BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint of Catalpa Cove against Florida Power and Light Company regarding the cost of removal of facilities not on an easement.	DOCKET NO. 930789-EI ORDER NO. PSC-93-1375-FOF-EI ISSUED: September 20, 1993

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON
LUIS J. LAUREDO

NOTICE OF PROPOSED AGENCY ACTION

ORDER DENYING RELIEF TO COMPLAINANT AGAINST FLORIDA POWER AND LIGHT

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are adversely affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Iona Development Corporation (Catalpa Cove) filed this consumer complaint against the Florida Power and Light Company (FPL or utility), regarding the cost of relocating electrical facilities. Catalpa Cove has paid the relocation costs under protest and now seeks a refund of those costs. The facilities in question are an underground multi-family service, including six pad-mounted transformers located aboveground.

The electrical facilities are located on property which was under development in 1984 by Iona Point Limited (a separate entity unrelated to Catalpa Cove). At that time, FPL had an existing overhead line, with an easement, which ran through the center of the property to serve a customer located at the other end of the parcel.

After its plans were approved by Lee County, Iona Point Limited was permitted to construct roads, docks, water and sewer lines, a sewer lift station, and a sewage treatment plant. These facilities were installed and the developer requested installation of underground electric facilities to serve the multiple occupancy

residential units planned for the development. Iona Point provided FPL plan drawings showing all facilities that had been constructed and easements to be platted. The developer also requested removal of the overhead line which ran down the center of the property.

Pursuant to its tariff 10.6, FPL installed the underground multi-family service, which included six pad-mounted transformers aboveground. The utility also relocated the existing overhead line to the east boundary of the property to serve the sewage treatment plant and to continue to serve the customer at the end of the property.

FPL did not record easements for the new overhead line location or for the underground service. Neither did it vacate the easement which existed for the line which had run through the center of the property. FPL states that easements were not obtained prior to the installation of the facilities because the original developer must survey the underground facilities after installation to establish the actual easement locations. FPL asserts that this is not uncommon in multiple occupancy developments, due to meandering cable routes and lack of established inner lot lines.

FPL further explained it will not always require advance easements if the utility is dealing with a reputable developer, a letter of intent is supplied, or easements are platted in the documents. FPL states that easements are recorded and unused easements are released when the property is platted and a final development order is issued.

After FPL installed facilities at the request of Iona Point Limited, FPL reported that the developer and Lee County entered into a conflict over the building density of the parcel, and the final development order was never issued. Iona Point, in turn, did not or could not plat the parcel. Consequently, no easements were ever recorded or released. The property was subsequently involved in bankruptcy proceedings between Iona Point Limited and Gold Dome Savings Bank.

Catalpa Cove entered into a contract for purchase of the property on November 26, 1990. Closing for purchase was executed on December 26, 1990. Catalpa Cove states that prior to purchase a visual inspection of the property was made, a title search was performed, an environmental audit was conducted, and a zoning and permitting review was done. Catalpa Cove further states that,

after closing, a boundary survey was done to confirm the exact boundary and a second survey was done to determine encroachment of FPL poles. No survey was done prior to closing. Catalpa Cove states it was unaware of the existence of FPL facilities since they were not on recorded easements and therefore were not a matter of public record.

When Catalpa Cove began its development of the property, it became clear that the current facilities would need to be reconfigured and relocated. Catalpa Cove also needed removal of an existing aboveground pole, which was in the planned roadway, and the unused existing easement down the center of the property relinquished. FPL needed an easement on the east boundary for the poles which had been moved to the location from the easement in the center of the property. The parties entered into an agreement to remove the pole in question, and FPL filed a quit claim deed for the existing easement. In turn, Catalpa Cove granted an easement for the poles on the east boundary and FPL placed these lines underground.

FPL records indicate the six pad-mounted transformer boxes on the property were 3 1/2 by 3 feet by 30-36 inches high and were set on 4 1/2 by 5 feet concrete pads. FPL says the boxes were not covered with trash or brush, and that five of the six could be seen from the road. FPL also said the transformers were visited periodically and serviced during the period the property was vacant.

Remaining in dispute is the relocation cost for the multi-family underground facilities. Pursuant to an agreement executed in November, 1992, Catalpa Cove paid under protest for the relocation and reconfiguration of the existing multi-family underground facilities in order to expedite the work. The agreement calls for refund of the disputed amount plus 8.5% interest if the Commission or a court determines the charges were not due.

Catalpa Cove seeks a refund of $38,136 paid to FPL for the removal and reconfiguration of the multi-family underground service and transformers. The cost of underground service for the existing 79 homesites is not in dispute and would have been paid if there had been no existing facilities on the property. This undisputed cost totals $25,991, less a credit of $1,364 for work performed by Catalpa Cove.

FPL's tariff 5.3 Relocation of Customer's Facilities, states that "when there is a change in the Customer's operation or construction which, in the judgement of the Company, makes the relocation of Company's facilities necessary, or if such relocation is requested by the Customer, the Company will move such facilities at the Customer's expense to a location which is acceptable to the Company." The purpose of this tariff is to assure that the customer causing a cost bears the burden of that expense, rather than the expense being passed on to the general body of ratepayers. We find that the tariff was properly applied to Catalpa Cove's situation, and the charges paid were due and proper.

Catalpa Cove argues that FPL had no recorded easement for the facilities, therefore Catalpa had no knowledge of the facilities and FPL had no right to have the facilities on the property. FPL counters by stating that FPL obtained consent to place the facilities on the property from the prior landowner. FPL argues that the real issue is whether Catalpa Cove knew or should have known of the physical presence of the facilities on the property, asserting that the facilities were visible or because Catalpa knew that the original landowner was a failed developer who had made some improvements to the land.

We find that this controversy presents issues of property law which do not fully lie within the Commission's jurisdiction. The Commission lacks the power to issue and enforce the appropriate remedies which would resolve the easement dispute. Consequently, any examination of the factual issues or the legal arguments relating to the easement dispute would be futile. We believe the easement dispute must be addressed by a court of competent jurisdiction, should the parties wish to pursue the matter.

We have been advised by other investor-owned utilities that they would not normally install primary service, either single-family or multi-family, to a subdivision before proper easements are recorded. We find that FPL should revise its internal procedures to adopt a similar policy so that future problems and conflicts of this nature are avoided.

In consideration of the foregoing, it is

ORDERED by the Florida Public Service Commission that the Florida Power and Light Company has not violated its tariff in charging the costs of electrical facility relocation to Catalpa Cove. It is further

ORDERED that all other issues of this controversy are dismissed, as more appropriate to adjudication by a court of law. It is further

ORDERED that the Florida Power and Light Company review and revise its internal procedures with regard to obtaining easements. It is further

ORDERED that this Order shall become final and this docket shall be closed unless an appropriate petition for formal proceeding is received by the Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date indicated in the Notice of Further Proceedings or Judicial Review.

By ORDER of the Florida Public Service Commission this 20th day of September, 1993.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)
MAA/MRC:bmi

Commissioner Luis Lauredo dissented as follows:

Commissioner Lauredo concurs with the Commission's finding that the Florida Power and Light Company shall review and revise its internal procedures with regard to obtaining easements. Commissioner Lauredo dissents from the Commission's decisions on all other issues in this docket.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on October 11, 1993.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.