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Subject: Docket No. 120015-EI

Attachments: VOP Post Hearing Statement of Issues and Positions and Post Hearing Brief 11_30_12.pdf

Below is the required information for the attached e-filing with the Florida Public Service Commission:

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b. The docket number and title if filed in an existing docket:

Title: In Re: Petition for Increase in Rates by Florida Power & Light Company
Docket No. 120015-EI

c. The name of the party on whose behalf the document is filed:

Village of Pinecrest, Florida

d. The total number of pages in each attached document:

THE VILLAGE OF PINECREST'S POST-HEARING STATEMENT OF ISSUES AND POSITIONS AND POST-HEARING BRIEF - 16 pages

e. A brief but complete description of each attached document:

THE VILLAGE OF PINECREST'S POST-HEARING STATEMENT OF ISSUES AND POSITIONS AND POST-HEARING BRIEF

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11/30/2012

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Increase in Rates by Florida Power & Light Company	)	DOCKET NO.: 120015-EI FILED: November 30, 2012

THE VILLAGE OF PINECREST'S POST-HEARING STATEMENT OF ISSUES AND POSITIONS AND POST-HEARING BRIEF

Pursuant to Orders No. PSC-12-0529-PCO-EI and PSC-12-0617-PHO-EI, the Village of Pinecrest, Florida ("Village"), by and through its undersigned counsel, hereby files its Post-hearing Statement of Issues and Positions and Post-Hearing Brief.

REFERENCES

For the purposes of this Brief, references to the hearing transcripts and pre-filed witness testimony will be as follows:

"STR" means Settlement Transcript.

"SDT" means Settlement Direct Testimony.

BASIC POSITION

The Village adopts the legal position of the Office of Public Counsel with respect to the validity of the proposed settlement agreement and the authority of the Commission to approve the proposed settlement agreement in light of the facts and circumstances surrounding this case. The Office of Public Counsel is an indispensable party to a valid settlement agreement settling the litigated file and suspend rate case in this proceeding. The legal basis for the Village's conclusion has been thoroughly and expertly set forth by Public Counsel in his petition for a writ of quo warranto now pending before the Florida Supreme Court, and has been supplemented in various motions filed in this proceeding by the Village, the Office of Public Counsel, and the Florida

Retail Federation. All arguments and rationale contained within each of said Petition and motions are incorporated in this pleading by reference.

Even if the Commission determines that the Office of Public Counsel is not an indispensable party to the proposed settlement agreement, it should nevertheless reject it as not in the public interest. The proposed settlement agreement is intended to resolve all outstanding issues in the proceeding despite the fact that every significant issue in the proceeding is being vigorously contested by several parties, including the Office of Public Counsel, representing the vast majority of FPL customers. The case has been fully litigated, and all that remains is a decision by the Commission. In fact, nothing in the case is settled among the adversarial parties, even in the remotest sense of the term. Approval of such a "settlement" would serve only to undermine and marginalize the role of the public's advocate and diminish the participation of the other intervenors, and would also eliminate any meaningful participation by the vast majority of customers in the process. Generally, residential customers have no more effective voice before the Commission than the Public Counsel. In some prior cases, such customers have been represented by other organizations, such as the Florida Attorney General or AARP. That is not true in this proceeding. No organization in this proceeding other than the Office of Public Counsel represents a broad base of customers and customer classes. Of even greater concern, no intervenor party to the proposed settlement agreement represents the interests of any class of customers other than the interruptible classes.

Furthermore, acceptance by the Commission of a settlement agreement such as the one proposed in this proceeding, which is not only opposed by the Office of Public Counsel but by others interested in the proceedings, such as the Florida Retail Federation and the Village, would have a chilling effect inhibiting representation of interested customer groups in the rate setting

process and would have the effect of weakening the future bargaining position of the Office of Public Counsel. Therefore, the Commission should adopt the bedrock policy principle that it will reject as not in the public interest any comprehensive settlement agreement in a file-and-suspend rate case that is supported by only a single class of customers.

The proposed settlement agreement is not in the public interest because it enables FPL to benefit from multiple back-to-back general rate increases without ensuring for customers that such increases are necessary given that changing circumstances in the intervening period could avoid the need for any increase. Under the proposal, FPL's customer rates would increase at the beginning of 2013 by $378 million, and then again six months later by an additional $165.3 million. One year after that, customer rates would automatically increase by another $236 million. And, following on another two years later in June 2016, rates would again increase by another $217.9 million. The Commission is asked to authorize revenue requirements in 2012 that FPL says it will not need until 2016. Such a decision by the Commission, to approve back-to-back-to-back-to-back general rate increases without a stipulation from the Office of Public Counsel or other representatives of a broad cross-section of customer classes, is unprecedented and is flatly at odds with the Commission's position articulated only two years ago that "back-to-back rate increases should be allowed only in extraordinary circumstances." Order No. PSC-10-0153-FOF-EI, p. 9. If such extraordinary circumstances existed, FPL would have addressed its need in its general rate case and not as part of an eleventh-hour settlement agreement excluding the Office of Public Counsel.

FPL is not entitled to the establishment of its permanent base rates by negotiation, and neither the Public Counsel nor any other party is required to seek or entertain settlement of a file and suspend rate case. Conversely, once the Commission sets a hearing to determine rates, the law

requires that the Public Counsel and other intervenors be afforded full participation in the proceedings. Approval of the proposed settlement agreement over the objection of every representative of the non-interruptible rate classes short-circuits the file and suspend rate setting process and diminishes, if not precludes, the process owed to the intervenor-parties and their clients. They have effectively been cut out of the rate setting process, even after having fully litigated the rate case.

ISSUES AND POSITIONS

ISSUE 1: Are the generation base rate adjustments for the Canaveral Modernization Project,Riviera Beach Modernization Project, and Port Everglades Modernization Project, contained in paragraph 8 of the Stipulation and Settlement, in the public interest?

POSITION: No. As a general proposition, the Commission should reject the use of a GBRA-type mechanism absent a stipulation from parties representing a much broader coalition of customer classes and a much larger number of customers than is the case with the proposed settlement agreement. The Commission has already rejected, more than once, attempts by a public utility to adopt the GBRA mechanism in the absence of a stipulation from multiple parties representing all customer classes. The Legislature has authorized the use of similar mechanisms only to achieve specific policy outcomes, such as the encouragement of nuclear power development, and has in fact rejected the use of the mechanism in broader rate setting contexts when proposed by public utilities.

Discussion of Issue 1

The Village, generally, adopts the arguments of the Office of Public Counsel. In addition, The Village must point out that both the Commission and the Legislature have previously signaled their hesitation at allowing public utilities to use the GBRA-type mechanism outside of a fully stipulated settlement agreement. As FPL witness Barrett acknowledged in cross examination from Commission staff, see STR, p. 5787, in Order No. PSC-10-0153-FOF-EI the Commission states:

> It is not possible for us or interested parties to examine projected costs at the same level of detail during a need determination proceeding as we would be able to do in a traditional rate case proceeding. A need determination examines costs only in

> comparison to alternative sources of generation. It does not allow for a review of the full scope of costs and earnings, as a rate case does.

Witness Barrett also acknowledged the Commission's denial of a similar GBRA proposal by TECO for substantially the same reasons, as well as the failure of an effort to incorporate a GBRA proposal into law during the 2012 Legislative Session. STR, p. 5787. The failure of Florida's public utilities to achieve the permanent establishment of this kind of rate setting mechanism indicates a clear preference by both the Commission and the Legislature that permanent base rates should be set utilizing the file and suspend procedure absent a compelling policy justification, such as fostering the development of new nuclear power generation or encouraging broad and legitimate compromise among disparate interest groups. This is because the Commission has not been able, and will not be able, to review the full scope of costs and earnings for plant that was not included within a filed test year. Absent such review, without a stipulation by a broad representation of affected parties, the Commission has no assurance that the costs and earnings used to establish revenue requirements will result in fair, just and reasonable, rates, or that affected parties and those they represent are willing to bear the risk that they will not.

In Order No. PSC-10-0153-FOF-EI, whereby the Commission rejected an FPL proposal to establish a permanent GBRA mechanism, the Commission distinguished its prior decision to approve the GBRA mechanism in the utility's 2005 settlement agreement on the basis that: 1) the 2005 agreement was the result of the "give-and-take" in negotiating the agreement; 2) the parties stipulated to the basis for the costs, as well as the return on equity and capital structure to be used in the calculation of the cost factor to be submitted for true-up purposes in the Capacity Clause projection filing; 3) the GBRA mechanism was time-limited, to remain in effect until the Commission established new base rates; 4) base rates could not change during the term of the

agreement; and 4) the negotiated agreement provided a revenue sharing plan between shareholders and customers.

The settlement agreement proposed in this proceeding can be similarly distinguished from the 2005 settlement, and other similar settlements which utilize a GBRA mechanism. First, the proposed settlement agreement increases the amount of credit non-firm customers may receive at the expense of other customer classes. Because no party to the negotiations of the settlement agreement represents any of these other non-interruptible customer classes, there was no legitimate "give-and-take" in negotiating the agreement. To the contrary, by offsetting the cost of the additional credits against the rates paid by non-interruptible customer classes FPL is not "giving" anything, and residential and other firm customers not represented in the negotiations are certainly not "taking" anything. Other aspects of the agreement, such as those that are intended to create certainty, also do not reflect a legitimate process of "give-and-take" negotiations among representatives of the different customer classes and FPL, as different classes of customers may value different kinds of certainty. In addition, many non-interruptible customers may value the same type of certainty differently than would a non-firm customer. For example, the kind of alleged price certainty offered by the proposed settlement's fixing of base rates for a longer period of time may not be as important to residential customers as it is to industrial customers, particularly in light of the fact that rates fluctuate annually due to the annual clause adjustments made in the roll-over dockets. Additionally, FPL's residential customers already have a means to achieve price certainty through the use of budget billing, which alternative means diminishes the value of any such alleged price certainty to non-interruptible customers that is argued to exist under the proposed settlement agreement.

Although the proponents of the settlement agreement argue that the GBRA mechanism would create certainty for the utility and the large industrial-class customers, the Village notes that any such certainty would come at a cost to all other customers. Customers would lose the opportunity to have lower rates four years from now than they would have under the settlement agreement if operational and financial circumstances change to the degree that a lesser revenue requirement is warranted than that required utilizing the GBRA mechanism. Customers also lose the potential benefit of avoiding a future rate increase altogether if circumstances change to a degree that FPL continues to earn within the authorized range for return on equity, even after the Riviera and Port Everglades modernizations are placed into service.

Nevertheless, parties representing the non-interruptible classes of customers are not represented under the proposed settlement agreement, they are not party to it, and there is no give and take among those customer groups of the kind recognized in the Commission's 2010 Order denying FPL's request to establish a GBRA.

Second, the parties to the proceeding have not stipulated to the basis for the costs, the capital structure, or the return on equity to be used in the calculation of the cost factor to be submitted for true-up purposes in the Capacity Clause projection filing. As discussed, the only parties to the proposed settlement agreement that so stipulate are the non-firm customers. Parties in the proceeding who do not so stipulate include the Village of Pinecrest, the Office of Public Counsel, the Florida Retail Federation and pro se intervenors. In other words, the representatives of all other customer classes and the vast majority of customers do not stipulate. This is in stark contrast to the 2005 stipulation and settlement agreement, as acknowledged by FPL witness Deason, which included as signatories the following parties: 1) the Office of Public Counsel; 2) the Florida Attorney General; 2) AARP; 3) the Florida Retail Federation; 4) Common Cause Florida;

5) the Commercial Group; 6) the Florida Industrial Power Users Group; 7) the Federal Executive Agencies; 8) the South Florida Hospital and Healthcare Association; and 9) FPL. STR, pp. 5314-5315.

The GBRA mechanism established by the proposed settlement agreement is clearly not supported by a stipulation of the parties as has been the case with similar settlement proposals establishing the mechanism. The proposed settlement agreement is also clearly not the result of a give and take negotiation among parties with sufficiently disparate or opposing interests. Therefore, key elements which the Commission has historically relied upon to support the use of a GBRA mechanism are not present in this case.

ISSUE 2: Is the provision contained in paragraph 10(b) of the Stipulation and Settlement, which allows the amortization of a portion of FPL's Fossil Dismantlement Reserve during the Term, in the public interest?

POSITION: No.

Discussion of Issue 2

The Village adopts the position of the Office of Public Counsel, and its rationale in support of its position.

ISSUE 3: Is the provision contained in paragraph 11 of the Stipulation and Settlement, which relieves FPL of the requirement to file any depreciation or dismantlement study during the Term, in the public interest?

POSITION: No.

Discussion of Issue 3

The Village adopts the position of the Office of Public Counsel, and its rationale in support of its position.

ISSUE 4: Is the provision contained in paragraph 12 of the Stipulation and Settlement, which creates the "Incentive Mechanism" including the gain sharing thresholds established between customers and FPL, in the public interest?

POSITION: No.

Discussion of Issue 4

The Village adopts the position of the Office of Public Counsel, and its rationale in support of its position.

ISSUE 5: Is the Settlement Agreement in the public interest?

POSITION: No.

Discussion of Issue 5

In 1974, the Legislature enacted the "file and suspend" rate statute, prescribing the method the Florida Public Service Commission is required to utilize when it establishes permanent base rates for a public utility. Within the same enactment, the Legislature created the Office of Public Counsel ("OPC") "to provide legal representation for the people of the state in proceedings before the commission," and gave the Office the power to "appear in any proceeding or action before the commission in the name of the state or its citizens and to urge therein any position which he deems to be in the public interest ... ." Chapter 74-195, Laws of Florida. Today, the Commission is still required to establish permanent base rates for a public utility like Florida Power & Light Co. ("FPL") utilizing the "file and suspend" method and by adducing evidence in hearing, and the OPC is still empowered to intervene and participate in such a hearing. See ss. 366.06 (2), (3) and (4), and 350.0611, Fla. Stat. (2012).

The Florida Supreme Court has acknowledged the special interrelationship of the role of the public counsel and the operation of the file and suspend statute, stating:

> Whatever format the Commission chooses to provide, however, special conditions pertain in cases where public counsel has intervened. This is a consequence of the statutory nexus between the file and suspend procedures and the role prescribed for public counsel in rate regulation. Public counsel was authorized to represent the

> citizens of the State of Florida in rate proceedings of this type. That office was created with the realization that the citizens of the state cannot adequately represent themselves in utility matters, and that the rate-setting function of the Commission is best performed when those who pay utility rates are represented in an adversary proceeding by counsel at least as skilled as counsel for the utility company. The office of public counsel was created by the same enactment which brought the utilities accelerated rate relief. Under these circumstances, the Commission cannot schedule a "public hearing" and preclude public counsel, the public's advocate, from acting to protect the public's interest. Indeed, where public hearings are scheduled for interim rate increases these procedural requirements may be more important than they are for permanent rate increases, since the need for special expertise in rate matters is compressed into a shorter period of time.

Citizens of Florida v. Mayo, 333 So. 2d 1, 6-7 (Fla. 1976).

The Commission is, thus, required to set FPL's rates in the manner prescribed by statute, and the Office of Public Counsel is entitled to full adversary participation in the proceedings required by said statute and applicable case law. Further, the Commission may not preclude the public's advocate from acting to protect the public's interest. Conversely, no provision exists in the law which establishes a right of a public utility to have its rates set by a negotiated settlement agreement. Provisions expressing a preference for, or establishing a policy favoring, settlement agreements are conspicuously absent from Chapter 366, Florida Statutes. In fact, during cross examination FPL witness Deason acknowledged that there is no presumption that a file and suspend rate case should settle. STR p. 5248-5249. He also later agrees in his testimony that there is no right in a utility to have a filed case settle. STR p. 5249.

Nevertheless, the Florida Public Service Commission has a history of approving negotiated settlements to file and suspend rate proceedings, even preferring a negotiated result to a litigated result. The Commission has historically been able to rely on the stipulations of adversaries representing key interests that the resulting rates from a settlement agreement would be fair, just, reasonable and compensatory, and that on balance, the effect of the agreement would be in the

public interest. Where key constituencies are not represented in negotiations, and where key constituencies are not able to stipulate to the reasonableness of the compromise and its resulting rates, the Commission has no basis for deviating from the Legislature's prescribed method for establishing permanent base rates. It is only the general agreement among key adversarial interests that allows the Commission to establish permanent base rates by a means different than that mandated in the law. This is especially true when the proposed settlement agreement would create a mechanism to establish revenue requirements for power plants that are not within the test year of the filed case, when the power plants covered by such mechanism are not expected to provide service to customers for at least another two to four years, when the mechanism would rely on cost projections that are derived for a purpose other than rate setting, and when the revenue requirement established through the mechanism is not determined in light of current capital costs, market conditions, and other financial and operating conditions.

Notwithstanding the Commission's rulings in this proceeding on the various motions filed by the Village, the Office of Public Counsel, and the Florida Retail Federation, the Village asserts that, as a matter of law, the Commission may not approve a proposed settlement agreement, like the one at issue in this case, which is opposed by every representative of the residential and non-interruptible general customer classes. Even if the Commission disagrees with the Village's assertion, it should nevertheless reject the proposed settlement agreement, because approving it would be the wrong thing to do, for a variety of reasons.

First, as already discussed, the vast majority of customers and most customer classes were not represented in negotiations. In fact, the representatives of all customer groups save large industrial interruptible class customers oppose the proposed settlement. This fact alone should give the Commission pause in its decision whether to approve the proposal, and should raise the

bar significantly in its evaluation whether the proposal is in the public interest. FPL's witness Deason acknowledged under cross examination that the Commission should accord lesser deference to settlement agreements that are opposed by multiple customer groups, stating "I do agree with the concept that the degree of deference may be dependent upon the degree of participation of the various intervenors, to what extent they participated in the case, what concession they are making." STR, p. 5269, lines 15-19. This acknowledgment is consistent with the position Mr. Deason takes in his direct testimony where he states: "The best negotiated settlements are those where the public utility and the intervenors all willingly negotiate from a position of knowledge and strength with a willingness to engage in compromise to achieve a beneficial balance." Deason SDT, p. 9, lines 19-21. In fact, under cross-examination, he also acknowledged that, conversely, when all parties do not participate, the negotiations are not as good as they could have been if all had participated. STR, p. 55316, lines 8-11.

Second, the Commission's approval of the proposed settlement agreement would create a precedent that signals to a public utility that it need not compromise with representatives of all, or even a few, customer classes, to achieve what it desires in a settlement agreement. The effect of such a signal would be to increase the rates that future customers will pay, either by weakening the negotiating position of future intervenors (including Public Counsel), or by decreasing the likelihood that a litigated case carries through to conclusion, regardless of the strength of the intervenors' case. Worse, if the Commission accepts the apparent position of witness Deason that settlement approval may be appropriate where a public utility negotiates with a single customer, so long as the agreement appears to include elements contested in the case and contains compromises on those elements, see, STR, pp. 5268-5269, such acceptance would open the door to the possibility of sham settlements designed only to avoid reaching a decision in a file and suspend

rate case, or to achieve outcomes that would not otherwise be possible in a fully litigated proceeding.

Third, both the Commission and the Legislature have previously signaled their hesitation at allowing public utilities to use the GBRA-type mechanism outside of a properly stipulated settlement agreement. As FPL witness Barrett acknowledged in cross examination from Commission staff, see STR, p. 5787, in Order No. PSC-10-0153-FOF-EI the Commission states:

> It is not possible for us or interested parties to examine projected costs at the same level of detail during a need determination proceeding as we would be able to do in a traditional rate case proceeding. A need determination examines costs only in comparison to alternative sources of generation. It does not allow for a review of the full scope of costs and earnings, as a rate case does.

Witness Barrett also acknowledged the Commission's denial of a similar GBRA proposal by TECO for substantially the same reasons, as well as the failure of a proposal to incorporate a GBRA proposal into law during the 2012 Legislative Session. STR, p. 5787. The failure of Florida's public utilities to achieve a permanent adoption of this kind of rate setting mechanism indicates a clear preference by both the Commission and the Legislature that permanent base rates should be set utilizing the file and suspend procedure absent a compelling policy justification, such as fostering the development of new nuclear power generation or encouraging broad and legitimate compromise between disparate interest groups.

Fourth, the settlement agreement achieves certainty for the utility and big industry, but at a cost to all other customers. Customers lose the potential opportunity to have lower rates four years from now than they would have under the settlement agreement, if operational and financial circumstances change to the degree that a lesser revenue requirement is warranted than that required utilizing the GBRA mechanism. Customers also lose the potential benefit of avoiding a future rate increase altogether if circumstances change to a degree that FPL continues to earn

within the authorized range for return on equity, even after the Riviera and Port Everglades modernizations are placed into service.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail, to the service list below, on this 30th day of November, 2012:

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