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February 26, 1997

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 961184-EQ
Docket No. ~~970002-EU~~

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of the Motion to Dismiss Florida Power Corporation's Petition on Proposed Agency Action in docket numbers 961184-EQ and 970002-EU. Also enclosed are an original and fifteen copies of a Notice of Intervention in docket number 961184-EQ.

Also Enclosed is a 3.5 inch diskette containing the Motion to Dismiss Florida Power Corporation's Petition on Proposed Agency Action in WordPerfect for Windows 6.1 format. Thank you for your assistance in this matter.

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Sincerely,

John Roger Howe
Deputy Public Counsel

Notice of intervention
DOCUMENT NUMBER - DATE
02174 FEB 26 97
FPSC-RECORDS/REPORTING

Motion to dismiss
DOCUMENT NUMBER - DATE
02173 FEB 26 97
FPSC-RECORDS/REPORTING

ORIGINAL
FILE COPY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of)
an early termination amendment)
to a negotiated qualifying)
facility contract with Orlando)
Cogen Limited, Ltd., by Florida)
Power Corporation.)

Docket No. 961184-EQ

In re: Energy conservation cost)
recovery clause.)

Docket No. 970002-EU
Filed: February 26, 1997

**MOTION TO DISMISS
FLORIDA POWER CORPORATION'S
PETITION ON PROPOSED AGENCY ACTION**

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Section 350.0611, Florida Statutes (1995), and Rule 25-22.037(2), Florida Administrative Code, move the Florida Public Service Commission to dismiss Florida Power Corporation's petition on proposed agency action (hereinafter referred to as the "protest"), filed February 17, 1997, for the following reasons:

BACKGROUND

1. On March 13, 1991, Florida Power Corporation (FPC) entered into a negotiated 30-year qualifying facility contract with Orlando Cogen Limited, Ltd., to purchase capacity and energy. The contract was approved by Order No. 24734, issued July 1, 1991, in Docket No. 910401-EQ. A subsequent settlement agreement was approved by Order No. PSC-96-0898-AS-EQ, issued July 12, 1996. All capacity and energy costs are borne by FPC's

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customers through the cost recovery mechanisms administered by the Commission.

2. On October 1, 1996, FPC petitioned the Commission to approve an early termination amendment to the contract. In return for an up-front payment of \$49,405,000, Orlando Cogen would agree to forego the last ten years of the contract. In FPC's estimation, its customers (who would fund the up-front payment) would benefit because, on a present value basis, the customers' rates would be lower under the buyout than over the life of the original contract. FPC did not request a hearing on its petition, nor did it identify any benefit or harm which would accrue to the company from acceptance or rejection of its petition.

3. The Commission denied FPC's petition in Order No. PSC-97-0086-POF-EQ, issued on January 27, 1997. (A correction, not relevant to this pleading, was made in an amended order, Order No. PSC-97-0086A-POF-EQ, on February 17, 1997.) The Commission concluded, among other things, that the proposal to amortize the early termination charge through the capacity cost recovery clause over a five-year period unduly burdened FPC's customers, particularly given the fact that customers could not expect to see a net benefit until twenty-two years later.

**FLORIDA POWER CORPORATION'S PROTEST IS AN
IMPROPER MOTION FOR RECONSIDERATION
OF A PROPOSED AGENCY ACTION ORDER**

4. A protest of a PAA normally initiates a *de novo* proceeding. See, e.g., Beverly Enterprises v. Dept. of HRS, 573 So. 2d 19, 23 (Fla. 1st DCA 1990) ("A request for a formal

administrative hearing commences a de novo proceeding intended to formulate agency action, and not to review action taken earlier or preliminarily. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981).") The filing of a protest dissipates the agency's original notice of intent and triggers a formal or informal hearing process in which the party seeking affirmative relief must meet its burden of proof by a preponderance of the evidence. A de novo proceeding is initiated because, to do otherwise, would require the protesting party to overcome the agency's predisposition to act in the manner expressed in the notice.

5. FPC, however, is not asking for a hearing to prove up the allegations in its petition. Instead, FPC wants an opportunity to show the Commission, and its staff, where they erred in their evaluation of the petition.

6. The "disputed issues of fact and policy," pages 4-5 of the protest, are direct challenges to the order. The first three of FPC's "issues," for example, identify mistakes FPC perceives in the Commission's action. The order, at page 3, states: "The Amendment contradicts the objective of the reverse auction bid solicitation." FPC's first disputed issue is: "That the proposed buyout of the OCL contract is not inconsistent with the objectives of the reverse auction bid solicitation." The order states, again at page 3, that "[t]he Amendment . . . has negative effects on intergenerational equity." FPC's second issue is: "That the proposed buyout of the OCL contract does not have

negative effects on intergenerational equity such that the proposed buyout should not be approved." The order states, still on page 3, that "FPC's ratepayers will not see this [present value] benefit until the year 2019, or 22 years from today." FPC's third issue is: "That the proposed buyout of the OCL contract will provide net benefits sooner than 22 years into the future."

7. Other "issues" dispute whether the staff's sensitivity analyses were performed correctly and whether concerns about future fuel prices and inflation are justified. FPC also challenges "whether it is appropriate to address potential strandable costs at this time."

8. FPC is unhappy with the order and wants the Commission to reconsider it. Rule 25-22.060 (1)(a), Florida Administrative Code, however, prohibits reconsideration of a PAA:

The Commission will not entertain a motion for reconsideration of a Notice of Proposed Agency Action issued pursuant to Rule 25-22.029, regardless of the form of the Notice and regardless of whether or not the proposed action has become effective under Rule 25-22.029(6).

FPC's petition on proposed agency action should be denied on the Commission's own motion as an invalid motion for reconsideration filed in violation of Rule 25-22.060(1)(a).

**THE ORDER NEITHER DETERMINED NOR
ADVERSELY AFFECTED FLORIDA POWER
CORPORATION'S SUBSTANTIAL INTERESTS**

9. Even if the Commission concludes FPC's protest is not an improper motion for reconsideration of a PAA, it should still dismiss the protest because FPC has not established its standing.

Nothing precluded FPC from asking the Commission to allow the company to recover its contract obligations over a shorter time period. But the right to file a petition does not necessarily mean that its rejection by the agency adversely affected the petitioning party's interests. Rule 25-22.029(4) only allows a person "whose substantial interests may or will be affected by the Commission's proposed action" to protest and request a hearing.

10. The Commission could have denied the petition in a final order; a decision to leave rates unchanged without affecting the company's earnings harms no one. The Commission, however, chose to render its decision as a proposed agency action (perhaps because FPC requested this treatment in its petition). The "Notice of Further Proceedings or Judicial Review" appended to the order makes it clear that the right to a hearing is only afforded to persons "whose substantial interests are affected by the action proposed by this order," and that the notice, itself, "should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought." Moreover, Section 120.569, Florida Statutes (Supp. 1996), only applies to "proceedings in which the substantial interests of a party are determined by an agency."

11. FPC has not shown its substantial interests were either determined or affected by the PAA. The Commission's action neither helped nor harmed the company. Either way, under the original contract or the proposed amendment, FPC would be

reimbursed by its customers for all its costs. No one was harmed by the PAA order, and the only persons who could be harmed by a contrary decision would be the customers whom FPC is asking to charge almost \$10 million more per year.

12. In an attempt to gain standing, FPC claims (at page 5) its substantial interests are affected in two ways: (1) because the contract amendment "will provide net savings of over \$400 million to Florida Power and its customers;" and (2) because the amendment "will mitigate the exposure of Florida Power and its customers to potentially strandable costs in the future." With respect to purported savings, FPC does not allege any facts which would demonstrate how the company could achieve savings from approval of the contract amendment, or lose anticipated savings from its rejection. FPC will pass all costs on to its customers. The company will see neither savings nor increased costs either way. Customers, however, who have not protested the order, will experience immediate harm in the form of almost \$10 million per year of increased rates if the contract amendment is approved. Thus, although FPC cannot show harm from denial of its petition, its customers would have had no trouble demonstrating immediate injury-in-fact if the Commission had granted the company's petition.

13. The second part of FPC's allegation of its substantial interests being affected, i.e., the mitigation of potentially strandable costs in the future, is disproved by its own terms. A party alleging standing under Chapter 120, Florida Statutes

(Supp. 1996), must show: (1) injury-in-fact of sufficient immediacy to establish entitlement to a Section 120.57 hearing; and (2) substantial injury of a type or nature which the proceeding is designed to protect. Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). Allegations of injury which are remote or speculative -- in this case, they are both -- are inadequate to confer standing. See, Village Park Mobile Home Association, Inc. v. Department of Business Regulation, 506 So. 2d 426, 433 (Fla. 1st DCA 1987) ("The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct.")

14. FPC is currently recovering all costs incurred under the Orlando Cogen contract, and, as things now stand, there is every expectation FPC will continue to recover its costs for the life of the contract. (In its petition, at page 4, FPC stated that its customers will be paying an average of 11.63 cents per kWh over the last ten years of the contract.) FPC has not identified circumstances which, given facts known today with reasonable certainty, are likely to jeopardize its ability to recover all its costs from customers under the existing contract.

15. Potential harm from potential changes in the regulatory environment which might give rise to potential stranded investments and potentially impair cost recovery is speculation in the

extreme. It is the antithesis of the immediately identifiable injury-in-fact necessary to confer standing to protest agency action, whether proposed or already taken, under Florida's Administrative Procedure Act.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, move the Florida Public Service Commission to dismiss the petition on proposed agency action filed by Florida Power Corporation.

Respectfully submitted,

JACK SHREVE
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Attorneys for the Citizens of
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CERTIFICATE OF SERVICE
DOCKET NO. 961184-EQ

I HEREBY certify that a correct copy of the foregoing MOTION TO DISMISS FLORIDA POWER CORPORATION'S PETITION ON PROPOSED AGENCY ACTION has been served by *hand delivery or by U.S. mail to the following individuals on this 26TH day of February, 1997:

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CERTIFICATE OF SERVICE
DOCKET NO. 970002-EG

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO DISMISS FLORIDA POWER CORPORATION'S PETITION ON PROPOSED AGENCY ACTION has been furnished by *hand-delivery or by U.S. Mail to the following parties on this 26TH day of February, 1997:

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