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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition for )  
Determination of Need for an )  
Electrical Power Plant in Volusia )  
County by the Utilities Commission, )  
City of New Smyrna Beach, Florida, )  
and Duke Energy New Smyrna Beach )  
Power Company Ltd., L.L.P. )

DOCKET NO. 981042 FEM RECORDS AND REPORTING  
FILED: November 4, 1998

PETITIONERS' MOTION TO STRIKE PORTIONS OF PREFILED DIRECT TESTIMONY OF FLORIDA POWER & LIGHT COMPANY'S WITNESS, WILLIAM B. STEINMEIER

The Utilities Commission, City of New Smyrna Beach, Florida, ("UCNSB" or "Utilities Commission") and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P. ("Duke New Smyrna"), collectively referred to as "Petitioners," pursuant to Uniform Rule 28-106.206, Florida Administrative Code ("F.A.C."), hereby move to strike portions of the prefiled direct testimony of William D. Steinmeier. In support of this motion, Petitioners say:

1. On October 12, 1998, Intervenor, Florida Power and Light Company ("FPL") filed with the Commission in this docket the testimony and exhibits of William D. Steinmeier, an attorney. Significant portions of Mr. Steinmeier's testimony constitute his legal opinion about the rulings by the Florida Supreme Court in prior cases involving the Public Service Commission and about the interpretation of various federal and state statutory provisions. Mr. Steinmeier's arguments, however, should be stricken. Legal arguments are not the proper subject for prefiled testimony.

2. FPL's attempt to boot-strap legal arguments into this

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FPSC RECORDS/REPORTING

evidentiary proceeding, in the guise of direct testimony, is inappropriate. In In re: Investigation Into the Appropriate Rate Structure for Southern States Utilities, Inc. for all Regulated Systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties, 94 FPSC: 3:724, (hereinafter "Southern States"), Commissioner Julia L. Johnson, serving as prehearing officer, addressed a similar attempt to offer legal opinion as expert testimony, and Commissioner Johnson stated:

It has not been Commission practice to allow expert testimony on legal issues. I concur. The most appropriate place for legal discussion is in a post-hearing filing, such as a brief, where all of the parties have equal opportunity to present case law and argument in support of their position on the issue. Cross-examination of a witness on legal opinion is not contemplated by Section 120.57, Florida Statutes, which provides for a fact finding proceeding. Legal argument is more appropriately reserved for argument of counsel in a party's brief.

Id. at 3:726. In Southern States, Commissioner Johnson granted a motion to strike the legal analysis from the prefiled testimony. The same rationale applies in this case. FPL will have ample opportunity to raise all legal arguments<sup>1</sup> in its post-hearing filing and nothing prohibits Mr. Steinmeier from assisting FPL in

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<sup>1</sup>In fact, FPL has already made most of the legal arguments that appear in Mr. Steinmeier's testimony in its 56-page Memorandum of Law Supporting Motion to Dismiss Joint Petition, filed in this docket on September 8, 1998.



preparing such a filing.<sup>2</sup> However, it would be fundamentally inappropriate to require Petitioners to cross-examine Mr. Steinmeier on such quintessentially legal issues as the holding of Florida Supreme Court opinions or the other portions of Mr. Steinmeier's testimony described below.

3. Accordingly, the following portions of Mr. Steinmeier's testimony should be stricken as inappropriate legal opinion:

- a. Page 3, line 2 through line 11.
- b. Page 3, line 19 (beginning with the word "[f]inally") through page 4, line 1.
- c. Page 5, line 7 through page 12, line 6 (ending with the word "determination").
- d. Page 13, line 1 through page 15, line 9.
- e. Page 16, line 5 through line 6 (ending with the word "orders").
- f. Page 17, line 12 (beginning with the word "[t]he") through line 20.
- g. Page 21, line 7 through line 13.
- h. Page 23, line 20 (beginning with the word "[t]hat") through page 24, line 12.
- i. Page 25, line 13 through page 27, line 12.
- j. Page 27, line 19 (beginning with the word "[u]nder") through line 22 (ending with the word

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<sup>2</sup>Mr. Steinmeier is an attorney. If Mr. Steinmeier is not admitted to practice law in the State of Florida, Uniform Rule 28-106.106, F.A.C., provides a mechanism for FPL to seek to have Mr. Steinmeier appear on its behalf as a qualified representative.

"generators").

k. Page 28, line 9 (beginning with the word "[t]his") through line 11.

l. Page 31, line 5 (beginning with the word "[t]he") through line 9.

m. Page 31, line 14 (beginning with the word "[t]he") through line 21 (ending with the word "soaring").

n. Page 32, line 20 through page 33, line 3 (ending with the word "power").

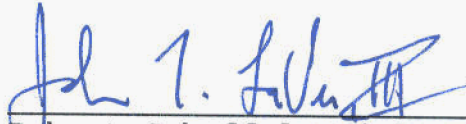
o. Page 33, line 5 (beginning with the phrase "[i]n addition") through line 16 (ending with the word "authority").

p. Page 34, line 5 (beginning with the word "[f]inally") through line 9.

4. The parties of record in this proceeding take the following positions on this motion: FPL, FPC and FECA oppose it, and LEAF does not oppose it. Petitioners' counsel has attempted to obtain Staff's and TECO's positions, but was unsuccessful.

WHEREFORE, the Utilities Commission, New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P. request that the Commission strike as legal opinion the above-cited portions of the direct testimony of William B. Steinmeier.

Respectfully submitted this 4th day of November, 1998.



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**CERTIFICATE OF SERVICE**  
**DOCKET NO. 981042-EM**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (\*) or by United States Mail, postage prepaid, on the following individuals this 4th day of November, 1998:

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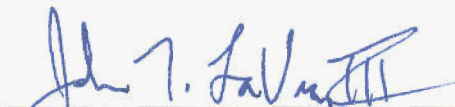
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