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**Subject:** e-filing (Docket No. 110009-EI)  
**Attachments:** 110009.OPC response in opposition to FPL motion to bifurcate.sversion.doc

Electronic Filing

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b. Docket No. 110009-EI

In re: Nuclear Cost Recovery Clause.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 11 pages.

e. The document attached for electronic filing is OPC's Response in Opposition to FPL's Motion to Bifurcate.  
(See attached file: 110009.OPC response in opposition to FPL motion to bifurcate.sversion.doc)

Thank you for your attention and cooperation to this request.

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DOCUMENT NUMBER-DATE

01317 FEB 28 =

FPSC-COMMISSION CLERK

2/28/2011

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Nuclear Cost Recovery     )  
Clause.                                 )  
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Docket No. 110009-EI

FILED: February 28, 2011

**OPC'S RESPONSE IN OPPOSITION TO FPL'S MOTION TO BIFURCATE**

Pursuant to Rule 28-106.204, F.A.C., the Citizens of the State of Florida, through the Office of Public Counsel (OPC), submit their Response in opposition to Florida Power & Light Company's ("FPL's") Motion to Bifurcate 2009 Extended Power Uprate Issues for Hearing ("Motion to Bifurcate"), and state:

**Background**

OPC offers this brief background to facilitate the Commission's assessment of FPL's Motion to Bifurcate.

The stipulation to which FPL refers in its motion, and which the Commission approved, deferred all FPL-specific issues to the 2011 hearing cycle of the nuclear cost recovery proceedings ("Stipulation"). In its motion, FPL breaks out 3 of the FPL-specific issues and refers to them as the "2009 EPU prudence issues."

The "prudence issues" that are the subject of FPL's motion relate primarily to Commission Staff's audit review of FPL's management of nuclear uprate activities in 2009, marked Exhibit FR-1 in the Prehearing Order, and a report (identified as Staff Exhibit No. 177 in the Prehearing Order) by Concentric Energy Advisors, which FPL engaged in March 2010 to investigate an employee complaint letter.

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*The Staff's audit review.* In its review, Staff described how the estimate of the cost of completing FPL's nuclear uprate projects (as reported to FPL's senior management by the managers of the uprate projects) had increased dramatically during the three months immediately following FPL's submission of prefiled testimony on the subject on May 1, 2009. Staff also described a major overhaul of the structure and personnel of uprate project management that occurred during the summer of 2009. Staff indicated its view that the management changes were based in part on performance issues, and recommended that the Commission refer the prudence of costs incurred in 2009 to a separate docket or to the following hearing cycle, so as to enable Staff to assess whether any imprudent costs resulted from those issues. FPL denies that it incurred any imprudent costs in 2009. FPL contends that the management changes were a natural evolution of the uprate projects. OPC indicated its support of Staff's recommendation to defer the prudence review of 2009 uprate costs in the positions that it articulated in response to Issue Nos. 21 and 22 in the Prehearing Order.

*The Concentric Report.* Completed on June 21, 2010, Concentric's report on its investigation of the employee complaint letter concluded, *inter alia*, that FPL failed to adhere to its management policies and procedures when its witness on the cost to complete the uprate projects failed to apprise the Commission of revised, dramatically higher estimates of which he was aware when during the hearing on September 8, 2009 he adopted prefiled testimony submitted on May 1, 2009, without change. FPL disagrees with its expert's position, and contends that witness had no obligation to amend testimony prefiled on May 1, 2009, because the higher estimates were still being reviewed and evaluated at the time of his appearance at

hearing. In its audit review, Commission Staff included a section on this aspect of the Concentric Report, including Concentric's conclusion<sup>1</sup>.

The question of whether FPL withheld information it should have provided the Commission prior to or during the 2009 hearing became part and parcel of the disputed issues that the Commission deferred. In fact, prior to the point of the hearing at which the Commission approved the stipulation to defer all FPL-specific issues, on September 2, 2010, FPL asked for – and subsequently received – authority to prefile additional testimony addressing this subject. The Commission should not allow early bifurcation of the 2009 EPU prudence issue fragments that FPL has identified to separate the issues identified in FPL's motion from this subject.

### **Argument**

#### ***I. The Commission Should Deny FPL's Motion Because It Is A Blatant Attempt To Disadvantage Parties and Staff Procedurally By Disregarding the Terms of a Stipulation and Truncating a Schedule In Midstream.***

The full, established nuclear cost recovery schedule is implicit in the stipulation to defer until the next hearing cycle. The OPC was entitled to, and did, rely upon this schedule in reaching agreement with FPL. The company is now taking the highly improper step of seeking to unilaterally alter the fundamental terms of a stipulation so as to disadvantage the other parties to the stipulation. At the time the OPC entered into the Stipulation that was filed on August 17, 2010, the express terms of the stipulation called for the deferred issues “to be

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<sup>1</sup> Staff added to the Prehearing Order Issue No.3B, which asks:

Should any FPL rate case type expense associated with the 2010 NCRC hearing for FPL be removed?

OPC believes Staff's Issue 3B may be intended to relate to the subject of FPL's unmodified testimony. Regardless, in a later section of this pleading OPC will address language that will avoid any issue or claim of lack of notice.

deferred for consideration with all other FPL issues to the 2011 Nuclear Cost Recovery cycle.” See, Order No. PSC-11-0095-FOF-EI, Issued February 2, 2011, at p. 62; Docket No. 100009-EI, *In Re: Nuclear cost recovery clause*. This clause is unequivocal on its face. On this basis alone, the Commission should deny the FPL motion.

Even so, further support for the intent that the issues were to be deferred to the established hearing track is found in the transcript of the proceedings. At the August 11, 2010, prehearing conference in this Docket, counsel for OPC indicated that a stipulation for deferral was under discussion and that the OPC agreed with the Staff position at that time to consider these matters either in “a separate proceeding, either a spin-off or in the next hearing cycle...” Prehearing Conference Transcript, p. 55.

On August 26, 2010, in advocating for approval of the stipulation, counsel for FPL advised the Commission that the stipulation had been entered into on August 17<sup>th</sup> and that it provided for deferral of “issues until the 2011 nuclear cost recovery cycle...” Hearing T. 1256. Notably, this representation along with the plain language of the Stipulation indicates that the concept of a “spin-off” or separate hearing did not survive the formal agreement entered into six days after the OPC representation to the Prehearing officer. FPL counsel then pointed out that “this stipulation is very similar to the stipulation for deferral that was approved by the commission with respect to FPL in the Commission’s 2008 cost recovery docket.” Hearing T. 1257. The deferred 2008 issues were heard in the regular 2009 hearing cycle. Finally, and most significantly, FPL counsel argued that:

The NCRC is an annually recurring docket. The proceeding will provide a *clear and well-established method for staff and parties to obtain information*, to raise any considerations they wish to raise through preparation and filing of prefiled testimony, for our company to respond in prefiled testimony, and for

the Commission to consider and decide based upon issues identified through the Commission's prehearing process.

[Emphasis supplied] Hearing Tr. 1259.

The clear and well-established method is the full hearing schedule that FPL now seeks to have the Commission ignore. Clearly, FPL was reflecting the meeting of the minds among the Stipulation signatories when it made the representations to the Commission seeking approval of the Stipulation. The OPC has relied on this understanding since August 2010 and has established its litigation strategy in full reliance on this plain meaning of the agreement that the Commission approved. Any change to that understanding would violate the Stipulation and impose a hardship and a denial of due process to the OPC.

One of the more cynical aspects of the FPL request is that the company has no corresponding need to engage in discovery or preparation of additional testimony, because FPL has all of the information in its possession and obviously had its case prepared prior to the filing of the Motion to Bifurcate. The company had 6 months since the filing of the stipulation to devise this effort to accelerate the timeline of the docket while giving parties less than a half a day's notice of its intent to unilaterally amend the stipulation. This filing itself was made on February 21, 2011-- only 8 days before the date (March 1, 2011) in FPL's motion on which it proposed to file its separate testimony.

Offering to file its case on March 1<sup>st</sup> does not require FPL to do anything differently; the primary function of the stipulation is to provide Staff and parties more time to perform discovery and evaluate the implications of the matters treated in the Staff's audit report and the Concentric report. The OPC on the other hand has been caught completely off guard by this and will not be able to make adjustments to its litigation strategy to overcome the harm. It should not be the burden of the OPC or any party or the staff or the Commission to

accommodate FPL's self-serving desire to accomplish this scheme. The burden that is rightfully FPL's to justify its costs would be turned on its head by making the OPC strain its limited resources to conduct two separate hearing tracks with intensive testimony, hearing preparation and brief writing for the proposed accelerated hearing track at the very time discovery and testimony preparation for the non-bifurcated issues are underway. This is patently unfair and should be rejected by the Commission.

Granting FPL's motion would complicate, not make more efficient, the Commission's management of the issues in the cost recovery proceeding. Parties, Staff, and Commission would be required to contend with competing deadlines for discovery, testimony, and hearing preparation.

More importantly, FPL proposes that the Commission set aside the Stipulation for no good reason and effectively cut out nearly 3 crucial months of hearing preparation time on all pivotal milestones in the schedule. Below is FPL's Attachment A with the proposed scheme compared to the 2010 nuclear cost recovery cycle hearing track. The critical events are highlighted in yellow. Not only do the proposed dates cut out significant preparation time, but they also interpose significant Intervenor milestones in critical preparation stages of the remaining issues' hearing track. For example, FPL has proposed that post hearing briefs be due on June 30, 2011 – the Thursday before the July 4<sup>th</sup> holiday – essentially 3 business days after briefs are due under FPL's scheme. If the 2010 track is followed, Intervenor testimony on all issues would be due 3 days after the July 4<sup>th</sup> holiday-- the difference being that absent FPL's proposal, testimony preparation resources by OPC consultants and attorneys would not be diverted during this time. This is but one example of how the FPL scheme would impose an enormous burden on intervenors' limited resources by taxing the same attorneys, analysts and

experts to try to accomplish two concurrent tasks when the established schedule would only require them to be done once.

<b>FPL Bifurcation Request</b>	<b>Event</b>	<b>Estimated 2011 Track based on 2010 Sched.</b>	<b>Diff.</b>
March 1, 2011	FPL files direct case	March 1	70
April 15, 2011	Staff Audit Report	June 24	70
April 29, 2011	Intervenor testimony	July 8	70
May 11, 2011	Staff testimony	July 20	70
May 25, 2011	FPL rebuttal testimony	August 3	70
May 27, 2011	Prehearing Statements	August 3	68
May 27, 2011	Discovery actions complete	August 12	77 <sup>2</sup>
June 3, 2011	Prehearing Conference	August 11	69
June 10, 2011	Prehearing Order	August 20	70
June 15, 2011	Hearings	August 24	70
June 30, 2011	Posthearing briefs	September 10	72
July 21, 2011	Staff Recommendation	September 30	71
August 2011	Agenda Conference	Unknown	NA

FPL has shown no substantive reason why the Commission should grant its motion. Basically, FPL's position is that the Commission should impose the different schedule on parties because FPL wants it. If the EPU prudence issues are material and significant – and OPC agrees they are – imposing the heavy burden of the acceleration on the intervenors and staff while maintaining the response intervals for FPL creates no burden on the company which has had 6 months to prepare its testimony. This would be onerous, unfair and a denial of due

<sup>2</sup> For good measure and its own apparent convenience FPL has proposed to cut out an extra week of Intervenor and staff discovery so that it is not inconvenienced during the Memorial Day weekend.



process to the intervenors. If anything, the solution to any problem putatively raised by the FPL Motion is to allocate more time for hearing in the established nuclear cost recovery hearing cycle, not to overwhelm the intervenors with two concurrent tracks.

***II. The Commission Should Ensure That the Issue of Whether FPL Improperly Withheld Information Is Framed So As To Preclude Claim Of Inadequate Notice.***

As OPC indicated above, the question of whether FPL withheld information that the Commission needed and to which it was entitled when FPL failed to amend or update testimony during the September 2009 hearing was framed for consideration by the evidence and the parties' actions prior to the deferral of "all FPL issues" to the 2011 hearing cycle. FPL is aware of the issue and filed testimony to address it. OPC has been conducting discovery on this aspect of the case. The question of whether FPL withheld information during the 2009 hearing cannot be separated from the rest of the prudence review of the 2009 uprate costs, all of which should take place in accordance with the regular, unmodified schedule for the 2011 hearing cycle. Upon reflection, OPC believes the full articulation of the issue would include:

- A. Did FPL willfully withhold information that the Commission needed to make an informed decision during the September 2009 hearing in Docket No. 090009-EI?
- B. If the answer is yes, does the Commission possess statutory and regulatory authority with which to address FPL's behavior?
- C. In light of the determinations on (a) and (b), what action, if any, should the Commission take?

To avoid any possibility of a claim of misunderstanding or lack of notice, OPC favors adding this articulation of the issue to the matters deferred to the 2011 hearing cycle. In a more typical scenario, when the Commission is presented with a stand-alone issue involving a possible penalty, the Commission would issue an order to show cause to the utility. Citizens submit that is unnecessary in this instance, in which FPL has had actual notice of the issue and

in fact actively defended its position on the question during the proceeding prior to the stipulation and deferral. It is particularly unnecessary in light of the statement of Counsel for FPL, made at the time FPL sought approval of the stipulation, to the effect that the Commission' prehearing process can be used to identify issues associated with the stipulation and deferral:

. . . and for the Commission to consider and decide *based upon issues identified through the Commissions prehearing process.*

See Hearing TR page 1259, quoted on page 4, *supra* (emphasis provided). As part of the prehearing process associated with the stipulation and deferral, and to avoid any possibility of a claim of inadequate notice, OPC provides notice of OPC's intent to add this more complete formulation of the issue. Regardless of the manner that the Commission chooses to incorporate this or similar language during the balance of prehearing procedures, OPC submits the Commission should continue to investigate and evaluate FPL's decision not to apprise the Commission of the higher estimates of completing the uprate projects, as well as the other deferred, FPL – specific issues, during the schedule for the regular 2011 hearing cycle.

*Conclusion*

In conclusion, the OPC urges the Commission to deny FPL's Motion to Bifurcate and ensure that the original intent of the deferral of issues is preserved at the regularly scheduled hearing in the 2011 nuclear cost recovery cycle.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and foregoing **OPC'S RESPONSE IN OPPOSITION TO FPL'S MOTION TO BIFURCATE** has been furnished by electronic mail and U.S. Mail on this 28<sup>th</sup> day of February, 2011, to the following:

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