

FLORIDA PUBLIC SERVICE COMMISSION  
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**M E M O R A N D U M**

OCTOBER 5, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (BROWN) *MCB*  
DIVISION OF ELECTRIC & GAS (SHINE, MILLS) *MS* *JDJ*

RE: DOCKET NO. 941170-EG - FLORIDA POWER & LIGHT COMPANY -  
APPROVAL OF DEMAND-SIDE MANAGEMENT PLAN OF FLORIDA POWER  
& LIGHT COMPANY

AGENDA: 10/10/95- REGULAR AGENDA - DECISION PRIOR TO HEARING -  
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\941170EG.RCM

**CASE BACKGROUND**

On June 9, 1995, the Commission issued a Notice of Proposed Agency Action, Order No. PSC-95-0691-FOF-EI. In that order the Commission approved Florida Power and Light's (FPL) Demand-Side Management Plan that complied with Order No. PSC-94-1313-FOF-EG, which set numeric conservation goals for Florida's four major investor-owned electric utilities. In its Proposed Agency Action Order, the Commission indicated that its approval of FPL's plan would not become effective or final if any person whose substantial interest was affected by the proposed action filed a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, by the close of business on June 30, 1995.

By June 30, 1995, The Independent Savings Plan Company (ISPC) and Solar City, Inc. (SOLAR) filed a joint petition protesting Order No. PSC-95-0691-FOF-EI. Legal Environmental Assistance Foundation, Inc., (LEAF), and Peoples Gas System, Inc. (Peoples) also filed petitions for a formal proceeding in the case. Donnie Nolley, owner of Free Energy, an energy auditing company, filed a letter requesting that the Commission reverse its decision approving FPL's plan to eliminate its solar water heating incentive plan. The letter is attached to this recommendation. (Attachment D).

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On July 17, 1995, FPL filed Motions in Opposition to the petitions for formal proceedings. The parties also filed responses to FPL's motions. Thereafter, in order to avoid litigation, the parties began settlement negotiations. FPL and LEAF filed a stipulation resolving LEAF's protest of the proposed agency action order on September 18, 1995. FPL and Peoples filed their stipulation on September 19, 1995, and FPL and ISPC/Solar filed their stipulation on September 28, 1995. The stipulations are attached to this recommendation. (Attachments A, B and C).

This is staff's recommendation to approve the stipulations, to deny Donnie Nolley's request to reverse its decision, and to reinstate Order No. PSC-95-0691-FOF-EI as a final order. Because staff continues to have concerns about the competitive relationship between the electric and gas industries and the effect of commercial/industrial conservation programs on competition in the industries, staff also requests permission for the Commission's Bureau of Regulatory Review to conduct a management review and study of these issues.

#### **DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission approve the stipulation between FPL and LEAF?

**RECOMMENDATION:** Yes. The Commission should approve the stipulation.

**STAFF ANALYSIS:** In their September 18, 1995, stipulation, LEAF and FPL state that the stipulation is designed to attain "an informal disposition of LEAF's request for hearing in Docket No. 941170-EG . . . to avoid the time, expense and uncertainty associated with adversarial litigation in this docket in keeping with the Commission's encouragement to settle disputes". In return for LEAF's agreement to withdraw its protest of the PAA order and refrain from further participation in the review and approval of FPL's program participation standards, FPL has agreed to take several actions in the implementation of its demand-side management plans. Among other actions, FPL has agreed to seek approval from the Commission to conduct monitoring and evaluation studies of its programs, and FPL has agreed to provide the information obtained to LEAF. FPL has agreed to revise and seek Commission approval of the "Program Objective" section of its the proposed program participation standards for the Commercial/Industrial Heating Ventilation and Air Condition Program. FPL will also petition the Commission for approval of a residential new construction program

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as part of its Demand Side Management (DSM) program. The actions FPL has agreed to take are described in detail in the stipulation attached to this recommendation. See attachment A.

Staff has reviewed the terms of the stipulation and believes that they are consistent with the Commission's decisions in the Conservation Goals Docket and in Order No. PSC-95-0691-FOF-EI approving FPL's demand-side management plans. With the understanding that the Commission is not preapproving any proposed new programs, staff recommends that the stipulation be approved. The stipulation will avoid additional time-consuming, expensive litigation and will allow FPL to proceed with the implementation of its new conservation programs. Staff believes that the stipulation is in the public interest.

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**ISSUE 2:** Should the Commission approve the stipulation between FPL and ISPC/Solar?

**RECOMMENDATION:** Yes. The Commission should approve the stipulation

**STAFF ANALYSIS:** In their September 28, 1995, stipulation, ISPC/SOLAR and FPL state that the stipulation is designed to attain "an informal disposition of ISPC's and SOLAR's request for hearing in Docket No. 941170-EG . . . to avoid the time, expense and uncertainty associated with adversarial litigation in this docket in keeping with the Commission's encouragement to settle disputes". In return for ISPC/SOLAR's agreement to withdraw its protest of the PAA order and refrain from further participation in the review and approval of FPL's program participation standards FPL has agreed to a more gradual phase-out its solar water heating incentives plan. The program will not be discontinued until May 30, 1996, or until 1,439 Wattsaver incentive certificates are issued for the year beginning June 1, 1995, whichever comes first. FPL has also agreed to consult with ISPC/Solar over the contents of objective solar water heating educational information to be provided to customers during residential energy audits. If agreement cannot be reached the parties will bring the disagreement to the Commission for resolution. The stipulation is attached to this recommendation. See attachment B.

Staff has reviewed the terms of the stipulation and believes that they are consistent with the Commission's decisions in the Conservation Goals Docket and in Order No. PSC-95-0691-FOF-EI approving FPL's demand-side management plans. We recommend that the stipulation be approved, with the understanding that any new conservation plans developed as a result of the stipulation will need to be approved by the Commission. The stipulation will avoid additional time-consuming, expensive litigation, and will allow FPL to proceed with the implementation of its new conservation programs. Staff believes that the stipulation is in the public interest.

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**ISSUE 3:** Should the Commission approve the stipulation between FPL and Peoples?

**RECOMMENDATION:** Yes. The Commission should approve the stipulation with the clarification letter incorporated therein.

**STAFF ANALYSIS:** In their September 19, 1995, stipulation, Peoples and FPL state that the stipulation is designed to attain "an informal disposition of Peoples' request for hearing in Docket No. 941170-EG . . . to avoid the time, expense and uncertainty associated with adversarial litigation in this docket in keeping with the Commission's encouragement to settle disputes". Peoples has agreed to withdraw its protest of the PAA order, to refrain from further participation in the review and approval of FPL's program participation standards. Peoples has also agreed to identify potential sites for FPL's proposed Gas Engine-Driven DX Air Conditioning Research Project. Peoples has also agreed to contribute a total of \$35,000 toward monitoring and evaluation of that project and FPL's Gas Engine-Driven Chillers Research Project. In return, FPL has agreed to take several actions in the implementation of its demand-side management plans. Those actions are described in detail in the stipulation attached to this recommendation. See attachment C.

FPL also agreed that Peoples could hire a specific consultant to provide services regarding the agreement and the data to be collected, and FPL agreed that all costs incurred by Peoples would be recoverable through Peoples' ECCR clause over the period of the research and development projects. Staff raised some objections to the language of this part of the agreement because of its concern that the Commission would be preapproving Peoples' costs of the project for recovery through the ECCR clause before the project was approved and before the prudence of the costs incurred had been demonstrated. In response, Peoples sent a letter to staff on September 27, 1995, clarifying the language of the stipulation. Peoples stated in that letter that:

Paragraph 3 of the subject stipulation is not intended, by either Peoples or FPL, to bind the Commission to preapproval of the costs of certain activities that have not yet been undertaken. Rather, this language is intended as an expression of Peoples' intent to seek recovery, through its Commission-approved Energy Cost Recovery Factors, of the costs that it incurs in carrying out its obligations

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pursuant to the stipulation over the life of those efforts rather than during the ECCR recovery periods when incurred.

Peoples' clarification letter is attached to the stipulation at Attachment C.

Staff has reviewed the terms of the stipulation as clarified, and believes that they are consistent with the Commission's decisions in the Conservation Goals Docket and in Order No. PSC-95-0691-FOF-EI approving FPL's demand-side management plans. We recommend that the stipulation be approved, with the clarification letter incorporated therein. The stipulation will avoid additional time-consuming, expensive litigation and will allow FPL to proceed with the implementation of its new conservation programs. Staff believes that the stipulation is in the public interest.

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**ISSUE 4:** How should the Commission proceed with the investigation of the competitive relationship between electric and gas industries and the effect of commercial/industrial conservation programs on competition in the industries?

**RECOMMENDATION:** The investigation should be initiated with a management review and study of:

1. Whether the implementation of conservation programs by the electric and gas utilities, particularly for commercial/industrial customers, has complied with the Commission's policy of fuel neutrality.
2. Whether the conservation programs of the electric and gas utilities, particularly for commercial/industrial customers, have resulted in the increased usage of electricity and natural gas.

The management review and study should be conducted by the Bureau of Research and Regulatory Review with technical assistance as required from the Division of Electric and Gas. The results of the study should be brought back to the Commission.

**STAFF ANALYSIS:** At the Commission's May 16, 1995 Agenda Conference, the Commission directed staff to conduct a Commission workshop on September 5, 1995, to address concerns over the competitive relationship between the electric and gas industries and the effect of commercial/industrial conservation programs on competition between the industries. On June 19, 1995, staff met with Florida Power & Light (FPL) to request data to prepare for the September 5 Commission workshop. On June 30, staff sent a letter to Florida Power Corporation (FPC), Gulf Power Company (GULF), and Tampa Electric Company (TECO) requesting the same data. Basically, staff requested that each investor owned electric utility provide KW and KWH usage and cost effectiveness data for each commercial/industrial customer for which the electric utility had presented a competitive analysis for electric usage in lieu of one or more natural gas end uses.

During and subsequent to the June 19 meeting, FPL expressed its concern that the data be held confidential. Because the requested data involves detailed customer KW and KWH usage information, FPL was sensitive to releasing the data into the public domain. Also, considerable controversy arose as to whether the natural gas utilities would be allowed to review and critique the data and analyses performed by the electric utilities. In

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response to these concerns, staff has cancelled its data request at this time. The Commission workshop scheduled for September 5 was also cancelled.

Staff continues to believe that the competitive relationship between the electric and natural gas industries should be explored. To preserve the confidentiality of the data necessary to explore the issues, staff recommends that the investigation be initiated with a management review and study of:

1. Whether the implementation of conservation programs by the electric and gas utilities, particularly for commercial/industrial customers, has complied with the Commission's policy of fuel neutrality.
2. Whether the conservation programs of the electric and gas utilities, particularly for commercial/industrial customers, have resulted in the increased usage of electricity and natural gas.

The study would be conducted by the Bureau of Research. The process necessary to protect the confidentiality of information is built into the Bureau's audit process. According to Rule 25-22.006, Florida Administrative Code, all information gathered by the Audit Document/Record Request Notice of Intent form during the investigative process will be treated confidentially through the audit exit conference. At the audit exit conference the utility will have the opportunity to review the draft audit report and workpapers. Then the utility will have twenty one days thereafter to file a formal request for confidential treatment of all confidential information to be used in the final report. Technical assistance will be provided from the Division of Electric and Gas. The results of the study would be brought back to the Commission.



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**ISSUE 5:** Should the Commission grant Donnie Nolley's request that it reverse the decision to approve FPL's proposal to eliminate the solar water heating incentive plan?

**RECOMMENDATION:** No. The Commission should deny the request and reinstate Order No. PSC-95-0691-FOF-EI as a final order. Donnie Nolley has not demonstrated either that he will suffer an injury in fact that is of sufficient immediacy to entitle him to a formal hearing under Section 120.57, Florida Statutes, or that his injury is of a type or nature that the proceeding is designed to protect.

**STAFF ANALYSIS:** Rule 25-22.029 (4), Florida Administrative Code, "Point of Entry into Proposed Agency Action Proceedings", provides that a person may file a petition for a formal hearing pursuant to section 120.57, Florida Statutes, if that person's substantial interests may or will be affected by the Commission's proposed action. As the Court stated in Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981):

[B]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Both requirements must be met to establish standing to protest an agency action.

Mr. Nolley's letter to the Commission, entitled "Petition on Proposed Agency Action", fails to meet either prong of this test for substantial interest. The letter states only that Mr. Nolley owns a residential energy auditing company in FPL's service area, that solar water heating is of interest to homeowners, that solar energy is a valuable resource, that ending solar water heating incentives would be a step backwards, and that with the help of the incentives, homeowners can take advantage of this renewable resource. These are all general, unspecified allegations that do not relate in any direct or immediate way to the specific substantial interests of Mr. Nolley. Remote, speculative, abstract or indirect injuries are not sufficient to meet the "injury in fact" standing requirement. International Jai-Alai Players Association v. Florida Pari-Mutuel Commission, 561 So.2d 1224 (Fla. 3d DCA 1990); Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987); Agrico

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Chemical Company v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981); Department of Offender Rehabilitation v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1978). There must be allegations that either (1) the petitioner has sustained actual injuries at the time of the filing of the petition, or (2) that the petitioner is immediately in danger of sustaining some direct injury as a result of the Commission's determination. Village Park, 506 So.2d at 433. We simply cannot tell from the letter how Mr. Nolley himself will be harmed.

Because Mr. Nolley's letter does not demonstrate how he will be harmed by the elimination of FPL's incentive program, it is not possible to establish that his claim meets the second prong of Agrico, the "zone of interest" test. Mr. Nolley's letter shows that he advocates the use of solar energy and encourages homeowners to take advantage of that renewable resource; and Mr. Nolley may have an economic interest in the continuation of the program. Neither interest, however, is sufficient to satisfy the test.

In determining whether a petitioner has met the zone of interest test, the agency must examine the nature of the injury alleged and determine if a statute or rule governing the proceeding is intended to protect that interest. Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n, 418 So.2d 1046 (Fla. 1st DCA 1982); Suwannee River Area Council Boy Scouts of America v. Department of Community Affairs, 384 So.2d 1369 (Fla. 1st DCA 1980); Boca Raton Mausoleum v. Department of Banking and Finance, 511 So.2d 1060 (Fla. 1st DCA 1987); Friends of the Everglades v. Board of Trustees, 595 So.2d 186 (Fla. 1st DCA 1992). Economic interests usually are not sufficient to establish the zone of interest unless it is determined that the statute was specifically intended to protect economic interests. The Florida Energy Efficiency and Conservation Act (FEECA), Sections 366.80-.85, Florida Statutes, is not intended to promote businesses or protect business markets, and thus in this case an economic interest in the continuation of FPL's incentive program is insufficient to establish standing.

Furthermore, while FEECA evinces the Legislatures' intent that "the use of solar energy" is to "be encouraged", the Commission has interpreted this expression as limited by FEECA's intent that conservation measures must also be "cost-effective". In the Conservation Goals proceeding, the Commission approved FPL's goals based on conservation measures that are cost-effective under the RIM and Participants tests. Order No. PSC-94-1313-FOF-EG at 22, 32. The Commission concluded that it was not cost-effective for FPL to continue its existing solar water heating incentive plan. Instead, the Commission directed FPL to investigate and consider other means to encourage the use of solar energy.

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We agree with FPL that the cost-effectiveness of the program, the effect of elimination of the program on the solar industry and on the encouragement of the use of solar energy was fully investigated and decided by the Commission in the goals docket. To reopen that investigation in these proceedings without a demonstration of mistake or material changed circumstances would violate the doctrine of administrative finality. Peoples Gas System, Inc. vs. Mason, 187 So.2d 325 (Fla. 1966).

For these reasons, staff recommends that the Commission deny Mr. Nolley's request to reverse its decision approving the elimination of FPL's solar water heating incentive program. The Commission should reinstate its Proposed Agency Action Order approving FPL's demand side management program as a final order, and FPL should be permitted to proceed with the implementation of its new conservation programs. Staff would like to point out that the stipulation between FPL and Solar provides that the solar water heating incentive program will be phased out over a period of time, and FPL and Solar will work together to develop objective marketing information for the encouragement of the use of solar energy equipment. These efforts should be of some value to Mr. Nolley in his efforts to encourage the use of solar energy.

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**ISSUE 6:** Should this docket be closed?

**RECOMMENDATION:** Yes. The Commission's Proposed Agency Action Order No. PSC-95-0691-FOF-EI should be reinstated as a Final Order, and this docket should be closed.

**STAFF ANALYSIS:** Since all protests of Order No. PSC-95-0691-FOF-EI have been denied or withdrawn, and there is no further action required in this docket, the Order should be reinstated as a final order, and the docket should be closed.