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080677-EI
090130-EI

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Subject: Attorney General McCollum's Motion in Limine in Docket No. 080677
Attachments: motion in limine 2-rsk.doc



MOTION
IN LIMINE 2-RS

Attached is the Attorney General's Motion in Limine for filing in Docket No. 080677. Thank you for your consideration of this matter.

(See attached file: motion in limine 2-rsk.doc)

Please note that Florida has a broad public records law, and that all correspondence to me via email may be subject to disclosure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by
Florida Power & Light Company

DOCKET NO.: 080677-EI
FILED: August 14 2009

In re: 2009 depreciation study by Florida
Power & Light Company.

DOCKET No. 090130-EI
FILED: August 14, 2009

ATTORNEY GENERAL'S MOTION IN LIMINE

The Attorney General, by and through undersigned counsel, submits this motion in limine and states in support thereof as follows:

1. The Attorney General respectfully submits that an issue has arisen in certain recent rate hearings where the Commission requested late-filed exhibits and parties were not allowed an opportunity to cross examine the witness who prepared the exhibit or to offer testimony or exhibits in opposition thereto. In one case, the party presenting the exhibit added additional information other than that information requested by the Commission, resulting in confusion over the issues involved. By this motion, the Attorney General is seeking to prevent the possibility of such confusion at the upcoming hearing by asking the Commission to exercise its inherent authority to control the proceedings.
2. The scheduling order in this case set deadlines for parties to identify witnesses and exhibits for the hearing in this case. Such a practice is customary for these proceedings, however, the Commission has recently been allowing late-filed exhibits in contravention of the prehearing orders. The courts have previously addressed such late-filed exhibits and held that "failure to disclose the subject of witness testimony and documents that will be introduced into evidence in violation of discovery rules and court orders amounts to "trial by ambush," another way of saying a denial of due process." *See Menard v. Univ. Radiation Oncology Assocs.*, 976 So. 2d

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69, 72 (Fla. 4th DCA 2008) (“Once the trial starts the lawyers are engaged in the unfolding of the evidence they have already collected. That is why there are discovery cutoffs. *All the discovery rules and the extensive efforts of parties to discover the other party's case would be for naught if one side were able to wait until after the trial started to establish key pieces of evidence* such as what occurred in this case” (quoting *Grau v. Branham*, 626 So. 2d 1059, 1061 (Fla. 4th DCA 1993) (emphasis added)).

3. Accordingly, the Attorney General would request the entry of an order specifying that any late-filed exhibits should be limited to the information requested or approved by the Commission. The Attorney General would further request the order provide that if any late-filed exhibit is allowed, it should not be admitted as an exhibit unless and until the other parties have reviewed the exhibit, cross-examined the witness who prepared the exhibit, and had the opportunity to file testimony and exhibits in opposition to the late-filed exhibit.

WHEREFORE, for the aforesaid reasons, the Attorney General respectfully requests that the Commission grant this motion and enter an appropriate order.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

s/ Cecilia Bradley
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CERTIFICATE OF SERVICE
DOCKETS NOS. 080677-EI and 090130-EI

I HEREBY CERTIFY that a copy of the foregoing Attorney General Bill McCollum's Motion in Limine has been furnished by electronic mail and U.S. mail to the following parties on this 14th day of August, 2009 to the following:

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