

**Dorothy Menasco**

**From:** Bruette Davis [bdavis@kagmlaw.com]  
**Sent:** Monday, February 28, 2011 2:42 PM  
**To:** Filings@psc.state.fl.us  
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**Subject:** Docket No. 100410-EI; Review of Florida Power & Light Company's earnings  
**Attachments:** FIPUG Petition to Intervene and Protest of Order No. PSC-11-0103 02.28.11.pdf

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

a. The name, address, telephone number and email for the person responsible for the filing is:

Vicki Gordon Kaufman  
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b. This filing is made in Docket No. 100410-EI.

c. The document is filed on behalf of The Florida Industrial Power Users Group.

d. The total pages in the document are 5 pages.

e. The attached document is Petition to Intervene and Protest of Order No. PSC-11-0103-FOF-EI.

Bruette Davis  
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*Done  
2/28/11  
-DW*

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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

2/28/2011

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Review of Florida Power & Light  
Company's earnings.

Docket No. 100410-EI

Filed: February 28, 2011

**PETITION TO INTERVENE AND PROTEST OF ORDER NO. PSC-11-0103-FOF-EI**

The Florida Industrial Power Users Group (FIPUG), pursuant to sections 120.569 and 120.57(1), Florida Statutes, and rules 25-22.029, 25-22.039, 28-106.205, and 28-106.111, Florida Administrative Code, file this Petition to Intervene and Protest of Order No. PSC-11-0103-FOF (Order). As grounds therefore, FIPUG states:

1. Name and address of agency. The affected agency is the Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.

2. Name and address of petitioner. The name and address of the Petitioner is:

Florida Industrial Power Users Group  
c/o Keefe, Anchors, Gordon & Moyle, P.A.  
118 North Gadsden Street  
Tallahassee, Florida 32301  
Telephone: (850) 681-3828  
Facsimile: (850) 681-8788

3. Petitioner's representatives. Copies of all pleadings, notices, and orders in this docket should be provided to:

Jon C. Moyle, Jr.  
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4. Notice of docket. Petitioner received notice of this docket by a review of the

Commission's website.

5. Statement of Substantial Interests. FIPUG is an ad hoc association consisting of industrial users of electricity in Florida. The cost of electricity constitutes a significant portion of FIPUG companies' overall costs of production. FIPUG members require adequate, reasonably-priced electricity in order to compete in their respective markets.

6. FIPUG's interests are of the type that this proceeding is designed to protect. *See, Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981). The purpose of the proceeding coincides with FIPUG companies' substantial interests, which is to ensure that the rates they pay are just and reasonable.

7. Background. In this docket, Staff filed a recommendation with the Commission in which it recommended that the Commission open a docket to monitor Florida Power & Light Company's (FPL) earnings.

8. The recommendation in this case was originally filed on October 4, 2010 for the October 12, 2010 Agenda Conference. At the time of filing, the recommendation noted that the item was "Proposed Agency Action" (PAA). When the recommendation was refiled for the October 26, 2010 Agenda Conference, it was denoted a PAA.<sup>1</sup> When the recommendation was refiled for the November 9, 2010 Agenda Conference, it was denoted a PAA. When the recommendation was refiled for the November 30, 2010 Agenda Conference, it was denoted a PAA. When the recommendation was refiled for the December 14, 2010 Agenda Conference, it was denoted a PAA. It was not until January 7, 2011 (almost 3 months after its original filing) – the Friday before the Tuesday Agenda Conference at which the item was considered – that the PAA treatment was "corrected" via a note that read: "not PAA – typographical error corrected 1-7-11-ac." The Commission voted on the matter at the January 11, 2011 Agenda Conference.

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<sup>1</sup> The recommendation was refiled several times due to a pending FPL appeal.

It denied the Staff recommendation.

9. FIPUG is a frequent and long-time participant before the Commission. It often waits – as is its right under the Administrative Procedure Act - until after the Commission has made a *preliminary (PAA)* decision before making an appearance and/or lodging a protest. The change in the way in which this matter was handled, without inadequate notice to affected persons, causes FIPUG grave concern. It attempts to remove affected parties' ability to participate in the Commission proceeding after preliminary or free form action<sup>2</sup> and deprived FIPUG of a point of entry into the proceeding. FIPUG's substantial interests are affected by this departure from Commission procedure and administrative law and how such procedure might be used in future dockets.

10. Rule 28-106.111(2), Florida Administrative Code, clearly requires that the *Commission provide a point of entry:*

Unless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing with the agency within 21 days of receipt of written notice of the decision.<sup>3</sup>

11. Similarly, rule 25-22.029(3), Florida Administrative Code, provides that:

[o]ne whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a Section 120.569 or 120.57, F.S., hearing...

Such a point of entry was not provided in this matter and FIPUG is concerned regarding the precedent this may have for future cases.

12. Disputed Issues of Material Fact and Law. FIPUG's allegations of disputed issues of material fact and law include, but are not limited to, the following:

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<sup>2</sup> See, *Capeletti Brothers, Inc. v. Department of Transportation*, 362 So.2d 346 (Fla. 1<sup>st</sup> DCA 1978) (an agency's free-form action is only preliminary irrespective of its tenor and opportunity for hearing must be provided). The fact that Commission Staff initiated this matter does not change this administrative law precept.

<sup>3</sup> See also, rule 25-22.029, Florida Administrative Code.

a. Whether the Commission has provided a point of entry into this proceeding as required by Chapter 120, Florida Statutes, and applicable implementing rules.

13. Statement of Ultimate Issues of Law. The Commission has failed to provide a point of entry into this proceeding as required by Chapter 120, Florida Statutes.

14. Statement of Specific Rules and Statutes Requiring Reversal of the Agency's Decision. FIPUG is entitled to relief pursuant to:

- a. 120.569, Florida Statutes;
- b. 120.57(1), Florida Statutes;
- c. Rule 25-22.029, Florida Administrative Code;
- d. Rule 25-22.039, Florida Administrative Code;
- e. Rule 28-106.205, Florida Administrative Code;
- f. Rule 28-106.111, Florida Administrative Code.

15. Relief Requested. FIPUG requests that it be permitted to intervene in this docket and that the Commission provide a point of entry into the proceedings for affected parties.

s/ Vicki Gordon Kaufman  
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Attorneys for the Florida Industrial Power Users  
Group

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of The Florida Industrial Power Users Group's Petition to Intervene and Protest of Order No. PSC-11-0103-FOF-EI has been furnished by electronic mail and U.S. Mail this 28<sup>th</sup> day of February, 2011 to the following:

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