

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

IN RE: Fuel and Purchased Power Cost  
Recovery Clause with Generating Performance  
Incentive Factor

Docket No: 140001-EI  
Filed: November 11, 2014

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION  
TO FIPUG'S MOTION TO EXCLUDE OR STRIKE INADMISSIBLE  
EXPERT TESTIMONY PERTAINING TO QUESTIONS OF LAW**

Florida Power & Light Company ("FPL" or the "Company"), pursuant to Rule 28-106.204, Florida Administrative Code, and the prehearing officer's direction, hereby files this response in opposition to FIPUG's Motion to Exclude or Strike Inadmissible Expert Testimony Pertaining to Questions of Law, and states:

1. FIPUG's Motion is predicated on case law that has no application to the relief it seeks. The Motion cites case law that prohibits expert witnesses from testifying about questions of law such as how particular terms in statutes or regulations are to be interpreted. As shown in the attached Exhibit 1, however, none of the portions of the rebuttal testimony of FPL witness Terry Deason that FIPUG seeks to exclude or strike relates to the interpretation of such terms. Rather, Mr. Deason's testimony addresses how this Commission's regulatory principles and policies, including its prior precedent, should apply to evaluating FPL's proposed gas reserve project. Mr. Deason is not offering legal opinions; he is offering his advice as a former Commissioner on how this Commission should evaluate FPL's proposed project within the framework of the Commission's duty to regulate in the public interest. None of the cases cited by FIPUG would prohibit a witness in an administrative proceeding from offering such advice.

2. This Commission has consistently permitted witnesses to offer their opinions on regulatory policy and how prior Commission decisions should be applied to the facts of the proceeding in which the witnesses are testifying. *See, e.g.*, Order No. PSC-07-0816-FOF-EI at

pp. 15-16, Docket No. 060658-EI, issued October 10, 2007 (Commission comments on Progress Energy Florida witness Fetter and OPC witnesses Lawton and Bohrmann testifying about the proper regulatory policy for retrospective review of fuel costs, noting that Mr. Bohrmann “referred to numerous Commission Orders to support OPC’s contention ....”); Order No. PSC-93-0295-FOF-WS at p. 11, Docket 910637-WS, issued February 24, 1993 (Commission comments on the testimony of OPC witness Dismukes regarding the application of “sound regulatory policy” to recovery of the costs for abandoning wastewater treatment plants).

3. In fact, FIPUG’s witnesses have frequently availed themselves of the opportunity to offer opinions on regulatory policy and how the Commission should apply its prior decisions. For example, Jeffrey Pollock (FIPUG’s witness in this proceeding) testified on behalf of FIPUG in FPL’s 2009 rate case (Docket No. 080677-EI). As just one instance of offering position on regulatory policy and buttressing it by referring to Commission precedent, Mr. Pollock was asked on page 54 of his prefiled testimony “Does Commission policy support the movement of utility rates toward actual cost?” His response was “Yes. The Commission’s support for cost-based rates is longstanding and unequivocal. The Commission reiterated this principle in the recent TECO rate case [followed by a citation to Order No. PSC-09-0283-FOF-EI].” In an admirable display of efficiency, Mr. Pollock repeated that question and answer verbatim on page 11 of his prefiled testimony in FPL’s 2012 rate case (Docket No. 120015-EI). He also was asked on page 14 of his prefiled testimony in that proceeding “Has the Commission addressed class revenue allocation in prior litigated cases?” His answer was “Yes. The Commission recently addressed class revenue allocation in the prior FPL and Tampa Electric Company rate cases.” He then went on to compare the treatment of cost recovery clauses in applying what he called the “gradualism” principle, concluded that “it does not appear that the Commission has a consistent policy on this” and advised the Commission that “from a policy perspective, cost recovery

clauses should not be included in this [gradualism] analysis ....” In other words, his prefiled testimony cited Commission precedent, evaluated that precedent and concluded that it was inconsistent, and then recommended the direction the Commission should take from a policy perspective. Mr. Pollock’s testimony pre-filed was entered into the record of both Docket Nos. 080677-EI and 120015-EI.

4. FPL does not intend these citations as criticism of the scope or subject matter of Mr. Pollock’s testimony,<sup>1</sup> but rather to underscore how common place and well accepted is the practice of having expert witnesses present their views on regulatory policy and the appropriate application of Commission precedent to the facts of a particular docket. There is no reason that a different standard should be applied to this proceeding. To the contrary, all parties have emphasized the novelty of FPL’s proposed gas reserve project, which makes the value of expert testimony on regulatory policy especially relevant and useful here.

5. There is a second and equally fundamental flaw in FIPUG’s Motion, one that highlights both the hypocrisy and impracticality of FIPUG’s Motion. The sole purpose of Mr. Deason’s testimony is to rebut testimony of OPC and FIPUG witnesses who themselves offer opinions about regulatory policy and how the Commission should apply its precedent to FPL’s proposed gas reserve project. For example, Mr. Pollock concludes his testimony in this proceeding with an opinion about the application of Order No. 14546 and consistency with Commission policy. For the reasons discussed above, there is no valid basis to exclude or strike Mr. Deason’s rebuttal testimony because it addresses regulatory policy and precedent. If the Commission were to do so, however, large sections of the OPC and FIPUG witnesses’ testimony would also need to be struck in order to avoid the manifest injustice of allowing intervenor witnesses to testify on a topic that FPL is denied the opportunity to rebut. Attached as Exhibit 2

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<sup>1</sup> FPL certainly took issue with many of his conclusions, however.

is a listing of all of the portions of the OPC and FIPUG witnesses' testimony that would have to be struck if FIPUG's Motion were granted.

WHEREFORE, FPL respectfully requests that the Commission deny FIPUG's Motion to Exclude or Strike Inadmissible Expert Testimony Pertaining to Questions of Law.

Respectfully submitted this 11th day of November, 2014.

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**CERTIFICATE OF SERVICE**  
**Docket No. 140001-EI**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic service on this 11th day of November, 2014 to the following:

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## EXHIBIT 1

### TOPICS OF DEASON TESTIMONY FIPUG SEEKS TO STRIKE

LETTER DESIGNATION	PAGE AND LINE NUMBERS	TOPIC OF TESTIMONY
A	Page 3, Lines 4-10	References and summarizes the intervenor witnesses' commentary on regulatory principles – no interpretation of the terms of any statute, rule or order
B	Page 3, Lines 14-21	Summarizes organizational layout of rebuttal testimony -- no interpretation of the terms of any statute, rule or order
C	Page 4, Lines 19-21	Introduces quotation of "Item 10" from Order No. 14546 -- no interpretation of the terms of any statute, rule or order
D	Page 5, Lines 7-9	Summarizes the scope of "Item 10" -- no interpretation of the terms of any statute, rule or order
E	Page 5, Lines 12-13	Comments on how OPC witness Ramas has mischaracterized "Item 10" -- no interpretation of the terms of any statute, rule or order
F	Page 5, Lines 15-23 and Page 6, Lines 1-9	Provides further detail on OPC witness Ramas's mischaracterization of "Item 10" -- no interpretation of the terms of any statute, rule or order
G	Page 6, Lines 12-23 and Page 7, Lines 1-12	Comments on another mischaracterization of "Item 10" by OPC witness Ramas -- no interpretation of the terms of any statute, rule or order
H	Page 7, Lines 14-16	Discusses application of "Item 10" to specific facts of FPL's gas reserve project -- no interpretation of the terms of any statute, rule or order
I	Page 7, Lines 20-23, Page 8, Lines 1-22, Page 9, Lines 1-2	Discusses application of Order No, PSC-11-0080-PAA-EI to specific facts of FPL's gas reserve project -- no interpretation of the terms of any statute, rule or order
J	Page 9, lines 5-22	Uses Order No, PSC-11-0080-PAA-EI to show that OPC witness Ramas mischaracterized "Item 10" -- no interpretation of the terms of any statute, rule or order
K	Page 10, Lines 16-21	Discusses inapplicability to FPL's gas reserve project of TECO's agreed limitation of cost

		recovery to actual fuel savings -- no interpretation of the terms of any statute, rule or order
L	Page 12, Lines 5-10	Discusses application of Commission's established practice concerning hedging to FPL's gas reserve project -- no interpretation of the terms of any statute, rule or order
M	Page 15, Lines 9-23	Discusses Order No. PSC-02-1484-FOF-EI concerning hedging -- no interpretation of the terms of any statute, rule or order
N	Page 16, Lines 7-10	Discusses application of Commission's hedging practice to specific facts of FPL's gas reserve project -- no interpretation of the terms of any statute, rule or order
O	Page 16, Lines 16-23, Page 17, Lines 1-21	Discusses the regulatory policies that are relevant to specific facts of FPL's gas reserve project -- no interpretation of the terms of any statute, rule or order
P	Page 18, Lines 2-4, 6-15, 17-23, Page 19, Lines 1-7	Explains how intervenor witnesses' recommendations with respect to FPL's gas reserve project deviate from relevant regulatory policies -- no interpretation of the terms of any statute, rule or order
Q	Page 19, Lines 10-22	Same
R	Page 20, Lines 2-23, Page 21, Lines 1-2	Explains why OPC witness Ramas's concern over FPL earning a regulated return on gas reserve project is unfounded and inconsistent with relevant regulatory policies -- no interpretation of the terms of any statute, rule or order
S	Page 21, Lines 13-23, Page 22, Lines 1-22	Explains why OPC witness Lawton has incorrectly applied Commission policy on "profiting" under the Fuel Clause to return on investment component of gas reserve project costs -- no interpretation of the terms of any statute, rule or order
T	Page 23, Lines 1-8, 12-16, 19-23, Page 24, Lines 1-3	Discusses Commission policy on proper return on investment to recover through the Fuel Clause and its application to FPL's gas reserve project -- no interpretation of the terms of any statute, rule or order
U	Page 25, Lines 4-11	Discusses asymmetry of OPC witness Ramas's proposal to limit recovery of FPL's gas reserve project costs -- no interpretation of the terms of any statute, rule or order
V	Page 25, Lines 16-23, Page 26, Lines 1-21	Discusses Commission's hedging practice -- no interpretation of the terms of any statute, rule or order

W	Page 26, Line 23, Page 27, Lines 1-8	Applies Commission's hedging practice to specific facts of FPL's gas reserve project -- no interpretation of the terms of any statute, rule or order
X	Page 27, Lines 19-23, Page 28, Line 1	Cites Commission's authority to regulate in the public interest -- no interpretation of the terms of any statute, rule or order
Y	Page 28, 13-14, 18-23, Page 29, Lines 1-3	Explains that OPC witness Ramas's proposed limitation on recovery of gas reserve project costs would be short-sighted and inconsistent with Chapter 366 -- no interpretation of the terms of any statute, rule or order
Z	Page 29, Lines 9-10, 12-16	Discusses application of Section 366.06 to specific facts of FPL's gas reserve project -- no interpretation of the terms of any statute, rule or order
AA	Page 30, Lines 14-23, Page 31, Lines 1-4	Explains that OPC witness Ramas's proposed limitation on recovery of gas reserve project costs would not fulfill the Commission's role of regulating in the public interest -- no interpretation of the terms of any statute, rule or order
BB	Page 31, Lines 18-20, 22-23, Page 32, Lines 1-23, Page 33, Lines 1-4	Explains tools available to Commission to monitor costs incurred by utilities in third-party arrangements -- no interpretation of the terms of any statute, rule or order
CC	Page 33, Lines 6-23	Summarizes testimony rebutting intervenor witnesses -- no interpretation of the terms of any statute, rule or order
DD	Page 34, Lines 8-11	Same

## **EXHIBIT 2**

### **PORTIONS OF OPC AND FIPUG WITNESSES' TESTIMONY THAT ADDRESS REGULATORY POLICY AND PRECEDENT, WHICH WOULD HAVE TO BE STRUCK IF FIPUG'S MOTION TO STRIKE WERE GRANTED**

#### **OPC Witness Lawton:**

- Page 12, lines 2-5
- Page 16, lines 6-8
- Page 17, line 16 to page 19, line 3
- Page 44, lines 1-20
- Page 70, lines 1-3

#### **OPC Witness Ramas:**

- Page 3, lines 12-23
- Page 7, line 2 to page 13, line 25
- Page 14 line 13 to page 16, line 1
- Page 16, line 6 to page 17, line 3
- Page 18, line 21 to page 19, line 1
- Page 20, lines 4-15
- Page 25 lines 1-14
- Page 28, line 22 to page 30, line 11

#### **FIPUG Witness Pollock:**

- Page 21, line 14 to page 22, line 2