

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida Power & Light Company	Docket No. 160021-EI
In re: Petition for approval of 2016-2018 storm hardening plan, by Florida Power & Light Company	Docket No. 160061-EI
In re: 2016 depreciation and dismantlement study by Florida Power & Light Company	Docket No. 160062-EI
In re: Petition for limited proceeding to modify and continue incentive mechanism by Florida Power & Light Company	Docket No. 160088-EI
	Filed: September 1, 2016

FLORIDA POWER & LIGHT COMPANY’S RESPONSE IN OPPOSITION TO OPC’S MOTION TO DISMISS FPL’S AMENDED REQUEST FOR CREATION OF A RESERVE AMOUNT AMORTIZATION MECHANISM OR ALTERNATIVELY, MOTION FOR DIRECTED FINAL DECISION THAT FPL HAS FAILED TO PRODUCE ANY EVIDENCE IN SUPPORT OF ITS REQUEST

Florida Power & Light Company hereby opposes OPC’s Motion To Dismiss FPL’s Amended Request for Creation of a Reserve Amount Amortization Mechanism or Alternatively, Motion for Directed Final Decision that FPL has Failed To Produce Any Evidence in Support of its Request (“OPC’s Motion”). OPC’s Motion is premised on demonstrably false assertions. First, and fundamentally, the Motion mischaracterizes as an “amended request” a *position* taken by FPL with regard to a single issue in the case from among the 166 issues to be ruled upon by the Commission. FPL’s position was timely taken, without objection, consistent with the Commission’s Order Establishing Procedure issued March 25, 2016.

OPC’s Motion also incorrectly implies that the only evidence with respect to an FPL position in the case available for review and consideration of the Commission must have been submitted as part of the Company’s direct case. Yet, in a move that directly contradicts this implication, OPC voluntarily and precipitously withdrew the direct testimony of its own witness

Jacob Pous one business day before Mr. Pous was scheduled to take the stand to present his pre-filed testimony. OPC's action was a thinly veiled attempt to ensure that the Commission would have no evidence in the record upon which to reach a decision on Issue 48 that might include the potential disposition of depreciation reserve surplus amounts to defer or avoid future base rate proceedings.

As explained below, the Commission is not limited to evidence submitted in the Company's direct case to decide an issue in the case upon which FPL or any other party has timely taken a position. In any event and as demonstrated below, OPC ignores several pieces of key evidence presented by FPL's witnesses during the Company's direct case, which not only address the existence of a reserve surplus but also would support the use of an amortization mechanism should the Commission determine that doing so would be appropriate for purposes of deferring or avoiding future base rate proceedings. In the face of this record evidence, and for the reasons set forth in this response, OPC's Motion must be denied.

Introduction

1. Examination of FPL's direct case concluded after five full days of testimony lasting more than 50 hours. Thereafter, OPC presented an *ore tenus* motion to dismiss FPL's position on Issue 48, asserting that the Company "amended its request" in order to create and authorize an amortization reserve mechanism. According to OPC, (i) there is no evidence in FPL's direct case that supports the creation of reserve surplus based on the 2016 Depreciation Study, and (ii) to the extent that FPL has "effectively or constructively amended its petition" to ask the Commission to create a Depreciation Reserve Surplus Amortization Mechanism using the depreciation parameters supported in the Depreciation Study or supported in its direct case, there is no evidence supporting such a mechanism or supporting a basis for the Commission to

create such a mechanism. OPC asked the Commission to find and order that FPL has not met its burden.

2. As a threshold matter, OPC misleadingly characterizes FPL's position as an "amended request." The Commission's Order Establishing Procedure permits parties to state their position on each identified issue "by the time of the Prehearing Conference or by such later time as may be permitted by the Prehearing Officer." Order No. PSC-16-0125-PCO-EI, at p. 6. As is typically the case in proceedings before this Commission, numerous parties modified or corrected their positions with regard to certain issues at the time of the Prehearing Conference or with leave of the Prehearing Officer within the day following the Prehearing Conference. Such changes were submitted, received and reflected in the final Prehearing Order issued August 19, 2016.

3. FPL's prehearing statement set forth its position on Issue 46.

ISSUE 46: Based on the application of the depreciation parameters and resulting depreciation rates that the Commission deems appropriate, and a comparison of the theoretical reserves to the book reserves, what are the resulting imbalances?

FPL: Based on the application of depreciation rates and principles previously approved by the Commission, FPL's theoretical reserve imbalances are those identified in the supplemental depreciation schedules as filed in the Second Notice of Identified Adjustments on June 16, 2016, which total \$80.4 million (total system).

Consistent with the Order Establishing Procedure, FPL stated at the Prehearing Conference its amended position on Issue No. 48.

ISSUE 48: What, if any, corrective reserve measures should be taken with respect to the imbalances identified in Issue 46?

FPL: The remaining life technique should be used, *unless another disposition has the ability to defer or avoid future base rate proceedings.* (Italicized language added during prehearing conference).

Neither OPC nor any other party asserted an objection at that time, and FPL's position on Issue 48 was incorporated in the prehearing order. Though an objection following the prehearing conference would have been untimely, FPL notes that in the ten days between prehearing conference and the start of the technical hearing, OPC expressed no objection regarding the position. Instead, OPC waited until August 26 – two full weeks after the prehearing conference and five days into the evidentiary or technical hearing – to articulate its objection. Contrary to OPC's characterization, FPL's timely amended position to an issue that all parties were given the opportunity to address does not constitute an amended request for relief; rather, it simply acknowledges what the Commission has authority to do after a full and fair review of all evidence submitted during the course of the technical hearing.

4. In a related move, intended to prevent the Commission's use of OPC-sponsored testimony to establish a reserve surplus for purposes of reaching a decision with respect to Issue 48, OPC withdrew the testimony of Jacob Pous. While initially expressing some concern over the intended action, ultimately FPL did not object to OPC withdrawing its testimony. FPL even went so far as to incur the time and expense to revise Mr. Ned Allis's testimony by excising the extensive portions of his pre-filed rebuttal testimony that rebutted Mr. Pous.

5. OPC is not entitled through an ill-conceived motion to prevent the Commission from reaching a decision that the Commission otherwise is entitled to make based on evidence in the record, Commission policy and prior Commission orders. FPL's position is supported by evidence reflected in its direct case, and it could also be based on other prepared and oral testimony that will constitute the record in this proceeding, and on Commission precedent upon which all parties and the Commission can rely, irrespective of whether cited in the Company's direct case. The record will not be complete until the close of the proceeding. OPC's motion is

a transparent attempt to curtail the Commission's ability to reach a decision on the full record in this case. Accordingly, OPC's Motion must be denied.

Applicable Legal Standard

6. In a nonjury trial a motion for directed verdict is known as a motion for involuntary dismissal. *Tillman v. Baskin*, 260 So. 2d 509, 510-11 (Fla. 1972). A motion for involuntary dismissal is used during trial primarily to test the sufficiency of the evidence. The fact finder may grant a motion for involuntary dismissal only if the claim is unsupported by any version of the evidence. When making this determination, the trial judge must view all of the facts and factual inferences in a light most favorable to the party *opposing* the motion. In fact, a party who moves for a directed verdict *admits* for the purpose of the motion the evidence presented by the opposing party and also every reasonable and proper conclusion based on those facts. *Wald v. Grainger*, 64 So. 3d 1201 (Fla. 2011).

7. It is reversible error for the fact finder to consider the credibility of the witnesses or the weight of the evidence in ruling on a motion for involuntary dismissal. *Miami Purveyors, Inc. v. Forte*, 407 So. 2d 330, 332 (Fla. 3d DCA 1981) (“[T]o apply a harmless error test to the absolute rule laid down in *Tillman v. Baskin, supra*, that a trial judge cannot weigh evidence when ruling on a [motion for involuntary dismissal], would effectively abrogate the rule.”). If the evidence presented in the petitioner's case-in-chief supports a prima facie claim, then a motion for involuntary dismissal must be denied. *Wygodny v. K-Site 600 Associates*, 644 So. 2d 579, 581 (Fla. 3d DCA 1994).

8. Research has revealed no provision of the Administrative Procedure Act or rule in the Florida Administrative Code that extends the mechanisms of either directed verdicts or involuntary dismissals to administrative proceedings or PSC proceedings. Further, research has uncovered no instance in which the Commission dismissed a party's position on a discrete issue

in a rate case involving more than 150 issues. To the extent the Commission wishes to entertain the merits of OPC's Motion, however, the discussion below demonstrates that the evidence in the record supports FPL's position on Issue 48, exclusive of the legion of FPSC precedent that addresses the Commission's discretion to determine how a utility may treat a theoretical reserve imbalance.

FPL Established a Prima Facie Case in Support of Issue 48

9. FPL's case-in-chief establishes, at the very least, a prima facie case in support of its position on Issue 48. Indeed, the facts necessary to defeat an involuntary dismissal are set forth on the face of OPC's Motion.

10. First, the evidence indicates that FPL's depreciation study using 2016 year-end balances has a positive theoretical depreciation reserve imbalance:

Q. (OPC, C. Rehwinkel) And in the second notice of identified adjustments, the depreciation expense results of the study were shown based on plant balances as of 12/31/2016, is that correct?

A. (FPL, K. Ferguson) Yes, that is correct.

Q. Okay. And as a result of those revisions, the company, on page 62 of 91 of the second notice of identified adjustments, presents a theoretical reserve imbalance of \$80.4 million, is that correct?

A. Yes, \$80.4 million positive --

Q. Okay.

A. -- reserve imbalance.

(Hearing Tr., Vol. 15, 1787:10-21). *See also* OPC's Mot. at ¶ 3; Exhibit 113 (NWA-1), pages 101-116 (shows theoretical reserve positions for each account and by function).

11. The evidence in FPL's direct case also supports the disposition of the reserve surplus in a manner other than the remaining life method in order to defer or avoid future base rate proceedings:

Q. (OPC, Rehwinkel) If the Public Service Commission happens to develop a record basis that you have a positive balance in amortization reserve, you would agree that the Commission has the discretion to direct that that balance be used to benefit customers, correct?

A. (FPL, Barrett) I would agree that that balance is at the Commission's discretion as to how to dispose of it, whether it be through normal depreciation over the life of assets or some other method that the Commission chooses.

(Tr. Vol. 12, 1478: 14-23)

Q. (OPC, Rehwinkel) Okay. But can you tell me whether the dismantlement study assumed any remaining portion of the dismantlement portion of the amortization reserve in the presentation of that study?

* * *

A. (OPC, Barrett) You did raise an interesting point, though, that if there were some left over, what could the Commission choose to do with it? There are a number of things they could choose to do with it, including continuing a mechanism like we have under this current settlement agreement.

(Tr. Vol. 12, 1479:20-1480:9)

Q. You have not made -- there is no testimony --there is nothing in your testimony, or any other witness in FPL's direct case, that asks for continuation of the mechanism that we have been discussing for the last 10 minutes, is there?

A. That's correct. And if I could explain --

* * *

The proposal -- the four-year proposal that we have before the Commission has, as its predicate, that we are awarded everything that is in our filing. There may be circumstances where, as you alluded to earlier, we don't get awarded everything in the filing. **And one of the mechanisms that may be at the Commission's disposal is to allow another mechanism like this that has worked so well for us to, likewise, make a commitment to stay out for four years.**

(Tr. Vol. 12, 1482:19-1483:21); *see also* (Vol. 14, 1619:3-10; 1620:6-15); and OPC Mot. ¶ 5.

12. This evidence presented in FPL's case-in-chief establishes a prima facie case in support of FPL's position on Issue 48. That is, viewed in the light most favorable to the Company, FPL has a positive theoretical reserve imbalance (surplus) in the amount of \$80.4 million, and the Commission has the discretion to authorize FPL to flexibly amortize the surplus as a mechanism that could allow FPL to avoid rate cases through 2020. Moreover, the record that has developed following the closing of FPL's direct case contains substantial additional support for such a mechanism and, as discussed above, the Commission is entitled to rely upon that information as well in reaching its decision in this proceeding. Accordingly, OPC's Motion must be denied.

WHEREFORE, for the reasons stated above, FPL requests that the Commission deny OPC's Motion To Dismiss FPL's Amended Request for Creation of a Reserve Amount Amortization Mechanism or Alternatively, Motion for Directed Final Decision that FPL has Failed To Produce Any Evidence in Support of its Request.

Respectfully submitted this 1st day of September 2015.

R. Wade Litchfield, Esq.
Vice President and General Counsel
John T. Butler, Esq.
Assistant General Counsel-Regulatory
Maria J. Moncada, Esq.
Senior Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
Telephone: (561) 304-5795
Facsimile: (561) 691-7135

By: s/ Maria J. Moncada

Maria J. Moncada
Fla. Bar No. 0773301

CERTIFICATE OF SERVICE

Docket Nos. 160021-EI, 160061-EI, 160062-EI and 160088-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 1st day of September 2016 to the following:

Suzanne Brownless
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-1400
sbrownle@psc.state.fl.us
**Office of the General Counsel
Florida Public Service Commission**

Jon C. Moyle, Jr.
Karen A. Putnal
Moyle Law Firm, PA
118 North Gadsden Street
Tallahassee, FL 32301
jmoyle@moylelaw.com
kputnal@moylelaw.com
**Attorneys for Florida Industrial
Power Users Group**

Kenneth L. Wiseman
Mark F. Sundback
William M. Rappolt
Kevin C. Siqveland
Andrews Kurth LLP
1350 I Street NW, Suite 1100
Washington, D.C. 20005
kwiseman@andrewskurth.com
msundback@andrewskurth.com
wrappolt@andrewskurth.com
ksiqveland@andrewskurth.com
**Attorneys for South Florida Hospital
and Healthcare Association**

J. R. Kelly, Public Counsel
Patricia A. Christensen, Lead Counsel
Charles J. Rehwinkel
Erik Sayler
Tricia Merchant
Stephanie Morse
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
Kelly.jr@leg.state.fl.us
Christensen.Patty@leg.state.fl.us
Rehwinkel.Charles@leg.state.fl.us
sayler.erik@leg.state.fl.us
merchant.tricia@leg.state.fl.us
morse.stephanie@leg.state.fl.us
**Attorneys for the Citizens
of the State of Florida**

Stephanie U. Roberts
Spilman Thomas & Battle, PLLC
110 Oakwood Drive, Suite 500
Winston-Salem, NC 27103
sroberts@spilmanlaw.com

Derrick P. Williamson
Spilman Thomas & Battle, PLLC
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com
**Attorneys for Wal-Mart Stores East, LP and
Sam's East, Inc. (Walmart)**

Federal Executive Agencies
Thomas A. Jernigan
AFCEC/JA-ULFSC
139 Barnes Drive, Suite 1
Tyndall Air Force Base, FL 32403
Thomas.Jernigan.3@us.af.mil
**Attorney for the Federal Executive
Agencies**

Robert Scheffel Wright
John T. Lavia, III
Gardner, Bist, Bowden, Bush, Dee, LaVia
& Wright, P.A.
1300 Thomaswood Drive
Tallahassee, FL 32308
schef@gbwlegal.com
jlavia@gbwlegal.com
**Attorneys for the Florida Retail
Federation**

Nathan A. Skop, Esq.
420 NW 50th Blvd.
Gainesville, FL 32607
n_skop@hotmail.com
**Attorney for Daniel R. Larson and
Alexandria Larson**

Jack McRay, Advocacy Manager
AARP Florida
200 W. College Ave., #304
Tallahassee, FL 32301
jmcray@aarp.org

John B. Coffman
John B. Coffman, LLC
871 Tuxedo Blvd.
St. Louis, MO 63119-2044
john@johncoffman.net
Attorney for AARP

Diana A. Csank
Staff Attorney
Sierra Club
50 F St. NW, 8th Floor
Washington, DC 20001
diana.csank@sierraclub.org
Attorney for Sierra Club

By: s/ Maria J. Moncada
Maria J. Moncada
Fla. Bar No. 773301