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ORIGINAL

January 28, 1999

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

Re: Docket No. 981390-EI

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and fifteen copies of FIPUG's and Tropicana's Motion to File Response One Day Out of Time and Response to Florida Power & Light Company's Motion to Dismiss with Amended Certificate of Service in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into the Equity Ratio and Return on Equity of Florida Power & Light Company.	))))	Docket No. 981390-EI Filed: January 28, 1999

THE FLORIDA INDUSTRIAL POWER USERS GROUP'S AND TROPICANA PRODUCTS, INC.'S RESPONSE TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS

The Florida Industrial Power Users Group (FIPUG) and Tropicana Products, Inc. (Tropicana) file their response in opposition to Florida Power and Light Company's (FPL) motion to dismiss. FPL's motion is without merit and should be denied.

The FPL motion to dismiss is divided into four discrete parts: an Introduction; an allegation that the Protestants failed to plead an interest sufficient to support their protest; an allegation that the Protestants failed to establish the right to participate as an association; and finally an allegation that the Protestants are not affected by the proposed deal between FPL and the Florida Public Service Commission.

This response will deal with the four contentions seriatim, but the essence of FPL's motion is contained in FPL's Introduction and in FPL's final argument. FPL appears to assert that this docket is a Star Chamber proceeding in which the power company meets exclusively with the agency established to protect customers against unreasonable rates. As FPL sees it, the purpose of the meeting is to decide far-reaching matters that will govern the amounts customers are required to pay, but, according to FPL, the customers who will be required to pay the bill can do no more than observe while the real parties throw bones to decide the customers' fate. This is a concept that was disputed at a Tea Party in Boston and laid to rest more than two hundred years ago by the culmination of the American Revolution against intolerable trade practices. It should be allowed to repose undisturbed.

Introduction: In this section of its argument, FPL points out that the Commission did not hold hearings on FPL's equity ratio or return on equity but only accepted FPL's settlement offer. This is a correct statement of what happened, but due process entitles customers whose interest is vitally affected by this decision to fully examine the justification for this action at a public hearing. Neither FIPUG, Tropicana, nor the other interested parties, accepted FPL's offer. Hearings must be held to ascertain the underlying facts. Customers need an explanation as to why rates must remain high when real costs are descending.

FIPUG's protest focuses on the fact that the proposed deal conceals that FPL's current earnings grossly exceed a fair and reasonable return. This astonishing fact is hidden because the deal allows extraordinary expenses of up $723 million in the current year, plus the opportunity for additional undesignated expenses, if necessary, to shield earnings. With annual sales of 80 million megawatt hours, each 1000 kwh of consumption will be asked to absorb $9.15 of this cost. FPL's average residential customer could be charged $129.93 in 1999 to cover these extra ordinary charges. Tropicana and members of FIPUG, who use much greater amounts of electricity, will be charged exponentially more. Under the circumstances, a hearing is called for, not a private consultation in the holy of holies beyond the veil of public scrutiny.

Failure to Plead Sufficient Interest: FPL relies on Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981), and rule 28-106.201(2)(b), Florida Administrative Code, to support its claim that FIPUG and Tropicana fail to explain how their substantial interests will be affected by the Commission's decision. However, each clearly alleged that they are, or represent, industrial customers of FPL and that "the cost of electricity constitutes one of [their] largest variable costs." Is it possible that FPL, with a straight face,

contends that the imposition of an additional $723 million in extraordinary costs won't directly affect these large consumers of electricity?

In the Agrico case cited by FPL, competitors alleged that if Agrico received an environmental permit to build a storage warehouse for a new type of sulfur, it would get a competitive advantage. The court concluded that the law being administered by the Department of Environmental Regulation wasn't designed to protect economic interests and that the injury alleged was not immediate.

FPL previously explained what the Agrico case means in Docket No. 971313-EI. In that case, FPL postulated that, as a public utility operating in Florida, it had standing pursuant to Agrico to intervene in a Declaratory Statement case in which a customer of another utility asked for a ruling that the power plant it proposed to build was a self-generation project. FPL concluded that a ruling in that case would affect its immediate economic interest and that the statute authorizing the Commission to make a ruling that it had no jurisdiction over the self-generation project of another utility customer was designed to protect FPL.. Comparison of the difference in substantial economic interest FPL claimed it had in Docket No. 971313-EI and the economic interest of customers in this case borders on the ludicrous, but highlights the nature of FPL's belief that it not only has government protection for its operations, but that no one affected by its actions has standing to complain. It will be a dismal day indeed if the Commission accepts this unsupported premise.

Chapter 366, the statute that gives the Commission authority to regulate rates, is clearly designed to protect customers and the associations representing them. The allowance of a $723 million extraordinary expense in the current year on top of a ruling affecting FPL's return on

equity and capital structure is immediate. It will be too late for the Commission to take action after the extraordinary cash flow authorization is collected and transferred to the parent holding company over which the Commission has little or no jurisdiction.

Associations Can't Represent Members: This argument, of course, doesn't apply to Tropicana, which is appearing on its own behalf and is an FPL customer. As to FIPUG's appearance, the cases cited by FPL, and a raft of others, hold that associations can represent their members before state agencies. FIPUG has been appearing in FPL matters before this Commission on behalf of its affected members without objection for over twenty years. It is not surprising, however, that FPL raises this argument at this time. FPL is for the first time publicly espousing its new theory that its special relationship with the Commission allows it to engage in private Olympian consultation with the Commission about matters affecting its customers' rates. Hopefully, the Commission will quickly and summarily dash this egotistical assumption of privileged supremacy into the nether world where it belongs.

There is a compelling reason for allowing associations to represent their members in matters of this kind. It has to do with an even playing field. FPL collects money from customers to pay its attorneys, experts and internal analysts to develop and present its positions to the Commission, even though these positions may be adverse to consumers' interests. FPL's customer-funded war chest enables it to combat and crush dissenters at every quarter. Single customers seeking relief can be readily overwhelmed in such an unequal contest. Associations provide a mechanism by which substantially affected customers can pool their resources to present a credible, if modest, case for the common good. The FIPUG prayer for relief in this docket to compel FPL to disgorge some of the customers' money in its coffers to be used to

present the customers' side of the case will prove to be a meaningful way to enable customers to compete on an even footing with Florida's power behemoth. Customer associations can be stewards of the funds used to present the customers' case. Their expenditures can be audited without invading individual customers' privacy, without subjecting individual customers to retribution, and without concern that the funds are being used to rebate an individual customer's account.

Substantial Interests Not Affected: This argument is pretty hard to swallow. Like the Emperor's clothes in Hans Christian Anderson's fairy tale even a small boy can see the naked truth. Excessive earnings and cash collections funded by customers are being gobbled up by phantom non-cash expenses. The protested order will generate massive cash flows for FPL. Clearly, this affects customers' substantial interests.

It also raises other questions which must be answered, such as how will the extra surcharge on customers be spent? Will it be flowed to the holding company parent to buy another insurance company, orange groves, a cablevision company, obsolete generators in Maine at four times their book value, windmills in Arizona and Iowa or a new power plant across the country in Washington state? When (if ever) and how will the customers who provide the funds see the benefits? These are the issues that must be explored in a public hearing where affected customers can participate.

FPL has failed to demonstrate any basis for dismissing FIPUG's and Tropicana's protests. Rather, the Commission should move forward with this proceeding and invite participation by affected customers.

WHEREFORE, FPL's motion to dismiss should be denied.

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AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **FIPUG's and Tropicana's** foregoing **Response to FPL's Motion to Dismiss** has been furnished by hand delivery to the following parties of record this **28th** day of **January, 1999**:

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