an offered security should provide the potential investor with the factual information necessary to make an informed investment decision.
2. On reconsideration, the Commission should clarify that it can authorize the bonds to be issued even without the financial advisor’s certification. Otherwise, the Financing Order could permit the financial advisor to hold up the issuance of bonds, irrespective of Commission preference. (finding of fact 135, p. 43; 4th ordering paragraph, p. 57; last ordering paragraph, p. 58 top of p. 59)
 3. On reconsideration, the Commission should clarify that, while the annual servicing and administration fees must be applied to the Reserve per the Commission vote, the Commission’s decision in paragraphs 114b and 116 is not intended to require FPL to deposit all moneys received pursuant to the Servicing and Administration Agreements into the Reserve (i.e., moneys received by FPL from the SPE as reimbursement for expenses paid to third parties, such as audit fees or SEC filing fees). Otherwise, this could jeopardize the needed bankruptcy opinions because these are expenses that FPL would be paying on the SPE’s behalf for which it would not receive reimbursement, which is inconsistent with an arm’s length transaction.
 4. On reconsideration, the Commission should clarify that the requirement that the Indenture trustee invest the funds in Subaccounts in “short-term, high quality investments with minimum management and other fees” (e.g., p. 10) does not constrain the Bond Team to considering only management and other fees when selecting the trustee. (finding of fact 112)

- The Bond Team will be charged to select a trustee that they believe will meet the standard of providing the lowest overall costs, and they should not be constrained by isolating one component (management fees) of the services to be provided by the trustee.

WHEREFORE, for the above and foregoing reasons, Florida Power & Light Company respectfully requests that the Commission grant its Motion for Reconsideration and Request for Clarification on an expedited basis.

Respectfully submitted this 6th day of June, 2006.

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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 on the 6th day of June, 2006, to the following:

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