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Attachments: 1.22.13 Response to Saporito 1-14-13 mot for reconsideration.pdf; 1.22.13 Response to Saporito 1-14-13 mot for reconsideration.docx

Electronic Filing

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b. Docket No. 120015 - EI
In re: Petition for rate increase by Florida Power & Light Company

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

d. There are a total of 13 pages

e. The document attached for electronic filing is Florida Power & Light Company's Response in Opposition to Thomas Saporito's Second Motion for Reconsideration.

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Florida Power & Light Company	Docket No. 120015-EI January 22, 2013

FPL'S RESPONSE IN OPPOSITION TO THOMAS SAPORITO'S SECOND MOTION FOR RECONSIDERATION

Florida Power & Light Company ("FPL"), pursuant to Florida Rule of Administrative Procedure 28-106.204, hereby responds to Thomas Saporito's Motion for Reconsideration of Commission's January 14th, 2013 Order Approving Revised Stipulation And Settlement Agreement and Motion for Further Hearing and Motion for Opportunity To Engage in Discovery ("Motion for Reconsideration"). The Motion for Reconsideration should be denied because there is no point of fact or law that the Florida Public Service Commission ("FPSC" or "Commission") overlooked or failed to consider in rendering its Order Approving Revised Stipulation and Settlement Agreement (Order No. PSC-13-0023-S-EI, dated January 14, 2013; the "Settlement Order") and thus the motion states no valid basis for reconsideration. In further support, FPL states:

I. Background

On August 15, 2012, FPL, the Florida Industrial Power Users Group, the South Florida Hospital and Healthcare Association and the Federal Executive Agencies (collectively, the "Signatories") filed a Joint Motion to Approve Stipulation and Settlement (the August 15th settlement document is hereinafter referred to as the "Proposed Settlement Agreement"). Following a technical hearing on FPL's original rate case filing, the Commission entered an order allowing all parties to submit prefiled testimony and take discovery regarding the settlement. The Commission held a two-day hearing on November 19 and 20, during which time the Signatories

presented the testimony of eight witnesses in support of the Proposed Settlement Agreement and the Office of Public Counsel ("OPC"), proclaiming to represent all non-signatories, presented four witnesses in opposition.

On December 13, 2012, the Commission held a special agenda conference to consider the Proposed Settlement Agreement. The Commission evaluated the evidence to determine whether the Proposed Settlement Agreement and certain specific provisions therein were in the public interest. During its discussions, the Commission expressed concerns regarding some of the settlement terms, suggesting certain changes it believed to be consistent with the public interest.

The Commission briefly recessed to permit the Signatories to address the Commission's stated concerns. The Signatories submitted a Revised Settlement Agreement that addressed each of those concerns. The Commission reconvened the special agenda conference and its Executive Director read into the record a statement opposing the Revised Settlement Agreement on behalf of OPC and the other Non-Signatories.[1] As noted in the Motion for Reconsideration, the statement confirmed that the Non-Signatories would not sign the settlement agreement with or without the modifications that the Signatories made. The Non-Signatories' statement asserted that they had not been provided an adequate opportunity to negotiate the revisions, but they did not request (either from the Signatories or the Commission) a further recess to do so. Motion for Reconsideration, at p. 2. Neither Mr. Saporito nor any other Non-Signatory expressed disagreement with OPC's statement or asked to have any other statement regarding the Revised Settlement Agreement read into the record. Thereafter, the Commission voted to approve the Revised Settlement Agreement.

[1] The Executive Director noted that "all the parties, all the non-signatory parties join the objections of OPC, with the exception of Mr. Hendricks, who's not here today." Dec. 13, 2012 Tr. at 98.

The following morning, Mr. Saporito filed a motion for reconsideration. The Commission denied this first motion for reconsideration on the ground that reconsideration was premature because no written order had been rendered, and because his request for a further hearing and discovery was untimely. Order 13-0015, at p. 2.

Mr. Saporito's current Motion for Reconsideration must also be denied. While it is no longer premature, nothing in the Motion for Reconsideration points to a mistake in law or fact that the Commission overlooked or failed to consider in rendering its order that would warrant reconsideration.

II. Standard for Motion for Reconsideration

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. *Stewart Bonded Warehouse. Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962). The alleged overlooked fact or law must be such that if it had been considered, the Commission would have reached a different decision than the decision in the order. *Id.* In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959); *State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, it is not necessary for the Commission's order to respond to every argument and fact raised by each party. *Id.* at 818. An opinion should "never be prepared merely to refute the arguments advanced by the unsuccessful litigant." *Id.*

III. The Commission Did Not Overlook A Point of Fact or Law

Mr. Saporito essentially makes two arguments: (i) that the Non-Signatories were excluded from negotiations, (ii) that the Non-Signatories' due process rights were violated because they did

not have an opportunity to engage in further hearings and discovery with respect to the changes made to the Settlement Agreement. Neither of these arguments identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering the Settlement Order.

A. The Non-Signatories had Sufficient Opportunity To Negotiate

Mr. Saporito alleges – falsely and without foundation -- that the Revised Settlement Agreement resulted from "secret negotiations" between FPL and the Commission Staff. Motion for Reconsideration, at p. 4. Far from being a "point of fact," the record demonstrates that nothing could be further from the truth. The modifications contained in the Revised Settlement Agreement were made in direct response to public comments from the Commissioners. The Commissioners' comments, in turn, were based on their evaluation of the evidence presented during the November 19-20 technical hearings, all of which was presented openly and publicly. *See, e.g.*, Dec. 13, 2012 Tr. at 7, 9, 13 15-16, 116.

Indeed, the Settlement Order expressly recognizes the basis for the modifications. Settlement Order at p. 5 ("The modified agreement incorporates changes based upon our extensive discussion. "). The principal changes are described below:

- In response to Commissioner's comments regarding the appropriate Return on Equity ("ROE"), the Signatories *reduced* the ROE to 10.50 percent from 10.70 percent for all purposes.
- In response to comments regarding the fair level for the revenue increase, the Signatories *dropped* the revenue increase from $378 million to $350 million effective January 1, 2013. Eighteen million dollars of the reduction is allocated to the residential rate class only.
- In response to the Commissioner's concerns regarding the late payment charges, FPL's minimum late payment charge was *reduced* from $6.00 to $5.00 as originally requested in FPL's MFRs.

There was nothing secret about these changes. And it is questionable whether Mr. Saporito even has standing to challenge them, since, in each instance, the modifications favored customers, including Mr. Saporito. Under Mr. Saporito's bizarre theory, FPL and the Commission "conspired" against the Non-Signatories to provide additional benefits to customers, particularly the residential class under which he takes service. This argument lacks not only factual support, but also logic.

As a corollary to this argument, Mr. Saporito further alleges that the Non-Signatories were excluded from the negotiations or had insufficient opportunity to negotiate. Again, this argument fails to identify a point of fact or law that was overlooked or that the Commission failed to consider in rendering the Settlement Order.

The Commission did not overlook the Non-Signatories' level of opportunity to participate in negotiating a settlement. In fact, the Non-Signatories expressed their objection to the Revised Settlement Agreement *immediately before the vote*. Through a statement presented by the FPSC's Executive Director, the Non-Signatories asserted that the break did not provide a meaningful opportunity to negotiate, and there can be no doubt that the Commission considered this objection in rendering its decision:

> Upon completion of our discussion, all parties were given an opportunity to engage in further settlement negotiations. Upon reconvening the Special Agenda Conference, the signatories filed a revised Stipulation and Settlement *and the non-signatories reiterated their continued objections* to our consideration of the proposed and modified agreements.

Settlement Order at p. 5 (emphasis added).

The Commission also acknowledged the Non-Signatories' objection during the special agenda conference, and remarked that, contrary to the objection, there had been ample time to negotiate following the close of the technical hearings where the parties could have engaged in

negotiations. Dec. 13, 2012 Tr. at 117. The facts support the Commission's observations. The Signatories filed their Joint Motion for Approval of Stipulation and Settlement on August 15, 2012 – four months before the Commission's vote on December 13, 2012. There was an extended period of discovery and pre-filing of testimony by all parties prior to the November 19-20, 2012 technical hearing on the Proposed Settlement Agreement, during which time the Non-Signatories had an ample opportunity both to gather information in support of negotiations and to negotiate based on that information. The technical hearing concluded on November 20, 2012 – three weeks before the Commission's vote. This provided a further, ample period for negotiations to take place had the Non-Signatories been serious about negotiating. It is disingenuous to suggest that the opportunity to negotiate was limited to the December 13, 2012 intermission between the Commission's discussion and its vote approving the Revised Settlement Agreement. In any event -- and as noted above -- the statement that the Executive Director read into the record for OPC and the other Non-Signatories showed that they were inalterably opposed to the settlement agreement, with or without the modifications that the Signatories made on December 13. Dec. 13, 2012 Tr., at p. 98-99. Neither Mr. Saporito nor any other Non-Signatory offered any other views.

Mr. Saporito's argument that he was disadvantaged by the limited time to negotiate on December 13 is further undermined by the fact that all of the changes that the Signatories proposed and the Commission accepted were directly beneficial to him and FPL's other customers. Mr. Saporito was in no way harmed by those changes; rather, they significantly increased the benefit that the Revised Settlement Agreement will provide to him and other customers. The Motion for Reconsideration asserts no plausible explanation as to why an

extended period of discussion would have been necessary to accept concessions that were being made to his advantage.

In short, Mr. Saporito contention that the Non-Signatories had insufficient opportunity to negotiate identifies no point of fact that the Commission overlooked, and cites no law that, if considered, would change the result.

B. The Commission's Decision Did Not Violate Due Process

Mr. Saporito misunderstands both the concept of due process as well as the nature of Commission's ratemaking authority. Due process requires that parties to a proceeding be given adequate notice and an opportunity to be heard on an issue. *Bresch v. Henderson,* 761 So. 2d 449, 451 (Fla. 2d DCA 2000). This principle is the same when the issue in question is approval of a settlement. In a wide variety of contexts involving settlements, courts have consistently focused their due-process inquiry on whether the complaining party was given notice that a settlement is under consideration and an opportunity to be heard concerning the fairness of that settlement, rather than on whether the party participated in negotiating the settlement. *See, e.g., Nelson v. Wakulla County,* 985 So. 2d 564 (Fla. 1st DCA 2008); *Bland v. Cage,* 931 So. 2d 931 (Fla. 4th DCA 2006); *Humana Health Plans v. Lawton,* 675 So. 2d 1382 (Fla. 5th DCA 1996). The concept of due process in an administrative proceeding is less stringent than in a judicial proceeding. *Hadley v. Department of Administration,* 411 So. 2d 184, 187 (Fla. 1982).

Here, the Commission provided timely notices of conferences and hearing, and gave all parties an opportunity to be heard on all issues regarding the Proposed Settlement Agreement, including the terms that were subsequently modified. The Commission also gave all parties the opportunity to take discovery and present witnesses in support of, or opposition to, the Proposed Settlement Agreement. The Signatories and OPC submitted prefiled testimony and prepared

exhibits for the Commission to consider in making its decision whether to approve the settlement. Mr. Saporito chose not to submit pre-filed testimony. As a consequence, he presented no evidence in support of his position, notwithstanding the Commission's procedures and order that gave him that opportunity.

The Commission held a properly noticed hearing on November 19 and 20. During the hearing all parties were allowed to cross-examine opposing witnesses even those parties who chose not to present their own. Thus, the Non-Signatories were given an opportunity to challenge all evidence presented in support of the Proposed Settlement Agreement, an opportunity Mr. Saporito did pursue through cross-examination of every witness who testified in support of the settlement. Following the November hearing, all parties were permitted to file a post-hearing brief to address each issue and attempt to marshal the evidence in their favor, and Mr. Saporito, along with OPC and the other parties who challenged the settlement agreement submitted a post-hearing brief for the Commission's consideration. These facts plainly establish that all parties were afforded more than adequate opportunity to be heard.

The Commission's approval of the modified terms in the Revised Settlement Agreement was consistent with legal authority and not a violation of the Non-Signatories' due process rights. It was within the range of alternatives that the Commission could consider when setting rates for FPL. The breadth of the Commission's discretion in the ratemaking process is well settled. *Gulf Power Co. v. Bevis*, 296 So. 2d 482, 487 (Fla. 1974) ("as pointed out by the Commission, it has considerable discretion and latitude in the rate fixing process"); *Storey v. Mayo*, 217 So. 2d 304, 307 (Fla. 1968) ("the regulatory powers of the Commission . . . are exclusive and, therefore, necessarily broad and comprehensive"); *City of Miami v. Florida Public Service Commission*, 208

So. 2d 249, 253 (Fla. 1968) ("it is quite apparent that these statutes repose considerable discretion in the Commission in the ratemaking process").

The modified terms fell within the range of alternatives the FPSC considered in deciding whether to approve the Proposed Settlement Agreement, and more generally, in determining the appropriate rates and charges for FPL. The Commission evaluated the extensive testimony presented at the August and November hearings regarding revenue increase, charges, ROEs, and other areas. Based on that evidence, the Commission engaged in considerable discussion and expressed concerns regarding certain terms. As part of that discussion, the Commission openly and publicly suggested modifications that would satisfy the public interest. Approval of the modified terms contained in the RSA is entirely consistent with the Commission's broad ratemaking authority and a proper exercise of its authority to choose a reasonable alternative. *Gulf Power Company v. Florida Public Service Commission*, 453 So. 2d 799, 805 (Fla. 1984) (affirming Commission's authority to reject proposals presented by parties and "make some other reasonable determination.").

Moreover, "the extent of procedural due process protections varies with the character of the interest and nature of the proceeding involved." *Hadley, supra*, at 411 So. 2d 187. Thus, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (citing *Mathew v. Eldridge*, 424 U.S. 319, 334 (U.S. 1976)). The situation here demands no additional due process. As noted above, each of the revisions that the Commission approved will directly benefit Mr. Saporito and other FPL customers. Full and fair proceedings were held on the original terms of the Proposed Settlement Agreement, in which Mr. Saporito actively participated. The Motion for Reconsideration suggests no manner in which he was harmed by customer-favoring revisions to those original terms, nor would any claim of such harm

be plausible. In the absence of any plausible argument that the revisions were adverse to Mr. Saporito's interests, there can be no valid basis for his assertion that he is entitled to additional due process protections with respect to those revisions.

FPL further notes that Florida's contemporaneous-objection requirement applies even to issues of due process when there has been a clear opportunity to present the argument. *Matar v. Fla. Int'l Univ.*, 944 So. 2d 1153, 1157–58 (Fla. 3d DCA 2006). During the special agenda conference, all parties had the opportunity to assert their objections through statements provided to, and read into the record by, the Commission's Executive Director. Mr. Saporito never sought an opportunity to be heard regarding the changes contained in the Revised Settlement Agreement. Having failed to raise his objection contemporaneously, Mr. Saporito is foreclosed from doing so now. And, in any event, reconsideration is unavailable because Mr. Saporito cannot plausibly claim that the Commission overlooked a point of fact or law when he did not even raise it at the time of the Commission's decision.

Mr. Saporito cites no statute, rule or precedent that suggests parties are entitled to additional discovery and a new hearing simply because the Commission exercised its authority to make a reasonable determination. No point of law was overlooked. Accordingly, the Commission should not reconsider its Settlement Order.

C. Conclusion

Mr. Saporito identifies no point of fact or law that the Commission overlooked or failed to consider in rendering it order. The Non-Signatories had sufficient opportunity to negotiate. OPC, the representative of the Non-Signatories, made no serious effort prior to or at the December 13, 2012 Special Agenda. There was no due process violation. The Commission afforded all parties adequate notice and an opportunity to be heard. Approval of the modified terms in the Revised

Settlement Agreement was a proper exercise of the Commission's broad ratemaking discretion. The Motion for Reconsideration should be denied.

FPL is authorized to represent that its co-Signatories support FPL's opposition to the Motion for Reconsideration.

Respectfully submitted this 22nd day of January 2013.

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By: *s/ John T. Butler*
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CERTIFICATE OF SERVICE
DOCKET NO. 120015-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing Response in Opposition to Thomas Saporito's Motion for Reconsideration of Commission's January 14, 2013 Order Approving Revised Stipulation and Settlement Agreement and Motion for Further Hearing and Motion for Opportunity To Engage in Discovery has been furnished electronically this 22nd day of January 2013, to the following:

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