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100410-EI

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Electronic Filing

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b. Docket No. 100410 - EI
In RE: Review of Florida Power & Light Company's earnings

c. The Document is being filed on behalf of Florida Power & Light Company.

d. There are a total of 7 pages

e. The document attached for electronic filing is Florida Power & Light Company's Response in Opposition to FIPUG's Petition to Intervene and Protest of Order No. PSC-11-0103-FOF-EI

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FPSC-COMMISSION CLERK

3/7/2011

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 100410-EI
Filed: March 7, 2011

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE
IN OPPOSITION TO FIPUG'S PETITION TO INTERVENE
AND PROTEST OF ORDER NO. PSC-11-0103-FOF-EI**

Pursuant to Rules 25-22.039 and 28-106.204, Florida Administrative Code ("F.A.C."), Florida Power & Light Company ("FPL") hereby responds in opposition to the Petition to Intervene and Protest of Order No. PSC-11-0103-FOF-EI that was filed in this docket by FIPUG on February 28, 2011 (the "FIPUG Petition"). The grounds for this response are as follows:

Petition to Intervene

1. Ordinarily, FPL does not object to FIPUG's intervention in FPL proceedings, as FIPUG represents a substantial number of FPL's large commercial and industrial customers. However, intervention in this proceeding, at this time, and for FIPUG's stated purposes would be improper and FPL must oppose that intervention. For the reasons discussed below, FIPUG should not be permitted to intervene because it has failed to allege any substantial interest of sufficient immediacy that are of a type that this proceeding is intended to protect.

2. On its own initiative, the Commission considered in this docket whether to initiate an earnings review for FPL. It decided not to do so, after seeking and receiving information from FPL and the Office of Public Counsel ("OPC") at the January 11, 2011 agenda conference. FIPUG's counsel was present at the January 11 agenda conference but did not seek to intervene, object or otherwise comment on the Commission's decision not to initiate an earnings review. The Commission issued Order No. PSC-11-0103-FOF-EI ("Order 11-0103") on February 7, 2011 documenting its decision. The FIPUG Petition does not assert that the Commission's declining to initiate an earnings review was improper or adversely affected FIPUG's substantial

interests. Nor could FIPUG – which is a signatory to the Stipulation and Settlement Agreement that was approved by the Commission in Docket No. 080677-EI -- properly do so while still receiving the benefits of that agreement. Rather, the FIPUG Petition relates solely to the procedure that the Commission used in reaching its decision, specifically the Commission’s issuing Order 11-0103 as final agency action rather than as proposed agency action that would be subject to protest. FIPUG asserts that this procedure is “a departure from Commission procedure and administrative law” which “might be used in future dockets.” FIPUG Petition at page 3.

3. *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981) established a two-prong test for standing to intervene in Florida administrative proceedings: a prospective intervenor must allege that, as a result of the proceeding in which intervention is sought, (1) it would suffer injury in fact, and (2) the injury is of a type that the proceeding is intended to protect. The FIPUG Petition satisfies neither prong of this test.

4. In *Ameristeel Corp. v. Clark*, 691 So.2d 473 (Fla. 1997), the Supreme Court of Florida cautioned that the injury-in-fact prong of the standing test established in *Agrico* could not be met by mere speculation on the possible occurrence of injurious events. Here, FIPUG asserts that its substantial interests are affected because the procedure followed by the Commission in declining to initiate an FPL earnings review “*might* be used in future dockets.” This assertion is speculative on its face and utterly fails to meet the immediacy requirement for an injury-in-fact under *Ameristeel*.

5. The FIPUG Petition is also deficient on its face with respect to the second prong of the *Agrico* standing test, because FIPUG’s asserted substantial interests are not of a type that this proceeding is intended to protect. FIPUG alleges concern about the implications for future dockets of the administrative procedure that the Commission used in deciding not to initiate an

earnings review for FPL. But this proceeding is not (nor could it be) about establishing, confirming or modifying administrative procedures – it relates to the substantive question of whether to review FPL’s earnings. FIPUG does not allege any dispute with the substance of the Commission’s decision not to initiate the earnings review, or that it was harmed by that decision. Nor could FIPUG properly do so, given the commitments it made in the Stipulation and Settlement Agreement that it would not challenge FPL’s rates except under specified conditions that are not present here. And FIPUG continues to enjoy the benefits it negotiated, along with other parties to that agreement. Rather, FIPUG chooses to express concern about the procedures that the Commission might use in deciding future proceedings. Potential adverse legal precedent does not constitute the substantial interest needed for intervention. *In Re: Petition of Monsanto Company for a Declaratory Statement Concerning The Lease Financing of a Cogeneration Facility*, Docket No. 860725-EU, Order No. 16581, issued September 11, 1986. FIPUG thus has failed to satisfy the second prong of the *Agrico* standing test as well.¹

6. Finally, the FIPUG Petition is untimely. Even if FIPUG were allowed to intervene, it would necessarily “take the case as they find it.” *See* Rule 25-22.039, F.A.C. How

¹ FPL notes that, even if FIPUG did dispute the substance of the Commission’s decision not to initiate an earnings review for FPL, its allegation of injury-in-fact would be fatally speculative under *Ameristeel*. FIPUG would have to speculate that -- in spite of the mechanism in Paragraph 7 of the Stipulation and Settlement Agreement for FPL to maintain its return on equity (“ROE”) within the authorized range of 9% to 11%, FPL’s express commitment to the Commission that it *intends* to use Paragraph 7 to achieve that end,¹ and FPL’s forecasted earnings surveillance report for 2010 and monthly earnings surveillance report for December 2010 showing that FPL *is* maintaining its ROE within that range -- FPL would fail to do so. FIPUG also would have to speculate that, if FPL indeed failed to maintain its ROE within the authorized range, the Commission could use an earnings review to require a retroactive refund over FPL’s objection. The Commission has never before required a retroactive refund of earnings over the objection of the utility, as was contemplated in the Staff recommendation for this docket. And the Commission has never even attempted to overlay an earnings review over the top of an existing, approved settlement agreement, as it would be doing here. *See* January 11, 2011 agenda conference transcript, pages 46-47. Thus, FIPUG’s standing argument would be doubly speculative, taking it far afield of the immediacy requirement enunciated in *Ameristeel*.

FIPUG would find this case is that a final order has already been issued. None of what it seeks via intervention would be timely or appropriate. FIPUG is an active and attentive participant in Commission proceedings involving rate issues for FPL and other utilities. It had the same opportunity to attend and speak at the January 11, 2011 agenda conference as FPL and OPC. For whatever reasons, FIPUG's counsel chose not to do so. FIPUG should not be permitted to intervene at this late date to raise issues or concerns that it could and should have raised on January 11.

Notice of Protest and Request for Formal Hearing

7. The FIPUG Petition purports to protest Order 11-0103. A protest is simply irrelevant here, as it is a procedure used to seek a hearing on *proposed* agency action. The Commission took *final* agency action in Order 11-0103. There is no procedure or occasion to “protest” final agency action.

8. FIPUG suggests that the Commission *should* have issued Order 11-0103 as proposed agency action, in order to provide a point of entry into this docket. The premise to that argument is flawed, however, as the Commission's discretionary decision not to initiate an earnings review is not the sort of administrative proceeding for which a formal hearing would be necessary or appropriate. The Commission Staff opened this docket simply to ask the Commissioners whether they wanted to exercise their discretion to initiate an earnings review. The Commissioners exercised their discretion and declined to initiate such a review. Neither FIPUG nor any other customer has a legal right to compel the Commission to initiate an earnings review. Thus, a discretionary decision by the Commission not to do so cannot “determine substantial interests,” which is a predicate to any entitlement for a point of entry under Rules 28-106.111 and 25-22.029, Florida Administrative Code, that are cited by FIPUG.

9. This distinction is illustrated in *Capeletti Brothers, Inc. v. Department of Transportation*, 362 So.2d 346 (Fla. 1st DCA 1978), which is also cited in the FIPUG Petition. The decision in *Capeletti* involved DOT's informal revocation of a contractor's qualification to bid, without giving the contractor an opportunity for a hearing. Section 337.16 of the Florida Statutes expressly entitles contractors to a hearing before their qualification to bid is revoked, so DOT's informal revocation was in direct contradiction to the statutory entitlement to a hearing. In contrast, there is no statutory entitlement for the Commission to conduct an earnings review, and there is no statutory entitlement to a hearing if the Commission decides not to do so. *See, e.g., U.S. Sprint Communications Co. v. Nichols*, 534 So.2d 698 (Fla. 1988) (no requirement to hold a hearing where action taken did not represent a change from the status quo).

10. Moreover, as noted above, FIPUG had sufficient opportunity to appear at the Commission's January 11, 2011, agenda conference and present arguments in opposition to the closing of the docket. Whatever due process rights FIPUG might have to speak to the Commission's decision were not violated. *See, e.g., South Florida Hospital and Healthcare Association v. Jaber*, 887 So.2d 1210 (Fla. 2004) (finding no due process violation where party had ample opportunity to make arguments in opposition prior to Commission approval of rate case settlement agreement and closing of docket to end rate review). In short, there was no need for, and no right to, a point of entry with respect to the Commission's discretionary decision not to initiate an earnings review.

11. FIPUG points to the Commission's change to its published agenda for the January 11, 2011 agenda conference, where the decision on initiating an earnings review was originally listed as proposed agency action and then was revised to a regular (final agency action) agenda item three business days before the agenda conference. This is a red herring. For the reasons just discussed, the Commission has no obligation to initiate earnings reviews, and there are

accordingly no rights for parties or potential parties to participate in a Commission decision not to initiate one. The timing of the Commission's announcement on how it intends to proceed on a discretionary matter cannot create a right to a hearing where one does not otherwise exist.

12. While the relief sought in the FIPUG Petition is unwarranted and unnecessary, FPL would not object to the Commission's providing clarification of its decision in Order 11-0103, to the effect that (a) the Commission moved directly to final agency action in this docket without a hearing because the docket involves only a unilateral, discretionary decision by the Commission on whether to open an earnings review on its own initiative rather than a decision affecting substantial interests; and (b) the Commission recognizes its duty to provide a point of entry for interested persons to request a hearing with respect to any matter that affects an interested person's substantial interests.

WHEREFORE, for the reasons set forth above, FPL respectfully requests that the FIPUG Petition be denied in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE
Docket No. 100410-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically this 7th day of March, 2011, to the following:

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