

**Diamond Williams**

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**From:** rpjrb@yahoo.com  
**Sent:** Thursday, December 09, 2010 10:03 AM  
**To:** Filings@psc.state.fl.us; John.Butler@fpl.com  
**Subject:** Electronic Service / Dockets 100410-EI / 100009-EI / 080677-EI / Robert H. Smith Motion to Strike FPL's Motion to Strike Robert H. Smith's Response to FPL Response to Robert Smith's M/for FPL to Answer Staff's Data Request

**Attachments:** 12092010MotiontoStrikeFPLMotiontoStrike.pdf

Dear Ann Cole, Office of Commission Clerk and Apryl Lynn, Division of Administrative Services and Mr. Butler,

Attached is the PDF filing for the Robert H. Smith Motion to Strike Florida Power & Light's Motion to Strike Robert H. Smith's response to Florida Power & Light's response to motion for Florida Power & Light to Answer Question 3 to Staff's Data request No. 1 in order to inspect and examine and answer to question 3 email that I have sent on Thursday, December 9<sup>th</sup>, 2010. The attached PDF file is to serve as the electronically filed document based upon the E-Filing requirements as per Florida Public Service Commission Electronic Filing Requirements.

I am sending this to the above email addresses only to meet the E-Filing requirements as per Florida Public Service Commission Electronic Filing Requirements

Thanks,

Robert H. Smith

**Confidentiality Statement**

The documents accompanying this telecopy transmission contain information which is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named on this transmission sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this telecopied information is strictly prohibited, and the documents should be returned. In this regard, if you received this telecopy in error, please contact the sender by reply E-mail and destroy all copies of the original.

12/9/2010

DOCUMENT NUMBER-DATI

09830 DEC-9 2

FPSC-COMMISSION CLERK

Robert H. Smith  
Ratepayer/Shareholder  
11340 Heron Bay Blvd. #2523  
Coral Springs, Florida 33076-1629

Thursday, December 09, 2010

Ann Cole and Apryl Lynn  
Office of Commission Clerk and  
Division of Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

RE: Robert H. Smith's Motion to Strike Florida Power & Light Company's Motion to Strike Robert H. Smith response to Florida Power & Light's response to motion for Florida Power & Light to Answer Question 3 to Staff's Data request No. 1 in order to inspect and examine and answer to question 3. / Dockets 100410-EI, 100009-EI and 080677-EI

Dear Ms. Lynn:

Enclosed is Robert H. Smith's Motion to Strike Florida Power & Light Company's Motion to Strike Robert H. Smith's response to Florida Power & Light's response to motion for Florida Power & Light to Answer Question 3 to Staff's Data request No. 1 in order to inspect and examine and answer to question 3. / Dockets 100410-EI, 100009-EI and 080677-EI

Copies of the response will be served to all parties that have a legal interest in the proceeding as outlined below.

Sincerely,

/S Robert H. Smith

DOCUMENT NUMBER DATE

09830 DEC-9 2010

FPSC-COMMISSION CLERK

**Certificate of Service**  
**Dockets 100410-EI, 100009-EI and 080677-EI**

I HEREBY CERTIFY that a true and correct copy of the Robert H. Smith's Motion to Strike Florida Power & Light Company's Motion to Strike Robert H. Smith response to Florida Power & Light's response to motion for Florida Power & Light to answer question 3 to Staff's Data Request No. 1 in order to inspect and examine the answer to question 3 email dated December 9<sup>th</sup>, 2010 was served via electronic email on Thursday, December 9<sup>th</sup>, 2010 and to [filings@psc.state.fl.us](mailto:filings@psc.state.fl.us) on Thursday, December 9<sup>th</sup>, 2010. All issues as outlined in the response to Florida Power & Light's response dated Thursday, December 9<sup>th</sup>, 2010 below has been sent to the parties listed below.

Electronic email dated Thursday, December 9<sup>th</sup>, 2010

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/S Robert H. Smith



Before the Florida Public Service Commission

In re: ) Docket No. 100410-EI  
) Docket No. 100009-EI  
) Docket No. 080677-EI  
  
Robert H. Smith's Motion to Strike Florida Power & )  
Light Company's Motion to Strike Robert H. Smith's )  
Response to Florida Power & Light response dated ) Emailed Filed December 9<sup>th</sup>, 2010  
December 7<sup>th</sup>, 2010 by Robert H. Smith ratepayer/ ) Electronically Filed December 9<sup>th</sup>, 2010  
Shareholder with a legal interest for the answer/release )  
of an answer to the Staff Data Request No. 1, Question 3 )  
in order to inspect and examine the answer to question )  
3 that might have a legal impact on my legal interest in )  
these proceeding as outlined by the appeal email dated )  
November 26<sup>th</sup>, 2010. )

**ROBERT H. SMITH'S MOTION TO STRIKE FLORIDA POWER & LIGHT  
COMPANY'S MOTION TO STRIKE ROBERT H. SMITH'S RESPONSE TO FLORIDA  
POWER & LIGHT'S RESPONSE TO MOTION FOR FLORIDA POWER & LIGHT TO  
ANSWER QUESTION 3 TO STAFF'S DATA REQUEST NO.1 IN ORDER TO  
INSPECT AND EXAMINE THE ANSWER TO QUESTION 3**

Pursuant to Rule 28-106.204, Florida Administrative Code, Robert H. Smith hereby moves to strike Florida Power & Light Company's Motion to Strike Robert H. Smith's response to Florida Power & Light Company's Response to Answer Question 3 to Staff's Data Request No. 1 in Order to inspect and examine the Answer to Question 3, filed November 26<sup>th</sup>, 2010.

DOCUMENT NUMBER-DATE

09830 DEC-9 2010

FPSC-COMMISSION CLERK

Based upon Chapter 350.042 (1) (2) of the Florida Statutes "A commissioner should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, shall neither initiate nor consider ex parte communications concerning the merits, threat, or offer of reward in any proceeding other than a proceeding under s. 120.54 s. 120.565, workshops, or internal affairs meetings. No individual shall discuss ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days."

Based upon Chapter 350.042 (1) of the Florida Statutes, I am making sure that my communications are being made part of the public record to make sure that there is no "ex parte" communications on my end. This can be through email correspondence and/or a response to a motion. Since a motion was sent to the commission based upon my legal rights that would be afforded under Chapter 350.042 (1) of the Florida Statutes, "A commissioner should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, shall neither initiate nor consider ex parte communications concerning the merits, threat, or offer of reward in any proceeding other than a proceeding under s. 120.54 s. 120.565, workshops, or internal affairs meetings." I have served all commissioners with my original motion(s) and response(s) to comply with the requirements of Chapter 350.042 (1) of the Florida Statutes. This would preempt Rule 28-106-204 based upon my right under Chapter 350.042 (1) that I have the "full right to be heard according to law". This would afford me my rights to practice before the commission in order to protect my legal interests in these proceedings. I have a legal interest from both a ratepayer and shareholder perspective therefore I am within my full rights to practice before the Commission to protect my legal interest in these proceedings.

Since it is my "full right to be heard according to law", based upon Chapter 350.042 (1) of the Florida Statutes the motion to strike by Florida Power & Light should not be granted.

Based upon Chapter 350.042 (2) of the Florida Statutes "The Provisions of this section shall not prohibit an individual residential ratepayer from communicating with a commissioner, provided that the ratepayer is representing only himself or herself, without compensation."

Since I am a ratepayer under Chapter 350.042 (2) of the Florida Statutes, I am within my legal rights to fully communicate with the commission from a ratepayer perspective. This would allow me within my legal rights as a ratepayer to fully practice before the commission to protect my legal interests from a ratepayer perspective.

Since it is my right as a ratepayer to fully communicate with a "commissioner" Chapter 350.042 (2) of the Florida Statutes would preempt rule 28-106-204 therefore the motion to strike by Florida Power & Light should not be granted.

According to Florida Power & Light Company, "Rule 28-106-204 does not provide, however, for moving parties such as Mr. Smith to file a reply or sur-response to a response in opposition to their motion".

According to Chapter 350.042 (1) (2) of the Florida Statutes, I have the "full right to be heard according to law". This would preempt this statement since I should be able to make any email(s)/motion(s) /response(s) part of the public record in order for me to be heard based upon my legal interests in these proceedings and as a right as a ratepayer and/or shareholder.

Since it is my "full right to be heard according to law", based upon Chapter 350.042 (1) of the Florida Statutes the motion to strike by Florida Power & Light should not be granted.

According to Florida Power & Light Company "Nothing in the Smith Response refutes the reasons given in FPL's response denying the Smith Motion. Rather, the Smith Response is simply an unauthorized attempt to protract improperly and unnecessarily the Commission's ruling on the Smith Motion. Allowing the Smith Response to be filed without objection could promote additional unauthorized filings and increase the associated administrative burden for FPL and the Commission."

This is not specific and appears to be an attempt to keep something off the public record that I would be fully allowed to make part of the public record through email(s)/motion(s)/response(s) based upon my rights under Federal and State laws. Mr. Butler should be specific and give examples of what he indicates is "Nothing in the Smith Response refutes the reason given in FPL's response denying the Smith motion". This is a generic statement and without the specifics it appears that there is no basis for this statement.

My response to Florida Power & Light was very specific with regard to my concerns with providing the transparency needed for a person with a legal interest in these proceedings. I was very specific with regard to what I would like to see in the original motion and response to FPL.

If the original order in these proceedings is going to yield the same earned returns in 2010 versus the pending Stipulation and Settlement agreement then there should be an explanation as to why one agreement would be better than the other. This is why any information requests should be fully granted in order any party with a legal interest to protect their interests. I was very specific with my original motion and response. Mr. Butler has to be specific as to why "Nothing in the Smith Response refutes the reason given in FPL's response denying the Smith motion". This is very generic and this appears to be no basis for my response to be struck. This is supported by my rights under both Federal/State laws based upon preemption.

Mr. Butler has to be specific with regard to why there would be "additional unauthorized filings and increase the associated administrative burden for FPL and the Commission."

"Allowing the Smith Response to be filed without objection could promote additional unauthorized filings and increase the associated administrative burden for FPL and the Commission."

The original motion is asking for them to compute the ESR's based upon the original order. This would be normal due diligence that would usually be provided with these types of proceedings. Without comparing the two options (ESR's with the original order versus the ESR's with the pending Stipulation and Settlement agreement) any party with a legal interest would not be able to determine which option is in the best interests of the ratepayer and/or shareholder.

Furthermore, it would be up to the Commission to decide if my email(s)/motion(s)/response(s) "could promote additional unauthorized filings and increase the associated administrative burden for FPL and the Commission." My motion is a request for information based upon my Federal/State rights to the "full right to be heard according to law" and to be able to protect my legal interest in these proceedings. Based upon Federal/State law "A commissioner should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law," there is no reason why Florida Power & Light would be able to stop any of my email(s)/motion(s)/response(s) to made part of the public record. My intent of my email(s)/motion(s)/responses(s) is to exercise my right to protect my legal interests in these proceedings. As evidenced by the same type of question(s) asked by the Commission, it appears that the statement by Mr. Butler should not be considered. The commission by asking the same type(s) of question(s) has already determined that this question already has merit therefore why would Florida Power & Light take this position to strike my motion(s)/responses(s) and not file to strike the same type(s) of question(s) that are being asked by the Commission?

Since it appears that the original order and the Stipulation and Settlement agreement are going to keep the base rates basically the same there are only a few issues that would have to be taken a look at.

The pending Stipulation and Settlement agreement is going to keep the cash base rates the same with only a couple of caveats:

- (1) The company is going to be able to control the rate of depreciation over recovery amortization.
- (2) The company is going to lock the cash rates for the term of the pending stipulation and settlement agreement.
- (3) The company is going to remove costs from base rates to collect them through another rate recovery clause that the current base rates might have not been adjusted for the decrease currently (Base rates will include the additional \$18 Million to \$20 million of nuclear uprates costs due to the base rate freeze).
- (4) The company is going to be able to control its rate of return which under normal ratecase proceedings, a set rate of return would be set by the commission.

If the company is going to have the ability to control the cash base rate(s) recovery for the term of the stipulation and settlement agreement then it should be able to support both the historical accounting and forecast accounting to substantiate why the pending stipulation and settlement agreement is a better deal for both its ratepayers and/ or shareholders versus the original order that has been issued.

What happens if there are future cost reduction(s) during the term of the Stipulation and Settlement agreement if it is approved?

Based upon the terms there would not be a cash base rate reduction for the term of the agreement. This is why you would have to take a look at this from both a historic approach and a forecast approach. They asked for rate relief based upon a forecast approach in the original order. The original ask was \$1 billion dollars. The original order reduced this to \$75 million and now they want to agree to a base rate freeze for a set term. There is a pending \$400 million dollar over earnings issue. Why would it be in the best interests for the ratepayers and/or shareholders to lock their base rates for the term of the Stipulation and Settlement agreement when the possibility exists that there may be additional savings in the future? I brought up the interest savings for refinancing of the company's debt to lower rates. Is this material? If so, then this would require more due diligence in order to make sure that the best option is being selected for the ratepayers and/or shareholders. In my experience when I worked on these cases the Commission would want to choose the option that provided the best economical solution/outcome for the ratepayers.

If it was OK for the commission to ask for this type of information, why would it not be OK for me to ask the same type(s) of question(s)?

Based upon the Company's statement, their response appears to be biased. The Company (FPL) has complained that they were concerned with impartiality. This seems to be the same type of issue. Why would it be OK for the commission to ask these type(s) of questions to protect their legal interests and it would not be OK for me as a ratepayer and/or shareholder to ask the same? Why would their motion to strike only be for my question(s) and not the questions(s) of the Commission? I followed up with a motion to ask for the ESR's to be calculated without the Stipulation and Settlement agreement just like the Commission since I thought that their response that it would be time consuming was not an appropriate response.

It appears that staff thought that the ESR's should be recalculated without the pending Stipulation and Settlement agreement. This would reverse the Company's (FPL's) accounting from the pending Stipulation and Settlement agreement back to the original order that was originally issued by the commission. Since both the original order and pending Stipulation and Settlement agreement are basically keeping cash base rates the same we would have to take a look at which option would yield the ratepayers the best agreement.

Based upon my experience with these proceedings I thought that FPL's response that it was time consuming to recalculate the ESR reports was not a valid response since this type of analysis would be required under normal due diligence. If the Company would like, I would recalculate the ESR information if the Company (FPL) made this information available to me as per my rights as a ratepayer and

shareholder. Based upon my previous experience I am sure that these calculations can be automated from the historic approach as well as the forecast approach. This is why I have sent numerous emails and the motion(s)/responses(s) requesting this type of information from both the Commission and Florida Power & Light Company.

Furthermore based upon Federal preemption, I am requesting this information under Title 5 of §557(d) (1), §557(a), §556, §553(c), §554(a) of the Administrative Procedure Act. Since this would be considered a formal ruling making and formal adjudication I feel that I am within my right's to protect my legal interest to make sure that all pertinent questions are being asked before the Stipulation and Settlement agreement is signed.

Based upon Title 5 of §551 (14) of the Administrative Procedure Act "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered in this sub-chapter."

Based upon Title 5 of §551 (14) of the Administrative Procedure Act, I would have to make part of the public record any communication(s) to make sure that there is reasonable notice so there is no "ex parte communications". The response was filed timely and put on the public record to give reasonable notice that the original motion should be granted.

Based upon Federal preemption I would have to make all my emails/motions/responses part of the public record to avoid "ex parte communications".

Therefore Title 5 of §551 (14), of §557(d) (1), §557(a), §556, §553(c), §554(a) of the Administrative Procedure Act would preempt rule 28-106-204 since I would have to meet the requirements of this Federal regulation in order to be in compliance with no "ex parte communications".

There was a time in these proceedings when the commission heard and took statements from the public speakers and made it part of the record. The testimony was accepted from these speakers. I think that this testimony was completed by telephone conversation with the Commission. My emails/motions/responses should not be treated any differently. There is no reason why the commission should not accept my testimony into the public record just like these speakers. Why would these speakers be afforded the right to make part of the public record their concerns? I should be afforded the same rights as these speakers.

Based upon Chapter 350.042 of the Florida Statutes it appears that I would reserve the right to be fully heard on the public record. This would include all email(s)/motion(s)/response(s). There should be no reason why I would not be able to practice before the commission in order to protect my legal interests in these proceedings. Why would I be treated differently than these public speakers?

Title 5 §551 (14) of the Administrative Procedures Act

**§551. Definitions**

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

Chapter 350.042 of the Florida Statutes

**350.042 Ex parte communications.--**

(1) A commissioner should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, shall neither initiate nor consider ex parte communications concerning the merits, threat, or offer of reward in any proceeding other than a proceeding under s. 120.54 or s. 120.565, workshops, or internal affairs meetings. No individual shall discuss ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days. The provisions of this subsection shall not apply to commission staff.

(2) The provisions of this section shall not prohibit an individual residential ratepayer from communicating with a commissioner, provided that the ratepayer is representing only himself or herself, without compensation.

**28-106.204 Motions.**

(1) All requests for relief shall be by motion. All motions shall be in writing unless made on the record during a hearing, and shall fully state the action requested and the grounds relied upon. The original written motion shall be filed with the presiding officer. When time allows, the other parties may, within 7 days of service of a written motion, file a response in opposition. Written motions will normally be disposed of after the response period has expired, based on the motion, together with any supporting or opposing memoranda. The presiding officer shall conduct such proceedings and enter such orders as are deemed necessary to dispose of issues raised by the motion.

(2) Unless otherwise provided by law, motions to dismiss the petition or request for hearing shall be filed no later than 20 days after service.

(3) Motions, other than a motion to dismiss, shall include a statement that the movant has conferred with all other parties of record and shall state as to each party whether the party has any objection to the motion.

(4) In cases in which the Division of Administrative Hearings has final order authority, any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

(5) In cases in which the Division of Administrative Hearings has recommended order authority, a party may file a motion to relinquish jurisdiction whenever there is no genuine issue as to material fact.

(6) Motions for extension of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request.

*Specific Authority 120.54(5) FS. Law Implemented 120.569, 120.57 FS. History—New 4-1-97, Amended 1-15-07.*

WHEREFORE, Robert H. Smith respectfully requests that the Florida Power & Light's motion to strike not be granted and honor and answer the Motion request in its entirety (answering all specific questions in the motion) and that Florida Power and Light answer Staff's Data request No. 1, Question 3 and respectfully requests the Commission and/or Florida Power and Light Company to allow Robert H. Smith to inspect and examine the answer to Staff's Data request No. 1, Question 3. As explained above, the full answer to the motion would be required in order to serve as normal due diligence in order to substantiate any ruling with these types of proceedings. This will provide any person with a legal interest the "full right to be heard according to law" before any ruling is made on the pending Stipulation and Settlement agreement.

Respectively submitted electronically (email), Thursday December 9<sup>th</sup>, 2010 to the listed parties above and electronically filed to [filings@psc.state.fl.us](mailto:filings@psc.state.fl.us) on Thursday December 9<sup>th</sup>, 2010 as outlined per Florida Public Service Commission Electronic Filing Requirements.

/s Robert H. Smith

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