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**Subject:** Docket No. 110009-EI, Nuclear Cost Recovery Clause  
**Attachments:** FIPUG response to motion to stay 6.20.11.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:

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- b. This filing is made in Docket No. 110009-EI.
- c. The document is filed on behalf of The Florida Industrial Power Users Group.
- d. The total pages in the document are 8 pages.
- e. The attached document is The Florida Industrial Power Users Group's Response in Opposition to Mr. Kundalkar's Motion to Stay Subpoena.

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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

6/20/2011

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Nuclear Cost Recovery  
Clause.

DOCKET NO: 110009-EI  
FILED: June 20, 2011

**THE FLORIDA INDUSTRIAL POWER USERS GROUP'S  
RESPONSE IN OPPOSITION TO MR. KUNDALKAR'S  
MOTION TO STAY SUBPOENA**

The Florida Industrial Power Users Group (FIPUG), pursuant to rule 28-106.204, Florida Administrative Code, opposes Mr. Rajiv Kundalkar's (Kundalkar) Motion to Stay Order No. PSC-11-0246-PCO-EI (Order), which denies Kundalkar's motion to quash the subpoena served upon him for deposition.

Kundalkar's motion to stay should be summarily denied. Further, unless and until Kundalkar is deposed, the nuclear cost recovery process concerning FPL should be stayed in its entirety.

**Background**

1. One of the issues to be considered in this docket is whether FPL willfully withheld important and relevant information from the Commission in the September 2009 nuclear hearing and, if so, what action should be taken.

2. Kundalkar was an FPL employee during the time frame in question, was intimately and directly involved in the events at issue, and filed testimony in the 2009 docket, which was not updated. The Office of Public Counsel (OPC), FIPUG and Staff<sup>1</sup> sought to depose Kundalkar on April 20, 2011 (almost 2 months ago). Kundalkar filed a motion to quash the subpoena.

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<sup>1</sup> FIPUG and Staff filed cross-notice of deposition.

3. The Prehearing Officer denied Kundalkar's motion to quash the subpoena for deposition. In its Order, the Prehearing Officer thoroughly analyzed the parties' arguments and the pertinent law. The Prehearing Officer held:

The balancing test that must be used under these facts and circumstances is the litigants' right to pursue full discovery with the deponent's, a nonparty, right to protection against annoyance, embarrassment, oppression, or undue burden or expense that justice requires. Here, I find that the test favors the litigants (OPC, FIPUG, and the other parties to the FPL portion of the docket). As expressed below, the characterization of Mr. Kundalkar as a "private citizen" does not accurately reflect his involvement in this matter. Mr. Kundalkar's personal knowledge and impressions due to his direct involvement in the development certain facts at issue, leads towards satisfying the "necessary" requirement; thus, I find that Mr. Kundalkar can be deposed.

Order at 9.

4. Kundalkar's continuing and basic argument in opposition to being deposed is that he is a private citizen and is *no longer* employed at FPL. This position is disingenuous at best. Kundalkar is not a random person whom the parties wish to depose. Kundalkar was employed at FPL during the time period in question and was intimately involved in the events at issue. He was a witness, who under oath, sponsored testimony and exhibits during the 2009 nuclear hearing in his capacity as Vice President, Nuclear Power Uprates – the very subject and the very time frame which is at issue regarding the veracity of FPL information presented at that hearing. As the Prehearing Officer said in his Order, Kundalkar has "...personal knowledge and impressions due to his direct involvement in the development certain facts at issue."<sup>2</sup> The fact that Kundalkar is no longer employed at FPL is irrelevant – he was involved in the events at issue and the parties are entitled to explore his knowledge about those events. Parties have the right to take Kundalkar's deposition regardless of the fact that others at FPL also have

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<sup>2</sup> Order at 9.

knowledge regarding the situation and regardless of how much testimony of others FPL has filed in this matter.

5. On June 15, 2011, FIPUG participated in the deposition of FPL witness, John Reed (Reed). Reed is an outside expert FPL retained to investigate allegations related to the handling of the Extended Project Uprate (EPU). He is the author of the June 2010 Concentric report in which FPL's processes and procedures were reviewed. The Concentric report was critical of FPL's failure to update its 2009 testimony. The Concentric report finds:

Certain information provided by FPL in the 2009 NCRC was out-of-date and did not represent the best information available at that time.

6. At his deposition, Reed testified that Kundalkar was a key decision maker regarding FPL's failure to update its 2009 testimony. Reed also described his review of a briefing book prepared for Kundalkar in preparation for the 2009 hearing and the fact that he met with Kundalkar regarding the update issue. Thus, it is beyond dispute that Kundalkar has knowledge and close involvement in the matters at issue.

**Kundalkar Does Not Meet the Legal Criteria for A Stay**

7. Now in an attempt to thwart legitimate discovery, Kundalkar seeks to further delay his deposition by asking the Commission to stay its Order denying his motion to quash the subpoena pending judicial review. In other words, Kundalkar asks that the parties again be denied the ability to conduct relevant discovery in this matter and instead engage in continuing motion practice at the Commission as well as appellate proceedings related to arguments, which in FIPUG's view, fail to raise a colorable claim of entitlement to such a stay.<sup>3</sup> Kundalkar's tactics result in nothing but unwarranted delay. Kundalkar asks the Commission to delay, for an

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<sup>3</sup> FIPUG is also considering the option of filing a motion for attorneys' fees related to this on-going attempt to delay the proceedings.

undetermined period of time, the implementation of its valid order, which impacts the upcoming nuclear proceedings.

8. Kundalkar recognizes the stringent standards that must be met to prevail on a motion for stay; however, he falls woefully short of meeting such requirements.

9. The standards for a stay<sup>4</sup> require Kundalkar to show:

- a likelihood of success on the merits on appeal;
- a likelihood of sustaining irreparable harm if the stay is not granted; and
- that the delay in implementing the order will likely cause substantial harm or be contrary to the public interest if the stay is granted.<sup>5</sup>

10. As to his likelihood of success on the merits, Kundalkar provides one scant paragraph in his motion, lifting a portion of the same argument previously made to and rejected by the Prehearing Officer. Kundalkar's contention that the Commission's decision voids section 350.123, Florida Statutes, has no merit. This section is entirely consistent with the Commission's authority and Kundalkar has not demonstrated otherwise.

11. Regarding irreparable harm, the United States Supreme Court has found that a litigant attempting to demonstrate irreparable harm has a heavy burden. *Bush v. Gore*, 531 U.S. 1046 (2000). Some examples of irreparable harm that courts have found include: loss of essential medical services (*Smith v. Benson*, 703 F.Supp.2d 1261 (S.D. Fl. 2010)); loss of customers and good will (*Urologix, Inc. v. Wood*, 2008 WL 2790230 (M.D. Fl. 2008)); trademark infringement (*Dunkin' Donuts Franchised Restaurants LLC v. D&D Donuts, Inc.*, 566 F.Supp.2d 1350 (M.D. Fl. 2008)); loss of authority to issue insurance policies (*Fortune Life*

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<sup>4</sup> All three criteria in the Commission's rule must be met.

<sup>5</sup> Rule 25-22.061(2), Florida Administrative Code.

*Insurance Co. v. Department of Insurance*, 569 So.2d 1325 (Fl. 1<sup>st</sup> DCA 1990)); loss of customer base (*In re: Cherry Payment Systems, Inc.*, Order No. PSC-93-1561-FOF-TI, 1993)).

12. Kundalkar has failed to even approach the standard set out in the Commission's rule. It appears that the irreparable harm that Kundalkar alleges is that the result of the Commission's Order is that he must be deposed and then his deposition cannot be "erased."<sup>6</sup> Kundalkar fails to explain how or why this creates irreparable harm. He will be deposed pursuant to the pertinent Florida discovery rules with all protections such rules afford any deponent. Kundalkar has failed to demonstrate any irreparable harm from his deposition.

13. Finally, as to the public interest, substantial harm will occur if the parties are denied access to information held by a person intimately involved in the events at issue in this case. The matter of FPL's veracity regarding its 2009 testimony has already been delayed for one year; Kundalkar has provided no reason it should be delayed further.

14. The public interest (that is, the ratepayers' interest) is to ensure that the Commission makes decisions, which result in the collection of millions of dollars from consumers, based on accurate and truthful information. Substantial harm will accrue to ratepayers if this is not the case and undermine faith in the regulatory process. Thus, the public interest clearly weighs heavily in favor of consumers being permitted to depose Kundalkar.

**WHEREFORE**, FIPUG respectfully requests that:

1. Kundalkar's motion for stay be denied, and
2. The nuclear cost recovery proceeding related to FPL should be stayed until Kundalkar's deposition is concluded.

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<sup>6</sup> Kundalkar Motion at 6.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Florida Industrial Power Users Group's Response in Opposition to Mr. Kundalkar's Motion to Stay Subpoena has been furnished by electronic mail and U.S. Mail on this 20<sup>th</sup> day of June, 2011, to the following:

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s/ Vicki Gordon Kaufman

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