STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

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JACK SHREVE
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February 16, 1999

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Petition by the Citizens of the State of Florida to Have the Florida Public Service Commission Conduct a Full Revenue Requirements Rate Case and Establish Reasonable Base Rates and Charges for Florida Power & Light Company; Docket No. 990067-EI

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of the Citizens' Response In Opposition To Florida Power & Light Company's Motion To Dismiss for filing in your office.

Also enclosed is a 3.5 inch diskette containing the Response in WordPerfect for Windows 6.1. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

Roger Howe
Deputy Public Counsel

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for a full revenue requirements rate case for Florida Power & Light Company.

Docket No.: 990067-EI
Filed: February 16, 1999

RESPONSE IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Rule 28-106.204(1), Florida Administrative Code, respond in opposition to the motion to dismiss filed by Florida Power & Light Company on February 9, 1999. The motion should be denied for the following reasons:

1. The petition filed by the Citizens on January 20, 1999, set in motion the traditional procedures used to evaluate the reasonableness of an electric utility's current rates and, if appropriate, establish new rates and charges on a going-forward basis. Without contesting this overall statutory process, FPL has taken the position that two subparts, i.e. the capturing of excess revenues subject to refund under interim-rate procedures and the filing of MFR's, should be inapplicable to it, the former because it has a "Plan" in place, and the latter because the MFR rule purportedly is inapplicable under the circumstances. FPL's arguments should be rejected as inconsistent with, and inimical to, the Commission's statutory responsibilities to set fair, just and reasonable rates and charges for electric utilities under its jurisdiction.

2. The current Plan was approved by Order No. PSC-98-0027-FOF-EI in Docket No. 970410-EI for calendar years 1998 and 1999. FPL's motion suggests the Plan is immutable in terms of expenses the company could record in 1998, thus precluding an interim rate decrease in

this rate case. But if the Plan was really carved in stone, it could not be altered in any fashion; additional accruals as defined in the Plan would have to be recorded until the Plan expired by its own terms. The Commission staff, however, initiated a separate docket, Docket No. 981390-EI, to investigate FPL's ROE and equity ratio in the midst of the current plan. FPL responded in that new docket with a unilateral proposal, which the Commission accepted, offering a new plan with a new ROE midpoint, a new fixed, minimal amount of write-offs, and a new term, through the end of the year 2000.[1] FPL, through its actions, has acknowledged the Plan can be superseded at any time.

3. The Plan and its predecessors lacked attributes of permanence from the beginning. Although the amount of write-offs under the Plan was determined by resort to a banded revenue forecast, it was excess earnings which would otherwise have been returned to customers after a rate case which made the write-offs possible. The write-offs, in turn, increased the level of overearnings (calculated without regard to the write-offs) by reducing the company's investment base. The resulting spiral of overearnings was further exacerbated by FPL's customer growth. A rate case was inevitable. Having arrived at this predictable ending point, however, FPL wants to hold the Plan up as a shield to protect its cash flow a little longer even as it concedes, albeit without saying so directly, that the Plan cannot stop the rate case. But if a final order in this docket establishing new base rates and charges can stop accruals under the Plan, then clearly all attributes of the process by which base rates are set, including the provision for interim rates, must control over the transient terms of the Plan.

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[1]Several parties protested the Commission's proposed agency action order. Subsequently FPL withdrew its offer, which was accepted at the February 16, 1999, agenda conference.

4. In their petition, the Citizens asked for an interim rate decrease measured by FPL's earnings above a 13% ROE, the ceiling of the currently allowed ROE range, calculated without regard to additional expenses booked under the current Plan. FPL has not disputed this approach as an appropriate measure of interim rates; its opposition is based solely on legal arguments addressing concepts of retroactive ratemaking and administrative finality.

5. Subparagraph 366.071(5)(b)1, Florida Statutes (1997), requires that the achieved rate of return for interim purposes be based on the most recent 12-month period using appropriate adjustments consistent with those used in FPL's last rate case. Accounting entries made pursuant to the Plan, however, were necessarily inconsistent with the last rate case: If the additional depreciation and amortization allowed under the Plan had been consistent with the last rate case, there would have been no need for the Plan in the first place. Adjustments under the Plan, therefore, must be excluded in calculating the company's achieved rate of return for interim purposes.

6. FPL claims an interim rate decrease in its case would constitute retroactive ratemaking, citing to City of Miami v. Florida Public Service Commission, 208 So. 2d 249 (Fla. 1968). That case stands generally for the proposition that the Commission can only set prospective rates "to be thereafter charged," but as the Florida Supreme Court explained in Southern Bell Telephone & Telegraph Co. v. Bevis, 279 So. 2d 285, 286-87 (Fla. 1973), the Commission does not engage in retroactive ratemaking when it establishes interim rates subject to a later determination of reasonableness:

> In City of Miami v. Florida Public Service Commission, 208 So.2d 249 (Fla. 1968), we determined that the Commission could not make a retroactive utility rate reduction, but we never held the Commission powerless to make interim

> increases contingent on the outcome of a full hearing, and thus refundable if the full hearing discloses that the interim increase was improvidently granted.

The authority to set interim rates was later found to exist within the range of alternatives available to the Commission under the file-and-suspend statutes which were enacted in 1974. See Citizens of Florida v. Mayo, 333 So. 2d 1, 6 n. 12 (Fla. 1976) ("The Legislature has now addressed itself to the subject of interim rate relief, consistent with our views in Southern Bell it so happens, so that reliance on judicial intervention into this aspect of rate regulation is no longer justified.") The Commission's authority to order an interim rate decrease (i.e., to order a portion of existing base rate revenues held subject to refund with interest pending the outcome of hearings) was upheld in United Telephone Co. v. Mann, 403 So. 2d 962 (Fla. 1981). In that opinion, the Court, at 403 So. 2d 966, addressed both the City of Miami and Southern Bell decisions and the manner in which the later case limited the holding in the earlier decision:

> In [the Southern Bell] case we stated that if a company showed that its rate of return was below the minimum previously authorized by the commission, it made a prima facie case for approval of an interim increase. We also stated that if the commission was in doubt as to the propriety of the rate of return, it could grant the interim increase contingent upon the outcome of the full hearing and require the company to refund any part of the interim increase which was later found to be improper. We specifically stated that our decision in City of Miami was never meant to preclude the commission from making interim increases contingent on the outcome of a full hearing. By the same token that decision does not preclude the commission from making interim decreases contingent upon the outcome of a full hearing. [Emphasis added.]

As long as the Commission puts the company on notice by attaching a refund-with-interest condition to a quantifiable amount of revenues, the proscription against retroactive ratemaking will neither be implicated nor violated.

7. The ability to set interim rates also means the doctrine of administrative finality must be inapplicable to the ratesetting process. The Court could not have reached the decision it did in United Telephone Co. v. Mann if the finality of a previous Commission order precluded consideration of interim rates in a later case. Interim rates established on a conditional basis pending the outcome of final hearings necessarily supersede prior orders.

8. The need for new rates is triggered whenever changed circumstances since the last rate case cause previously justified rates to become either inadequate of excessive. The court, in Florida Power & Light Co. v. Beard, 626 So. 2d 660, 662 (Fla. 1993), the case cited by FPL at page 3 of its motion, noted that "this Court has recognized exceptions to the doctrine of administrative finality based on a significant change of circumstances or a demonstrated public interest. [Citations omitted.]" Changed circumstances will always allow the Commission to revisit prior rate decisions, find existing rates and charges no longer reasonable, and set new ones for an indefinite term until new changed circumstances start the process all over again. Interim rates are just one component of this process.

9. The Florida Supreme Court outlined circumstances that would warrant the Commission revisiting a prior decision in Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966):

> [T]he commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public. However, this power may only be exercised after proper notice and hearing, and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified.

This procedure describes what the Commission does each time it sets rates for the future. New orders supplant old orders whenever changed circumstances are considered and found to dictate a different result. See Reedy Creek Utilities v. Florida Public Service Commission, 418 So. 2d 249, 250 (Fla. 1982) ("The power of the Commission to modify its orders is inherent by reason of the nature of the agency and the functions it is empowered to perform. This inherent authority to modify is not without limitation.") Elaborating on its decision in United Telephone, the court, in Citizens v. Public Service Commission, 425 So.2d 534, 540 (Fla. 1982), said:

> The statutory standard imposed upon the Commission is to fix 'fair, just and reasonable rates.' §§ 366.06(2), 366.05(1), Florida Statutes (1979). This Court has consistently recognized the broad legislative grant of authority which these statutes confer and the considerable license the Commission enjoys as a result of this delegation.

The doctrine of administrative finality has never been raised as a barrier to the Commission's quasi-legislative ratemaking functions.

10. FPL's objections to the request for a full set of MFR's is somewhat perplexing. Nothing less than a "full set" of MFR's is sufficient to process a full revenue requirements rate case for the largest electric utility in the state. The Commission, on its own motion, is certainly empowered to order FPL to file MFR's, notwithstanding the language of Rule 25-6.043 which might be construed as directed only to an electric utility which initiates a rate case. The Citizens' petition merely asks the Commission to exercise its authority at the request of an interested and adversely affected party. An order granting the Citizens' request would not be a rule, as FPL alleges, because it would not be a statement of general applicability directed to all electric utilities. To the contrary, it would be directed to FPL, alone, in the particular circumstances outlined in the petition.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, urge the Florida Public Service Commission to deny Florida Power & Light Company's motion to dismiss.

Respectfully submitted,

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Attorneys for the Citizens
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS has been furnished by hand-delivery* or U.S. Mail to the following parties this 16th day of February, 1999:

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