BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season that exceed storm reserve balance, by Florida Power & Light Company.	)	Docket No: 041291-EI
	)	Filed: November 24, 2004

FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO JOINT MOTION TO DISMISS OF OFFICE OF PUBLIC COUNSEL AND FIPUG

NOW, BEFORE THIS COMMISSION, through undersigned counsel, comes Florida Power & Light Company ("FPL" or the "Company"), and pursuant to Rule 28-106.204(1), Florida Administrative Code, files this Response in Opposition to the Joint Motion to Dismiss of the Office of Public Counsel ("OPC") and the Florida Industrial Power Users Group ("FIPUG") (the "Joint Motion"), and in support states:

Introduction

1. On November 4, 2004, FPL petitioned the Florida Public Service Commission ("PSC" or the "Commission") for authority to recover the expected $354 million (jurisdictional)[1] deficit in FPL's Storm Reserve (sometimes referred to as "Storm Damage Reserve"), which exists after an unprecedented 2004 storm season during which three hurricanes struck FPL's service territory over an approximately six-week span between mid-August and late September, resulting in power outages to millions of FPL customers. In undertaking the largest electric service restoration efforts in a single storm season in the history of the United States, and having

[1] FPL expects a system-wide deficit of $356 million, an expected $354 million of which is PSC jurisdictional.

safely and expeditiously restored power to millions of customers, FPL has incurred extraordinary storm-related costs of approximately $710 million, net of insurance proceeds – or more than double the amount of its Storm Reserve.[2] Now, OPC and FIPUG (sometimes referred to herein as "Joint Movants") seek to dismiss FPL's Petition through their Joint Motion to Dismiss filed November 17, 2004. As noted in FPL's Petition to Implement Storm Surcharge Subject to Refund (the "Petition"), filed November 19, 2004, without approval of the Petition, the 2005 hurricane season will be upon us and FPL will remain in the untenable position of having spent hundreds of millions in excess of its Storm Reserve without having recovered the first dollar, and facing yet another potentially destructive storm season, -- a prospect that is in neither the Company's nor its customers' interests, and which would result in poor public policy.

2. OPC and FIPUG moved to dismiss FPL's Petition on grounds FPL failed to allege how the $354 million (jurisdictional) deficit in its Storm Reserve would impact its earnings or achieved rate of return. Joint Movants' Motion fails as a matter of law. The Joint Motion is inconsistent with the Stipulation and Settlement ("Stipulation and Settlement") that was executed by both parties to the Joint Motion, FPL and all but one party to Docket No. 001148-EI, and was approved by the Commission in Order No. PSC-02-0501-AS-EI, issued April 11, 2002. Joint Movants are fully aware that the Stipulation and Settlement establishes a regulatory mechanism that constitutes the "appropriate and exclusive mechanism to address earnings levels"[3] and

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[2] FPL proposes to initiate recovery of the estimated deficit through a monthly surcharge to apply to customer bills based on a recovery period of twenty-four months (or such shorter time as may be needed to recover the applicable revenue requirements) commencing January 1, 2005. The impact to the average residential customer bill (1,000 kWh per month) is expected to be $2.09 per month over the recovery period.

[3] See Order No. PSC-02-0501-AS-EI, Docket No. 020001-EI (issued April 11, 2002), Stipulation and Settlement, at ¶ 3.

expressly contemplates that FPL would have the opportunity to recover expenditures incurred in the event of an extraordinary storm season. Paragraph 13 of the Stipulation and Settlement states in pertinent part:

> In the event there are insufficient funds in the Storm Damage Reserve and through insurance, FPL may petition the FPSC for recovery of prudently incurred costs not recovered from those sources.

See Order No. PSC-02-0501-AS-EI, Docket No. 020001-EI (issued April 11, 2002), Stipulation and Settlement, at ¶ 13 (emphasis added).

3. Because the Stipulation and Settlement is entering the final year of an approximate three year and eight month term, Joint Movants and their constituents have realized most of the benefits they negotiated to receive under the agreement. Specifically, to date, Joint Movants and the customers they represent have received total rate reductions and refunds in excess of $ 2.5 billion as a result of the Stipulation and Settlement and its 1999 predecessor agreement. Now, late in the term of the Stipulation and Settlement, and having collected most of their benefits, the Joint Motion aims to have the Company forego provisions that were to protect FPL in the event of an extraordinary storm season. The Joint Motion puts the Commission in the unfair position of having to enforce the Joint Movants' own Stipulation and Settlement against them. Their position is contrary to the plain language and intent of the Stipulation and Settlement.

4. Further, putting aside that the $354 million (jurisdictional) costs FPL incurred in excess of its storm reserve represents roughly one-half of FPL's annual net income,[4] a fact of which Joint Movants cannot be ignorant, Joint Movants' argument is based on an erroneous

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[4] As reported in FPL's 2003 Form 10-K, the utility's net income for 2003 was $755 million.

conclusion that the only instance in which relief from extraordinary storm expenses can be granted by the Commission is upon a showing by the utility that it would earn below its authorized rate of return on equity. In support of their assertion, Joint Movants rely exclusively upon a 1993 Commission decision that addressed the Company's post-Hurricane Andrew request to establish a dollar-for-dollar cost recovery clause to operate prospectively for all storm events, --not at all the instant situation. Rather, FPL is responding as intended within the Commission-established regulatory framework to an unprecedented 2004 storm season that resulted in hundreds of millions in expenditures beyond the amount in its storm reserve.

5. Any doubt as to whether FPL's request is proper is clearly resolved in the affirmative by reference to the explicit terms of the Stipulation and Settlement. The terms of the Stipulation and Settlement provide that earnings levels will be addressed specifically through the revenue-sharing mechanism, and expressly contemplate that FPL could seek relief from the Commission in the event of extraordinary storm damage during the period of the Stipulation and Settlement. Moreover, approval of the surcharge sought by FPL is consistent with Commission precedent. The Joint Motion should be denied as a matter of law because FPL's Petition states a cause of action upon which the Commission can and should grant relief.

Legal Standard

6. A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action upon which relief may be granted. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving parties must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. See id. at 350. In determining the sufficiency of the petitions, the Commission should confine its consideration to

the petitions and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). All material allegations should be construed against the parties moving to dismiss the petition. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2d DCA 1960).

Argument

7. FPL respectfully requests that the Commission deny the Joint Motion as a matter of law because: (a) it is inconsistent with the Stipulation and Settlement approved by the Commission in Order No. PSC 02-0501-AS-EI, issued April 11, 2002, in Docket No. 001148-EI, In Re: Review of the retail rates of Florida Power & Light Company; and (b) it is based on an incorrect premise that the Commission can grant recovery of storm losses only upon a showing that the utility will not achieve its authorized rate of return. Taking all facts contained in FPL's Petition as true, Joint Movants have not met the standard for a Motion to Dismiss.

I. Joint Movants' proposed earnings test is inconsistent with the Stipulation and Settlement approved by the Commission in Docket No. 001148-EI

8. Joint Movants' argument that earnings must be considered for the Commission to rule on FPL's proposed surcharge is inconsistent with the Stipulation and Settlement and puts the Commission in the unfortunate position of having to enforce an agreement to which FIPUG and OPC are signatories. FPL's Petition and the Joint Motion cannot be decided without regard to the Stipulation and Settlement approved by the Commission by Order No. PSC-02-0501-AS-EI, Docket Nos. 001148-EI and 020001-EI (issued April 11, 2002), which has the force of law. Docket No. 001148-EI, opened August 15, 2000, involved Commission review of FPL's retail rates and the level of its earnings. FPL and OPC negotiated, and all parties to the docket except the South Florida Hospital and Healthcare Association, including FIPUG, signed the Stipulation and Settlement to be effective for the period April 15, 2002, through December 31, 2005. All

signatories then presented and recommended it to the Commission for approval. As a result of the negotiations, and as reflected in the Order and the Stipulation and Settlement, FPL agreed to a base rate reduction of $250 million annually and sharing of revenues with its customers in the form of a refund when revenues reached a specified threshold. See Stipulation at ¶¶ 2, 6-7.

9. In exchange for FPL's agreement to reduce base rates annually and share revenues above a certain threshold, FIPUG, OPC and the other parties to the Stipulation and Settlement agreed that FPL would "no longer have an authorized Return on Equity (ROE) range for the purpose of addressing earnings levels." See Stipulation at ¶ 3. "[T]he revenue mechanism herein described will be the appropriate and exclusive mechanism to address earnings levels." See id. (emphasis added). Regarding the Storm Reserve, the parties, including OPC and FIPUG, specifically agreed as follows:

> In the event there are insufficient funds in the Storm Damage Reserve and through insurance, FPL may petition the FPSC for recovery of prudently incurred costs not recovered from those sources. The fact that insufficient funds have been accumulated in the Storm Damage Reserve to cover costs associated with a storm event or events shall not be evidence of imprudence or the basis of a disallowance. Parties to this Stipulation and Settlement are not precluded from participating in such a proceeding.

See Stipulation at ¶ 13 (emphasis added). All parties confirmed that:

> No party to this Stipulation and Settlement will request, support, or seek to impose a change in the application of any provision hereof.

See Stipulation at ¶ 5 (emphasis added). The Commission found that "the Stipulation and Settlement is in the best interests of FPL's ratepayers, the parties, and FPL, and is therefore approved." See Docket No. 001148-EI, Order No. PSC-02-0501-AS-EI, at 5 (issued April 11, 2002) (sometimes referred to herein as "Order No. 02-0501"). FPL's Petition for authority to recover the prudently incurred storm restoration costs related to the 2004 storm season that

exceed the Storm Reserve balance is expressly permitted by paragraph 13 of the Stipulation and Settlement.

10. During the March 22, 2002, Special Agenda Conference where the Commission considered the Stipulation and Settlement, the following exchange occurred between Commissioners and Mr. Paul Evanson, the President of FPL at that time:

> Commissioner Baez: ... [I]s Section 13 creating a right of recovery that didn't exist before? ... [I]s the agreement offering you the ability to come back and, [] recover prudently incurred costs in excess of whatever the storm reserve was that didn't exist before?
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> Mr. Evanson: ... Well, no, it doesn't change, I think, what was there before. Actually, what makes the most economic sense, and I think what we came in and requested some time ago from the Commission after Hurricane Andrew was, was an agreement or a rule from the Commission that to the extent that there were losses, significant losses from the storm, that we would have the ability to recover them via a clause over a three-to-five year period. ... But the Commission at that time said that that logic made a lot of sense and, to the extent you are short, why don't you come in and we'll talk about it then? And I think what this is doing is continuing that same logic. So there's not a change in my mind in the substance of where we were before that provision.
> ...
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> Commissioner Bradley: [S]o then the Commission should assume then that you have sufficient funds to cover a catastrophic event at this time in this particular reserve fund?
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> Mr. Evanson: No. [W]e have what we think is adequate for most occurrences. But I could tell you surely if a storm like Hurricane Andrew hit Miami and came right up the east coast through Palm Beach, there would not be nearly enough assets in that fund in insurance and it would be a significant impact to the company, and there's no doubt I would be here before you asking for some kind of special relief on it because you could be talking about billions of dollars in that case.

See Tr. Special Agenda Conference, Friday March 22, 2002, at 41-42. While FPL did not experience a Category 5 storm or billions of dollars in damage, it did experience the debilitative effect of multiple hurricanes striking FPL's service territory over the course of a very brief

period – affecting every single county served by FPL and causing power outages to millions of FPL's customers. FPL safely and expeditiously restored power to its customers, and now it is entitled to seek recovery of prudently incurred costs associated with restoration as allowed by Commission precedent and expressly contemplated by the Stipulation and Settlement.

11. Now, contrary to the Stipulation and Settlement, the Joint Movants seek to explore the level of FPL's earnings in the context of Commission review of FPL's Petition for approval to recover the deficiency in its storm reserve. Joint Movants, contrary to paragraph 5 of the Stipulation and Settlement, are requesting, supporting AND seeking to impose a change in the application of the agreement's provisions. OPC and FIPUG's argument that FPL's Petition should be dismissed on grounds FPL did not allege how the $354 million (jurisdictional) deficit in its Storm Reserve would impact its earnings or achieved rate of return ignores that FPL does not have an authorized ROE range during the term of the agreement and, thus, does not have an achieved rate of return. The Joint Movants negotiated, signed and endorsed a settlement agreement that puts FPL under revenue sharing, not rate-of-return, regulation. The earnings test supported by the Joint Motion is inconsistent with the Stipulation and Settlement, which has the force of law. Further, to put that in perspective, even if FPL's earnings were relevant, which FPL in no way concedes, an estimated $354 million (jurisdictional) in storm-related costs amounts to approximately one half of FPL's annual net income!

12. While the Stipulation and Settlement does not prevent OPC's and FIPUG's participation in a proceeding for cost recovery of a deficiency in FPL's Storm Reserve, the Joint Movants negotiated and agreed to stand by the Stipulation and Settlement under which they have received massive base rate reductions, refunds and a stable storm accrual. OPC and FIPUG must be held to the wording of the Stipulation and Settlement as well as the spirit of the Stipulation

and Settlement. As stated in FIPUG and OPC's very own words, "[t]o do otherwise would permanently chill any possibility of future settlement of cases before the Commission." See Joint Motion to Dismiss of OPC and FIPUG, ¶ 4, filed Nov. 17, 2004, in Docket No. 041272-EI, In re: Progress Energy Florida, Inc.'s Petition for Approval of Storm Cost Recovery Clause for Extraordinary Expenditures related to Hurricanes Charley, Frances, Jeanne and Ivan (where, inconsistent with the Joint Motion to Dismiss FPL's Petition, Joint Movants have moved to dismiss the Petition of Progress Energy Florida, Inc. ("Progress") for recovery of the deficit in its storm reserve on grounds that Progress' Petition violates rate settlement agreement in effect for Progress' retail rates that was signed by Progress, OPC, FIPUG and other parties to Docket No. 000824-EI).

II. Joint Movants are incorrect to assert that the Commission can grant recovery of storm losses only upon a showing that the utility will not achieve its authorized rate of return.

13. It is a fallacy for Joint Movants to contend that the Commission cannot grant relief without taking earnings into consideration. The only circumstance in which the Commission has ever said that it should review earnings in the context of recovery of storm restoration costs was in Order No. PSC-93-0918-FOF-EI, Docket No. 930405-EI, when FPL asked the Commission to establish a clause mechanism to operate in perpetuity addressing all future storm costs, which mechanism is different from the Commission-adopted self-insurance mechanism that allows the Company to accrue for storm restoration costs over time and petition the Commission for relief if extraordinary events occur. Indeed, if the Commission were to approve recovery of extraordinary storm restoration costs only upon a showing that the Company is not achieving its authorized rate of return, it would create a perverse incentive for utilities

facing massive storm restoration efforts and would be inconsistent with the public policy of safe and rapid restoration.

14. Joint Movants incorrectly contend that Order No. PSC-93-0918-FOF-EI controls the disposition of FPL's Petition, and assert that FPL seeks to create a 100% pass-through mechanism like the one the Commission declined to create in that Order. See Joint Motion at ¶ 3. What OPC and FIPUG, both active participants in Docket No. 930405-EI, ignore, is that what FPL sought in 1993 was a clause mechanism to operate in perpetuity addressing all future storm costs. See In re: Petition to implement a self-insurance mechanism for storm damage to transmission and distribution system and to resume and increase annual contribution to storm and property insurance reserve fund by Florida Power and Light Company, Order No. PSC-93-0918-FOF-EI, at 4, Docket No. 930405-EI (issued June 17, 1993) (sometimes referred to herein as "Order No. 93-0918"). In Order No. 93-0918, the Commission declined to implement a clause mechanism for storm loss recovery "at this time." See id. at 5. It found that "[s]torm repair expense is not the type of expenditure that the Commission has traditionally earmarked for recovery through an ongoing cost recovery clause." See id. Instead, the Commission approved a self-insurance mechanism for FPL in Docket No. 930405-EI as a means of addressing the need for comprehensive storm recovery. The Commission determined that the inclusion of an annual accrual amount in base rates, coupled with the ability to request a specific recovery mechanism in the event of a shortfall, should provide sufficient protection to the Company and its customers. See id. at 5.[5] The Commission instructed FPL as follows:

[5] OPC agreed that "If a hurricane strikes, FPL can petition for appropriate regulatory treatment at that time." See Prehearing Statement of the Office of Public Counsel, at 1, Docket No. 930405-EI, filed May 14, 1993.

> If FPL experiences significant storm-related damage, it can petition the Commission for appropriate regulatory action. In the past, the Commission has acted appropriately to allow recovery for prudent expenses and has allowed amortization of storm damage expense. Extraordinary events such as hurricanes have not caused utilities to earn less than a fair rate of return, and FPL has shown no reason to believe that the Commission will require a utility to book exorbitant storm losses without recourse.
> ...
>
> If FPL suffers storm damage and finds it necessary to draw on its lines of credit, it will be able to request that some or all of the storm related costs be passed on to the customers. In such an emergency situation, this Commission will act quickly to protect the company and its customers.
> See id. at 5.

15. Further, Joint Movants conveniently skip over all Commission precedent subsequent to Order No. 93-0918 in filing their Joint Motion, including the Stipulation and Settlement addressing FPL's earnings levels. Before Hurricane Andrew struck FPL's service territory in 1992, FPL maintained insurance that provided adequate coverage at reasonable rates for storm damage to the Company's ("T&D") facilities. FPL had a T&D insurance limit of $350 million per occurrence with a 1992 premium of $3.5 million. See Order No. 93-0918 at 1. FPL's base rates included the cost of the insurance premiums and, if storm damage occurred, the amount of the deductibles. See id. However, after Hurricane Andrew forced FPL's insurers to pay claims approaching $300 million to cover T&D storm damage, the market for T&D insurance coverage at reasonable prices with adequate coverage all but vanished. See id.; see also In re: Petition for authority to increase annual storm fund accrual commencing January 1, 1997 to $35 million by Florida Power & Light Company, Order No. PSC-98-0953-FOF-EI, at 1, Docket No. 971237-EI (issued July 14, 1998) (sometimes referred to herein as "Order No. 98-0953"). Renewal of T&D coverage offered to FPL following Hurricane Andrew consisted of only a $100 million annual aggregate loss limit for T&D with a minimum premium of $23

million, not nearly enough coverage for an Andrew-scale storm. See Order No. 93-0918 at 1. Though FPL continued to explore the market for insurance for storm damage losses, it was forced to seek other methods to ensure that it would have adequate available resources for the costs of repairing and restoring its T&D system in the event of hurricane, storm damage, or other natural disaster.[6] See id.

16. To replace the risk previously borne by insurers and ensure comprehensive restoration of power following tropical storms and hurricanes, the Commission granted FPL's request for approval to implement a self-insurance mechanism to cover storm damage to T&D facilities. See id. As noted, the Commission-approved self-insurance mechanism included an annual accrual component that allows FPL to accrue a set amount of storm damage expenses up to a target reserve amount as part of base rates to offset future storm damage costs. See id. at 6; see also In Re: Petition for authorization to increase the annual storm fund accrual commencing January 1, 1995 to $20.3 million; to add approximately $51.3 million of recoveries for damage due to Hurricane Andrew and the March 1993 Storm; and to re-establish the storm reserve for the costs of Hurricane Erin by increasing the storm reserve and charging to expense approximately $5.3 million, by Florida Power & Light Company, Order No. PSC-95-1588-FOF-EI, at 3, Docket No. 951167-EI (issued Dec. 27, 1995). The goal was to target an amount of annual contributions that was sufficient to allow for fund growth over time, but low enough to prevent unbounded storm fund growth. See id. Also, the annual accrual was not designed to

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[6] By Order No. 93-0918, FPL was ordered to file, at least annually, beginning January 1, 1994, a report reflecting the Company's efforts in obtaining reasonably priced T&D insurance coverage. See id. at 9. FPL has done so and continues to search for commercial insurance where it is reasonably available.[6] Events such as those occurring on September 11, 2001, have actually lessened the potential for commercial or other insurance.

provide insurance for every contingency. The second component of the self-insurance mechanism is FPL's ability to petition the Commission for regulatory relief in the event of extraordinary loss. See id.

17. The annual accrual was initially set at $7.1 million, effective January 1, 1993, $3 million of which was embedded in rates for the storm fund and an additional $4.1 million for the traditional T&D insurance that was embedded in rates. See Order No. 93-0918 at 3. Based on the results of a statistical model that estimated the impact to the balance of the Storm Fund due to various accrual amounts and special customer assessments, the $7.1 million annual contribution was increased to $10.1 million, effective January 1, 1994. See In Re: Petition to implement a self-insurance mechanism for storm damage to transmission and distribution system and to resume and increase annual contribution to storm and property insurance reserve fund by Florida Power & Light Company, Order No. PSC-95-0264-FOF-EI, Docket No. 930405-EI (issued Feb. 27, 1995). In Order No. PSC-95-1588-FOF-EI, issued December 17, 1995, in Docket No. 951167-EI, FPL was authorized to increase its annual storm fund accrual to $20.3 million commencing January 1, 1995. Three years later, the Commission declined FPL's petition for an increase in the annual accrual amount to $35 million in Order No. PSC-98-0953-FOF-EI, issued July 14, 1998, in Docket No. 971237-EI. FPL's minimum filing requirements in Docket No. 001148-EI, its last rate proceeding, included an increase in the annual accrual to $50.3 million. See Docket No. 001148-EI. As part of the Stipulation and Settlement to Docket No. 001148-EI, FPL agreed to withdraw its request for an increase in the annual accrual provided that "[i]n the event that there are insufficient funds in the Storm Damage Reserve and through insurance, FPL may petition the FPSC for recovery of prudently incurred costs not recovered from those sources." See Order No. 02-0501, Stipulation and Settlement at ¶ 13.

18. Dating back as far as Order No. 93-0918, the Commission has repeatedly instructed that if FPL "experiences significant storm-related damage, it can petition the Commission for appropriate regulatory action." See id. at 5; see also Order No. PSC-98-0953-FOF-EI, at 3, Docket No. 971237-EI (issued July 14, 1998) (determining that the December 1997 reserve balance of $251.3 million was "sufficient to protect against most emergencies," and FPL continued to be able to petition the Commission for emergency relief "[i]n cases of catastrophic loss"); Order No. PSC-95-1588-FOF-EI, at 9, Docket No. 951167-EI (issued Dec. 27, 1995) (recognizing "that FPL has experienced a catastrophic loss from Hurricane Andrew and that the potential for another loss of this magnitude exists," and instructing that "FPL may petition the Commission for emergency relief if FPL experiences a catastrophic loss."). Indeed, in early September 2004, with Hurricane Frances restoration efforts ongoing and before Hurricane Jeanne struck, FPL filed a petition for approval to establish a regulatory asset. See In re: Petition for approval to establish as regulatory asset any costs charged to Account No. 228.1 in excess of Storm Reserve, by Florida Power & Light Company, Docket No. 041057-EI. FPL's intent in making the request was to obtain an order from the Commission enabling FPL to record storm restoration costs as a regulatory asset in conformance with Statement of Financial Accounting Standards No. 71, Accounting for the Effects of Certain Types of Regulation. By Order No. PSC-04-0976-PAA-EI, the Commission denied FPL's petition to establish a regulatory asset on grounds "[i]t is unnecessary to create a separate regulatory asset ... because allowing a negative balance to be recorded in the Storm Reserve (Account No. 228.1) serves the same purpose and is contemplated by Rule 25-6.0143, Florida Administrative Code." See In re: Petition for approval to establish as regulatory asset any costs charged to Account No. 228.1 in excess of Storm Reserve, by Florida Power & Light Company, Order No. PSC-04-0976-PAA-EI,

at 2, Docket No. 041057-EI (issued Oct. 8, 2004). The Commission concluded that through the application of Rule 25-6.0143, FPL could defer storm restoration costs in excess of the Storm Reserve and recover prudently incurred costs through a means to be determined at a later date upon application by FPL. See id.

19. Approval of the surcharge sought by FPL is, therefore, consistent with the Commission's directives. It has become clear since 1993 that commercial and other insurance is not reasonably available to FPL to insure against storm damage to T&D facilities, so the Storm Reserve coupled with the ability to request a special assessment in the event of an extraordinary loss continue to comprise FPL's self-insurance mechanism to ensure comprehensive restoration following a severe storm. As clearly contemplated by Commission precedent, FPL is entitled to seek regulatory relief for the negative balance in its Storm Reserve following the most disastrous storm season on record in the State, during which three hurricanes struck FPL's service territory over a span of approximately six weeks. As contemplated by the self-insurance mechanism, the annual accrual included in base rates was insufficient to insure the enormous loss experienced by FPL during the 2004 storm season. Therefore, FPL is seeking limited recovery outside of base rates to address insolvency in the Storm Reserve. FPL is asking to recover over a two-year period prudently incurred costs to restore power during the most catastrophic storm season on record in Florida, particularly during a time where the Stipulation and Settlement carves out such costs for recovery and earnings levels are to be addressed exclusively by revenue sharing.

20. Further, Joint Movants incorrectly argue that FPL seeks to be held risk-free. As "color" for their position, OPC and FIPUG argue that a "free market place ... does not hold proprietors totally harmless from the effects of natural events." See Joint Motion at 1. FPL was not held harmless by the storms. Per the Stipulation and Settlement signed by both OPC and

FIPUG, FPL bears the risk of lost revenues, and indeed FPL lost significant revenues – $38 million – as a result of the 2004 storms. FPL does not seek recovery of those revenues. Unlike proprietors who have access to commercial insurance for repair and restoration of physical damage, and/or Federal Emergency Management Agency ("FEMA") assistance, FPL has access to neither. Instead, FPL relies solely upon the self-insurance plan established by the Commission, which targets a certain level for the Storm Reserve and allows the Company to seek relief for extraordinary events, and which is further modified by the Stipulation and Settlement that includes the parties to the Joint Motion as signatories.

Conclusion

21. Viewed in the context of Commission storm-recovery precedent and the Stipulation and Settlement, as described above, the effect of the Joint Motion as a matter of regulatory policy is as follows: Tell the Company to self insure against storm losses up to a target dollar amount in the Storm Reserve, but *come back to the Commission for relief if extraordinary events occur*.[7] Agree with FPL that commercial insurance for transmission and distribution damage caused by storms is cost prohibitive and, thus, not a practicable alternative for FPL's customers, but tell FPL to *come back to the Commission if extraordinary events*

[7] See Docket No. 930405-EI, Order No. PSC-93-0918-FOF-EI, at 1, 5 (issued June 17, 1993) ("None of the parties [which included FIPUG and OPC] disagree with the premise that FPL needs to implement some type of self-insurance program for repairing and restoring its T&D system in the event of future hurricane or other storm damage. ... If a hurricane strikes, FPL can petition at that time for appropriate regulatory action."); see also Docket No. 930405-EI, OPC Prehearing Statement at 1, Filed May 14, 1993 ("FPL is understandably concerned about changes in the insurance market since Hurricane Andrew. ... If a hurricane strikes, FPL can petition at that time for appropriate regulatory action.")

occur.[8] Tell the Company when it asks to increase the accrual and target level of the Storm Reserve that the existing amount of the Reserve is reasonable to cover most events, but *come back if something extraordinary occurs.*[9] Approve a negotiated Stipulation and Settlement that results in a $250 million annual rate reduction, contains significant refund opportunities for customers where certain revenue thresholds are reached, provides that return on equity ("ROE") and earnings levels will be addressed specifically through a revenue-sharing mechanism for the term of the agreement, and requires the Company to forego its 2001 request to increase the amount of the accrual and target level of the reserve, but specifically provides that the Company has the right to *come back to the Commission for additional relief should extraordinary events occur.*[10] Then, after FPL has incurred hundreds of millions to restore electric service during Florida's most catastrophic storm season on record, tell FPL that its request is inappropriate, without regard to the Stipulation and Settlement, and suggest that the impact and costs of three hurricanes striking the Company's service territory in a single season is not extraordinary. If three major hurricanes striking FPL's service area over a six-week period do not qualify as "extraordinary," FPL doubts any event or events could give effect to that term. In fact, FPL's Petition is consistent with regulatory precedent and policy, expressly contemplated by the

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8 See id. at 1-2, 5 ("While there might be some controversy over the exact form of the self-insurance program, the record demonstrates the need for self-insurance and the adverse effects that Hurricane Andrew has had on FPL's efforts to obtain reasonably priced T&D insurance at an adequate level of coverage. ... If FPL experiences significant storm-related damage, it can petition the Commission for appropriate regulatory action.")

9 See id.; see also Docket No. 971237-EI, Order No. PSC-98-0953-FOF-EI, at 3 (issued July 14, 1998) ("In cases of catastrophic loss, FPL continues to be able to petition the Commission for emergency relief"); Docket No. 951167-EI, Order No. PSC-95-1588-FOF-EI, at 9 (issued Dec. 27, 1995) ("FPL may petition for emergency relief if FPL experiences a catastrophic loss").

10 See Order No. PSC-02-0501-AS-EI, Docket No. 001148-EI (issued April 11, 2002).

Stipulation and Settlement and, indeed, is predicated on extraordinary events. The Joint Motion should be denied as a matter of law because FPL's Petition states a cause of action on which the Commission can and should grant relief.

WHEREFORE, for the above and foregoing reasons, Florida Power & Light Company respectfully requests that the Commission deny FIPUG and OPC's Joint Motion to Dismiss FPL's Petition for Authority to Recover Prudently Incurred Storm Restoration Costs Related to the 2004 Storm Season That Exceed the Storm Reserve Balance.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and United States Mail this 24th day of November, 2004, to the following:

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