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September 30, 2002

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VIA HAND DELIVERY

Blanca S. Bayó, Director
Division of the Commission Clerk &
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

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Re: Docket Nos. 020262-EI and 020263-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") are the original and seven (7) copies of FPL's Response to FACT's Motion for Reconsideration to Full Commission, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows 2000, and the word processing software in which the document appears is Word 2000.

If there are any questions regarding this transmittal, please contact me at 222-2300.

Very truly yours,

Elizabeth C. Daley

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3. Neither the full Commission nor the Prehearing Officer has issued any protective order as to FACT. Nevertheless, FACT has continued to defy both the Discovery Order and a subpoena served by FPL commanding Mr. Bach to appear at deposition on September 20.²

4. The Commission should deny FACT's Motion for Reconsideration, thereby rendering moot FACT's prior Motion for Protective Order, because FACT has not made the requisite showing that the Prehearing Officer committed an error of law or fact in his granting of FPL's motion to compel discovery on the issue of FACT's standing to participate in this proceeding.³

5. FACT bases its Motion for Reconsideration upon the following: (a) the Prehearing Officer allegedly erred in failing to find that FPL was precluded from contesting FACT's standing because FPL did not seek reconsideration within the required time limits following the Prehearing Officer's Order Granting FACT's Amended Petition to Intervene ("Intervention Order")⁴; and (b) the Prehearing Officer allegedly erred in declining to issue an order protecting FACT from having to provide certain information to FPL during discovery.

² On September 24, 2002, FPL filed a Motion for Summary Final Order Removing FACT as an Intervenor Party and Response to FACT's Motion to Quash Subpoena ("Motion to Remove FACT"). In the pending Motion for Summary Final Order, FPL asked the Commission to remove FACT from this proceeding based on FACT's refusal to prove up its contested allegations as to standing and its defiance of the Commission's rules and orders governing discovery.

³ See *In re: Petition on behalf of Citizens of the State of Florida to initiate investigation into integrity of Southern Bell Telephone And Telegraph Company's repair service activities and reports*. Order No. PSC-92-0339-FOF-TL (holding that the standard of review of a Prehearing Officer's order is a showing of an error of law or fact).

⁴ Order No. PSC-02-0934-PCO-EI.

**The Prehearing Officer Correctly Held that FPL
Is Not Precluded from Challenging FACT's Standing**

6. FACT alleges that FPL is precluded from an interlocutory challenge in this proceeding as to the standing conditionally granted to FACT in the Intervention Order.

7. In the Intervention Order, the Prehearing Officer stated that “FACT has adequately alleged that the substantial interests of a substantial number of its members may be affected by the Commission’s decision in these dockets, and that those interests are both the type of interest the Commission’s need determination proceedings are designed to protect and the type of interest FACT is entitled to represent on behalf of its members.” Order No. PSC-02-0934-PCO-EI.

8. FPL did not seek reconsideration or otherwise challenge the Intervention Order because FPL believed that the “preliminary, procedural or intermediate” Intervention Order⁵ complied with Florida law. FPL correctly recognized that, under Florida law, FACT would be required to follow up its standing allegations, which were found to be “adequate” in the preliminary Intervention Order, with evidence during discovery to prove up its standing to participate as a party in this proceeding. As the Prehearing Officer correctly stated in his Discovery Order, “[u]nder Commission rules, FPL would not have been required to ask for reconsideration of an order that it believed complied with Florida law.” Discovery Order at 4.

9. FPL’s recognition of FACT’s burden of proof was correctly reflected by the Prehearing Officer in the Discovery Order as follows:

It is true that the Order granted intervention without expressly reserving the issue of standing for proof at hearing. All orders issued by this Commission, however, are subject to, and incorporate, the requirements of organic law; and parties to administrative proceedings in Florida have an affirmative duty to

⁵ See Intervention Order at 4.

prove standing -- not just allege standing -- when another party contests that standing.

Discovery Order at 4, citing Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), *rev. denied* 415 So. 2d 1359 (Fla. 1982), and NAACP, Inc. ex rel. NAACP v. Florida Bd of Regents, 822 So. 2d 1 (Fla. 1st DCA 2002)(“NAACP”).(emphasis added). FPL has consistently contested FACT’s standing throughout this proceeding. FPL believes FACT to be a front organization for one or more Independent Power Producers (“IPPs”) rather than solely a representative of consumers.

10. In the present Motion for Reconsideration, FACT cites to administrative orders conditionally granting intervention “subject to proof of standing during the final hearing.” FACT cites these orders in support of its allegation that the Prehearing Officer erred in requiring FACT to produce discovery concerning standing because the present Intervention Order contained no such limiting language.

11. As the Prehearing Officer correctly recognized, no such limiting language is necessary. Under Florida law, an order finding that an “allegation” of standing is adequate is simply not enough to preclude later discovery as to standing. In support of this finding, the Prehearing Officer cited the recent decision of the First District Court of Appeal in NAACP, in which the Court reversed an administrative law judge’s order granting standing and held that the appellants had “failed to present competent, substantial evidence” demonstrating that they would be substantially affected by the challenged actions. NAACP, 822 So. 2d at 6.

12. Further, this Commission has held that a party does not waive a challenge to standing if it does not contest standing in a challenge to a third party’s petition to intervene. In re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, LLC, Order No. PSC-00-0562-PCO-EU.

13. Thus, the Commission should deny FACT's present motion and affirm the Prehearing Officer's ruling that FPL was not required to challenge FACT's standing in a Motion for Reconsideration of the non-final Intervention Order and that FACT is required to comply with the Discovery Order to prove up its standing allegation.

**The Prehearing Officer Correctly Refused
To Issue A Protective Order**

14. FACT further alleges that the Prehearing Officer erred by not issuing a protective order or otherwise limiting FPL's discovery as to FACT's standing. FACT cites Rule 1.280(c), Florida Rules of Civil Procedure, which allows protective orders if the party seeking the order can show that the order is needed "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

15. FACT has made no such showing, and thus, the Prehearing Officer did not err in refusing to find that FPL has, by its discovery requests, caused "annoyance, oppression and undue burden and expense" to FACT. In order to adequately prepare for the hearing in this proceeding, FPL merely seeks required evidence as to FACT's standing and its positions in this proceeding.

CONCLUSION

The Prehearing Officer committed no error in requiring FACT to produce discovery to allow FPL to test FACT's proof of allegations of standing and to decide how to respond to potential challenges to FPL's Petitions for Determination of Need. FACT is entitled neither to a protective order nor to any limitation of FPL's discovery.

WHEREFORE, FPL respectfully requests that the Commission enter an order denying FACT's Motion for Reconsideration to Full Commission.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

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CERTIFICATE OF SERVICE
Docket Nos. 020262-EI and 020263-EI

I HEREBY CERTIFY that on this 30th day of September 2002, a copy of Florida Power & Light Company's Response to FACT's Motion for Reconsideration to Full Commission was served by hand delivery (*) or electronically (**) and U.S. Mail to the following:

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