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**Subject:** Electronic Filing / Dkt 110309 - EI / Florida Power & Light's Opposition to Florida Industrial Power Users Group's Petition to Intervene  
**Attachments:** Florida Power & Light Company's Opposition To Florida Industrial Power Users Group's Petition to Intervene.pdf; Florida Power & Light Company's Opposition To Florida Industrial Power Users Group's Petition to Intervene.docx

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 110309 - EI  
In RE: Florida Power & Light Company's Petition To Determine Need for Modernization of Port Everglades Plant

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

d. There are a total of 8 pages

e. The document attached for electronic filing is Florida Power & Light Company's Opposition To Florida Industrial Power Users Group's Petition To Intervene

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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

2/15/2012

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Florida Power & Light Company's  
Petition To Determine Need for Modernization  
of Port Everglades Plant

Docket No. 110309-EI

Dated: February 15, 2012

**FLORIDA POWER & LIGHT COMPANY'S OPPOSITION TO  
FLORIDA INDUSTRIAL POWER USERS GROUP'S PETITION TO INTERVENE**

Florida Power & Light Company ("FPL" or the "Company") hereby responds to the Florida Industrial Power Users Group's ("FIPUG") Petition To Intervene filed February 14, 2012. FIPUG's Petition To Intervene is untimely, and should therefore be denied. Even if FIPUG's failure to timely file its Petition were not an absolute bar, the belated filing places significant restrictions on the scope of FIPUG's participation. Pursuant to this Commission's Rules and Order Establishing Procedure, FIPUG must take the case as FIPUG found it, and has therefore waived the opportunity to take a position on any issues or examine witnesses on any issues. Accordingly, the Commission is free to consider the stipulations of issues reached between FPL and the Commission's Staff. In support of this Opposition to the Petition To Intervene, FPL further states:

**A. Background**

On July 18, 2011, the Company filed a Petition to request exemption from issuing requests for proposal for the modernization project, effectively giving notice of its intent to modernize the Port Everglades plant site. See Docket No. 110228-EI. In that docket, the Commission concluded that FPL demonstrated the modernization appeared to be a favorable project that would increase the reliable supply of electricity to customers by providing base load generation to the area of most concentrated use on FPL's system and that it was unlikely that a respondent to FPL's request for proposal could provide similar benefits. Order No. PSC-11-0360-PAA-EI, dated August 26, 2011, at page 3.

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FPL subsequently commenced this need determination on November 21, 2011. On December 9, 2011, the Commission issued an Order Establishing Procedure, setting deadlines in this Docket. For example:

- Intervenors' testimony and exhibits            December 23, 2011
- Staff's testimony and exhibits, if any            December 30, 2011
- Rebuttal testimony and exhibits                January 13, 2012
- Prehearing Statements                            January 17, 2012
- Prehearing Conference                          January 31, 2012
- Discovery deadline                                February 9, 2012
- Hearing    February 20, 2012

FPL has responded to three sets of interrogatories and two sets of requests for production propounded by Staff. Thereafter, during the two week period immediately following the Prehearing Conference, Staff and FPL worked together to resolve pending issues. On February 13, 2012, the Commission issued a Prehearing Order that sets forth a proposed stipulation on all issues. Discovery closed on February 9, 2012.

FIPUG was not a party and, it did not participate in discovery or submit any testimony. Nor did FIPUG attend or participate in the Prehearing Conference. On February 15, 2012 – four business days before the final hearing – FIPUG filed a Petition To Intervene in this proceeding and attempts to interject new issues and purported disputed issues of fact. As demonstrated below, FIPUG's Petition To Intervene must be denied as untimely.

**B. FIPUG's Petition To Intervene Must Be Denied as Untimely**

Rule 25-22.039, F.A.C. provides that “[p]etitions for leave to intervene must be filed at least five days before the final hearing . . . .” When the period of time allotted under the Florida Administrative Code is less than seven days, intermediate Saturdays, Sundays and holidays are

excluded in the computation of time. Rule 28-106.103, F.A.C. There is no “good cause” or other exception to this uniform rule. The final hearing in this proceeding is scheduled to take place on Monday, February 20, 2012. Thus, under the governing rules, the time in which to file any petition to intervene in this docket expired on Monday, February 13, 2012 – five business days before the final hearing. FIPUG filed its Petition To Intervene on February 14, 2012. Thus, the Petition is untimely and must be denied. *See In Re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor*, Docket No. 080001-EI, Order No. PSC-08-0733-PCO-EI (“Mr. Saporito and SEC’s Petition is denied as being untimely filed pursuant to Rule 25-22.039, F.A.C., which requires that petitions for leave to intervene be filed at least five days before the final hearing.”).

Analogous facts arose in *In re Complaint by DPI-Teleconnect, L.L.C. Against BellSouth Telecommunications, Inc. for Dispute Arising under Interconnection Agreement*, Docket No. 050863-TP, Order No. PSC-07-0791 (Fla. P.S.C. Sept. 27, 2007). That case involved a party’s motion for continuance of a hearing, which, under the applicable rule, must be filed “at least five days prior to the date noticed for hearing.” *Id.* The moving party filed its motion five calendar days before the hearing. Relying on Rule 28-106.103, however, the Commission explained that Saturdays and Sundays must be excluded in the computation and thus denied the motion as untimely because it was filed only three business days before the hearing. *Id.*

Here, too, Saturday and Sunday must be excluded in computing the deadline for intervention. FIPUG filed its Petition To Intervene only four business days before the final hearing. Accordingly, under the authority of *DPI-Teleconnect*, FIPUG failed to meet the deadline and the Petition must be denied.

**C. FIPUG Waived Its Position on All Issues**

It is well established that “intervenors take the case as they find it.” Rule 25-22.039, F.A.C. Thus, FIPUG, like any other intervenor, must “comply with the same standards, rules, statutes, and procedures as all other parties to this proceeding, and shall be required to stay within the scope of this proceeding as it has been established through the issues, rules, and governing statutes.” *In re: East Marion Sanitary Sys. Inc.*, Docket No. 080562, Order No. PSC-10-0570 (Fla. P.S.C. Sept. 15, 2010). The Order Establishing Procedure the Commission issued in this Docket provides that:

Any issue not raised by a party either before or during the Prehearing Conference shall be waived by that party, except for good cause shown.

Order No. PSC-11-0565-PCO-EI (issued Dec. 9, 2011) (absent a finding that the party acted diligently in failing to take a position and that such failure will not prejudice other parties or confuse the proceeding, “the party shall have waived the entire issue, and the party’s position shall be shown as ‘no position’ in the Prehearing Order.”).

The Prehearing Conference in this proceeding was held on January 31, 2012. FIPUG was not a party and did not attend the Prehearing Conference. Accordingly, it asserted no position at that time, and has set forth no reason – let alone good cause – for having failed to state its position on any of the issues by the date of the Prehearing Conference. Now, at the eleventh hour, FIPUG attempts not only to take a position on each of the issues but also to introduce new issues in this Docket. Under the express terms of the Commission’s Order Establishing Procedure, however, FIPUG has waived each issue. Moreover, FIPUG “must stay within the scope of this proceeding,” and thus cannot belatedly introduce new issues.

It is implausible that FIPUG could demonstrate any good cause for failing to involve itself earlier. FIPUG is a long-time active participant in numerous electric utility proceedings

before this Commission, and regularly appears and intervenes in dockets involving FPL. FPL filed its petition for a bid rule exemption concerning Port Everglades about nine months ago and initiated this docket more than three months ago. The notice of hearing and prehearing was published January 9, 2012, and the coverage surrounding the proposed modernization has been considerable. Therefore, FIPUG had sufficient notice and could have abided by the governing rules.

In effect, FIPUG's decision to wait until the eve of the final hearing to file its Petition To Intervene means that it takes "no position" on each of the issues identified by Staff and FPL. It therefore follows that FIPUG should be given no opportunity to cross examine any witness. The role of cross examination is to establish through the opposition's witnesses the positions a party wishes to establish. Here, however, FIPUG has waived all issues and positions. It thus has no positions to establish and no rationale for cross examining any witness.

Likewise, FIPUG is subject to the Prehearing Order issued by this Commission. The Prehearing Order provides that each of FPL's witness, except Rene Silva, should be excused from hearing unless a Commissioner seeks to cross-examine a particular witness. Mr. Silva is available only for questioning by the Commissioners. The Prehearing Order does not otherwise contemplate oral testimony. The Commission should not indulge FIPUG's lack of diligence and belated decision to intervene by according rights beyond those already established. The Prehearing Order does allow parties to make opening statements. Thus, if the Commission allows FIPUG to intervene despite the untimely filing, FPL would not object to FIPUG making an opening statement.

**D. The Commission May Approve the Proposed Stipulation**

As explained above, FIPUG is relegated as a matter of law to take “no position” on the issues identified in this Commission’s Order Establishing Procedure and discussed in the Prehearing Order. Staff and FPL have reached proposed stipulations on each issue. Consistent with Commission practice, the Commission may proceed to consider, and if warranted, approve, proposed stipulations to which other parties take no position. *See, e.g., In re: Fuel and purchased power cost recovery*, Docket No. 11000I-EI, Order No. PSC-11-0579 (Fla. P.S.C. Dec.16, 2011) (approving stipulation reached between Staff and utility, where intervenors took “no position”); *In re: Fuel and purchased power cost recovery*, Docket No. 100001-EI, Order No. PSC-11-0094 (Fla. P.S.C. Feb. 1, 2011) (Commission approved stipulation on the issue where FIPUG took “no position”).

In conclusion, FIPUG’s Petition To Intervene should be denied as untimely because it did not file its Petition by the statutorily prescribed deadline. Moreover, even if the Commission determined such untimeliness was not an absolute bar, FIPUG has waived its opportunity to take positions on any issues and has no basis upon which to cross examine any witness. Accordingly, the Commission can, consistent with prior practice, consider and approve the stipulations reached between FPL and Staff.

Respectfully submitted this 15th day of February, 2012.

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By: /s/ John Butler

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**CERTIFICATE OF SERVICE**  
**DOCKET NO. 110309-EI**

I HEREBY CERTIFY that a true and correct copy of the foregoing FPL's Opposition to FIPUG's Petition To Intervene was served via hand delivery and electronic delivery this 15th day of February, 2012 to the following:

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