



**Florida  
Power  
CORPORATION**

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FLORIDA PUBLIC SERVICE COMMISSION  
DIVISION OF APPEALS

JAMES A. MCGEE  
GENERAL COUNSEL

July 31, 1997

Via FedEx

Christiana T. Moore, Esquire  
Division of Appeals  
Florida Public Service Commission  
2540 Steward Oak Boulevard  
Tallahassee, Florida 32399-0830

Re: **Docket No. 961407-BQ** - Petition for Approval of Early Termination Amendment to Negotiated Qualifying Facilities Contract with Orlando Cogen Limited, Ltd., by Florida Power Corporation.

**Docket No. 961407-BQ** - Petition for Expedited Approval of Settlement Agreement with Pasco Cogen, Ltd., by Florida Power Corporation.

**Docket No. 961477-BQ** - Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd., by Florida Power Corporation.

ACK \_\_\_\_\_  
AFA \_\_\_\_\_  
AFP \_\_\_\_\_  
CAF \_\_\_\_\_  
Dear Ms. Moore:

CMU \_\_\_\_\_  
CTR \_\_\_\_\_  
EAG \_\_\_\_\_  
LTS \_\_\_\_\_  
This responds to your letters dated July 23, 1997 in the subject dockets requesting information from the parties regarding the conflict of interest that may have existed between a former Commission staff attorney and an employee of Florida Power Corporation.

As you may know, shortly after Florida Power filed its Notice of Conflict of Interest in Docket No. 961477-BQ, it retained former Federal District Court Judge Frederick B. Lacey, of the law firm of Labovof, Lamb, Greene & MacRae, to conduct an investigation into the relationship between the former staff attorney

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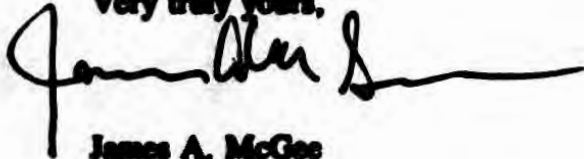
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GENERAL OFFICE

and the Florida Power employee. Judge Lacey was also asked to provide his views on whether the relationship had any impact on proceedings before the Commission to which Florida Power was or is a party. The Judge's report of his investigation was completed on July 29, 1997.

To assist in the preparation of your recommendation to the Commission on this matter, I have enclosed three copies of Judge Lacey's report. Please feel free to contact me if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "James A. McGee", with a long horizontal flourish extending to the right.

James A. McGee

JAM/kp  
Enclosures

cc: Division of Records and Reporting (with 3 copies of enclosure)  
Parties of record (with enclosure)

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FLORIDA PUBLIC SERVICE  
DIVISION OF APPEALS

**REPORT ON  
SPECIAL INVESTIGATION**

**Dated: July 29, 1997**

**LEBOEUF, LAMB, GREENE & MACRAE**  
**L.L.P.**

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

**125 WEST 55TH STREET**  
**NEW YORK, NY 10019-5388**

**July 29, 1997**

**TO: Florida Power Corporation**  
**FROM: LeBoeuf, Lamb, Greene & MacRae, L.L.P.**  
**RE: Dolan/Wagner Special Investigation**

You have retained us to conduct an investigation to determine when a social or romantic relationship began between Lorna Wagner, a former staff attorney of the Florida Public Service Commission (the "PSC" or the "Commission"), and Robert Dolan, Manager of Cogeneration Contracts and Administration at Florida Power Corporation ("Florida Power"), and to develop the chronology of that relationship up to the engagement of Wagner and Dolan on June 28, 1997. You have also requested that we provide you with our views on whether the relationship between Wagner and Dolan had any impact upon regulatory proceedings to which Florida Power is or was a party, recognizing that the PSC is ultimately the entity in the best position to determine this issue because the PSC has the most complete access to individuals and documents involved in its decision making process. Our conclusions are set forth below.

Our conclusions at this time are based upon a review of relevant documents, together with interviews we conducted on

July 13-14, 1997 and July 17, 1997 of the following officers and employees of Florida Power:

- Joseph M. Richardson, President and Chief Executive Officer;
- James P. Fama, Deputy General Counsel;
- Michael B. Foley, Senior Vice President of Energy Delivery;
- James McGee, Senior Counsel;
- James Stanfield, Public Service Commission Liaison and Senior Counsel;
- Samuel F. Wilson, Jr., Director of Purchased Power Resources;
- Lee G. Schuster, Manager of Purchased Power;
- David Gammon, Manager of Cogen Purchased Power;
- R. James Rocha, Manager of Cogen Purchased Power;
- Richard Broyer, Project Manager;
- John Pierpont, Staff Market Specialist, Power Marketing;
- Edward Lynch, Manager of Load Forecasting;
- Margaret Griffith, Department Support Specialist;
- Dele S. Williams, Principal Buyer;
- Byron Covey, Crystal River Plant Manager; and
- Mr. Dolan.

We also interviewed three individuals with knowledge of relevant facts who are not Florida Power employees or officers:

- Chris S. Coutroulis, a partner in the Florida law firm of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. ("Carlton Fields");
- Philip S. Henry, retired Senior Vice President of Energy Delivery at Florida Power; and
- Michael R. Waller, contract counsel to Florida Power.

Rodney Gaddy, Senior Counsel, and Belisa Oliveira, contract counsel, conducted preliminary interviews with many of the individuals we later interviewed, and participated and aided us in the fact gathering process. The facts and conclusions set forth in this report, however, were compiled and reached through our own investigation.

I. EXECUTIVE SUMMARY

Our investigation at this time indicates that a social or romantic relationship between Wagner and Dolan began with their meeting on or about May 5, 1997, although there is some tenuous, hearsay evidence that the relationship may have begun prior to March 17, 1997. Wagner and Dolan saw each other socially at least twice more during May, and several times during June, leading to their engagement on June 28, the day after Wagner left the employ of the PSC.

None of the interviews we have conducted, or the documents we have reviewed, indicated that the relationship between Wagner and Dolan had any impact upon regulatory proceedings to which Florida Power is or was a party, for at least two reasons.

First, it is our understanding that Wagner, who worked for the PSC as a staff attorney for approximately 2½ years, would have her legal work reviewed and revised by two supervisors. As a result, it is dubious that Wagner possessed the ability or status to influence PSC decisions. Moreover, it is our understanding that staff attorneys at the PSC generally do not

make the policy recommendations that serve as the basis for PSC staff recommendations to the PSC Commissioners.

Second, even if Wagner had the ability or status to influence PSC decisions, we have seen no indication, based upon the evidence we have reviewed to date, that any PSC decision regarding Florida Power was influenced by bias or improper conduct.

## II. ZACSE

Dolan began working at Florida Power in November 1983. Wagner began working at the PSC in November 1994. In 1997, as Manager of Cogeneration Contracts and Administration at Florida Power, Dolan's responsibilities included negotiating cogeneration contracts and preparing arguments and PSC testimony relating to those contracts. As a staff attorney at the PSC, Wagner's responsibilities included drafting PSC orders and crafting arguments based upon policy decisions made by others at the PSC. Because Wagner was a relatively junior member of the PSC staff, her work was reviewed by two superiors: Robert Elias and Noreen Davis.

According to Dolan, he and Wagner first met "a couple of years ago," when Wagner was working on a case in which Dolan was involved. A list of the Florida Power matters assigned to Wagner since January 1, 1996 is annexed as Exhibit 1. None of the facts we have gathered to date indicates that the relationship between Dolan and Wagner was a social or romantic one prior to 1997. Indeed, with a few limited exceptions, the

individuals we interviewed identify May 5, 1997 as the first social encounter between Dolan and Wagner.<sup>1</sup>

**A. Initial Communications**

Several of the individuals we have interviewed indicated that Dolan and Wagner took occasional smoking breaks together prior to May 5, 1997, during PSC meetings and/or hearings, often in the company of others. None of these individuals inferred from these smoking breaks that anything other than a professional working relationship existed between Wagner and Dolan.

During one of such smoking breaks, and on or before April 7, 1997, Wagner advised Dolan that she was thinking of leaving the PSC and was interested in exploring other job opportunities. James Fama, who spoke with Wagner regularly on Florida Power/PSC business matters, recalls that Wagner also told him she was interested in moving to another area.

On April 7, while in Tallahassee for meetings to attempt to settle a dispute relating to the Petition by Florida Power Corporation for Expedited Approval of Agreement with Tiger

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<sup>1</sup> Dolan flatly denies that he and Wagner ever met socially prior to May 5. However, Michael Waller recalls Dolan mentioning a "Lorna" prior to March 17, 1997, and Waller thinks he may have heard prior to March 17 that "Lorna" had invited Dolan to go to the Florida Keys. None of the other individuals we have interviewed share Waller's recollection, although we have been advised that Jeanne Benedetti of Destech, Inc. recalled Dolan relating to her in Houston, Texas on April 29, 1997 that he was dating someone at the PSC and that his supervisor was concerned about it. Benedetti has refused our request for an interview, and no other person we have spoken with can confirm her recollection.



Bay Limited Partnership to Purchase Tiger Bay Cogeneration Facility and Terminate Related Purchaser Power Contracts -- PSC Docket No. 970096 - EQ (the "Tiger Bay Matter"), Dolan and his supervisor, Samuel Nixon, mentioned to Chris Coutroulis, a partner in the Florida law firm of Carlton Fields, that Wagner was interested in leaving the PSC. Coutroulis was also in Tallahassee for the Tiger Bay negotiations.

Coutroulis indicated that Carlton Fields was looking for litigation attorneys with 3 to 5 years experience, and asked Dolan and Nixon to have Wagner send Coutroulis her resume. They agreed. As discussed below, Wagner did not contact Coutroulis until June 5.<sup>2</sup>

**B. Social Encounters**

**1. The Cinco De Mayo Celebration**

Dolan, Nixon and several others point to the Cinco De Mayo celebration on May 5, 1997 in Tallahassee as the first time Dolan and Weger met socially. Dolan, by pre-arrangement, knew in advance that Wagner was coming to his motel in Tallahassee, the Cabot Lodge, on May 5 to pick him up to go to the celebration.

Wagner arrived at the motel with two friends and her daughter. In addition to Dolan, the group met Nixon and James Rocha, who were in Tallahassee with Dolan to attend a meeting on May 6 relating to the Petition of Florida Power Corporation for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd.

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<sup>2</sup> The Tiger Bay Matter was subsequently settled by stipulation of all parties, which was approved unanimously by the Commission at the May 19 Agenda Conference.

-- PSC Docket No. 961477-EQ (the "Lake Cogen Matter"). John Pierpont, who was in Tallahassee on unrelated Florida Power business, was also present.

The Lake Cogen meeting on May 6 apparently concerned financing matters and withdrawal of a third-party petition. Florida Power did not take a position on either issue. Wagner attended the meeting together with several other Commission staffers.<sup>3</sup>

According to Dolan, he and Wagner left the motel with her daughter and, after leaving her daughter with a babysitter at a friend's house, attended the Cinco de Mayo celebration for two or three hours.

## 2. Madeira Beach

Between May 5 and the end of May, Dolan and Wagner saw each other socially at least once more.<sup>4</sup> On or about Friday, May 16, Wagner drove to St. Petersburg from Tallahassee for the weekend. According to Dolan, Wagner had wanted to come to St. Petersburg to see a friend and her friend's husband, whom Wagner

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<sup>3</sup> Also on May 6, the PSC held an Agenda Conference relating to, among other things, the Petition by Florida Power Corporation for Approval of Revised Program Participation Standards for Residential Home Energy Improvement and Residential New Construction Programs -- PSC Docket No. 970056 - EQ (the "Residential Home Energy Matter"). No legal issues were raised by the recommendation of PSC staff with respect to the Residential Home Energy Matter. At the Agenda Conference, the PSC unanimously approved tariff revisions for residential home energy and new construction improvements by Florida Power. Dolan had no involvement in the Residential Home Energy Matter.

<sup>4</sup> They also spoke by telephone several times about matters unrelated to work, according to Dolan.

knew from law school. Wagner stayed at Dolan's house for the weekend. Dolan and Wagner spent a portion of the day on Saturday, May 17, at the Madeira Beach "Taste of the Beaches" festival, where they briefly met three Florida Power employees: Edward Lynch, Richard Breyer and Marc Aarstead. According to Dolan, Lynch and Breyer, no Florida Power matters were discussed in Wagner's presence. Indeed, Dolan denies that he and Wagner ever discussed Florida Power or PSC business after their relationship became a social or romantic one.

### 3. The Marathon Weekend

Dolan and Wagner next saw each other on Thursday, May 29, when they flew together with Wagner's daughter to Marathon, Florida, where Wagner's mother has a home. Wagner obtained the flight tickets by using frequent flyer miles. Dolan and Wagner spent Thursday night, Friday and Sunday at her mother's home; they stayed Saturday night, May 31, at the Pier House.<sup>5</sup>

Our interviews and document review indicate that upon his return to the office during the week of June 2, Dolan reported to Nixon, Michael Waller, Rocha, Lee Schuster and perhaps others that he had a "wonderful" weekend with Wagner. Waller reported to Fama that Dolan and Wagner were in Marathon together. Fama, in turn, spoke with James Stanfield on June 3 or shortly thereafter. Fama also discussed the weekend trip with

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<sup>5</sup> It is unclear whether Dolan and Wagner stayed at the Pier House in Marathon, or at the Pier House in Key West, Florida.

Nixon, and spoke briefly with Dolan. Because Fama and Stanfield were, at that time, aware of few details relating to the weekend, it was unclear to them whether Dolan and Wagner traveled together to Marathon, went there as part of a group, or simply ran into each other during the weekend.

#### 4. The Old Town Gathering

Dolan and Wagner next saw each other on Friday, June 6, 1997. On that date, Wagner drove to meet Dolan at a weekend gathering he was attending with approximately one dozen former and current Florida Power employees in Old Town, Florida on the Suwannee River. Although Dolan was invited to attend by a Florida Power employee whose Old Town home served as the site for the gathering, Wagner was not invited. Moreover, according to several of the Florida Power employees who attended, Wagner's presence for a few hours on Friday and Saturday night was viewed as inappropriate and a surprise, because (1) Wagner introduced herself as a PSC staff attorney who worked on cogeneration matters; and (2) there was an understanding among the guests that the gathering was intended to be just for males.

Shortly after Wagner's arrival on Friday, June 6, the group agreed (outside the presence of Wagner and Dolan) not to have any discussion of Florida Power in Wagner's presence. In addition, the uneasiness created by Wagner's presence prompted at least two Florida Power employees to leave the gathering early. All of the individuals we have interviewed who were present at the Old Town gathering have confirmed that no Florida Power matters were discussed in Wagner's presence.

**5. The Orlando Cogen Agenda Conference**

Dolan traveled to Tallahassee on Tuesday, June 10 to attend the Agenda Conference relating to the Petition for Approval of Early Termination Amendment to Negotiated Qualifying Facility Contract with Orlando Cogen Limited -- PSC Docket No. 071194-EQ (the "Orlando Cogen Matter"). At the Agenda Conference, the PSC denied a motion to dismiss of Public Counsel relating to the Orlando Cogen Matter. Wagner played no role in the Conference with respect to that issue. Earlier in the year, on January 27, 1997, the PSC issued an Order denying Florida Power's petition on the Orlando Cogen Matter.

While in Tallahassee on June 10, Dolan played racquetball with Wagner. Dolan returned to St. Petersburg on Wednesday morning, June 11.

**C. Dolan's Removal from Coproduction Matters**

Also on June 10, Fama and Stanfield met for lunch in Tallahassee. Fama and McGee were in Tallahassee to attend the Agenda Conference and another meeting. During the lunch, Fama and Stanfield discussed, among other things, the weekend trip of Dolan and Wagner to Marathon. Fama and Stanfield had now come to understand that Dolan and Wagner had traveled to Marathon together, but neither Fama nor Stanfield knew of Wagner's trip to the Old Town gathering, or of any other social contacts between Dolan and Wagner. Because of their concern about the Marathon trip, however, Stanfield brought the trip to the attention of Florida Power's president and chief executive officer, Joseph Richardson.

On June 11, Richardson directed that Michael Foley discuss the issue with Dolan, and remove Dolan from all work on cogeneration contracts.<sup>6</sup> That same day, Foley confronted Dolan with the facts as understood by Fana, Stanfield and Richardson. Dolan would not, at first, admit to dating Wagner. Dolan conceded that he had been seeing Wagner socially, but Dolan indicated that the relationship was not a serious one, because he continued to date other women, and that the trip to Marathon was not a "date," but was only a visit to Wagner's mother. Dolan added that Wagner was no longer working on cogeneration matters at the PSC, but was now working on industry restructuring.

Foley told Dolan that his behavior was inappropriate, because Wagner was a PSC attorney working on cogeneration matters. Foley advised Dolan that he was removed from work on cogeneration matters, effective immediately, and reassigned to fleet truck work. When Foley returned to Dolan to discuss these issues further, Foley advises that Dolan mentioned that he had telephoned Wagner during the interim and that Wagner planned to resign from the PSC. Dolan denies that Wagner advised him on June 11 that she planned to resign.

D. Wagner's Resignation

On Friday, June 13, 1997, Wagner submitted her letter of resignation to the PSC, effective June 27, 1997. Eight days earlier, on June 5, 1997, Wagner had contacted Coutroulis and

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<sup>6</sup> Nixon, Dolan's supervisor, was on vacation between June 9th and June 13th and did not return to the office until Monday, June 16th.

asked, among other things, about employment opportunities at Carlton Fields. Coutroulis advised Wagner that she could send him her resume. Coutroulis found Wagner's telephone call somewhat odd, particularly because he had heard nothing further regarding Wagner's search for employment since his conversation with Dolan and Nixon on April 7.

As a result, Coutroulis telephoned Fama, who advised Coutroulis of the weekend trip to Marathon, and suggested that Coutroulis call Wagner back and instruct her not to send Coutroulis a resume. Coutroulis did call Wagner and, when he reached her on Thursday June 12, asked that she not forward a resume. Wagner advised Coutroulis that she would be leaving the PSC shortly after the PSC staff recommendation was submitted in connection with the Lake Cogen matter.

After submitting her resignation on June 13, Wagner flew to St. Petersburg to spend the weekend with Dolan. According to Dolan, June 13 was the first time Wagner advised him of her resignation. The two apparently passed part of the evening of June 13 at Harry's Beach Bar in St. Pete Beach.

Wagner also visited Dolan in St. Petersburg during the weekend of June 20-June 22. Dolan's parents and sister were in St. Petersburg to see Dolan, and Dolan, Wagner and Dolan's sister went to Harry's Beach Bar, where they met Nixon, Lynch, Breyer and perhaps a few other Florida Power employees.

**E. The Lake Cogen Agenda Conference**

On Tuesday, June 24, a PSC Agenda Conference was held on matters relating to, among other things, the Lake Cogen

Matter. Florida Power's petition was approved at the June 24 Conference by a 3-2 vote. Wagner participated in discussion of only one jurisdictional issue, and the Commission declined to vote on the issue. Dolan was not present at the Conference.

The issues raised by the Lake Cogen petition were virtually identical to those raised in the Petition by Florida Power Corporation for Expedited Approval of Settlement Agreement Regarding Negotiated Contract for Purchase of Firm Capacity and Energy from a Qualifying Facility with Pasco Cogen, Ltd. -- PSC Docket No. 961407-EQ (the "Pasco Cogen Matter"). The Pasco Cogen petition was approved by the Commission after much discussion on April 1, 1997.

**F. The Engagement**

It was reported to us that, on or about June 20, during a lunchtime conversation, Dolan was "teased" about "losing his freedom." Dolan also examined a diamond and a setting brought in by a fellow employee during the week of June 23, and purchased an engagement ring on June 24 or June 25 in Tampa. Wagner visited Dolan again during the weekend of June 27, and they became engaged on Saturday evening June 28, the day after Wagner's last working day at the PSC. Dolan knew that Wagner's resignation had become effective prior to June 28.

Word of the engagement reached Fana at Florida Power on Monday, June 30. He reported the engagement to Eliss at the PSC on Tuesday, July 1. Our interviews have indicated that until Fana's meeting with Eliss on July 1, Florida Power management and



employees did not know that Wagner had not reported her relationship with Dolan to the PSC.

Both Dolan and Nixon have been placed on administrative leave from Florida Power pending completion of Florida Power's investigation and evaluation of the results of that investigation. Dolan was placed on administrative leave on July 7; Nixon was placed on administrative leave on July 11.

**G. Events Subsequent To the Engagement**

**1. The PSC and Florida Power Investigations**

Upon learning of the engagement between Dolan and Wagner, the PSC announced that it was undertaking an internal investigation to determine if the relationship between Dolan and Wagner had any impact upon Florida Power matters before the PSC. Memoranda prepared by or at the direction of the PSC in connection with that investigation are annexed as Exhibit 2. On Tuesday, July 8, 1997, Florida Power filed a Notice of Conflict of Interest with the PSC. A copy of that notice is annexed as Exhibit 3. As you know, Florida Power retained this firm as outside counsel to conduct its own investigation.

On Tuesday, July 15, 1997, the PSC determined at an Agenda Conference that (1) the Orlando Cogen and Pasco Cogen Matters would be reviewed to determine if any evidence of bias existed; and (2) the Lake Cogen Matter would be reopened and rebriefed because one of the Commissioners who had voted to approve the petition indicated that she had voted incorrectly. Because the Lake Cogen Matter has been reopened, any issues

relating to alleged bias in connection with that matter may also be considered.

2. Our Communications With the PSC

In addition to the interviews and document review we have conducted, we have also discussed our investigation with the PSC. Specifically, we arranged through Stanfield to meet with PSC General Counsel Robert Vandiver on Thursday, July 17. We indicated to Vandiver that Florida Power wanted to cooperate completely with the PSC's investigation and that Florida Power was conducting its own investigation. Vandiver was pleased to learn of Florida Power's cooperation and stated that the PSC would make readily available all facts uncovered during its investigation. Vandiver also arranged for us to communicate directly with Elias and Davis, both of whom are involved in the PSC's investigation.

On Friday, July 18, 1997, we spoke by telephone with Elias and conveyed to him the facts, as we understood them, regarding the relationship between Wagner and Dolan. Elias expressed appreciation for our cooperation and advised us that Davis would be interviewing Wagner on Monday, July 21, and that Davis would telephone us after the interview to provide us with any new information she had learned. We spoke with Davis on Monday afternoon, July 21.

Our conversations with Elias and Davis added some detail to our factual account, and revealed some minor factual discrepancies. For example, Elias related that a PSC employee, Tarik Noriega, recalled Dolan asking whether "Lorna" would be

present for a PSC employee plant tour conducted in early March, 1997. Overall, however, we do not regard the additional facts and minor discrepancies as significant, because they do not change our conclusion, discussed more fully below, that the relationship between Wagner and Dolan had no impact upon PSC proceedings to which Florida Power is or was a party.

### **III. DISCUSSION**

#### **The Facts Presented to Date Demonstrate No Evidence of Bias or Improper Conduct Relating to Florida Power Matters Before the PSC**

The interviews we have conducted, together with the documents we have reviewed, revealed no affirmative evidence of bias or improper conduct regarding the Florida Power matters in which Wagner was involved before the PSC.<sup>7</sup> Our conclusion that no bias or improper conduct existed is based on two reasons.

First, it is our understanding that Wagner, who worked for the PSC as a staff attorney for approximately 2½ years, would have her legal work reviewed and revised by two supervisors. As a result, it is dubious that Wagner possessed the ability or status to influence PSC decisions.<sup>8</sup>

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<sup>7</sup> In asserting that our investigation revealed no evidence of bias or improper conduct, we recognize, as stated above, that the PSC is ultimately the entity in the best position to make a final judgment on this issue, because the PSC has the most complete access to individuals and documents involved in the PSC decision making process.

<sup>8</sup> As a threshold matter, it should also be noted that Wagner, as a staff attorney, could not act as a decision maker. The five PSC Commissioners are the  
(continued...)

Moreover, it is our understanding that staff attorneys at the PSC generally do not make the policy recommendations that serve as the basis for PSC staff recommendations to the PSC. Those policy recommendations are generally made by the PSC's technical advisers, with staff attorneys serving only to craft legal arguments or orders relating to the policy recommendations.

Second, even if Wagner potentially had the power to influence PSC decisions, none of the evidence we have reviewed to date indicates that any PSC decision regarding Florida Power was influenced by bias or improper conduct. Five considerations may be relevant in determining whether an agency's decision making process is so irrevocably tainted that the decision must be voided. Those considerations are:

1. The gravity of the ex parte communications;
2. Whether the contacts may have influenced the agency's ultimate decision;
3. Whether the party making the improper contacts benefitted from the agency's ultimate decision;
4. Whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and
5. Whether vacation of the agency's decision would serve a useful purpose.

In the Matter of the Petition of Northern States Power Company,  
1986 Minn. PUC LEXIS 182 (Minn. Public Utilities Comm. 1986),

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<sup>9</sup>(...continued)  
only individuals with the ability to make binding decisions regarding regulated companies such as Florida Power.

aff'd in part, rev'd in part on other grounds, 414 N.W.2d 383  
(Minn. 1987).

In this instance, the facts as we currently understand them do not provide support for voiding any of the PSC's decisions regarding Florida Power under this five-prong test. There is no evidence that Wagner and Dolan discussed PSC business relating to Florida Power after their relationship became a social or romantic one. Indeed, Dolan denies such discussions ever occurred. Further, none of the facts we have reviewed indicate that the relationship between Dolan and Wagner influenced PSC decisions regarding Florida Power.

For example, in the Orlando Cogen Matter, the Commissioners ruled against Florida Power several months before the relationship apparently began, and Wagner played no role in the June 10 Agenda Conference with respect to Orlando Cogen. In the Lake Cogen Matter, Florida Power did not take a position on the issues raised at the May 6 meeting, and the Commissioners did not even vote on the single issue on which Wagner presented argument at the June 24 Agenda Conference. In addition, the substantive issues raised at that Conference regarding Lake Cogen were virtually identical to those presented in the Pasco Cogen Matter, which appears to have been decided by the Commissioners before any social or romantic relationship between Dolan and Wagner began. Similarly, the Tiger Bay Matter was resolved by a stipulated settlement agreed to by all the parties, and no legal issues were raised in the PSC staff recommendation or Agenda

Conference regarding the Residential Home Energy Matter, which was a docket in which Dolan had no involvement.

Moreover, there is no evidence that Florida Power (or Dolan) benefitted from any of the PSC's decisions concerning Florida Power or that the contents of the communications between Dolan and Wagner, if known to other parties to the various transactions involved, would have merited substantive responses by those parties.

Finally, our review does not indicate that vacating any of the PSC decisions involved on grounds of bias would serve a useful purpose. Each of the transactions involved was heavily negotiated at arms' length among the parties involved, and none of those parties has come forward seeking review on grounds of alleged bias. Vacating any of the decisions on grounds of alleged bias would only disrupt these painstakingly negotiated agreements, which appear to have been completely unaffected by the relationship between Dolan and Wagner.

#### **IV. CONCLUSION**

The foregoing sets forth the results of our investigation as of the date of this submission. Subject to facts that may further emerge, such as those that may be developed by the PSC investigation, we regard our investigation as complete. We thank you for affording us the opportunity to serve you in this matter.

**EXHIBIT 1**

**FLORIDA POWER MATTERS ASSIGNED  
TO LORNA WAGNER SINCE JANUARY 1, 1996**

1. **Docket No. 960283 - Joint Petition for Approval of Territorial Agreement between Florida Power Corporation and the City of Newberry.**
2. **Docket No. 960316 - Petition for Approval of Real Time Pricing Demonstration Tariff.**
3. **Docket No. 960325-EI - Revision of Tariffs on Underground Distribution Differential Costs for Florida Power and Light Company, Florida Power Corporation, Gulf Power Company and Tampa Electric Company.**
4. **Docket No. 961255-EI - Petition by Florida Power Corporation for Approval of Proposed Changes to Sheet No. 6.121 of Retail Tariff Regarding Rate Schedule RS-1 Budget Billing Plan (Optional Rider).**
5. **Docket No. 970056-ES - Petition by Florida Power Corporation for Approval of Revised Program Participation Standards for Residential Home Energy Improvement and Residential New Construction Programs.**
6. **Docket No. 970096-EQ - Petition by Florida Power Corporation for Expedited Approval of Agreement with Tiger Bay Limited Partnership to Purchase Tiger Bay Cogeneration Facility and Terminate Related Purchase Power Contracts.**
7. **Docket No. 950110-EQ - Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility between Panda-Kathleen, L.P. and FPC.**
8. **Docket Nos. 960001-ES and 970001-EI - Fuel and Purchased Power Cost Recovery.**
9. **Docket No. 961184-EQ - Petition by Florida Power Corporation for Approval of Early Termination Amendment to Negotiated Qualifying Facility Contract with Orlando Cogen, Ltd.**
10. **Docket Nos. 960002-ES and 970002-ES - Energy Conservation Cost Recovery.**
11. **Docket No. 961407-EQ - Petition by Florida Power Corporation for Expedited Approval of Settlement Agreement Regarding Negotiated Contract for Purchase of Firm Capacity and Energy from a Qualifying Facility with Pasco Cogen, Ltd.**
12. **Docket No. 961477-EQ - Petition by Florida Power Corporation for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd.**



**EXHIBIT 2**

# Public Service Commission

State of Florida

-M-E-M-O-R-A-N-D-U-M-

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**DATE:** July 8, 1997  
**TO:** Norman S. Davis, Director, Division of Legal Services  
**FROM:** Robert V. Elias, Chief of Electric & Gas, Division of Legal Services  
**RE:** Lorna Wagar

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RVE

After learning last Tuesday of Lorna Wagar's apparent violations of the Rules of Professional Conduct, I initiated a review of Lorna's case assignments to assess the possibility of any bias in the information presented to the Commission. My preliminary conclusion, based on the materials reviewed so far, is that no affirmative evidence of bias has been found.

In conducting the review, I looked at three types of cases:

- (1) All cases assigned to Lorna since January 1, 1996. (Attachment 1)
- (2) All cases assigned to Lorna since January 1, 1996, to which Florida Power Corporation was a party. (Attachment 2)
- (3) All cases pending at the time of her resignation, which have been reassigned. (Attachment 3)

The best information that I have (which is hearsay) is that Lorna and Mr. Dehan have been dating for a "couple of months." I interpret that to mean that the relationship began some time after March, 1997. I reviewed the assignments dating back to January 1, 1996, in an abundance of caution. I would note that of all the dechets assigned to Lorna, in only one instance was Legal the office of primary responsibility.

What follows is an analysis of all dechets involving Florida Power Corporation assigned to Lorna Wagar since January 1, 1996.

Dechet No. 90883 - Joint Petition for Approval of Territorial Agreement between Florida Power Corporation and the City of Newberry. This territorial agreement was unanimously approved at the May 23, 1996 agenda conference. No protest was filed to the Order issued June 10, 1996. If my information is correct, the Commission's action was final approximately 9 months before the relationship began.

**Norson S. Davis, Director**

**July 8, 1997**

**Page 2**

**Docket No. 960316 - Petition for Approval of Real Time Pricing Demonstration Tariff.** This tariff was unanimously approved at the May 9, 1996 agenda conference. No protest was filed to the Order, issued May 28, 1996. If my information is correct, the Commission's action was final approximately 9 months before the relationship began.

**Docket No. 960325-EI - Revision of Tariffs on Underground Distribution Differential Costs for Florida Power and Light Company, Florida Power Corporation, Gulf Power Company, and Tampa Electric Company.** This is an annual filing. FPC's tariffs were approved unanimously at the May 9, 1996 agenda conference. No protest was filed to the Order, issued May 28, 1996. If my information is correct, the Commission's decision was final 9 months before the relationship began.

**Docket No. 961233-EI - Petition for Approval of Proposed Changes to Sheet No. 6.121 of Retail Tariff Regarding Rate Schedule RS-1 Budget Billing Plan (Optional Rider) by Florida Power Corporation.** These tariff revisions were unanimously approved at the November 28, 1996 agenda conference. No protest was filed to the Order, issued December 16, 1996. If my information is correct, the Commission's decision was final approximately 3 months before the relationship began.

**Docket No. 970006-BB - Petition for Approval of Revised Program Participation Standards for Residential Home Energy Improvement and Residential New Construction Programs by Florida Power Corporation.** The Commission unanimously approved these tariff revisions at the May 1997 agenda conference. I do not recall whether or not there was any discussion of this item at the agenda conference. If my information is correct, Commission action on this item occurred after the relationship had begun. There were no legal issues in the recommendation.

**Docket No. 970006-BQ - Petition for Expedited Approval of Agreement with Tiger Bay Limited Partnership to Purchase Tiger Bay Generation Facility and Terminate Related Purchase Power Contract by Florida Power Corporation.** A hearing was scheduled for April 17, 1997 on this petition. At the outset of the hearing, the parties FPC, the Office of Public Counsel and the Florida Electric Energy, Inc. and Tiger Bay Limited Partnership presented a stipulation approving the purchase buy out. The stipulation was approved unanimously at the May 19, 1997 agenda conference. Given that the case was stipulated by all the parties, the possibility of bias appears unlikely. If my information is correct, Commission action on this item occurred after the relationship had begun.

**Docket No. 960130-BQ - Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility between Florida-Kathleen, L.P. and FPC.** Luma assisted Martha Brown on this docket. It has been on appeal before the Supreme Court for over a year. If my information is correct, all Commission action predated the relationship by almost a year.

**Norton S. Davis, Director**

**July 8, 1997**

**Page 3**

**Dockets Nos. 960001-SO & 970001-EI - Fuel and Purchased Power Cost Recovery.** Lema assisted Vidal Johnson in these dockets. If my information is correct, all Commission action predated the relationship by at least two months.

**Dockets pending at the time of Lema's resignation:**

**Docket No. 961104-SQ - Petition for approval of early termination amendment to negotiated qualifying facility contract with Orlando Cogen Limited by Florida Power Corporation.** The Commission voted to deny FPC's petition at the January 7, 1997 agenda conference. FPC presented the Commission's Order and a hearing has been set for October 30 & 31, 1997. If my information is correct, this Commission action predated the relationship by at least three months. OPC filed a Motion to Dismiss FPC's petition on February 26, 1997. Cochran Keating prepared, filed and presented at the July 24, 1997 agenda, the recommendation denying OPC's Motion. The panel approved staff's recommendation. If my information is correct, this action took place after the relationship began. However, Lema was not involved in this issue.

**Docket No. 960002-SO and 970002-SO - Energy Conservation Cost Recovery.** Lema represented staff at the February hearing in this docket. If my information is correct, all Commission action occurred more than a month before the relationship began.

**Docket No. 961409-SQ - Petition for Expedited Approval of Settlement Agreement Regarding Negotiated Contract for Purchase of Firm Capacity and Energy from a Qualifying Facility, with Fesco Cogen, Ltd. by Florida Power Cogen.** Lema was the lead attorney and did virtually all of the legal work on this petition, which was approved after much discussion by a 3-2 vote. (Commissioners Deason and Kinstling dissenting) at the April 1, 1997 agenda conference. If my information is correct, this action was taken in the same approximate time frame as the relationship began. Based on my recollection, and the documents I have reviewed so far, I see no affirmative evidence of bias in the information presented to the Commission. Further review is necessary. No protest was filed and the Order approving the settlement was final on May 29, 1997. This qualifying facility was owned by Peoples Gas System, Inc. When TBCO purchased Peoples, it was required by PURPA to sell the facility, I believe, within one year.

**Docket No. 961477-SQ - Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation.** Lema was the lead attorney and did most of the work on this docket. The petition was approved after much discussion by a 3-2 vote with Chairman Johnson and Commissioner Deason dissenting. The Proposed Agency Action Order is due to be issued July 14, 1997. Chairman Johnson and Commissioner Deason have indicated that they may want to write dissenting opinions. The recommendation was virtually identical to the one filed with respect to the Fesco docket, with one exception.

Norren S. Davis, Director

July 6, 1997

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After the Passo discussion at the April 1, 1997 agenda, staff was concerned about the confusion surrounding the Commission's jurisdiction to (EdG and Legal staff) deny cost recovery of amounts found by a court to be due pursuant to negotiated contract. We met in April and decided that we would include the issue in the Lains recommendation. I took the position that the Commission could deny cost recovery; Lorna was going to take the alternative position that the Commission could not. After a discussion of the issue, I was advancing in the primary, Lorna, on the filing date of the recommendation (June 12), decided not to file an alternative recommendation. She submitted her resignation the next morning. She did, however, participate in the discussion of the issue at the agenda conference. I do not see affirmative evidence of bias in the information presented to the Commission. The Commission decided that no vote was needed on this issue. If my information is correct, Commission consideration of this docket took place after the relationship began.

The question arises in my mind whether there was a duty of FPC to report their knowledge of this relationship to the Commission. I know of no affirmative requirement in the Commission's rules or in Florida Statutes that a utility report this type of alleged misconduct to the Commission. Some information (again hearsay) suggests that until the June 24, 1997, agenda conference, FPC did not know that Lorna had not reported this conflict. I would submit that good management practices would require that a utility to immediately report this type of alleged misconduct to the Commission.

#### **CONCLUSIONS/RECOMMENDATIONS**

- (1) Given the short time to review this matter, I can only reach a preliminary conclusion. However, I have not found any affirmative evidence of bias in the information presented to the Commission by Lorna Wagner in dockets involving Florida Power Corporation.
- (2) Further investigation is necessary to ascertain just when this relationship started and when and how FPC learned of it.
- (3) Further evaluation of those dockets where Commission action was taken after the relationship started is necessary.
- (4) After notice to the parties, the Commission should consider whether to revisit, at an agenda conference, each item assigned to Lorna where action was taken after the relationship began. These items should be presented to the Commission by Legal staff not previously involved in these items (probably, someone not in EdG or a personal friend of Lorna's).
- (5) Someone should review my work in this matter.

**Norren S. Davis, Director**

**July 8, 1997**

**Page 5**

**KVE:anj**

**Attachments**

**0133.anj**



# Public Service Commission

## -M-E-M-O-R-A-N-D-U-M-

**DATE:** July 8, 1997  
**TO:** Julia L. Johnson, Chairman  
**FROM:** Norman S. Davis, Director, Division of Legal Services *NSD*  
**RE:** Lorna Wagner

Based on the information contained in Bob Elias' July 1, 1997 memo to me (see Attachment A) regarding the alleged engagement of Lorna Wagner and Robert Dolan of Florida Power Corporation, I have reviewed Commission procedures and the Florida Bar Rules of Professional Conduct for possible conflict therewith. (Ms. Wagner resigned her staff attorney position with the Commission, effective June 27, 1997. She began part-time employment with the Commission on November 14, 1994).

### I. Commission Procedures

While there is no rule specifically on point regarding romantic relationships between Commission staff and employees of utilities regulated by the Commission, it is only common sense that such relationships create a conflict of interest.

The Commission has a formal Code of Ethics which was effective on November 10, 1994. See Attachment B. It sets forth conduct to which Commission employees are committed to aspire. Of particular importance are:

- II. Treat all parties and the public with honesty, objectivity, courtesy and respect.
- III. Provide fair and impartial analyses, recommendations, and decisions regarding all Commission matters.
- IV. Conduct ourselves so that any personal relationships will neither benefit nor harm any party appearing before the Commission.

Also, all Commission employees sign, within 30 days of hire, a Standards of Conduct and Conflict of Interest form, certifying that they have received and read the provisions of Chapter 5.04, Florida Public Service Commission Administrative Procedures (APM). See Attachment B. This provision addresses "conflicts arising from employment of spouse or other persons with whom the employee resides or intends to form a household, or who the employee intends to marry." This provision requires such information to be reported to the employee's immediate supervisor so that job reassignment can be arranged if necessary.

I attempted to contact Ms. Wagner by telephone on July 7, 1997, to ascertain her version of the facts related to Mr. Elias on July 1, 1997 by a Florida Power Corporation attorney. There was no answer; I left a recorded message.

If Ms. Wagner was doing Mr. Deins during her employ with the Commission, it is a very serious matter, particularly since she was assigned duties regarding cogeneration contracts and Mr. Deins worked in that area for Florida Power Corporation. At the very least, she violated APM Chapter 5.04 in that she did not inform Mr. Elias, her immediate supervisor, when the relationship progressed to the point of "intending to form a household" or "intends to marry." Prior to that point, common sense, as well as the Code of Ethics, should have caused her to inform her supervisor that she was doing a utility employee. If she had so informed her supervisor, she would have been removed from these cases and reassigned to work in another bureau in the Legal Services Division.

I note that Chapter 1.05 A.2, APM, provides in pertinent part that the Division of Legal Services supervises the procedural and legal aspects of formal proceedings before the Commission, and on behalf of the Commission in civil court proceedings. "The division also represents the staff before the Commission, issues reports and recommendations to the Commission as requested, and prepares Commission orders." The technical staff of the Commission are the clerks of the attorneys in the Legal Services Division. The attorneys participate in decision-making with technical staff and advise technical staff on legal matters. In the Electric and Gas Division divisions, the staff attorney often presents the technical staff's recommendations on issues to the Commission at Agenda Conferences.

## II. Florida Bar Rules of Conduct

### Rule 4-6.3, Reporting Professional Misconduct. Subsection (a) states:

A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other aspects shall inform the appropriate professional authority.

The Comment portion following the Rule states in pertinent part:

This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

From what information is known to me at this time, it appears that Ms. Wagner has violated Rule 4-1.7, Conflict of Interest and Rule 4-6.4, Misconduct.



**Rule 4-1.7, Conflict of Interest, states in subparagraph (b):**

**A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:**

- (1) the lawyer reasonably believes the representation will not be adversely affected; and**
- (2) the client consents after consultation. (Emphasis added).**

**The Comment section following the rule states that "Loyalty is an essential element in the lawyer's relationship to a client." It further states that:**

**Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.**

**Rule 4-2.4, Misconduct, states in subparagraph (c), that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Comment section states in pertinent part that:**

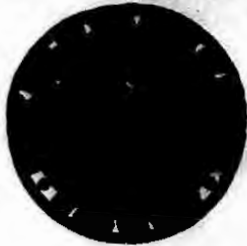
**... a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving ... dishonesty, or breach of trust ... are in that category.**

**Rule 4-2.1, Advice, states that "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."**

**If the information related to Mr. Elias and reported to me in his memo of July 1, 1997, is accurate, Ms. Wagner's ability to conform to Rule 4-2.1 was severely impaired. By having a romantic relationship with a utility employee while she was the staff attorney assigned to dockets relating to that utility, her independent professional judgment is seriously in question. Her lack of candor in not reporting the relationship to her client (and supervisor) appears to be a breach of the above-cited rules regarding conflict of interest and misconduct.**

**Since these are very serious matters, before any action is taken with the Bar, I would like to again try to make contact with Ms. Wagner to confirm the information related to Mr. Elias by Florida Power Corporation's attorney.**

**NED:raj  
Attachments  
0133.amj**



# Public Service Commission

## MEMORANDUM

**DATE:** July 10, 1987  
**TO:** Julia L. Johnson, Chairman  
**FROM:** John M. Grayson, Inspector General *JG*  
**RE:** Wagner Investigation [N-0783-01]

Per your direction, I have investigated the facts surrounding the relationship between Ms. Lorna Wagner, former PSC staff attorney, and Mr. Robert Dolan, a Florida Power Corporation employee, to determine the following:

- When the PSC staff became aware of the relationship between Ms. Wagner and Mr. Dolan.
- The course of action taken by PSC staff after becoming aware of the relationship.
- Whether any Commission rule, policy or procedure was violated as a result of the relationship.

I have performed interviews and taken affidavits from Robert Vandiver, Marvin Davis and Robert Elias concerning their knowledge of the engagement between Ms. Wagner and Mr. Dolan. It was determined that Mr. Davis and Mr. Elias became aware of the relationship on July 1, 1987, and Mr. Vandiver on July 2. It was further determined that upon learning of the engagement, this information was forwarded up the chain-of-command in an expeditious manner. In the affidavits taken on July 6, Mr. Elias stated that he first became aware of the relationship on July 1, through a meeting with Mr. James Fenn, an attorney with Florida Power Corporation. Upon obtaining this information, Mr. Elias immediately informed Mr. Davis, his immediate superior. This information continued up the chain-of-command until reaching the Chairman later that day. Although both Mr. Davis and Mr. Elias acknowledge hearing that Ms. Wagner was engaged on Monday, June 28, 1987, neither of them knew that she was engaged to Mr. Dolan. They were informed in an informal setting that her engagement was to a gentleman from the Tampa area. On July 2, 1987, Mr. Davis informed Mr. Vandiver, who was out of town on leave, of the engagement.

Additionally, I have reviewed the following Commission Rules and Administrative Procedures to determine whether Ms. Wagner's relationship constitutes an infraction of any of these provisions.

- Chapter 68B-2 F.A.C., - Select Exempt Service Employee Relationships with Regulated Entities
- Rule 25-31.000 F.A.C., - Acceptance of Gifts
- Commission APM - Section 6.02 - Code of Conduct for Public Service Commission Employees
- Commission APM - Section 6.04 - Employment of Spouses and Others by Regulated Utilities

It is important to note that I have neither interviewed nor taken a statement from Ms. Wagner concerning her relationship with Mr. Dolan. Without such a statement, I am unable to ascertain whether Commission rules or

procedures have been violated. Critical facts such as how long Mr. Wagner dated Mr. Dolan before their engagement and the actual date of the engagement, are unestablished. The absence of these facts leaves me with the following comment:

1. **Commission AFM 5.02, A, 2, a, (2), provides that a Commission employee shall not knowingly accept anything of value... from a person or entity acting on behalf of a regulated entity or party.**

In this case, it is unknown if or how long Mr. Wagner and Mr. Dolan were dating before her resignation from the Commission. A reasonable person may presume that if Mr. Wagner dated Mr. Dolan for any considerable length of time, that she may have accepted something of value from him during their courtship or upon their engagement.

2. **Commission AFM 5.04, provides that "The Commission will not permit conflicts arising from employment of spouses or other persons with whom the employee resides or intends to form a household, or who the employee intends to marry." It further states, "Any employee whose spouse or other above-identified person is employed by an entity regulated by the Commission shall tell his/her immediate supervisor of all pertinent facts so that, if necessary, job reassignments can be arranged."**

In this case, the actual date in which Mr. Wagner was engaged to marry Mr. Dolan is not an established fact. In addition, it is not known whether Mr. Wagner and Mr. Dolan decided to form a household, and if so, when this decision was made.

This case represents a prime example of the fine line between personal matters which should be maintained confidential and personal matters which need to be disclosed to one's employer. I believe that the Rules, and the Commission Administrative Procedures, which relate to conflict of interest, are as strict as possible without infringing upon an employee's right to privacy. I further believe that this was a case of poor judgment on the part of Mr. Wagner and that Commission employees need training on what may constitute a conflict of interest and how to report such possible conflicts of interest when they occur. It is therefore recommended that the Commission establish mandatory conflict of interest training for its employees and encourage its employees to voluntarily disclose any circumstances that have a remote possibility of causing a conflict of interest. Further, it should be emphasized to Commission employees that informing one's employer of possible conflicts of interest is a "professional responsibility," and that failure to accept this responsibility may have an adverse effect on one's career.

cc:

Commissioner Clark  
Commissioner Deason  
Commissioner Gardo  
Commissioner Hunsley  
Bill Talbot, SID  
Rob Vander, OCL  
Mary A. Bann, DED/T  
James A. Ward, DED/A  
Noreen S. Davis, Director, Legal Services  
Robert V. Egan, Chief, Bureau of E & S  
Suzanne DeMello, Director, Consumer Affairs

DOCKET NOS. 961284-EQ, 961407-EQ, 961477-EQ, 970056-EG, 970096-EQ  
DATE: JULY 12, 1997

**DOCKET NO. 970056-EG - PETITION FOR APPROVAL OF REVISED PROGRAM PARTICIPATION STANDARDS FOR RESIDENTIAL HOME ENERGY IMPROVEMENT AND RESIDENTIAL NEW CONSTRUCTION PROGRAMS BY FLORIDA POWER CORPORATION.**

**COMMISSION STAFF (HARLOW)**

**PARTIES (FLORIDA POWER CORPORATION)**

**DOCKET NO. 970096-EQ - PETITION FOR EXPEDITED APPROVAL OF AGREEMENT WITH TIGER BAY LIMITED PARTNERSHIP TO PURCHASE TIGER BAY COGENERATION FACILITY AND TERMINATE RELATED PURCHASED POWER CONTRACTS BY FLORIDA POWER CORPORATION.**

**COMMISSION STAFF (D. SMITH, CROSSMAN, D. DRAPER, P. LEE, MAUREY, MERTA, MORIDA, L. ROMIG, SLESKIEWICZ, STALLCUP, DUDLEY, KEATING)**

**PARTIES (DESTEC ENERGY, INC., FLORIDA INDUSTRIAL POWER USERS GROUP, FLORIDA POWER CORPORATION, OFFICE OF PUBLIC COUNSEL, TIGER BAY LIMITED PARTNERSHIP)**

**AGENDA: 07/15/97 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE**

**CRITICAL DATES: NONE**

**SPECIAL INSTRUCTIONS: S:\FPC\LEG\NF\COGEN.RCM**

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### **CASE BACKGROUND**

On Tuesday July 1, 1997, staff learned that Lorna Wagner, a former staff attorney with the Legal Services Division's Bureau of Electric and Gas, had become engaged to Robert Dolan, a Florida Power Corporation (FPC) employee. It has been alleged that Mr. Dolan and Ms. Wagner were dating prior to her last date of employment, June 27, 1997. After learning of these allegations, staff initiated a review of Ms. Wagner's case assignments to assess the possibility of any bias in the information presented to the Commission. In conducting the review, staff examined three categories of cases:

- (1) All cases assigned to Ms. Wagner since January 1, 1996.

DOCKET NOS. 961184-EQ, 961407-EQ, 961477-EQ, 970056-EG, 970096-EQ  
DATE: JULY 11, 1997

- (2) All cases assigned to Ms. Wagner since January 1, 1996, to which Florida Power Corporation was a party.
- (3) All cases pending at the time of her resignation.

The best information available at this time (which is hearsay) is that Ms. Wagner and Mr. Dolan have been dating for a "couple of months." From that information, staff has presumed the relationship began some time after March, 1997. Staff reviewed the assignments dating back to January 1, 1996, in an abundance of caution. Staff would note that of all the dockets involving FPC assigned to Ms. Wagner since January 1, 1996, in only one instance was Legal the office of primary responsibility. Staff's review indicates that Commission action has been taken in five of these cases since March 31, 1997. This recommendation addresses what action the Commission should take concerning the dockets involving Florida Power Corporation assigned to Ms. Wagner in which Commission action was taken after March 31, 1997.

#### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission revisit, at an agenda conference, the decisions made in each of the dockets involving Florida Power Corporation assigned to Ms. Wagner in which Commission action was taken after March 31, 1997?

**RECOMMENDATION:** After notice to the parties, the Commission should revisit, at an agenda conference, the decisions made in Dockets Nos. 961407-EQ (Pasco), 961477-EQ (Lake), and 961184-EQ (OC) to determine if there was any bias in the information presented to the Commission. Those items should be presented to the Commission by attorneys from the Division of Appeals, since that Division was not previously involved in those items. Based on the information known at this time, it does not appear that any further review is necessary with respect to the decisions made in Docket No. 970056-EG (Revision to Conservation Program Participation Standards) and Docket No. 970096-EQ (Tiger Bay).

**STAFF ANALYSIS:** Each of the five dockets is discussed separately:

Docket No. 970056-EG - Petition for Approval of Revised Program Participation Standards for Residential Home Energy Improvement and Residential New Construction Programs by Florida Power Corporation. The Commission unanimously approved those tariff revisions at the May 6, 1997 agenda conference. There was

DOCKET NOS. 961184-EQ, 961407-EQ, 961477-EQ, 970056-EG, 970096-EQ  
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no discussion of this item at the agenda conference and no party to the docket other than FPC. The order was issued as Proposed Agency action on May 28, 1997. No protest was filed. If staff's information is correct, Commission action on this item occurred after the relationship had begun. There were no legal issues in the recommendation. E&G staff indicates that the recommendation was based solely on its analysis of the merits of the petition.

**Docket No. 970096-EQ - Petition for Expedited Approval of Agreement with Tiger Bay Limited Partnership to Purchase Tiger Bay Cogeneration Facility and Terminate Related Purchase Power Contracts by Florida Power Corporation.** A hearing was scheduled for April 17, 1997 on this petition. At the outset of the hearing, the parties (FPC, the Office of Public Counsel, the Florida Industrial Power Users Group, Desteq Energy, Inc. and Tiger Bay Limited Partnership) presented a stipulation approving the purchase buy out. The stipulation was approved unanimously at the May 19, 1997 agenda conference. Given that the case was stipulated by all the parties, the possibility of bias appears unlikely. If staff's information is correct, Commission action on this item occurred after the relationship had begun. E&G and AFAD staff indicates that the recommendation was based solely on its analysis of the merits of the petition.

**Docket No. 961184-EQ - Petition for approval of early termination amendment to negotiated qualifying facility contract with Orlando Cogen Limited by Florida Power Corporation.** The Commission voted to deny FPC's petition at the January 7, 1997, agenda conference. FPC protested the Commission's Order and a hearing has been set for October 30 & 31, 1997. If staff's information is correct, this Commission action predates the relationship by at least three months. OPC filed a Motion to Dismiss FPC's protest on February 26, 1997. Staff attorney Cochran Keating prepared, filed, and presented the recommendation denying OPC's Motion at the June 24, 1997 agenda conference. The panel approved staff's recommendation. If staff's information is correct, this action took place after the relationship began. However, Ms. Wagner was not involved in this issue. Mr. Keating has indicated that Ms. Wagner provided no input and did not review the recommendation.

**Docket No. 961407-EQ - Petition for Expedited Approval of Settlement Agreement Regarding Negotiated Contract for Purchase of Firm Capacity and Energy from a Qualifying Facility, with Pasco Cogen, Ltd. by Florida Power Corporation.** Ms. Wagner was the lead attorney and did virtually all of the legal work on this petition, which was approved after much discussion by a 3-2 vote, with Commissioners Deason and Kiesel dissenting, at the April 1, 1997.

DOCKET NOS. 961184-EQ, 961407-EQ, 961477-EQ, 970056-EG, 970096-EQ  
DATE: JULY 11, 1997

agenda conference. If staff's information is correct, this action was taken in the same approximate time frame as the relationship began. No protest was filed and the Order approving the settlement was final on May 29, 1997. E&G and AFAD staff indicate that their recommendation was based solely on the analysis of the merits of the petition.

Docket No. 961477-EQ - Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd., by Florida Power Corporation. Ms. Wagner was the lead attorney and did most of the work on this docket. The petition was approved after much discussion by a 3-2 vote with Chairman Johnson and Commissioner Deason dissenting at the June 24, 1997 agenda conference. The Proposed Agency Action Order is scheduled to be issued July 14, 1997. Staff will delay the issuance of this Order until after the Commission's consideration of this recommendation. The recommendation was virtually identical to the one filed with respect to the Pasco docket, with one exception.

After the Pasco discussion at the April 1, 1997 agenda, staff (E&G and Legal staff) were concerned about the apparent confusion surrounding the Commission's jurisdiction to deny cost recovery of amounts found by a court to be due pursuant to a negotiated contract. We met in April and decided that we would include the issue in the Lake recommendation. Mr. Elias took the position that the Commission could deny cost recovery; Ms. Wagner was going to take the alternative position that the Commission could not. After a discussion of the areas Mr. Elias was advancing in the primary recommendation, Ms. Wagner, on the filing date of the recommendation (June 12), decided not to file an alternative recommendation. Ms. Wagner submitted her resignation the next morning. Ms. Wagner did, however, participate in the discussion of the issue at the agenda conference. The Commission decided that no vote was needed on that issue. If staff's information is correct, Commission consideration of this docket took place after the relationship began. E&G and AFAD staff indicate that the recommendation was based solely on their analysis of the merits of the petition.

The Commission has the authority to reconsider its Final Orders if they are based on a mistake Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966). While the information revealed so far does not indicate any affirmative evidence of bias in the information presented to the Commission, this review is ongoing. Further, the parties have not had an opportunity to provide information on the issue of possible bias. As stated above, the Tiger Bay docket was resolved by Commission approval of an arms-length negotiated agreement between the parties. At this time,

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DATE: JULY 11, 1997

there does not appear to be a reason to revisit this decision. The revision to the Program Participation Standards is fairly categorized as a routine filing, whose purpose was to assure that only cost-effective conservation programs are approved for cost-recovery. There were no other parties to the docket, and no protest was filed. At this time, there does not appear to be a reason to revisit this decision.

The Lake, Pasco, and OCL decisions are different.

The Lake decision is not yet final. There was a significant amount of discussion of the item at the June 24, 1997, agenda conference. While Ms. Wagner's participation at the agenda conference was limited to an issue which was not voted and no affirmative evidence of bias in the information presented to the Commission has been found to date, this item was recently decided. While some information (hearsay) suggests that this relationship began very recently, it appears likely that the relationship began before the Commission's consideration of this docket. Staff recommends that in an abundance of caution, after notice to the parties, the Commission should revisit, at an agenda conference, the decision to determine if there was any bias in the information presented to the Commission. Absent a showing of bias in the information presented to the Commission, no review on the merits would be necessary. This item should be presented to the Commission by the attorneys of the Appeals Division, since that Division was not involved in this item.

While it is now a final decision, the Pasco settlement/buy out was extensively discussed at the April 24, 1997 agenda conference. The relationship may not have started until after Commission action on this item. While no affirmative evidence of bias has been shown to date, staff recommends that in an abundance of caution, after notice to the parties, the Commission should revisit, at an agenda conference, the decision to determine if there was any bias in the information presented to the Commission. Absent a showing of bias in the information presented to the Commission, no review on the merits would be necessary. This item should be presented to the Commission by the attorneys of the Appeals Division, since that Division was not involved in this item.

Ms. Wagner was the lead counsel on Docket No. 961184-EG (Orlando Cogen). The staff recommendation on OPC's Motion to Dismiss FPC's Protest of the Commission's Order Denying the Settlement Agreement was prepared and presented by another attorney. The recommendation was a straight-forward application of well-established law on the question of FPC's substantial interests. The recommendation was approved without discussion at



DOCKET NOS. 961184-EQ, 96:407-EQ, 961477-EQ, 970056-EG, 970096-EQ  
DATE: JULY 11, 1997

On June 10, 1997 agenda conference. The attorney has indicated that Ms. Wagner provided no input and did not review his recommendation, nor did she participate in the preparation of the Order. While Ms. Wagner did not participate in any way in the formulation of this recommendation, in an abundance of caution since she was the lead attorney, this item should be revisited at an agenda conference, to allow the parties to provide input on the issue of bias in the information presented to the Commission.

As stated above, staff's review is ongoing. If, at any time, evidence of bias in these dockets is discovered, staff will promptly advise the Commission and the parties.

In summary, the Commission should revisit, at an agenda conference, the decisions made in Docket Nos. 961407-EQ (Pasco), 96:477-EQ (Luko), and 961184-EQ (OCA), to enable the parties to the respective dockets to present information to the Commission concerning any bias in the information presented to the Commission in rendering its decisions. Absent a showing of bias in the information presented to the Commission, no review on the merits would be necessary. In the interest of assuring a completely independent review, staff believes it would be appropriate for legal staff from the Appeals Division to participate in the further consideration of these three cases.

**EXHIBIT 3**

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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**In re: Petition for Expedited  
Approval of Settlement Agreement  
with Lake Cogen, Ltd. by Florida  
Power Corporation.**

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**Docket No. 961477-EQ**

**Submitted for filing:  
July 8, 1997**

**FLORIDA POWER CORPORATION'S  
NOTICE OF CONFLICT OF INTEREST**

**Florida Power Corporation ("Florida Power") hereby formally notifies the Commission and the parties to this case of a conflict of interest in the above-referenced docket.**

**A Florida Power employee involved in this case became engaged on June 29, 1997, to be married to a former Commission staff attorney. While employed by the Commission, the staff attorney participated in staff's recommendation to the Commission in this docket. Florida Power believes that this relationship began prior to June 12, 1997, the date of the filing of staff's written recommendation. Staff's written and oral recommendations were considered by the Commission when it approved Florida Power's petition as a proposed agency action at the Commission's June 24, 1997 Agenda Conference.**

**Florida Power cannot determine to what extent, if any, this conflict of interest may have influenced the Commission's June 24th decision. However,**

based on the facts stated above, Florida Power believes that the Commission should revisit its decision-making process in this docket.

Respectfully submitted,

**OFFICE OF THE GENERAL COUNSEL  
FLORIDA POWER CORPORATION**

By \_\_\_\_\_

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