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Sent: Thursday, July 09, 2009 2:18 PM
To: Filings@psc.state.fl.us
Cc: Butler, John; Rubin, Ken
Subject: FPL's Response in Opposition to the CSD's Motion to Dismiss - Docket No. 080677-EI
Attachments: FPL's Response in Opposition to the CSD's Motion to Dismiss_7-9-09.doc

Electronic Filing

a. Person responsible for this electronic filing:
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b. Docket No. 080677-EI
In re: Petition for rate increase by
Florida Power & Light Company

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

d. There are a total of 13 pages in the attached document.

e. The document attached for electronic filing is Florida Power & Light Company's Response in Opposition to the CSD's Motion to Dismiss.

Thank you for your attention and cooperation to this request.

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Increase in Rates by Florida Power & Light Company	))	Docket No. 080677-EI
In re: 2009 Depreciation and Dismantlement Study by Florida Power & Light Company	))	Docket No. 090130-EI Filed: July 9, 2009

FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO THE CITY OF SOUTH DAYTONA'S MOTION TO DISMISS

Florida Power & Light Company ("FPL" or the "Company"), by and through undersigned counsel and pursuant to Rule 28-106.204(1), Florida Administrative Code, files this its Response in Opposition to the City of South Daytona's ("CSD's") July 2, 2009 Motion to Dismiss Florida Power & Light Company's Petition for Rate Increase (the "Motion to Dismiss"). As will be discussed in more detail in this Response, on July 2, 2009, CSD filed with the Commission its Motion to Dismiss FPL's Petition in this proceeding. The sole basis of CSD's motion is a grossly incorrect claim that the Commission lacks jurisdiction to set rates for electric service based upon projected test year information. CSD's Motion should be denied because (i) it is untimely and should not be considered as a matter of law; and (ii) the Commission has well-established legal authority to set electric service rates based on a projected test year. In further support of its Response to CSD's Motion to Dismiss, FPL states as follows:

1. CSD's Motion to Dismiss is time barred by Rule 28-106.204(2), Florida Administrative Code, which states as follows: "Unless otherwise provided by law, motions to dismiss the petition or request for hearing shall be filed no later than 20 days after service." As will be described in more detail below, the relevant chronology of this pending case very clearly shows that CSD's late filed Motion dated July 2, 2009 is untimely and time barred and should be denied on that basis alone.

2. A review of the chronology of some of the key filings in this case, including those addressing the projected test year issue, helps to place the CSD Motion to Dismiss in proper perspective:

- November 17, 2008 – FPL Test Year Notification Letter proposing the use the projected test years
- November 18, 2008 –FPSC letter to FPL addressing projected test year issues
- December 2, 2008 – OPC letter to FPSC opposing the use of 2010 projected year as test year
- December 22, 2008 – FPL letter to FPSC addressing OPC's objection to use of 2010 projected year as test year, and requesting early interim decision on test year issue to assist in the efficient litigation of rate case
- December 23, 2008 – FPSC letter to FPL providing interim approval of 2010 as projected test year to establish rates (Note: letter confirms that "The approval of this test year is interim in nature and will be an issue subject to deliberation during the evidentiary proceeding.")
- January 15, 2009 – FPL to FPSC; FPL to file Supplemental MFRs for 2009 for informational purposes only
- March 18, 2009 – FPL's Petition for Rate Increase
- April 14, 2009 – CSD Petition to Intervene
- April 29, 2009 – FPSC Order Granting CSD's Petition to Intervene
- July 2, 2009 – CSD Motion to Dismiss

3. As indicated above, FPL's intention to use a projected test year in this case has been public knowledge since the publication of its test year letter in November of 2008. Moreover, FPL's Petition was served on March 18, 2009, and any Motion to Dismiss was required to be filed within 20 days of the filing date of that Petition, or no later than April 7, 2009. CSD's Motion to Dismiss was

filed almost 3 months later, in direct violation of the Rule and after the parties involved in this litigation had already devoted enormous efforts and resources to the litigation of this case.

4. Rule 28-106.204(2), Florida Administrative Code, uses the term "shall" when describing the time frame within which a Motion to Dismiss must be filed. Florida law is clear that the use of the term "shall" identifies a mandatory rather than a permissive requirement, and as a result CSD was required to file its Motion within 20 days after service of the Petition. (See for example The Florida Bar v. Trazenfeld, 833 So. 2d 734, 738 (Fla. 2002) where the Court stated that '[t]he word "may" when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word "shall."'). CSD neither argues any exception to that mandatory filing requirement, nor does its Motion in any way suggest that any possible exception would apply in this instance. The Motion should be denied as it is facially deficient by virtue of its failure to comply with the clearly stated time limitations in the Rule. The Commission need not look any further in properly denying the CSD Motion.

5. In addition to the foregoing, the substantive arguments raised by CSD in its Motion to Dismiss are completely without merit and essentially ignore the relevant statutes, rules, case law, logic, and years of regulatory practice before this Commission. Further, the issue raised by CSD's Motion to Dismiss (i.e., the use of projected test years in this case) has been extensively addressed in this case in pleadings, correspondence, and other communications involving FPL, the Commission and its Staff, and the Office of Public Counsel. The Commission has already provided its interim approval of the calendar year 2010 as the test year (see letter from Chairman Matthew Carter II dated December 23, 2008) with the caveat that the "approval of the test year is interim in nature and will be an issue subject to deliberation during the evidentiary proceeding."

6. Setting aside for the moment the fact that the Motion to Dismiss is time barred and should be summarily denied on that basis alone, the Motion incorrectly argues that this Commission does not have the authority to establish rates for an electric utility such as FPL on the basis of projected test years. CSD's arguments misconstrue both the controlling statutes and case law, while at the same time completely ignoring the Florida Supreme Court opinion most directly on point to the issues CSD attempts to raise in its Motion.

7. In Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, 443 So. 2d 92 (Fla. 1983), cited by FPL in its letter to the Commission of December 22, 2008 and in paragraph 18 of FPL's Petition for Rate Increase, but completely ignored by CSD in its Motion to Dismiss, the Florida Supreme Court left no question about the propriety of using projected test years as an appropriate ratemaking tool in utility rate cases. Southern Bell is directly on point to the case at issue here, and if the Commission does not deny the CSD Motion to Dismiss for failure to comply with Rule 28-106.204, the principles directly addressed by the Southern Bell court mandate denial of the CSD Motion.

8. In Southern Bell, the telephone company sought an increase in rates based upon a projected test year. The Public Service Commission authorized a rate increase, but for a number of reasons more fully discussed in the opinion, Southern Bell appealed. The Citizens of the State of Florida filed a cross-appeal on the following specific issue: "[T]he Citizens contend that the Commission's order departed from the essential requirements of law because it based Bell's rate increase on a projected test year, which is not subject to verification by audit." Southern Bell at page 94.

9. In a unanimous opinion, the Supreme Court squarely rejected this position and unequivocally affirmed the propriety of the use of the projected test year in rate cases when it stated the following:

> "In its cross-appeal, the Citizens contend that basing rate relief on a projected test year departs from the essential requirements of law. We disagree. Section 364.035(1), Florida Statutes (1981), provides that the Commission has the authority to fix "just, reasonable, and compensatory rates." Nothing in the decisions of this Court or any legislative act prohibits the use of a projected test year by the Commission in setting a utility's rates. We agree with the Commission that it may allow the use of a projected test year as an accounting mechanism to minimize regulatory lag. The projected test period established by the Commission is a ratemaking tool which allows the Commission to determine, as accurately as possible, rates which would be just and reasonable to the customer and properly compensatory to the utility. We also agree with the Commission that the utility met its burden of establishing the accuracy of the test period used and that the decision to use the projected test period was supported by competent, substantial evidence." Southern Bell at page 97.

10. Section 366.041, Florida Statutes governing FPL's pending action includes language virtually identical to Section 364.035(1) cited and relied upon by the Southern Bell court. It is also important to keep in mind that the Southern Bell decision was rendered at a time when telecommunications companies were still subject to statutory rate base and rate of return regulation, just as the investor-owned electric utilities are today.

11. While completely ignoring the dispositive Southern Bell case, CSD's Motion goes to great lengths to distinguish Citizens of the State of Florida v. Public Service Commission and Florida Power Corporation, 425 So. 2d 534 (Fla. 1982), another Supreme Court opinion issued 1 year before Southern Bell. Additionally, even with its misplaced focus, CSD relies heavily upon portions of the Citizens case while ignoring other relevant language within that same opinion.

12. CSD argues that the Citizens case does not authorize the use of projected test years for electric utilities based upon the following language: "[i]nasmuch as Public Counsel has not challenged the projected test year concept generally and the Commission has concluded that an adequate basis

has been provided for analysis of the projected test year, we find this portion of his argument to be without merit." Citizens at page 537 and paragraph 17 of CSD's Motion to Dismiss. However, this quote, standing alone and taken out of context, does not adequately address the finding of the Court.

13. In fact, the opinion makes clear that "[a]lthough Public Counsel does not challenge the projected test year concept generally, he argues that section 366.06(2) prohibits the inclusion of projected test year CWIP in the rate base." Citizens at page 537. The opinion explains that Public Counsel argued there, as CSD argues here, that the plain language of the statute limited the Commission to the use of historic (CWIP) cost data in calculating rate base. Using the Court's words to frame Public Counsel's issue, it is quite clear that "Public Counsel's first contention is that the statute clearly limits the Commission to the use of historic cost data in calculating rate base." Citizens at page 537. Although Public Counsel in the Citizens case did not argue against the use of projected test year data across the board, he did argue against the use of projected test year CWIP. In reliance upon the Commission's finding that an adequate basis had been provided for analysis of the projected test year, the Court found that portion of Public Counsel's argument to be without merit.

14. CSD further argues that the Citizens case is inapposite here, as the projected test year had already become an historic year by the time the evidentiary hearings were held. This argument lacks merit and relevance, as it ignores the fact that the case was litigated on the basis of what was at the time projected data.

15. While ignoring the controlling case law, CSD also argues unpersuasively that a comparison of Section 367.081, Florida Statutes relating to Water and Wastewater Utilities, to Section 366.06, Florida Statutes relating to Electric and Gas Utilities, suggests that the Commission is permitted to use projected test years when setting water utility rates but prohibited from doing so when setting electric utility rates. The argument ignores the plain

language and clear intent of both statutes, the applicable case law, the clear language of Rule 25-6.140, and many years of Commission practice. That argument also lacks both legal and logical support. In fact, if any conclusion can be drawn from such a comparison, it would simply support the wisdom of using the projected test year concept when setting rates.

16. CSD's Motion to Dismiss places considerable weight on Section 367.081, Florida Statutes. However, that reliance is again misplaced. Even insofar as its application to water and wastewater regulation is concerned, the statute simply does not address the use of projected test years to establish final rates. Instead, it is clear that the language relied upon by CSD relates only to a determination of the level of used and useful rate base, and it applies to just this one aspect of the ratemaking process by authorizing pro forma adjustments to plant in service only. That is, the statute on its face makes clear that its application is limited to the extent of "utility property, including land acquired or facilities constructed or to be constructed within a reasonable time in the future" that will be considered "to be used and useful in the public service," while that same statutory provision is completely silent as to revenues and expenses or the use of projected test years in setting rates.

17. Section 366.06(1), Florida Statutes, the controlling statute at issue in the pending case, reads as follows:

> (1) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of

> payment made therefore. In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.

This statute indicates that at a minimum, the Commission is obligated to investigate and keep a record of the net investment in property and use the value recorded for ratemaking purposes. However, no reasonable reading of the statute suggests that this is the only data the Commission can use in setting rates or that the use of projected test years is prohibited. The statute simply sets a minimum (mandatory) requirement on the type of information the Commission must use when considering the request for rate changes authorized by the statute, but it in no way prohibits the use of other classes of information. On the contrary, the statute on its face provides the Commission the authority to "fix fair, just, and reasonable rates." It is axiomatic that the Commission must have all reasonable tools available to it to accomplish this directive and to ultimately provide a fair and reasonable decision. The use of projected test years is just one such tool that the Commission may use, is authorized by law to use, and has used for many years.

18. CSD's Motion to Dismiss implicitly asserts that long established Commission rules and practice have consistently violated Florida law. For the reasons more fully outlined in this Response, nothing could be further from the truth. The use of projected test years is entirely consistent with and supported by Florida Statutes, case law and Commission Rules. For example, Rule 25-6.140 explicitly authorizes the use of test years in regulatory proceedings, as follows:

> 1) At least 60 days prior to filing a petition for a general rate increase, a company shall notify the Commission in writing of its selected test year and filing date. This notification shall include:
>
> (a) An explanation for requesting the particular test period. If an historical test year is selected, there shall be an explanation of why the historical period is more representative of the company's operations than a projected period. ***If a projected***

test year is selected, there shall be an explanation of why the projected period is more representative than an historical period; (emphasis added)

19. Additionally, Commission practice over the last several decades has been consistent with Florida statutory and case law and Commission rules, as applied to both FPL and other electric utilities. For example, the Commission permitted FPL to use a projected test year in 2005 that bears almost the same temporal relationship to FPL's rate request as FPL's proposed 2010 test year bears to the rate request in the current FPL Petition.[1] In terms of other utilities, the Commission has approved the use of projected test years on several occasions, including for example, Tampa Electric Company's application for a rate increase in 1993, and Gulf Power Company's request for a rate increase in 2002, as more fully discussed below.

20. Reference to excerpts from the FPSC Orders cited in the preceding paragraph is extremely helpful in understanding the wisdom and propriety of using projected test years when setting electric utility rates. In Commission Order No. PSC-93-0165-FOF-EI, "Order Granting Certain Increases," issued February 2, 1993, in FPSC Docket No 920324-EI, the Commission wrote as follows:

> "There are primarily two options for evaluating Tampa Electric Company's expected financial operations. The first option is to use a historical test year and make pro forma adjustments to it. The second is to use a projected test year. Both of these options have strengths and weaknesses.
>
> The historical test year has the advantage of using actual data for much of rate base, net operating income, and capital structure; however, the pro forma adjustments usually do not represent all the changes which occur from the end of the historical period to the time new rates are in effect. Therefore, this option generally does not present as complete an analysis of the expected financial operations as a projected test year.
>
> The main advantage of a projected test year is that it includes all information [*6] related to rate base, NOI and capital structure for the time new rates will be in effect. However, the data is projected and its accuracy depends on the company's

[1] See Florida Public Service Commission Docket No. 050045-EI

ability to forecast. Many companies are not able to forecast accurately enough to use the forecast for setting rates.

The parties and the Commission [*7] staff have conducted extensive discovery concerning TECO's forecast. We believe that TECO's forecast of its 1994 financial operations, as adjusted herein, is accurate enough to use as a basis for setting rates."

Similarly, in the case involving Gulf Power referenced above, the Commission wrote in Order No. PSC-02-0787-FOF-EI, "Order Granting In Part and Denying in Part Gulf Power Company's Petition for Rate Increase," issued June 10, 2002, in FPSC Docket No. 010949-EI, as follows:

"Gulf proposed a test period, for rate setting purposes, of 12 months ending May 31, 2003. With certain adjustment to Gulf's financial forecast, we find that this test period is appropriate. The purpose of the test year is to represent the financial operations of a company during the period in which the new rates will be in effect....

There are primarily two options for evaluating Gulf's expected financial operations. The first option is to use a historical test year and make pro forma adjustments to the test year. The second is to use a projected test year. Both of these options have strengths and weaknesses.

The historical test year has the advantage of using actual data for much of rate base, NOI, and capital structure; however, the pro forma adjustments usually do not represent all the changes that occur from the end of the historical period to the time new rates are in effect. Therefore, this option generally does not present as complete an analysis of the expected financial operations as a projected test year.

The main advantage of a projected test year is that it includes all information related to rate base, NOI, and capital structure for the time new rates will be in effect. However, the data is projected and its accuracy depends on the Company's ability to forecast. Many companies are not able to forecast accurately enough to use the forecast for setting rates.

The parties and the Commission staff have conducted extensive discovery on Gulf's forecast. As will be addressed later in this Order, certain adjustments will be made to Gulf's forecast to increase its accuracy. With the inclusion of these adjustments, the forecast of Gulf's financial operations for the year ending May 31, 2003, is sufficiently accurate to use as a basis for setting rates."

These Commission Orders very clearly outline both the propriety and the benefit of using projected test years in setting rates for electric utility companies, while at the same time serving as proof of the Commission's longstanding practice of using this effective ratemaking tool in full compliance with Florida law.

WHEREFORE, FPL respectfully requests that CSD's Motion to Dismiss be denied for the reasons more fully stated herein.

Respectfully submitted this 9th day of July, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically and by U.S. Mail this 9th day of July, 2009, to the following:

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