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**Attachments:** City's reply to FPL's response to motion to dismiss.pdf

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Docket Nos.: 080677-EI and 090130-EI

In Re: Petition for increase in rates by Florida Power & Light Company  
In Re: 2009 depreciation and dismantlement study by Florida Power & Light Company

Party: City of South Daytona

No. of Pages: 6

Name of Document: City of South Daytona's Reply to Florida Power & Light Company's Response to Motion to Dismiss

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for increase in rates by )  
Florida Power & Light Company )  
 )  
In Re: 2009 depreciation and dismantlement )  
study by Florida Power & Light Company )  
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DOCKET NO.: 080677-EI

DOCKET NO.: 090130-EI

Filed: July 17, 2009

**CITY OF SOUTH DAYTONA'S REPLY TO  
FLORIDA POWER & LIGHT COMPANY'S RESPONSE TO  
MOTION TO DISMISS**

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The City of South Daytona ("City"), by and through its undersigned counsel, files this Reply to Florida Power & Light Company's ("FPL") Response to the City's motion to dismiss, and states as follows:

1. FPL basically makes three arguments in opposition to the City's motion to dismiss. FPL argues that:

(1) a party's alleged non-compliance with a Public Service Commission ("Commission") procedural rule permits the Commission to act in a manner not authorized by Florida law;

(2) the Supreme Court opinion in Southern Bell Telephone and Telegraph Company v. Florida Public Service, Commission, 443 So.2d 92 (Fla. 1983) authorizes the Commission to establish new FPL rates based upon speculative costs and investments which FPL alleges it will experience more than two years after hearings in this matter are concluded; and

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(3) prior Commission actions not authorized by Florida law permit the Commission to act contrary to Florida law in this proceeding. None of FPL's arguments have merit.

2. A Commission procedural rule does not trump the clear absence of statutory authority for the Commission to provide rate relief based on projected costs and investments more than two years into the future. The City has clarified for the Commission that it does not possess statutory authority to grant FPL's request. Without such authority, it does not matter when a party raises this issue of law, or whether the Commission raises the issue itself. The timing of a motion or Commission action dismissing FPL's petition upon recognition that there is no statutory authority for the Commission to grant the relief requested by FPL is irrelevant.

3. The Commission has entertained motions to dismiss, and dismissed petitions for rate relief, after the expiration of ten (10) days from the filing of a petition in various rate proceedings. See, for example, Order No. 24715 in Docket No. 900329-WS issued June 26, 1991, also at 91 FPSC 6:509 and 1991 Fla. PUC Lexis 1017; see also Docket No. 060368; Docket No. 950495.

4. The events recited by FPL which occurred after FPL's filing of the request that the Commission unlawfully set rates based on FPL's pure speculation as to costs and investments which allegedly will be experienced more than two years after evidentiary hearings would be concluded in this proceeding also provide no support for denying South Daytona's motion. FPL's Response clearly establishes FPL's knowledge that the Commission has not approved FPL's request for projected test years two years and more into the future. FPL quotes Chairman Carter's letter to FPL which states "approval of the test year is interim in nature and will be an issue subject to deliberation during the evidentiary proceeding."

5. Clearly, the Commission can reject FPL's request for such a speculative basis for setting rates after evidentiary hearings have been concluded. Surely, no prejudice can be worked upon FPL or other parties to this proceeding if the Commission recognizes that it does not possess statutory authority to grant FPL's request now, before the waste of all parties' time, effort and money on further discovery, hearings and post-hearing activities, including likely appeals.

6. FPL suggests that the Commission may act unlawfully by setting rates based on speculative costs and investments more than two years from now because the Commission may have acted in this unlawful manner in the past. A person who robs a bank five times, but is apprehended on the 6th attempt while holding a gun to the bank teller's head, is not innocent because he got away with his unlawful acts five times previously.

7. FPL relies upon the Florida Supreme Court's opinion in Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, 443 So.2d 92 (Fla. 1983), as support for FPL's request to set rates based on costs and investments allegedly to be made more than two years after evidentiary hearings in this proceeding are concluded. Southern Bell involved a "projected test year" which included three months of historic information. 443 So.2d at 92. It is likely that most, if not all, of the nine months of cost and investment projections in that proceeding were historic before the proceeding was concluded. This is virtually the identical situation in Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982), which is so easily distinguishable from the current FPL petition (as discussed in the City's Motion to Dismiss).

8. Moreover, Southern Bell provides further support for the City's Motion in that the Supreme Court upheld the Commission's refusal to use an end of test year rate base to set Southern Bell's rates. 443 So.2d at 98. If the Commission can refuse to use an end of test year rate base in a proceeding when the projected test year (or most of the projected test year) has

become “historic” by the time evidentiary hearings are completed, surely the Commission can dismiss a utility’s petition requesting rate base and operating costs be recovered in rates for a projected period more than two years after the conclusion of a hearing.

9. FPL stock has risen from \$33.81 on October 10, 2008 to \$56.98 on July 16, 2009 (nearly a 70% increase in 9 short months, see “FP&L’s Bid to Build Nuclear Reactors Made Public,” South Florida Business Journal, July 17, 2009). FPL has requested rates which will enable FPL to earn up to a 13.5% return for the same shareholders who have enjoyed this amazing stock appreciation. At the same time, Floridians are unemployed in record numbers, Florida ranks among the top states in mortgage foreclosures, and Florida’s schools and universities, many of which do not have the funds to pay their current bills from FPL, are removing phones from professors’ offices.

For all of the foregoing reasons, the Commission must dismiss FPL’s petition to allow it to charge current customers rates today based on costs and investments which FPL alleges it will make years into the future.

Respectfully Submitted,

s/ Brian P. Armstrong

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic and U.S. Mail to the service list below, on this 17th day of July, 2009.

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