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Attachments: Joint Response In Opposition To Saporito's Motion To Dismiss.pdf; Joint Response To Saporito's Motion To Dismiss (9-10-12).docx

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 120015 - EI
In re: Petition for rate increase by Florida Power & Light Company

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

d. There are a total of 14 pages

e. The document attached for electronic filing is Joint Response In Opposition To Saporito's Motion to Dismiss.

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida Power & Light Company	Docket No. 120015-EI Filed: September 10, 2012

JOINT RESPONSE IN OPPOSITION TO SAPORITO'S MOTION TO DISMISS

Pursuant to Rule 28-106.204(1), F.A.C., Florida Power & Light Company ("FPL"), the Florida Industrial Power Users Group ("FIPUG"), the South Florida Hospital and Healthcare Association ("SFHHA") and the Federal Executive Agencies ("FEA") (collectively referred to as the "Signatories"), jointly file this Response in Opposition ("Response") to Thomas Saporito's ("Saporito") September 3, 2012 Motion to Dismiss Pursuant to Fed R. Civ. 12(b)(6) and Memorandum of Points and Authorities in Support thereof ("Saporito Motion to Dismiss"), and state as follows:

I. BACKGROUND

1. FPL filed a Petition for Rate Increase ("Petition") on March 19, 2012.

2. On August 15, 2012, the Signatories filed a Joint Motion for Approval of Settlement Agreement ("Joint Motion" and the "Proposed Settlement Agreement," respectively).

3. On September 4, 2012, Saporito filed his Motion to Dismiss.[1]

II. RESPONSE

A. Federal Rule of Civil Procedure 12(b)(6) Does Not Apply to This Commission's Proceedings.

5. The Saporito Motion to Dismiss states that it seeks dismissal under Federal Rule of Civil Procedure 12(b)(6). The Federal Rules of Civil Procedure "govern the procedure in all civil actions and proceedings in the United States district courts, ..." Fed. R. Civ. P. 1. This is

[1] Saporito purported to file and serve the Motion to Dismiss on Monday, September 3, 2012, but that is a legal holiday and hence both filing and service were effected the next day.

not such a proceeding and hence the Saporito Motion to Dismiss seeks dismissal under a rule that has no application herein.

B. The Joint Motion is not Properly Subject to a Motion to Dismiss.

4. The Signatories respectfully submit that it is procedurally impossible for the Commission to act on a motion to dismiss another motion— in this case, the Joint Motion. This fatal procedural defect is underscored by the first two paragraphs of legal argument in the Saporito Motion to Dismiss, wherein Saporito cites the following legal propositions:

> "In deciding a motion to dismiss, courts accept all material allegations in the complaint as true. *** Conclusory allegations of law and unwarranted inferences, however, are insufficient to defeat a motion to dismiss for failure to state a claim. *** [C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim. *** Moreover, dismissal is warranted if the complaint lacks a cognizable legal theory or insufficient facts under a cognizable claim. *** dismissing a complaint challenging a felon disenfranchisement law because of the legal theories raised by the complaint failed as a matter of law."[2]

Saporito Motion to Dismiss at pp. 4-5 (emphasis added). The Joint Motion is not a complaint or petition, and it is not in the nature of such a pleading. It contains no causes of action, but rather requests approval of the Proposed Settlement Agreement in the course of this Commission's consideration of FPL's March 19, 2012 rate petition. As such, the Joint Motion is not properly the subject of a motion to dismiss.

C. There is No Legal Requirement for the Commission to Treat the Settlement Agreement as a New Rate filing.

5. Saporito argues that the Joint Motion is actually a petition for new electric rates under Section 366.06(1), F.S., and as such, FPL failed to comply with applicable rules including the filing of test year notification letter (Rule 25-6.043, F.A.C.) and minimum filing requirements ("MFR") (Rule 35-6.043, F.A.C.). Saporito Motion to Dismiss at p. 6.

[2] Notwithstanding the fact that the standards cited by Saporito have absolutely no application to the Joint Motion, it is telling that none of the cases cited by Saporito derive from a jurisdiction anywhere close to Florida (For example, Saporito cites cases decided by federal courts in the 9th Cir., E.D. Va. and 4th Cir.).

6. Contrary to Saporito's argument, there is no legal requirement, nor would it be proper, for the Commission to treat the Proposed Settlement Agreement as a new request for general rate increase under Chapter 366, F.S. Saporito has not cited, and a diligent search by the Signatories has not uncovered, any Commission precedent supporting the proposition that new provisions in a rate case settlement trigger the legal requirements associated with a new rate request filing.

7. Rather, there is clear precedent that the Commission can and does approve settlement agreements containing new provisions that were not contemplated when the rate proceedings were initiated, without requiring new MFRs or test year letters. For example, in FPL's 1999 and 2005 rate cases, the Commission approved uncontested settlement agreements containing provisions that were not contemplated at the time the proceedings were initiated. *See* Docket No. 990067-EI, Order No. PSC-99-0519-AS-EI (March 17, 1999)[3]; Docket No. 050045-EI, Order No. PSC-05-0902-S-EI (Sept. 14, 2005)[4]. The Commission also approved the contested settlement agreement in FPL's 2002 rate case which included provisions not contemplated at the time that proceeding was initiated. Docket No. 001148-EI, Order No. PSC-02-0501-AS-EI (April 11, 2002).[5] None of the requests for approval of these settlement agreements was treated as a new rate request filing.

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[3] The 1999 rate case stipulation and settlement included a revenue sharing plan that was not contemplated at the time the proceeding was initiated.

[4] The 2005 rate case stipulation and settlement included continuation of a revenue sharing plan similar to the one contained in the 1999 rate case settlement; an option to amortize up to $125 million annually as a credit to depreciation expense and a debit to the bottom line depreciation reserve; clause recovery of incremental costs associated with establishment of a Regional Transmission Organization; suspension of FPL's nuclear decommissioning accrual; and a generation base rate adjustment mechanism. None of those elements was proposed in the original rate petition.

[5] The 2002 FPL rate case stipulation and settlement included continuation of a revenue sharing plan similar to the one contained in the 1999 rate case settlement; an option to amortize up to $125 million annually as a credit to depreciation expense and a debit to the bottom line depreciation reserve; and enhancements to regulated earnings by ceasing the recordation of additional amortization expense as an offset to the ITC interest synchronization adjustment and, withdrawing FPL's request to increase the annual accrual to the Company's Storm Damage Reserve.

D. Saporito's Concern Over the Commission's Procedures for Discovery Concerning the Proposed Settlement Agreement is Entirely Unfounded.

8. Saporito further argues that, to the extent the Joint Motion attempts to introduce "new" issues into Docket No. 120015-EI, "it must fail as a matter of law because all parties have 'due-process' rights to engage in full discovery procedures including the taking of deposition testimony, filing Requests for Interrogatory Responses, and filing Requests for the Production of Documents."[6] Saporito Motion to Dismiss at p. 6.

9. While the Office of Public Counsel ("OPC") is on record stating that formal discovery rights do not apply to the Proposed Settlement Agreement[7], the Second Amended Order on Procedure does provide the right to serve data requests concerning the Proposed Settlement Agreement. Pursuant to that order, each party (including Saporito) is allowed to ask up to 100 data requests, and [i]nformation obtained through data requests may be used by the parties in their oral arguments and by staff in advising the Commission.[8]

E. There is no Requirement That OPC be a Party to the Settlement Agreement

10. Saporito argues that "OPC is not a signatory to the Joint Motion. Therefore, the Joint Motion must fail on this basis alone because the absence of the OPC – as the statutory representative of the Citizens of the State of Florida is sufficient legal basis to warrant dismissal." Saporito Motion to Dismiss at pp. 2, 7. As the sole support for his argument, Saporito cites *South Florida Hospital and Healthcare Association v. Jaber*, 887 So.2d 1210 (Fla. 2004). But nowhere in the *Jaber* decision does the Florida Supreme Court hold that OPC must be a signatory to a settlement. Nor is there any provision in Chapter 350, Florida Statutes,

[6] Although Saporito argues that the Joint Motion "must fail as a matter of law," he cites no law for this proposition.
[7] *See* letter from OPC to Maria Moncada, dated September 4th, 2012, filed in Docket No. 120015-EI.

which establishes and provides for the authority of OPC, that even remotely suggests that OPC is a necessary or indispensable party to a settlement agreement. To the contrary, the Commission has approved a non-unanimous settlement that was not supported or approved by OPC on at least two prior occasions. *In re: Application for rate increase and increase in service availability charges by Southern States Utilities,* Order No. PSC-99-1794-FOF-WS, Docket No. 950495-WS. *See also, In re: Petition for increase in rates by Gulf Power Company*, Docket No. 110138, Order No. PSC-12-0179-FOF-EI (OPC did not participate in portions of settlement approved by Commission).

F. There is no Requirement That All Parties Take Part in Settlement Negotiations

11. Saporito further argues that "in *Jaber*, the Florida Supreme Court held that . . . all parties in the matter must have taken part in the settlement negotiations leading up to the proposed settlement agreement" and therefore that "this Commission should dismiss the Joint Motion as a matter of law" because Saporito was not invited to take part in settlement discussions. Saporito Motion to Dismiss at pp. 2, 7. Again, however, there is nothing in *Jaber* that supports Saporito's argument. Nowhere in that decision did the Florida Supreme Court hold that all parties must have taken part in negotiations leading up to a proposed settlement agreement.

12. In fact, it is not unusual for settlement discussions initially to involve a limited set of parties, with other parties later being offered an opportunity to join in the resulting proposed settlement agreement. All parties in this proceeding, including Saporito, have been offered the opportunity to join or support the Proposed Settlement Agreement. Algenol chose to support it; Saporito has not. He is free to decide whether to join or support the Proposed Settlement Agreement and cannot plausibly argue that he was foreclosed or restricted from doing so.

III. BRIEF RESPONSE TO SAPOROTIO's INACCURATE ASSERTIONS

13. In addition to containing fatal procedural and substantive flaws, the Saporito Motion to Dismiss also includes numerous inaccurate factual assertions concerning the Proposed Settlement Agreement. Those assertions are not, and cannot be, the basis for a motion to dismiss and so the Signatories are under no legal duty to respond to them. However, because Saporito's assertions are so off-base, the Signatories wish to reiterate in response the points made in their Joint Motion as to why the Proposed Settlement is fair, reasonable and in the public interest:

a. The Proposed Settlement Agreement would provide for a reasonable base rate increase in consideration of (i) FPL's overall request, (ii) recent increases for other electric utilities through litigated and settled outcomes (including the Commission's recent decision in the Gulf Power Company rate case and the approved settlement for Progress Energy Florida); and (iii) the depletion of the non-cash accounting (amortization of theoretical depreciation reserve surplus) under the 2010 settlement agreement.

b. The average residential customer using 1,000 kWh per month would see a modest bill increase in 2013 and would continue to benefit from having the lowest typical residential bill in the State. Most business customers would see their bills remain flat or actually decrease in 2013.

c. The Proposed Settlement Agreement would promote economic development in the state of Florida by providing significant base rate reductions and reasonable, competitive rates for many of Florida's businesses that continue to emerge from the recession. The business, commercial and industrial rates resulting from the Proposed Settlement Agreement, coupled with FPL's Commission-approved

Economic Development Rate, provide a catalyst for economic development and job growth in the State of Florida at a critical time for our State's future.

d. FPL remains Florida's largest investor in infrastructure capital projects, and the Proposed Settlement Agreement would provide for a reasonable rate of return on the $7.5 billion in beneficial capital investment that FPL plans to make in Florida over the term of the Proposed Settlement Agreement. Reliable and modern electric infrastructure provides an important economic platform for all businesses in Florida, and FPL's investment creates thousands of jobs in Florida.

e. The Proposed Settlement Agreement would provide regulatory and rate stability, certainty and predictability benefitting FPL's customers over its four-year term.

Moreover, the past few weeks have provided a vivid reminder of the tremendous commitment of time, money and other resources which must be borne by the Commission and all parties in a general rate case. The Proposed Settlement Agreement would provide a mechanism to help avoid such proceedings for FPL over the next four years, a period in which FPL's plans to bring the Canaveral, Riviera and Everglades Modernization Projects into service otherwise could require multiple rate proceedings. The four-year term also protects ratepayers during its term from the risk of investment environments that could require significantly higher costs of capital than that now observable and embodied in the Proposed Settlement Agreement and could produce higher authorized returns on equity if FPL is required to file pancaked rate proceedings to add the capital costs of its Canaveral, Riviera and Everglades Modernization Projects to rate base.

IV. CONCLUSION

14. The Saporito Motion to Dismiss has both procedural and substantive flaws that are fatal. It should be denied, and the Commission should proceed to consider the Proposed Settlement Agreement on September 27 as planned.

WHEREFORE, for the foregoing reasons, Signatories respectfully request that Saporito's Motion to Dismiss be denied.

Respectfully submitted this 10th day of September 2012.

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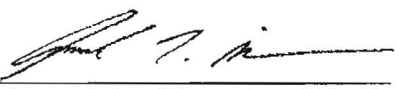
By: 
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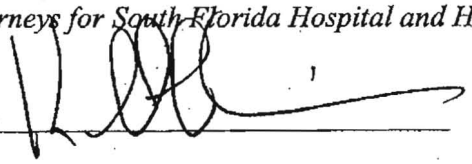
By: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint Response in Opposition to Saporito's Motion to Dismiss has been furnished electronically this 10th day of September 2012, to the following:

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