

ORIGINAL

Steel Hector & Davis LLP
215 South Monroe, Suite 601
Tallahassee, Florida 32301-1804
850.222.2300
850.222.8410 Fax
www.steelhector.com

September 24, 2002

Elizabeth C. Daley
850.222.2300
edaley@steelhector.com

VIA HAND DELIVERY

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

RECEIVED FPC
02 SEP 24 PM 1:50
COMMISSION
ERK

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

Dear Ms. Bayó:

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

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

Very truly yours,

EC Daley
Elizabeth C. Daley

AUS _____ ECD:gc
CAF _____ Enclosure
CMP _____
COM 5 Copy to: Counsel for All Parties of Record
CTR _____
ECR _____
GCL _____
OPC _____ TAL_1998 43735v1
MMS _____
SEC 1
OTH _____

RECEIVED & FILED

Mrs
BUREAU

DOCUMENT NUMBER-DATE
10225 SEP 24 02

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Determine Need for an Electrical Power Plant in Martin County by Florida Power & Light Company)))))	Docket No. 020262
<hr/> In re: Petition to Determine Need for an Electrical Power Plant in Manatee County by Florida Power & Light Company)))	Docket No. 020263-EI Dated: September 24, 2002

**FLORIDA POWER & LIGHT COMPANY'S
MOTION FOR SUMMARY FINAL ORDER
REMOVING FACT AS AN INTERVENOR PARTY,
AND FPL'S RESPONSE TO FACT'S MOTION TO QUASH SUBPOENA**

Florida Power & Light Company ("FPL"), pursuant to Rules 28-106.204 and 28-106.206, Florida Administrative Code, Rule 1.380(b)(2)(C), Florida Rules of Civil Procedure, and Section 120.57(1)(h), Florida Statutes (2001), hereby moves for a summary final order removing the Florida Action Coalition Team ("FACT") from this proceeding because (1) FACT has made no effort to prove up its contested allegations regarding standing; and (2) FACT has repeatedly defied Public Service Commission ("Commission") rules and orders governing discovery in this proceeding. In the event that FACT is not removed from this proceeding, its motion to quash FPL's subpoena should be denied. In support, FPL states:

I. MOTION FOR SUMMARY FINAL ORDER REMOVING FACT

In his order granting FACT's motion to intervene on the basis of FACT's allegations of standing, the Prehearing Officer stated clearly that FACT continued to have the burden of proving those allegations. Despite the Prehearing Officer's clear directions and FPL's equally clear signals that it intended to challenge FACT's allegations, FACT has failed to list a witness, to prefile testimony or to submit any other evidence to support the standing allegations in its

Amended Petition to Intervene. Moreover, FACT has at every turn obstructed FPL's attempts to conduct discovery as to FACT's standing.

Under Florida's Administrative Procedures Act, any party may move for a summary final order, which shall be rendered if the Commission determines that "no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order." Section 120.57(1)(h), Fla. Stat. FACT has not even attempted to meet its burden of proof and, thus, FPL is entitled as a matter of law to the entry of a final order. For these reasons, the Commission should issue a summary final order removing FACT as a party to this proceeding.

A. FACT Has Refused To Meet Its Burden Of Proving Standing

On June 26, 2002, FACT filed its Amended Petition to Intervene asking the Commission to grant it intervenor status in this proceeding. FPL contested FACT's standing and reserved the right to require proof of its allegations regarding standing. The Commission granted FACT's petition, noting that FACT had "adequately alleged" the elements of associational standing. Order No. PSC-02-0934-PCO-EI (July 11, 2002). Of course, as the Prehearing Officer later held, this was merely a determination that the allegations in FACT's petition, if proven, would confer standing. *See* Order No PSC-02-1260-PCO-EI (Sept. 13, 2002) ("[P]arties to administrative proceedings in Florida have an affirmative duty to prove standing -- not just allege standing -- when another party contests that standing.")

Thus, FACT still must prove up its claims. Indeed, the law is well-established that a party seeking to intervene has the burden of both pleading and proving its standing. *See* AgriCo Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), *rev. denied* 415 So. 2d 1359 (Fla. 1982); and NAACP, Inc. ex rel. NAACP v. Florida Bd of

Regents, 2002 Fla. App. Lexis 222012 (Fla. 1st DCA 2002). The elements that must be proven to show associational standing are (1) that the substantial interests of a substantial number of its members may be affected by the Commission's decision in these dockets, and that these interests are both (2) the type of interest the Commission's need determination proceedings are designed to protect and (3) the type of interest FACT is entitled to represent on behalf of its members. Florida Home Builders v. Dep't of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), and Farmworker's Rights Organization, Inc. v. Dep't of Health and Rehabilitative Services, 417 So. 2d 753 (Fla. 1st DCA 1982).

FACT has failed to provide evidence on these points. It has not submitted a single witness to support its standing and has responded only with objections and incomplete responses to FPL's requests for documents and information. This failure to produce comes despite FPL's clear indication that it would hold FACT to strict proof of its allegation and FPL's expressed skepticism regarding the veracity of allegations in FACT's intervention papers. *See* FPL's Response to FACT's Amended Petition to Intervene (July 8, 2002); FPL's First Request for Interrogatories (Nos. 1-13) and First Request for Production of Documents (Nos. 1-15) (Aug. 1, 2002); FPL's Motion to Compel FACT to Respond to FPL's First Set of Interrogatories and First Request for Production of Documents (Aug. 21, 2002); FPL's Motion to Compel Intervenor's Deposition (Aug. 21, 2002); and FPL's Response to FACT's Motion for Protective Order, Motion for Order Limiting Discovery, and Motion for Stay (Aug. 29, 2002). (FPL pleadings attached as Exhibit 1).

FACT has provided no indication of any intent to prove standing. FACT has passively ignored the deadlines for prefiling intervenor testimony and designation of witnesses and exhibits and has actively thwarted FPL's discovery attempts. Therefore, FACT has forfeited any

opportunity to prove its standing in this proceeding. Having failed to meet its burden of proof, it must be removed as a party in a summary final order.

B. FACT Has Refused to Cooperate As To Its Allegations of Standing

FACT's failure to submit any evidence proving its standing allegations is reason enough to grant FPL's motion for summary final order. It is not FPL's duty to seek out evidence concerning FACT's standing allegations. It is FACT's duty to present that evidence affirmatively. Nonetheless, FACT's failure to submit such evidence is made all the more egregious and troubling -- and the justification for FPL's motion for summary final order is made all the more compelling -- by FACT's desperate attempt to prevent any discovery as to the matter. To that end, FACT has used a seemingly endless array of tactics, regardless of legal merit, to preclude discovery regarding the allegations in its Amended Petition to Intervene.

FPL and intervenors other than FACT have prefiled testimony and provided depositions of witnesses they plan to call to testify at the Need Determination hearing. Although FACT was accorded the same party status as all other intervenors, FACT has chosen to provide only limited answers to interrogatories, incomplete production of documents, and neither witnesses nor prefiled testimony nor deposition transcripts. FACT has chosen to ignore the Commission's rules and resist the Order of the Prehearing Officer compelling the production of discovery, including the deposition of FACT's executive director, Ernie Bach. FACT's apparent position is that FPL should have no opportunity to depose or examine Mr. Bach or any other representative of FACT either prior to or during the hearing on its Need Determination.

On August 1, 2002, shortly after the Commission entered its order on FACT's Amended Petition to Intervene, FPL served its First Set of Interrogatories and Request for Production of Documents upon FACT ("FPL's Discovery"). At that time FPL also inquired of counsel for FACT, Michael Twomey, as to a date that Mr. Bach would be available for deposition.

Although FACT's counsel provided tentative dates of availability for Mr. Bach, he also announced that he intended to object to FPL's Discovery and to seek a protective order to avoid FPL's deposition of Bach. After changing the deposition date to accommodate Mr. Bach's vacation schedule, FPL filed a notice that a Deposition Duces Tecum of Mr. Bach had been set for August 28.

On August 12, FACT served blanket objections to FPL's Discovery. A week later, FACT electronically served (after normal business hours on the last day for service) general objections to FPL's Amended Notice of Taking Deposition Duces Tecum and indicated that specific objections and a motion for protective order would be filed August 23, 2002. On August 21, FPL filed a Motion to Compel Intervenor's Deposition and a Motion to Compel FACT to Respond to FPL's Discovery.¹ Five days later, on August 26 (not August 23, as represented), FACT again sought to avoid discovery by filing a Motion for Protective Order, Motion for Order Limiting Discovery and Motion for Stay ("FACT's Motions") (FACT's Motions attached as Exhibit 2).

On September 13, the Prehearing Officer granted FPL's motions to compel FACT's discovery responses, denied FACT's Motion for Protective Order, and directed Bach to appear for deposition. Order No. PSC-02-1260-PCO-EI ("Discovery Order"). The Prehearing Officer agreed with FPL's contention that FACT is required to provide proof of its allegations of standing in this proceeding:

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

¹ That same day, August 21, FACT filed limited and incomplete responses to FPL's Discovery.

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

Id. at 4 (Emphasis added; citations omitted).

Notwithstanding the plain language of this Discovery Order, counsel for FACT has made it clear that he intends to defy discovery attempts and the Prehearing Officer's ruling, and do everything possible to prevent any deposition of Mr. Bach.² Subsequent to issuance of the Prehearing Officer's Discovery Order, FPL again filed notice of Mr. Bach's deposition, this time for September 20, also a date that Mr. Twomey offered, conditioned on the potential loss of his appeal of the Discovery Order. Notwithstanding the Discovery Order and FACT's offer of a deposition date, FACT's counsel continued to refuse to comply. *See* FACT's Motion for Protective Order to Full Commission Pending Resolution of Motion for Reconsideration (Sept. 16, 2002), attached as Exhibit 3; FACT's Motion to Quash Subpoena Duces Tecum (Sept. 20, 2002), attached as Exhibit 4, and electronic messages to undersigned counsel dated September 12 through September 20, attached as Exhibit 5. Mr. Twomey and, apparently, Mr. Bach have even gone so far as to attempt to prevent service of subpoenas on Mr. Bach and have refused to comply with such subpoenas once they were served:

- On September 19, 2002, Mr. Twomey told a process server sent to his home on behalf of FPL that he would not produce Bach for the September 20 deposition in defiance of the subpoena that was served upon Bach through FACT's counsel. The process server's affidavit and the original subpoena signed by Twomey are attached as Exhibit 6.
- Also on September 19, 2002, a process server appeared on behalf of FPL at Bach's residence in Largo, Florida, to serve a subpoena for Bach's deposition noticed for September 20. The person who answered the door at Bach's residence matched a description of Bach but told the process server his name was "George"

² Indeed, in emails to undersigned counsel for FPL, Mr. Twomey indicated that, until faced with an order, Mr. Bach would not appear: *See* Exh. 5.

and refused to sign for the subpoena.³ (The Bach process server's affidavit is attached as Exhibit 7.)

- At 12:20 p.m. on September 20, counsel for FPL received a copy via facsimile and email of FACT's Motion to Quash Subpoena Duces Tecum. *See* Exh. 4. In that Motion, FACT alleged that FACT will suffer "irreparable harm" if it is forced to give Mr. Bach's deposition before the full Commission has undertaken FACT's requested review of the Prehearing Officer's Order Granting FPL's Motion to Compel. FACT also alleged that the subpoena should be quashed because it seeks production of discovery that is "unreasonable and oppressive." *Id.*
- At 1:30 p.m. on September 20, 2002, the time FPL noticed for Bach's deposition, neither Bach nor FACT's counsel appeared at the place designated for the deposition. (The court reporter's Certificate of Non-Appearance is attached as Exhibit 8.)

It is unclear what closely guarded secret motivates FACT to forestall any questioning by FPL of Mr. Bach. However, it is absolutely clear that FPL needs to depose Bach in order to gain further understanding of FACT's positions as to its alleged standing and its intended allegations during the hearing. FACT should not be allowed to ignore without consequence the Prehearing Officer's clear requirement of a deposition of Mr. Bach as well as complete answers to interrogatories and production of all relevant requested documents that are not privileged.

FPL is entitled as a matter of law to the Commission's entry of a summary final order dismissing FACT because FACT has not even attempted to meet its burden of proof as to standing. FACT cannot point to any disputed issue of material fact on this point because FACT indisputably has been advised by FPL and the Prehearing Officer that FACT must produce evidence to meet its burden of proof as to standing participate in this proceeding. Pursuant to

³ The process server certified that she left a copy of the subpoena with an individual at Bach's residence identifying himself as "George" and noted on her affidavit: "I fully believe the individual identifying himself as "George" was Ernest Bach. Description: approximately 65 years old, gray hair, full gray beard, glasses, about 5'8" or 5'9". He said Mr. Bach was in Port Richey visiting his sick father and would be back on Saturday. However, Mr. Bach's 2000 red Pontiac bearing license plate ERNIEB was present."

section 120.57(1)(h), Florida Statutes, the Commission should enter a summary final order dismissing FACT and all of its claims in this proceeding.

II. FACT'S DERELICTION OF ITS DISCOVERY DUTIES FURTHER COMPELS ITS REMOVAL

Beyond the failure to carry its burden of proof, there is another compelling reason why FACT should be removed from this proceeding: its deliberate noncompliance with the Commission's rules and orders in blatant dereliction of its discovery duties. This Commission held in In re: Application for Amendment of Certificates in Lake County by JJ's Mobile Homes, Inc., 94 FPSC 3:547, 1994 Fla. PUC Lexis (March 24, 1994) ("JJ's Mobile Homes") that removal of a party or cause of action is permitted in cases involving "willful disobedience" because:

While the Commission recognizes that dismissal would be the most severe sanction to impose upon individuals, it is also clear that parties who participate in the Commission proceedings must fulfill the obligations required of parties. **Parties are expected to comply with lawfully issued orders. . . . Each party has rights which must be protected. However, each party also owes certain responsibilities to the other parties and to the Commission.**

Id. at 5, 6 (emphasis added), citing Florida Rule of Civil Procedure 1.380(b)(2)(C)⁴. In JJ's Mobile Homes, the Commission also cited Carr v. Dean Steel Bldgs, Inc., 619 So. 2d 392, 394 (Fla. 1st DCA 1993) for the proposition that it is within the discretion of a judicial officer to dismiss a party or claim for failure to comply with the Florida Rules of Civil Procedure or with an order of the tribunal.

⁴ Rule 1.380(b)(2)(C), Florida Rules of Civil Procedure, is among the discovery rules that the Commission has expressly adopted in Rule 28-106.206, F.A.C. Rule 1.380(b)(2)(C) provides that, where a director or other designated party representative fails to obey an order to provide or permit discovery, the tribunal may issue an order "dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party."

As previously stated, FACT has willfully disobeyed discovery requests, orders and even a subpoena. The result of this egregious action is that FPL will be prejudiced and put at an unfair disadvantage in the hearing absent any opportunity to review relevant FACT documents, to receive complete answers to interrogatories, and to depose Mr. Bach. FPL needs this discovery as soon as possible in order to gain further understanding of FACT's proof of standing and FACT's intended positions in opposition to FPL's Determination of Need. FACT is obviously not going to provide it prior to the hearing. If FACT is allowed to remain as a party to this proceeding, FPL will be seriously prejudiced by its inability to prepare adequately to rebut any allegations that FACT might present. Therefore, this Commission should remove FACT as a party to this proceeding.

III. RESPONSE TO FACT'S MOTION TO QUASH

For all of the foregoing reasons, FACT should be removed as a party from this proceeding. However, if FACT is allowed to remain as a party, then FPL is clearly entitled to the discovery that FACT seeks to avoid through its Motion to Quash Subpoena Duces Tecum. In this motion, filed September 20, FACT alleged that it would suffer "irreparable harm" if forced to give Mr. Bach's deposition prior to FACT's requested review and that FPL seeks production of discovery that is "unreasonable and oppressive."

FPL accommodated FACT and Mr. Bach by rescheduling an earlier agreed-to deposition date, ostensibly to allow Mr. Bach to take a vacation. Nevertheless, FACT's counsel has steadfastly refused to produce Mr. Bach for deposition, thereby forcing FPL to serve a subpoena on Mr. Bach in an effort to obtain legitimate discovery as to FACT's standing and its positions in this proceeding.

On September 12, FACT's counsel asserted that he would not produce Mr. Bach for a deposition (then scheduled for September 13) unless so ordered.⁵ On September 13, the Prehearing Officer entered the Discovery Order, which granted FPL's Motion to Compel Mr. Bach's deposition. On September 19, the Commission issued a Subpoena Duces Tecum commanding Mr. Bach to appear on September 20 for deposition ("the Subpoena").⁶ Thus, the Commission now has twice commanded Mr. Bach to appear for deposition -- with the Discovery Order and the Subpoena -- and FACT has ignored and defied them both.

Moreover, FACT continues to assert that its requested review of the Prehearing Officer's Order Granting FPL's Motions to Compel precludes FPL's deposition of Bach during the pendency of FACT's requested reconsideration. *See* Twomey's email, exh. 5; FACT's Motion to Quash Subpoena Duces Tecum, exh. 4; and FACT's Motion for Protective Order to Full Commission, exh. 3. However, the Commission's rule as to reconsideration provides that the

⁵ In an email to undersigned counsel dated September 12, Mr. Twomey stated:

[U]ntil I get a definitive order stating that FACT's motion for protective order is denied and describing the scope of discovery that must be given, it is my intention to not allow the discovery, including presenting Ernie Bach for his deposition tomorrow. . . . Until we have a definitive order, I consider that the FACT motion for protective order serves as an automatic stay on the discovery being sought. Furthermore, FACT intends to avail itself of the review opportunities afforded by [prehearing officer] Deason's order if that order is adverse to FACT. FACT considers that such review of a discovery order will be meaningless if the objected to discovery is had while the review is pending. Accordingly, FACT intends to maintain the status quo pending the receipt of Commissioner Deason's order and a review of it by the full Commission if the order is adverse to FACT. So, we will not make Ernie Bach available [September 13] without an order requiring the same, and we will not make him available even in the face of such an order if the order is viewed as being sufficiently prejudicial to FACT without first taking advantage of any review offered.

(Emphasis added.)(See Exh. 5)

⁶ The subpoena was issued on September 19 at FPL's request by the Commission's Bureau of Records and Hearing Services.

effectiveness of a Commission discovery order is not automatically stayed during the pendency of a review. Rule 25-22.060(1)(c), F.A.C.

Contrary to the assertion of FACT's counsel in the Motion to Quash, the production of Bach for deposition would not be "unreasonable and oppressive." FPL merely wants to ascertain whether FACT has any evidence to support its allegations of standing and to determine what other evidence, if any, FACT intends to present at the hearing. FPL's reasonable discovery request presents no basis for reconsideration of the Prehearing Officer's Discovery Order and no basis for granting FACT's Motion to Quash the subpoena.

FACT has already been ordered to produce Mr. Bach for deposition. Without further delay, FACT should be compelled to comply with the same discovery rules with which every other party has been required to comply in this proceeding. Thus, in the event that the Commission does not grant FPL's request to remove FACT as a party, it should deny FACT's motion to quash FPL's subpoena and reiterate its order compelling the deposition of Bach in order to give FPL a fair opportunity to depose Mr. Bach.

WHEREFORE, undersigned counsel respectfully requests that this Commission enter a summary final order removing FACT from these proceedings. In the event that the Commission does not order the removal of FACT, then FPL requests that the Commission deny FACT's motion to quash FPL's subpoena of FACT's executive director, Mr. Bach.

[Signatures on next page]

Respectfully submitted,

R. Wade Litchfield, Esq.
Senior Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561.691.7101

STEEL HECTOR & DAVIS LLP
215 South Monroe Street
Suite 601
Tallahassee, FL 32301-1804
Telephone: 850.222.2300
Facsimile: 8500.222.8410

By: EC Daley
Charles A. Guston
Florida Bar No. 398039
Elizabeth C. Daley
Florida Bar No. 0104507
Gabriel E. Nieto
Florida Bar No. 0147559

Attorneys for Florida Power & Light Company

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

I HEREBY CERTIFY that on this 24th day of September 2002, a copy of Florida Power & Light Company's Motion for Summary Final Order Removing FACT as an Intervenor Party, and FPL's Response to FACT's Motion to Quash Subpoena was served by hand delivery (*) or electronically (**) and U.S. Mail to the following:

Martha Carter Brown, Esq.*
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
mbrown@psc.state.fl.us

D. Bruce May, Jr., Esq.**
Karen D. Walker
Holland & Knight LLP
315 S Calhoun Street, Ste. 600
Tallahassee, Florida 32301
dbmay@hklaw.com

John W. McWhirter**
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602
jmcwhirter@mac-law.com

R. L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, MD 21202-7110

Vicki Gordon Kaufman**
Timothy J. Perry
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
vkaufman@mac-law.com

Michael B. Twomey, Esq.**
P.O. Box 5256
Tallahassee, Florida 32314-5256
miketwomey@talstar.com

Jon C. Moyle, Jr., Esq.**
Cathy M. Sellers, Esq.
Moyle Flanigan Katz Raymond &
Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
jmoylej@moylelaw.com

Ernie Bach, Executive Director**
Florida Action Coalition Team
P.O. Box 100
Largo, Florida 33779-0100
ernieb@gte.net

Joseph A. McGlothlin, Esq. **
McWhirter, Reeves, McGlothlin, Davidson
Decker, Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
jmcglothlin@mac-law.com

Michael Green**
1049 Edmiston Place
Longwood, Florida 32779
mgreenconsulting@earthlink.net

By: EC Daley
Elizabeth C. Daley

EXHIBIT 1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need)
for Proposed Electrical Power Plant in)
Martin County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020262-EI

In re: Petition for Determination of Need)
For Proposed Electrical Power Plant in)
Manatee County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020263-EI

Filed: July 8, 2002

**Florida Power & Light Company's Response to
FACT's Request for Leave to Amend Petition to
Intervene and Amended Petition to Intervene**

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), responds as follows to the Florida Action Coalition Team ("FACT") Request for Leave to Amend Petition to Intervene and Amended Petition to Intervene, and states:

These proceedings were initiated on March 22, 2002 by FPL to determine the need for two proposed electrical power plants. To alleviate certain concerns raised by bidders in FPL's original request for proposals ("RFP"), FPL asked that these proceedings be placed in abeyance. This request was granted by the Commission on April 26, 2002, and FPL immediately issued a supplemental request for proposals (the "SRFP"). In the intervening period FPL has been conducting the SRFP, which is designed to address various bidders' stated concerns with FPL's initial RFP.

Shortly after FPL began the SRFP, FACT petitioned to intervene in these suspended need determination dockets and asked the Commission to immediately halt the

SRFP process. FPL responded by noting that (i) the relief sought by FACT was improper, (ii) there was nothing in FACT's papers that would compel bringing the SRFP to a halt, and (iii) in any event, FACT failed to properly allege standing. In response to the obvious deficiencies in its initial pleading, FACT has now sought leave to file an Amended Petition. While the Request for Leave to Amend corrects some deficiencies in the initial pleading -- most notably withdrawing the request for the Commission to halt the SRFP and conceding that an intervener takes the case as it finds it -- it nevertheless fails to demonstrate standing to participate.

FACT in its Amended Petition, as in its original papers, claims to be a "statewide, non-partisan, grassroots organization" of Florida retail electric customers. Yet FACT lists only six such customers as its members, and it remains unclear whether FACT is intervening to represent their interests as customers, or for some other undisclosed purpose. Indeed, there is nothing in the Amended Petition to indicate whether (i) FACT has other members or nonmember backers, (ii) who FACT's other members are, (iii) who funds FACT, or (iv) which of its members' and backers' interests FACT is truly here to further.

To demonstrate standing FACT must do more than merely allege that a few FPL customers are among its members. Such a theory of standing would let almost any organization even partially based in Florida intervene, regardless of whether the true interests being furthered are within the zone of interests of the Commission's governing statutes. *See Agrico Chemical Co. v. Department of Env'tl. Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981), *rev. denied*, 415 So. 2d 1359 and 1361 (Fla. 1982).

The test for associational standing has three essential requirements all of which must be both plead and proven: (i) that a substantial number of the association's members would have standing to intervene in their own right;¹ (ii) that the subject matter is within the association's general scope of interest and activity; and (iii) that the relief requested is appropriate for the association to request on behalf of its members. See *Florida Home Builders Ass'n v. Department of Labor and Employment Security*, 412 So. 2d 351, 353 (Fla. 1982); *Friends of the Everglades v. Board of Trustees*, 595 So. 2d 186, 188 (Fla. 1st DCA 1992).

FACT's Amended Petition fall far short of these requirements. A total of six customers out of what were alleged in its original papers to be "thousands" of members is hardly a substantial number. See *FACT's Petition to Intervene and Suggestion for Delay*, at 8. Moreover, there is nothing in the Amended Petition to demonstrate that one of FACT's organizational purposes is to challenge electric utility construction projects on behalf of its "members," a deficiency underscored by the fact that FACT has never once intervened in a similar proceeding. Given that FACT previously sought to halt a supplemental RFP designed to get a lower price for FPL's needed capacity, there is also a

¹ In other words, the association must show that a substantial number of its members could meet the standing test set forth in *Agrico* and adopted by the Supreme Court in *Ameristeel Corp. v. Clark*, 691 So. 2d 473 (Fla. 1997). See also *International Jai-Alai Players Ass'n v. Florida Parimutuel Comm'n.* 561 So. 2d 1224, 1225 n. 1 (Fla. 3d DCA 1990). Among the more pertinent *Agrico* requirements are (i) that the alleged injury be direct and immediate, and not speculative or remote and (ii) that the true reasons for participation are within the zone of interest of the statutes governing the proceeding. *Id.* at 1226. Nothing alleged in the Amended Petition goes beyond the realm of remote speculation as to impacts to FPL customers. And, it remains to be seen whether FACT's purpose for seeking to participate is to further the interests of the general body of FPL customers, as opposed to some other interest.

serious question as to whether FACT is seeking relief appropriate to an organization that claims to have the needs of FPL's customers at heart.²

Additionally, an association, such as FACT, can participate in a proceeding only if its members would have standing to participate and the organization is intervening to "fairly represent members" who are affected by the administrative proceeding. *Id.* Likewise, there is nothing to show that FACT is here to further the interests of its FPL-customer "members" as opposed to whatever other members or backers in might have. Indeed, many of the claims and "suggestions" in FACT's initial papers seemed designed to protect only the interests of SRFP bidders and independent power producers, seemingly without regard to potential adverse impact on FPL customers.

FPL recognizes that many of the issues surrounding FACT's intervention are factual in nature and might not be resolvable on the pleadings. However, the law is clear that FACT has the burden of proving, not merely alleging standing, and FPL intends to hold it to that burden. *Agrico*, 406 So. 2d at 482 (requiring proof, not mere allegation of standing); *NAACP, Inc. ex rel. NAACP v. Florida Bd. of Regents*, 2002 WL 265851, 27 Fla. L. Weekly D462 (Fla. 1st DCA 2002). Indeed, if FACT truly were a "grassroots organization" of thousands of FPL customers, and were participating *solely* for their interest in cheap and reliable power, FPL would have no objection to its intervention. However, FACT's true purpose for participation and the nature of its true membership and backers, at best, remains to be seen. This factual controversy may necessitate a preliminary evidentiary hearing before the Commission or prehearing officer on the

² All that FACT's Petition contains with respect to these requirements are conclusory invocation of the ultimate legal requirements. *See Amended Petition* at 10.

issues surrounding FACT's standing, after FPL has had an opportunity to conduct appropriate discovery on the matter.

Conclusion

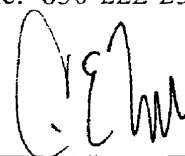
FACT's Amended Petition fails to properly allege standing and should be dismissed. However, in the event the Commission determines to tentatively allow intervention, FACT should be held to strict proof of its standing claims. If FACT fails to prove any element of associational standing at trial or at an evidentiary hearing on its standing, it should be excluded from further participation in these proceedings.

Respectfully submitted,

R. Wade Litchfield, Esq.
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408
Telephone: 561-691-7101

STEEL HECTOR & DAVIS LLP
215 S. Monroe St., Suite 601
Tallahassee, FL 32301-1804
Telephone: 850-222-2300

By:



Charles A. Guyton
Florida Bar No. 0398039
Gabriel E. Nieto
Florida Bar No. 014759

Such allegations are insufficient to properly raise a factual issue for determination. *See Rishel v. Eastern Airlines, Inc.*, 466 So. 2d 1136, 1138 (Fla. 3d DCA 1985).

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

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to FACT's Request for Leave to Amend Petition to Intervene and Amended Petition to Intervene has been furnished by e-mail (*), facsimile (**) or hand delivery (***) and United States Mail this 8th day of July, 2002, to the following:

Jon C. Moyle Jr., Esq.*
Cathy M. Sellers, Esq.
Moyle Law Firm
118 N. Gadsen Street
Tallahassee, Florida 32301
jmoylejr@moylelaw.com

Martha Carter Brown, Esq.**
Lawrence Harris, Esq.
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
MBrown@psc.state.fl.us

D. Bruce May, Jr., Esq.*
Karen D. Walker, Esq.
Holland & Knight LLP
315 S Calhoun, Ste. 600
Tallahassee, Florida 32301
dbmay@hklaw.com

Robert Scheffel Wright, Esq.*
Diane K. Kiesling, Esq.
Jay Lavia, Esq.
Landers & Parsons, P.A.
310 West College Avenue
Tallahassee, Florida 32301
Schef@landersandparsons.com

Michael B. Twomey, Esq.**
P.O. Box 5256
Tallahassee, Florida 32314
Fax: 850-421-8543

By: _____


Gabriel E. Nieto

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need)
for Proposed Electrical Power Plant in)
Martin County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020262-EI

In re: Petition for Determination of Need)
For Proposed Electrical Power Plant in)
Manatee County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020263-EI

Filed: August 1, 2002

**FLORIDA POWER & LIGHT COMPANY'S
FIRST SET OF INTERROGATORIES
TO FLORIDA ACTION COALITION TEAM (Nos. 1-13)**

Pursuant to Rule 28-106.206, Florida Administrative Code, and Rule 1.350, Florida Rules of Civil Procedure, Florida Power & Light Company ("FPL") hereby propounds the following interrogatories on the Florida Action Coalition Team ("FACT") and requests that they be answered separately, fully and under oath within twenty (20) days, pursuant to the time frames provided for in these proceedings.

DEFINITIONS

1. "You," "yours" and/or "yourselves" means FACT and any attorney, employee, agent, representative or other person acting or purporting to act on the behalf of FACT, including all persons who will offer testimony on your behalf in this proceeding.

2. "Person" or "persons" means all natural persons and entities, including but not limited to: corporations, companies, partnerships, limited partnerships, joint ventures, trusts, estates, associations, public agencies, departments, bureaus or boards.

3. “Document or documents” means “documents” as defined in Rule 1.350 of the Florida Rules of Civil Procedure. In addition, the words “document” or “documents” shall mean any writing, recording, computer-stored information, or photograph in your possession, custody, care or control, which pertain directly or indirectly, in whole or in part, to any of the subjects listed below, or which are themselves listed below as specific documents, including, but not limited to: correspondence, memoranda, notes, messages, e-mails, diaries, minutes, books, reports, charts, ledgers, invoices, computer printouts, computer discs, microfilms, video tapes or tape recordings.

4. “FPL” means Florida Power & Light Company.

5. “FACT” means Florida Action Coalition Team.

6. “FPL’s Need Determination proceedings” means the present Florida Public Service Commission proceedings in Dockets 020262-EI and 020263-EI.

7. “Identify” shall mean: (1) when used with respect to a person, to state the person’s full name, present or last known business address; and present or last known employer and position; (2) when used in respect to a document, to describe the document by character (e.g., letter, report, memorandum, etc.), author, date, and to state its present location and custodian; (3) when used with respect to an oral communication, to identify the persons making and receiving the communication, the approximate date of and time of the communication, and a summary of its content or substance; and (4) when used with respect to a power generation project, to state the name of the project, its megawatt size, its location, its fuel type and the generating technology it employs.

8. “Witness” means any person, including but not limited to expert witnesses, whom you intend to call to testify in this proceeding.

9. "Relate to" shall mean contain, discuss, describe or address.
10. "All" means all or any.

INSTRUCTIONS

11. If any of the following interrogatories cannot be answered in full after exercising due diligence to secure the information, please so state and answer to the extent possible, specifying your inability to answer the remainder, and state whatever information you have concerning the unanswered portion. If your answer is qualified or limited in any respect, please set forth the details of such qualifications and/or limitations.

12. If you object to fully identifying a document or oral communication because of a privilege, you must nevertheless provide the following information, unless divulging the information would disclose the privileged information:

- a. the nature of the privilege claimed (including work product);
- b. the date of the document or oral communication;
- c. if a document; its type (correspondence, memorandum, facsimile etc.), custodian, location, and such other information sufficient to identify the document for a subpoena duces tecum or a document request, including where appropriate the author, the addressee, and, if not apparent, the relationship between the author and addressee;
- d. if an oral communication; the place where it was made, the names of the persons present while it was made, and, if not apparent, the relationship of the persons present to the declarant; and
- e. the general subject matter of the document or the oral communication.

13. If you object to all or part of any interrogatory and refuse to answer that part, state your objection, identify the part to which you are objecting, and answer the remaining portion of the interrogatory.

14. Whenever an interrogatory calls for information which is not available to you in the form requested, but is available in another form, or can be obtained at least in part from other data in your possession, so state and either supply the information requested in the form in which it is available, or supply the data from which the information requested can be obtained.

15. The singular shall include the plural and vice versa; the terms “and” and “or” shall be both conjunctive and disjunctive; and the term “including” means “including without limitation.”

16. If any interrogatory fails to specify a time period from which items should be listed, identified or described, your answer shall include information from the previous three years.

17. These interrogatories shall be answered under oath by you or through your agent who is qualified to answer and who shall be fully identified, with said answers being served as provided pursuant to the Florida Rules of Civil Procedure or order of the Commission.

INTERROGATORIES

1. Please identify all fact witnesses you anticipate calling in this proceeding, and for each witness provide a description of the facts and conclusions to which each witness will testify.

2. Please identify all expert witnesses you expect to call at the hearing in this matter, and for each expert witness provide the witness's qualifications, a detailed summary of the witness's expected testimony, and a listing (name, docket number, jurisdiction, date) of all prior proceedings in which the witness has testified.

3. Please describe FACT's development, including the year in which same was organized, the state or country in which FACT was organized, and the names of the founders of the organization.

4. Please list the exact current membership of FACT.

5. Please list the name and address of each FACT member who is a retail residential customer of FPL.

6. Please list the name and address of each FACT member who is currently a party in FPL's Determination of Need proceedings.

7. Please list the name and address of each FACT officer and explain how the officers are selected.

8. Please describe FACT's financial condition, including a detailed description of each source of funding for FACT, including (a) general funding and (b) funding for FACT's intervention in FPL's Determination of Need proceedings.

9. Please list the approximate percentage of FACT's budget that is derived from each of the funding sources listed in Interrogatory No. 8.

10. Please explain how and when FACT engaged the services of Michael B. Twomey, including the basis for his compensation and the person or persons responsible for compensating him.

11. Please discuss in detail the history of FACT's involvement in Florida Public Service Commission proceedings and other types of regulatory proceedings.

12. Please describe any vote in which the FACT membership has approved FACT's intervention in FPL's Determination of Need proceeding.

13. Please describe in detail each and every way in which FACT believes that FPL has failed to demonstrate that the proposed Manatee and Martin units are the most cost-effective means of meeting its capacity needs.

Respectfully submitted this 1 day of Aug. 2002.

R. Wade Litchfield, Esq.
Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561-691-7101

Steel Hector & Davis LLP
Attorneys for Florida Power & Light
Company
200 South Biscayne Boulevard
Suite 4000
Miami, Florida 33131-2398
Telephone: 305-577-2872
Facsimile: 305-577-7001

By: Elizabeth C. Daley
John T. Butler, P.A.
Florida Bar No. 283479
Elizabeth C. Daley
Florida Bar No. 0104507

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

I HEREBY CERTIFY, that on this 1st day of August, 2002, a copy or courtesy copy (*) of Florida Power & Light Company's First Set of Interrogatories to FACT was served electronically (**) and by U.S. Mail to the following:

Martha Carter Brown, Esq.**
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850
mbrown@psc.state.fl.us

D. Bruce May, Jr., Esq.**
Karen D. Walker
Holland & Knight LLP
315 S Calhoun Street
Suite 600
Tallahassee, Florida 32301
dbmay@hkllaw.com

Robert Scheffel Wright, Esq.**
Diane K. Kiesling, Esq.
John T. LaVia, III, Esq.
Landers & Parsons, P.A.
310 W. College Avenue
Tallahassee, Florida 32301
schef@landersandparsons.com

R. L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, MD 21202-7110

Joseph A. Regnery, Esq.
Timothy R. Eves
Calpine Eastern Corporation
2701 North Rocky Point Drive
Suite 1200
Tampa, Florida 33607


Michael B. Twomey, Esq.**
P.O. Box 5256
Tallahassee, Florida 32314-5256
miketwomey@talstar.com

Jon C. Moyle, Jr., Esq.**
Cathy M. Sellers, Esq.
Moyle Flanigan Katz
Raymond & Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
jmoylejr@moylelaw.com

Ernie Bach, Executive Director**
Florida Action Coalition Team
P.O. Box 100
Largo, Florida 33779-0100
ernieb@gte.net

John W. McWhirter*
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602
Telephone: (813) 224-0866
Facsimile: (813) 221-1854

Vicki Gordon Kaufman*
Timothy J. Perry
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, &
Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525
Facsimile: (850) 222-5606

By: 
Elizabeth C. Daley

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need)
for Proposed Electrical Power Plant in)
Martin County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020262-EI

In re: Petition for Determination of Need)
For Proposed Electrical Power Plant in)
Manatee County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020263-EI

Filed: August 1, 2002

**FLORIDA POWER & LIGHT COMPANY'S
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
TO THE FLORIDA ACTION COALITION TEAM (NOS. 1-15)**

Pursuant to Rule 28-106.206, Florida Administrative Code, and Rule 1.350, Florida Rules of Civil Procedure, Florida Power & Light Company ("FPL"), hereby serves the following request for production of documents upon the Florida Action Coalition Team ("FACT"), and requests that responsive documents be produced within twenty (20) days, pursuant to the time frames provided for in these proceedings.

DEFINITIONS

1. "You," "yours" and/or "yourselves" means the Florida Action Coalition Team ("FACT"), and any attorney, employee, agent, representative or other person acting or purporting to act on the behalf of FACT, including all persons who will offer testimony on your behalf in this proceeding.

2. "Person" or "persons" means all natural persons and entities, including but not limited to: corporations, companies, partnerships, limited partnerships, joint ventures, trusts, estates, associations, public agencies, departments, bureaus or boards.

3. “Document or documents” means “documents” as defined in Rule 1.350 of the Florida Rules of Civil Procedure. In addition, the words “document” or “documents” shall mean any writing, recording, computer-stored information, or photograph in your possession, custody, care or control, which pertain directly or indirectly, in whole or in part, to any of the subjects listed below, or which are themselves listed below as specific documents, including, but not limited to: correspondence, memoranda, notes, messages, e-mails, diaries, minutes, books, reports, charts, ledgers, invoices, computer printouts, computer discs, microfilms, video tapes or tape recordings.

4. “FPL” means Florida Power & Light Company.

5. “FACT” means Florida Action Coalition Team.

6. “FPL’s Determination of Need proceedings” means the present Florida Public Service Commission proceedings in Dockets 020262-EI and 020263-EI.

7. “Identify” shall mean: (1) when used with respect to a person, to state the person’s full name, present or last known business address; and present or last known employer and position; (2) when used in respect to a document, to describe the document by character (e.g., letter, report, memorandum, etc.), author, date, and to state its present location and custodian; (3) when used with respect to an oral communication, to identify the persons making and receiving the communication, the approximate date of and time of the communication, and a summary of its content or substance; and (4) when used with respect to a power generation project, to state the name of the project, its megawatt size, its location, its fuel type and the generating technology it employs.

8. “Witness” means any person, including but not limited to expert witnesses, whom you intend to call to testify in this proceeding.

9. "Relate to" shall mean contain, discuss, describe or address.

10. "All" means all or any.

11. The singular of any word contained herein shall include the plural and vice versa; the terms "and" and "or" shall be both conjunctive and disjunctive; and the term "including" means "including without limitation."

INSTRUCTIONS

12. Scope of Production. In responding to this request to produce, produce all responsive documents, including any and all non-identical copies of each such document.

13. Manner of Objections and Inability to Respond. If you object to a part of a request and refuse to respond to that part, state your objection and answer the remaining portion of that request. If you object to the scope of a request and refuse to produce documents for that scope, state your objection and produce documents for the scope you believe is appropriate.

14. If any of the requests cannot be responded to in full after exercising due diligence to secure the requested documents, please so state and respond and produce documents to the extent possible, specifying your inability to respond further. If your response or production is qualified or limited in any particular way, please set forth the details and specifics of such qualification or limitation.

15. Privileged Information or Documents. In the event you wish to assert attorney/client privilege or the work product doctrine, or both, or any other claim of privilege, then as to such documents allegedly subject to such asserted privileges, you are requested to supply an identification of such documents, in writing, with sufficient specificity to permit the Prehearing Officer or Commission to reach a determination in the event of a motion to compel as to the applicability of the asserted objection, together with an indication of the basis for the

assertion of the claim of attorney/client privilege or the work product doctrine, or any other claim of privilege. The identification called for by this instruction shall include the nature of the document (e.g., interoffice memoranda, correspondence, report, etc.), the sender or author, the recipient of each copy, the date, the name of each person to whom the original or any copy was circulated, the names appearing on any circulation list associated with such document, and a summary statement of the subject matter of the document in sufficient detail to permit the Court to reach a determination in the event of a motion to compel.

16. Computer-Generated Documents. If a requested document is on computer or word processing disc or tape, produce an electronic copy of the document and a printout of the document.

17. Organization of Documents. With respect to the documents produced, you shall produce them as they are kept in the usual course of business, labeling them to correspond with each numbered paragraph of this Request in response to which such documents are produced. All pages now stapled or fastened together and all documents that cannot be copied legibly should be produced in their original form.

DOCUMENTS REQUESTED

1. Please provide all documents, including, but not limited to, a charter or other statement of purpose for FACT.
2. Please provide a list of the exact current membership of FACT.
3. Please provide the name and address of each FACT member who is a retail residential customer of FPL.
4. Please provide a list of FACT members who are currently parties in FPL's present Determination of Need proceedings.

5. Please provide all documents including, but not limited to, correspondence and other communications between FACT and each FACT member who is a retail residential customer of FPL.

6. Please provide a list of the officers of FACT and all documents relating to the selection process for those officers.

7. Please provide all documents that relate to lobby registrations filed by FACT.

8. Please provide all documents related to the following sources of funding for FACT: (a) general funding and (b) funding for FACT's intervention in FPL's Determination of Need proceedings.

9. Please provide all documents relating to funding for FACT that is derived from retail residential customers of FPL, from other FACT members, and from non-members of FACT.

10. Please provide all documents showing the approximate percentage of FACT's budget that is contributed by each of FACT's funding sources.

11. Please provide all documents relating to FACT's engagement of the services of Michael B. Twomey, including the basis for his compensation and the parties responsible for his compensation.

12. Please provide all documents relating to the history of FACT's involvement in Florida Public Service Commission proceedings and in other types of regulatory proceedings.

13. Please provide copies of newsletters or other informational materials sent to FACT members, including any such materials that address FPL's Determination of Need proceedings or the Determination of Need proceedings of any other Florida utility.

14. Please provide all documents relating to a vote or other approval by the FACT membership of a decision to petition to intervene in FPL's present Determination of Need proceedings.

15. Please provide copies of all correspondence or other communications between (a) FACT and any other party in FPL's Determination of Need proceedings and (b) FACT and the Florida Public Service Commission in connection with FPL's Determination of Need proceedings.

Respectfully submitted this 1st day of August, 2002.

R. Wade Litchfield, Esq.
Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561-691-7101

Steel Hector & Davis LLP
Attorneys for Florida Power & Light
Company
200 South Biscayne Boulevard
Suite 4000
Miami, Florida 33131-2398
Telephone: 305-577-2872
Facsimile: 305-577-7001

By: Elizabeth C. Daley
John T. Butler, P.A.
Florida Bar No. 283479
Elizabeth C. Daley
Florida Bar No. 0104507

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

I HEREBY CERTIFY, that on this 1st day of August, 2002, a copy or courtesy copy (*) of Florida Power & Light Company's First Request for Production of Documents to FACT was served electronically (**) and by U.S. Mail to the following:

Martha Carter Brown, Esq.**
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850
mbrown@psc.state.fl.us

D. Bruce May, Jr., Esq.**
Karen D. Walker
Holland & Knight LLP
315 S Calhoun Street
Suite 600
Tallahassee, Florida 32301
dbmay@hklaw.com

Robert Scheffel Wright, Esq.**
Diane K. Kiesling, Esq.
John T. LaVia, III, Esq.
Landers & Parsons, P.A.
310 W. College Avenue
Tallahassee, Florida 32301
schef@landersandparsons.com

R. L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, MD 21202-7110

Joseph A. Regnery, Esq.
Timothy R. Eves
Calpine Eastern Corporation
2701 North Rocky Point Drive
Suite 1200
Tampa, Florida 33607

Michael B. Twomey, Esq.**
P.O. Box 5256
Tallahassee, Florida 32314-5256
miketwomey@talstar.com

Jon C. Moyle, Jr., Esq.**
Cathy M. Sellers, Esq.
Moyle Flanigan Katz
Raymond & Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
jmoylejr@moylelaw.com

Ernie Bach, Executive Director**
Florida Action Coalition Team
P.O. Box 100
Largo, Florida 33779-0100
ernieb@gte.net

John W. McWhirter*
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602
Telephone: (813) 224-0866
Facsimile: (813) 221-1854

Vicki Gordon Kaufman*
Timothy J. Perry
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, &
Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525
Facsimile: (850) 222-5606

By: Elizabeth C. Daley
Elizabeth C. Daley

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need)
for Proposed Electrical Power Plant in)
Martin County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020262-EI

In re: Petition for Determination of Need)
For Proposed Electrical Power Plant in)
Manatee County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020263-EI

Filed: August 21, 2002

**FLORIDA POWER & LIGHT COMPANY'S MOTION TO COMPEL
THE FLORIDA ACTION COALITION TEAM TO RESPOND
TO FLORIDA POWER & LIGHT COMPANY'S
FIRST SET OF INTERROGATORIES (NOS. 1-13) AND
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS (NOS. 1-15)**

Florida Power & Light Company ("FPL"), pursuant to Rules 28-106.206 and 28-106.303, Florida Administrative Code, hereby moves to compel the Florida Action Coalition Team ("FACT") to respond to FPL's First Set of Interrogatories (Nos. 1-13) and First Request for Production of Documents (Nos. 1-15), a copy of which is attached hereto as Exhibit 1 (the "Discovery"). The grounds for this motion are as follows:

1. On August 1, 2002, FPL served its Discovery on FACT in order to increase its knowledge about FACT's intervention in the present docket concerning FPL's Petitions for Determination of Need for Proposed Electric Power Plant.

2. Unfortunately, FACT has responded with nothing more than blanket objections to every request in the FPL Discovery. See FACT's Objections to Florida Power & Light Company's First Set of Interrogatories and FACT's Objections to Florida Power & Light

Company's First Request for Production of Documents, which are attached hereto as Exhibit 2 (the "FACT Objections").

3. FACT objects generally that the FPL Discovery is "not relevant to this proceeding" and further labels FPL Discovery as "an attempt to punish and otherwise harass FACT for intervening in these proceedings." FACT Objections at III.

4. However, FPL's Discovery is relevant because FPL cannot effectively determine whether FACT can actually "prove up" its allegations of standing to intervene without identification of FACT's full membership and its exact reasons for intervention in this proceeding. FPL has reason to believe that FACT represents the economic interests of certain independent power producers instead of, or in addition to, the interests of individual customers.

5. Time is running out for discovery in this proceeding. FPL needs the discovery requested from FACT for its trial preparations and to contest FACT's standing to intervene. FPL cannot and does not waste time on frivolous harassment of FACT or any other parties. FPL's only purpose in this proceeding is to demonstrate under Florida law that the Commission should grant FPL's Petitions for Determination of Need. Thus, FPL is entitled to reasonable discovery from FACT and every other intervenor in order to seek proof of allegations of standing and to decide how to respond to potential challenges to FPL's Petitions for Determination of Need.

6. FACT's conduct regarding discovery requires FPL to move to compel. In addition to refusing to respond to legitimate written discovery, FACT has frustrated FPL's attempt to depose FACT's executive director, Ernie Bach, by untimely raising new objections to the deposition and by delaying the filing of a threatened motion for a protective order, most likely in order to avoid a ruling prior to the scheduled deposition. FPL has scheduled and then rescheduled a date for the deposition in order to accommodate FACT and its executive director.

7. The immediate purpose of the FPL Discovery is to learn as soon as possible (i) who are the members of FACT and whether FACT has standing as it has pled; (ii) FACT's positions on the issues in this case, (iii) FACT's witnesses, if any, and (iv) the materials FACT intends to rely upon in support of those positions. Receiving responses to basic questions in discovery from FACT and other intervenors is essential to FPL's ability to participate effectively in this proceeding.

8. FPL contests FACT's standing to intervene in this proceeding. Notwithstanding the Prehearing Officer's finding that FACT has "adequately alleged that the substantial interests of a substantial number of its members may be affected by the Commission's decision in these dockets," Order No. PSC-02-0934-PCO-EI (emphasis added), FACT still must "prove up" its allegations of standing in order to retain party status as an intervenor. See Edgewater Beach Owners Ass'n, Inc. v. Bd of County Commissioners of Walton Co., 1995 WL 1052993 (DOAH Case No. 95-0437DRI), *on remand from Edgewater Beach Owners Ass'n, Inc. v. Bd of County Commissioners of Walton Co.*, 645 So. 2d 541, 543 (Fla. 1st DCA 1994). In Edgewater Beach, an administrative law judge found, on remand from the First District Court of Appeal, that a petitioner lacked standing to appeal a development order because "the greater weight of the evidence" showed the petitioner had failed to present facts necessary to "prove up" the petitioner's allegations of standing that the appellate court initially found to be sufficient. Edgewater Beach (DOAH case), *supra*. See also Ocala/Silver Springs, Hilton v. Ocala Park Centre Maintenance Assoc., 1997 WL 1052617 (DOAH Case No. 96-3848, April 24, 1997)(Petitioner to intervene was required to prove up its allegations of standing in the course of a formal administrative hearing.)

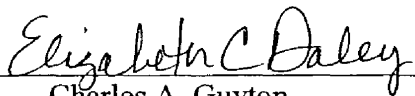
9. FPL seeks to learn whether FACT is acting to protect the interests of individual customers or to protect the economic interests of one or more independent power producers. FPL needs to receive discovery to gain further understanding of FACT's proof of standing, if any, in order to contest FACT's standing as an intervenor. FPL also needs to more fully understand FACT's position and the basis for its position in light of FACT's decision not to offer testimony. Consequently, FPL's motion to compel should be granted.

WHEREFORE, undersigned counsel respectfully requests that this Commission compel FACT to respond to FPL's First Set of Interrogatories (Nos. 1-13) and First Request for Production of Documents (Nos. 1-15).

Respectfully submitted,

R. Wade Litchfield, Esq.
Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561-691-7101

Steel Hector & Davis LLP
Attorneys for Florida Power & Light Company
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301
Telephone: 850-222-2300

By: 
Charles A. Guyton
Elizabeth C. Daley

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

I HEREBY CERTIFY, that on this 21st day of August, 2002, a copy of Florida Power & Light Company's Motion To Compel FACT To Respond To Florida Power & Light Company's First Set Of Interrogatories (Nos. 1-13) And First Request For Production Of Documents (Nos. 1-15) to FACT was served electronically (*) and by U.S. Mail to the following:

Martha Carter Brown, Esq.*
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850
mbrown@psc.state.fl.us

D. Bruce May, Jr., Esq.*
Karen D. Walker
Holland & Knight LLP
315 S Calhoun Street
Suite 600
Tallahassee, Florida 32301
dbmay@hkllaw.com

Jon C. Moyle, Jr., Esq.*
Cathy M. Sellers, Esq.
Moyle Flanigan Katz
Raymond & Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
jmoylejr@moylelaw.com

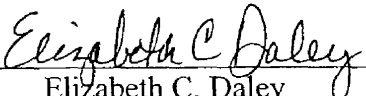
R. L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, MD 21202-7110

John W. McWhirter*
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602
Telephone: (813) 224-0866
Facsimile: (813) 221-1854

Michael B. Twomey, Esq.*
P.O. Box 5256
Tallahassee, Florida 32314-5256
miketwomey@talstar.com

Vicki Gordon Kaufman*
Timothy J. Perry
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525
Facsimile: (850) 222-5606

Ernie Bach, Executive Director*
Florida Action Coalition Team
P.O. Box 100
Largo, Florida 33779-0100
ernieb@gte.net

By: 
Elizabeth C. Daley

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need)
for Proposed Electrical Power Plant in)
Martin County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020262-EI

In re: Petition for Determination of Need)
For Proposed Electrical Power Plant in)
Manatee County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020263-EI

Filed: August 21, 2002

**FLORIDA POWER & LIGHT COMPANY'S
MOTION TO COMPEL INTERVENOR'S DEPOSITION**

Florida Power & Light Company ("FPL"), pursuant to Rules 28-106.206 and 28-106.303, Florida Administrative Code, hereby moves to compel the deposition of Ernie Bach, representative of the Florida Action Coalition Team ("FACT"), an intervenor in this proceeding, and in support thereof states:

1. FPL seeks to take Mr. Bach's deposition as to FACT's intervention and positions in the present docket concerning FPL's Petitions for Determination of Need for Proposed Electric Power Plant.

2. On August 5, 2002, FPL issued a Notice of Deposition of Mr. Bach, who is executive director of FACT, for August 13, 2002. Upon receipt of the August 5 notice, Michael Twomey, counsel for FACT, indicated to undersigned counsel that he intended to object to FPL's Notice of Deposition of Mr. Bach.

3. On August 8, 2002, FPL issued an Amended Notice of Deposition to change the date of the deposition to August 28, 2002, in order to accommodate Mr. Bach's vacation

schedule as requested by Mr. Twomey. A copy of the Amended Notice of Deposition is attached hereto as Exhibit 1.

4. On August 8 and again on August 16, FACT's counsel indicated to undersigned counsel that he intended to object to the Amended Notice of Deposition. FACT's counsel indicated that he would serve the objection on August 19, which was ten days after service of FPL's Amended Notice of Deposition. After the close of business on August 19, 2002 (7:30 p.m.) FACT's counsel faxed objections arguing that FPL alone carries a burden of proof, that FACT will offer no witness, that FACT has no burden to meet in this case, that FPL's discovery request is an effort to harass and punish FACT for intervening and that FACT will set forth more specific objections in a motion for protective order to be filed on August 23, 2002. FACT's objections to the deposition are attached as Exhibit 2.

5. FACT's objections are untimely. They were not served within ten days, as required by Order No. PSC-02-0992-PCO-EI. A motion for protective order filed after the specified time for raising objections is not a proper means of raising objections and should not be allowed as a means of raising belated and untimely objections.

6. FPL has worked with FACT's counsel to avoid this dispute and this motion to compel. Each time FPL's counsel has spoken with FACT's counsel, FACT's counsel has stated an intent to object without stating specific grounds and has attempted to drag out FACT's time for stating specific objections. Even FACT's untimely objections fail to state specific objections and seek to drag out further the time to file objections.

7. Time for discovery is running out. FPL needs the discovery requested from FACT for its trial preparations and to contest FACT's standing. The deposition of Mr. Bach was scheduled at FACT's convenience to accommodate Mr. Bach's vacation schedule and should

occur as noticed on August 28, 2002. To preserve that date and to protect against FACT's repeated attempts to defer this matter, FPL has been forced to move to compel Mr. Bach's deposition.

8. FPL is entitled to take the deposition of Mr. Bach, or another representative of FACT, for discovery purposes in order to determine as soon as possible (i) who are the members of FACT and whether FACT has standing as it has pled; (ii) FACT's positions on the issues in this case, (iii) FACT's witnesses, if any; and (iv) the materials FACT intends to rely upon in support of its positions. Receiving responses to basic questions from FACT and other intervenors is essential to FPL's ability to participate effectively in this proceeding.

9. FPL contests FACT's standing to intervene in this proceeding. Notwithstanding the Prehearing Officer's finding that FACT has "adequately alleged that the substantial interests of a substantial number of its members may be affected by the Commission's decision in these dockets," Order No. PSC-02-0934-PCO-EI (emphasis added), FACT still must "prove up" its allegations of standing in order to retain party status as an intervenor. See Edgewater Beach Owners Ass'n, Inc. v. Bd of County Commissioners of Walton Co., 1995 WL 1052993 (DOAH Case No. 95-0437DRI), *on remand from Edgewater Beach Owners Ass'n, Inc. v. Bd of County Commissioners of Walton Co.*, 645 So. 2d 541, 543 (Fla. 1st DCA 1994). In Edgewater Beach, an administrative law judge found, on remand from the First District Court of Appeal, that a petitioner lacked standing to appeal a development order because "the greater weight of the evidence" showed the petitioner had failed to present facts necessary to "prove up" the petitioner's allegations of standing that the appellate court initially found to be sufficient. Edgewater Beach (DOAH case), *supra*. See also Ocala/Silver Springs Hilton v. Ocala Park Centre Maintenance Assoc., 1997 WL 1052617 (DOAH Case No. 96-3848, April 24,

1997)(Petitioner to intervene was required to prove up its allegations of standing in the course of a formal administrative hearing.)

10. FPL seeks to learn whether FACT is acting to protect the interests of individual customers or to protect the economic interests of one or more independent power producers. FPL needs to take Mr. Bach's deposition and receive other discovery to gain further understanding of FACT's proof of standing, if any, in order to contest FACT's standing as an intervenor. FPL also needs to more fully understand FACT's position and the basis for its position since FACT is not offering testimony. Consequently, FPL's motion to compel should be granted.

WHEREFORE undersigned counsel respectfully requests that this Commission compel Mr. Bach's attendance at a deposition as previously noticed by FPL to be held in Clearwater, Florida, at 10 a.m. on August 28, 2002.

Respectfully submitted,

R. Wade Litchfield, Esq.
Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561-691-7101

STEEL HECTOR & DAVIS LLP
Attorneys for Florida Power & Light
Company
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301
Telephone: 850-222-2300

By Elizabeth C. Daley
Charles A. Guyton
Elizabeth C. Daley

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

I HEREBY CERTIFY, that on this 21st day of August, 2002, a copy of Florida Power & Light Company's Motion To Compel the Deposition of Ernie Bach was served electronically (*) and by U.S. Mail to the following:

Martha Carter Brown, Esq.*
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850
mbrown@psc.state.fl.us

D. Bruce May, Jr., Esq.*
Karen D. Walker
Holland & Knight LLP
315 S Calhoun Street
Suite 600
Tallahassee, Florida 32301
dbmay@hkllaw.com

Michael B. Twomey, Esq.*
P.O. Box 5256
Tallahassee, Florida 32314-5256
miketwomey@talstar.com

R. L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, MD 21202-7110

Jon C. Moyle, Jr., Esq.*
Cathy M. Sellers, Esq.
Moyle Flanigan Katz
Raymond & Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
jmoylejr@moylelaw.com

Ernie Bach, Executive Director*
Florida Action Coalition Team
P.O. Box 100
Largo, Florida 33779-0100
ernieb@gte.net

John W. McWhirter*
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602
Telephone: (813) 224-0866
Facsimile: (813) 221-1854

Vicki Gordon Kaufman*
Timothy J. Perry
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, &
Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525
Facsimile: (850) 222-5606

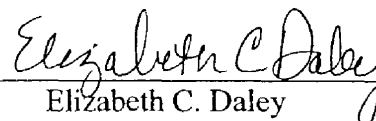
By: 
Elizabeth C. Daley

EXHIBIT 1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need)
for Proposed Electrical Power Plant in)
Martin County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020262-EI

In re: Petition for Determination of Need)
For Proposed Electrical Power Plant in)
Manatee County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020263-EI

Filed: August 8, 2002

COMMISSION
CLERK

AUG - 8 PM 4:07

RECEIVED FPSC

**FLORIDA POWER & LIGHT COMPANY'S
AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM**

TO: Michael B. Twomey, Esq.
P.O. Box 5256
Tallahassee, Florida 32314
Telephone: 850-421-9530
FAX: 850-421-8543

PLEASE TAKE NOTE THAT, PURSUANT TO Florida Rule of Civil Procedure 1.310, Florida Power & Light Company ("FPL") will take the deposition upon oral examination of Ernie Bach, Executive Director of the Florida Action Coalition Team ("FACT"). The foregoing deposition will take place on **August 28, 2002, beginning at 10 a.m.**, before a representative of Esquire Deposition Services, a Notary Public or some other officer authorized by law to take depositions. The deposition will take place at the following location:

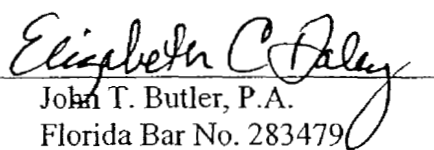
**Airport Business Center
4500 140th Avenue North, Suite 101
Clearwater, FL 33762
(Telephone: 727-539-7002)**

The deponent shall bring to his deposition copies of documents concerning the organization, officers, and membership of the Florida Action Coalition Team ("FACT") and copies of documents concerning the decision by FACT members or representatives to intervene in FPL's Determination of Need proceeding.

Said deposition is to be used for discovery purposes, for use at trial, or both, and will continue from day to day until complete. Individuals with disabilities needing a reasonable accommodation to participate in this proceeding should contact John T. Butler, Esq., at (305) 577-2939. If hearing impaired, call 1-800-955-8771 (TDD) or 1-800-955-8770 (V) via Florida Relay Service for assistance.

R. Wade Litchfield, Esq.
Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561-691-7101

Steel Hector & Davis LLP
Attorneys for Florida Power & Light
Company
200 South Biscayne Boulevard
Suite 4000
Miami, Florida 33131-2398
Telephone: 305-577-2872
Facsimile: 305-577-7001

By: 
John T. Butler, P.A.
Florida Bar No. 283479
Elizabeth C. Daley
Florida Bar No. 0104507

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

I HEREBY CERTIFY, that on this 8th day of August, 2002, a copy or courtesy copy (*) of Florida Power & Light Company's Amended Notice of Taking Deposition of FACT representative was served electronically (**) and by U.S. Mail to the following:

Martha Carter Brown, Esq.**
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850
mbrown@psc.state.fl.us

D. Bruce May, Jr., Esq.**
Karen D. Walker
Holland & Knight LLP
315 S Calhoun Street
Suite 600
Tallahassee, Florida 32301
dbmay@hklaw.com

Robert Scheffel Wright, Esq.**
Diane K. Kiesling, Esq.
John T. LaVia, III, Esq.
Landers & Parsons, P.A.
310 W. College Avenue
Tallahassee, Florida 32301
schef@landersandparsons.com

R. L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, MD 21202-7110

Joseph A. Regnery, Esq.
Timothy R. Eves
Calpine Eastern Corporation
2701 North Rocky Point Drive
Suite 1200
Tampa, Florida 33607

Michael B. Twomey, Esq.**
P.O. Box 5256
Tallahassee, Florida 32314-5256
miketwomey@talstar.com

Jon C. Moyle, Jr., Esq.**
Cathy M. Sellers, Esq.
Moyle Flanigan Katz
Raymond & Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
jmoylejr@moylelaw.com

Ernie Bach, Executive Director**
Florida Action Coalition Team
P.O. Box 100
Largo, Florida 33779-0100
ernieb@gte.net

John W. McWhirter*
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602
Telephone: (813) 224-0866
Facsimile: (813) 221-1854

Vicki Gordon Kaufman*
Timothy J. Perry
McWhirter Reeves, McGlothlin,
Davidson, Decker, Kaufman, &
Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525
Facsimile: (850) 222-5606

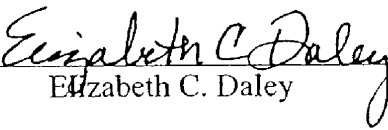
By: 
Elizabeth C. Daley

EXHIBIT 2

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition To Determine Need For an Electrical Power Plant in Martin County by Florida Power & Light Company.)	Docket No. 020262-EI
_____)	
In re: Petition To Determine Need For an Electrical Power Plant in Manatee County by Florida Power & Light Company.)	Docket No. 020263-EI
_____)	Served: August 19, 2002

**FACT'S OBJECTIONS TO FLORIDA POWER & LIGHT COMPANY'S
AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM**

The Florida Action Coalition Team ("FACT") hereby submits the following objections to Florida Power & Light Company's ("FPL") Amended Notice of Taking Deposition Duces Tecum, served August 8, 2002.

I. Preliminary Nature of These Objections

The objections stated herein are preliminary in nature and are made at this time consistent with procedural Order PSC-02-0992-PCO-EI of the Florida Public Service Commission ("Commission"), which requires a respondent to raise objections or requests for clarification within ten days of receipt of discovery requests. Should additional grounds for objection be discovered as FACT develops its response, FACT reserves the right to supplement or modify its objections up to and through the course of any deposition taken pursuant to this Notice. FACT has determined that a protective order is necessary to protect against unauthorized discovery, and FACT will file a motion for protective order with the Commission seeking such an order prior to the close of business Friday, August 23, 2002.

II. General Objections

These consolidated dockets involve the question whether the Commission should approve FPL's petitions for "need determinations" for new generation at its Martin and Manatee plant sites. As the petitioner in these need determination proceedings, FPL alone carries the affirmative burden of demonstrating that its proposed projects will satisfy the statutory need criteria set forth in Section 403.519, Florida Statutes.

FACT is an approved intervenor in these consolidated dockets. FACT will not support a witness in these consolidated dockets. FACT, consequently, has no affirmative burden to meet in these proceedings. Nonetheless, FPL has now served an Amended Notice of Taking Deposition Duces Tecum on FACT seeking to depose its Executive Director, Ernie Bach, and requiring him to bring to the deposition "documents concerning the organization, officers, and membership of the Florida Action Coalition Team ("FACT") and copies of documents concerning the decision by FACT members or representatives to intervene in FPL's Determination of Need proceeding."

Given FACT's assertion that it will file no testimony in these proceedings, FPL's discovery request, as represented by this notice of deposition, is nothing more than a thinly-veiled effort to harass and punish FACT for intervening in these proceedings. FPL is clearly attempting to deflect the focus of these need determinations from the requisite review of FPL's projects to a wholly irrelevant review of FACT. FACT's membership, organization, officers and the constitution of its membership, as well as its decision to seek party status in these dockets, have no relation or relevance to the Commission's statutory duty to determine, among other things, whether FPL's proposed plant additions are the "least-cost," as required by Section 403.519, Florida Statutes. FACT objects to this deposition because FPL's goal is clearly to discover information that is

irrelevant, immaterial, argumentative, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

III. Specific Objection

As stated previously, FACT will file its motion for protective order by the close of business Friday, August 23, 2002 setting forth its more specific legal objections to the deposition on the grounds that the deposition clearly seeks information not relevant to this proceeding and not reasonably calculated to lead to evidence admissible in this proceeding.

Respectfully submitted this 19th day of August, 2002.

A handwritten signature in black ink, appearing to read "Michael B. Twomey", written over a horizontal line.

Michael B. Twomey
Attorney for Florida Action Coalition Team
Post Office Box 5256
Tallahassee, Florida 32314-5256
Phone: 850-421-9530
FAX: 850-421-8543
miketwomey@talstar.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been transmitted electronically

and/or by U.S. Mail this 19th day of August, 2002:

Martha Carter Brown, Esq.
Lawrence Harris, Esq.
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Mbrown@psc.state.fl.us

Robert Scheffel Wright, Esq.
Diane K. Kiesling, Esq.
John T. LaVia, III
Landers & Parsons, P.A.
310 West College Avenue
Tallahassee, Florida 32301
Schef@landersandparsons.com

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
Timothy J. Perry, Esq.
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Jmcglothlin@mac-law.com

Charles A. Guyton, Esq.
Steel, Hector & Davis, LLP
215 South Monroe Street
Suite 601
Tallahassee, FL 32301

Jon C. Moyle, Jr., Esq.
Cathy M. Sellers, Esq.
Moyle Flanigan Katz Raymond &
Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
Jmoylejr@moylelaw.com

R.L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, Maryland 21202-7110

D. Bruce May, Jr., Esq.
Karen D. Walker, Esq.
Holland & Knight LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Dbmay@hklaw.com

Joseph A. Regnery, Esq.
Timothy R. Eves
Calpine Eastern Corporation
2701 North Rocky Point Drive
Suite 1200
Tampa, Florida 33607

John W. McWhirter
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602

Mr. William G. Walker, III
Vice President
Florida Power & Light Company
215 S. Monroe Street, Suite 810
Tallahassee, FL 32301-1859

John T. Butler, Esq.
Steel Hector & Davis, LLP
200 S. Biscayne Blvd., Suite 4000
Miami, FL 33131-2398

R. Wade Litchfield, Esq.
Jay Molyneaux, Esq.
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420



Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to Determine Need for)
an Electrical Power Plant in Martin County) Docket No. 020262-EI
by Florida Power & Light Company)

In re: Petition to Determine Need for)
an Electrical Power Plant in Manatee County) Docket No. 020263-EI
by Florida Power & Light Company)

Dated: August 29, 2002

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE
TO FACT'S MOTION FOR PROTECTIVE ORDER, MOTION
FOR ORDER LIMITING DISCOVERY, AND MOTION FOR STAY**

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code, responds as follows to the Florida Action Coalition Team's ("FACT") Motion for Protective Order, Motion For Order Limiting Discovery, And Motion For Stay.

The following is a list of relevant dates provided to demonstrate the pattern of delay and avoidance of discovery in this proceeding on the part of FACT and FACT's counsel:

- June 26, 2002: FACT filed its Amended Petition to Intervene in this proceeding. FPL responded that FACT had no standing as an organization to participate as an intervenor party.
- July 11, 2002: The Public Service Commission ("the Commission) granted FACT's Amended Petition to Intervene. Order No. PSC-02-0934-PCO-EI.
- July 23, 2002: The Commission entered its Order Consolidating Need Determination Proceedings, Approving Proposal for Handling Confidential Bid Information & Establishing Procedure. Order No. PSC-02-0992-PCO-EI ("Scheduling Order"). The Scheduling Order required that "all parties shall respond to discovery requests within 20 days of service of the discovery request" and that any "objection or request for clarification shall be made within ten days of service of the discovery request." Scheduling Order at 4.
- August 1, 2002: FPL served its First Set of Interrogatories and First Request for Production of Documents ("FPL Discovery") on FACT.
- August 5, 2002: FPL served a Notice of Deposition of Mr. Ernie Bach, executive director of FACT, set for August 13, 2002, a date suggested by FACT's counsel.

- August 8, 2002: At the request of FACT's counsel, FPL filed an Amended Notice of Taking Deposition set for August 28, in order to accommodate Mr. Bach's vacation schedule. FACT's counsel told the undersigned counsel on at least two occasions that he intended to object to FPL Discovery and to FPL's deposition of Mr. Bach and that FACT would file a motion for protective order seeking to avoid the discovery and deposition.
- August 12, 2002: FACT served general, blanket objections to FPL's Discovery.
- August 19, 2002: FACT electronically served general objections, by email after normal business hours on the last day for service, to FPL's Amended Notice of Taking Deposition. FACT indicated that specific objections would be provided in a motion for protective order to be filed August 23.
- August 21, 2002: FPL filed a Motion to Compel Intervenor's Deposition and a Motion to Compel FACT to Respond to FPL's Discovery.
- August 21, 2002: FACT filed timely, but limited and incomplete, responses to FPL's Discovery. However, FACT provided either general objections or no answer at all for 12 of FPL's 15 requests for documents. For Request No. 1, seeking "a charter or statement of purpose for FACT," FACT objected but provided a "Mission Statement." For Request No. 2, seeking "a list of the exact current membership of FACT," FACT objected but provided names and addresses of just 12 FACT members, despite the fact that FACT had alleged in its original papers that the organization had "thousands" of members. See Fact's Petition to Intervene and Suggestion for Delay, at 8. For Request No. 3, seeking "the name and address of each FACT member who is a retail residential customer of FPL," FACT objected but referred to the list provided for Request No. 2. For Request No. 12, seeking all documents relating to the history of FACT's involvement in Florida Public Service Commission proceedings and in other types of regulatory proceedings" FACT objected but provided a brief news release with a timeline listing three regulatory proceedings in which FACT claimed to have represented consumers. In response to FPL's First Set of Interrogatories, FACT objected to and/or refused to answer five of the 13 interrogatories. For the remaining interrogatories, FACT provided either one-word or incomplete answers.
- August 26, 2002: FACT filed the present Motion for Protective Order, Motion For Order Limiting Discovery, And Motion For Stay ("FACT's Motions") (Not filed on August 23, as represented by FACT).
- August 26, 2002: FPL agreed to a request by FACT's counsel to defer the scheduled deposition of Mr. Bach pending a ruling by the Prehearing Officer on FPL's pending Motions to Compel and FACT's Motions.

August 28, 2002: FACT filed its Response to FPL's Motions to Compel Intervenor's Deposition and Respond to First Set of Interrogatories and First Request for Production of Documents. In its Response, FACT again sought to avoid FPL's Discovery.

In FACT's Motions, FACT asks the Commission to grant a protective order that "the discovery not be had" and that FACT does not have to provide Mr. Bach for deposition. Alternatively, FACT asks the Commission to order that FPL limit its discovery to the issue of associational standing and any other issues related to the core purpose of these hearings under Section 403.519, Florida Statutes. FACT also seeks an immediate stay of discovery pending the Commission's final resolution of FACT's instant order.

FPL has done nothing to warrant the Commission's granting any of these requests. FPL has already limited its discovery as to the issues that FACT delineates. Further, FACT has demonstrated no reason that it should be granted any exception to this Commission's scheduling order, which is directed to all the parties, including any intervenor that might eventually be found to have no standing to participate as a party.

As the above list of relevant dates demonstrates, FACT has repeatedly forced delay and sought to frustrate FPL's attempts to discover information that FPL needs as soon as possible for its trial preparations and to further contest FACT's standing to intervene. FACT's present motions and all of its previous responses contain little more than baseless allegations that FPL is harassing FACT by seeking information through discovery and that FPL has no basis for challenging FACT's standing.

However, FPL continues to contest FACT's standing to intervene in this proceeding. In granting intervenor status for FACT, the Prehearing Officer found only that FACT has "adequately alleged that the substantial interests of a substantial number of its members may be

affected by the Commission's decision in these dockets," Order No. PSC-02-0934-PCO-EI (emphasis added). FACT's Motions devote three pages to arguing that FACT has no burden of proof as to its allegations of standing. However, the law is clear that FACT does have the burden of proving, not merely alleging, standing. Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), *rev. denied*, 415 So. 2d 1359, 1361 (Fla. 1982)(requiring proof, not mere allegation, of standing). FPL intends to hold FACT to that burden.

As FPL stated in its Motion to Compel, FPL's only purpose in this proceeding is to demonstrate under Florida law that the Commission should grant FPL's Petitions for Determination of Need. FPL cannot and does not waste time on harassment of FACT or any other party. FPL is entitled to discovery from FACT and every other intervenor in order to seek proof of allegations of standing and to decide how to respond to potential challenges to FPL's Petitions for Determination of Need.

CONCLUSION

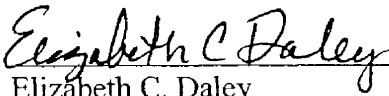
FACT's Motions contain nothing more than baseless allegations and should be disregarded. FACT should not be allowed to avoid the discovery process that is the obligation of every party in this proceeding. If FACT indeed is a legitimate party, as it contends but FPL disputes, then FACT should not be allowed to continue to force delay and seek to avoid legitimate discovery. FACT must produce discovery along with every other party bound by this Commission's Scheduling Order, the Florida Administrative Code, and the Florida Rules of Civil Procedure. If FACT will not do so, then FACT should be excluded from further participation in this proceeding.

[SIGNATURES ON NEXT PAGE]

Respectfully submitted,

STEEL HECTOR & DAVIS LLP
Attorneys for Florida Power & Light Company
215 South Monroe St.
Tallahassee, Florida 32301
Telephone: 850.222.2300

R. Wade Litchfield, Esq.
Senior Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561.691.7101

By:  _____
Elizabeth C. Daley
Florida Bar No. 0104507
Charles A. Guyton
Florida Bar No. 398039

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

I HEREBY CERTIFY that a true and correct copy or courtesy copy (*) of Florida Power & Light Company's Response to FACT's Motion for Protective Order, Motion for Order Limiting Discovery, and Motion for Stay has been furnished electronically (**) and by United States Mail this 29th day of August 2002, to the following:

Martha Carter Brown, Esq.**
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
mbrown@psc.state.fl.us

Jon C. Moyle, Jr., Esq.**
Cathy M. Sellers, Esq.
Moyle Flanigan Katz Raymond &
Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
jmoylejr@moylelaw.com

D. Bruce May, Jr., Esq.**
Karen D. Walker, Esq.
Holland & Knight LLP
315 S Calhoun Street, Ste. 600
Tallahassee, Florida 32301
dbmay@hklaw.com

R.L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, Maryland 21202-7110

Michael B. Twomey, Esq.**
Post Office Box 5256
Tallahassee, Florida 32314-5256
miketwomey@talstar.com

Ernie Bach, Executive Director**
Florida Action Coalition Team
P.O. Box 100
Largo, Florida 33779-0100
ernieb@gte.net

John W. McWhirter**
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602
jmcwhirter@mac-law.com

Vicki Gordon Kaufman, Esq.**
Timothy J. Perry, Esq.
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
vkaufman@mac-law.com

Joseph A. McGlothlin, Esq.***
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
jmcglothlin@mac-law.com

Michael Green***
1049 Edmiston Place
Longwood, Florida 32779
mgreenconsulting@earthlink.net

By: 
Elizabeth C. Daley

EXHIBIT 2

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition To Determine Need For) **Docket No. 020262-EI**
an Electrical Power Plant in Martin County)
by Florida Power & Light Company.)
_____)
In re: Petition To Determine Need For) **Docket No. 020263-EI**
an Electrical Power Plant in Manatee County)
by Florida Power & Light Company.)
_____) **Served: August 26, 2002**

**FACT'S MOTION FOR PROTECTIVE ORDER; MOTION FOR ORDER
LIMITING DISCOVERY; AND MOTION FOR STAY IN RELATION TO
FLORIDA POWER & LIGHT COMPANY'S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS AND FIRST SET OF INTERROGATORIES**

The Florida Action Coalition Team ("FACT"), pursuant to Rules 28-106.204 and 28-106.206, Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, hereby moves the Florida Public Service Commission ("Commission") to enter its order finding that FACT does not have to answer Florida Power & Light Company's ("FPL's") First Set of Interrogatories, First Request for Production of Documents, and provide Ernie Bach for the FPL deposition noticed for August 28, 2002 (collectively "FPL's Discovery"), or, alternatively, that the Commission enter its order finding that any discovery FPL is allowed to pursue be strictly limited to certain relevant matters. Lastly, FACT would ask this Commission to enter its order recognizing that FACT is entitled to a stay from having to answer the challenged discovery or sit for the challenged deposition pending this Commission's complete and final resolution of this motion. The grounds for this motion are as follows:

INTRODUCTION

FACT would ask this Commission to keep directly before it the clear fact that Florida's largest electric utility, the petitioner in these cases, FPL, is seeking to remove from this case, through rather extraordinary efforts, the only party representing the utility's residential customers. Why? Why is FPL trying so hard to remove little customers from this case when the subsidiaries of other huge electric utilities and an association of large industrial customers are allowed in without FPL's objection?

The purpose of this motion is to argue (1) that FPL missed its legal window within which to challenge FACT's party status granted by Commissioner Deason's order when it failed to seek reconsideration or appellate review of that order in a timely manner; (2) that the scope of permissible discovery relevant to the associational standing issue is extremely limited and that further FPL discovery, if any, related to this question should be strictly limited by order of this Commission; and (3) that the Commission should recognize that FACT is entitled to a stay precluding it from responding to any of FPL's over broad and impermissible discovery pending the final resolution of FACT's motion seeking protection.

BACKGROUND

1. On March 22, 2002, FPL, in the above-styled dockets, filed its initial petitions for need determinations for new generation proposed for its Manatee and Martin plant sites pursuant to the provisions of Section 403.519, Florida Statutes.

2. In response to criticism from intervenors, including Reliant Energy Power Generation, Inc., Calpine Energy Services, L.P., CPV Cana, Ltd., Mirant Corporation, and South Pond Energy Park, LLC., that the RFP process leading to its self-build selections at both plant sites was flawed, FPL, on April 22, 2002, filed an emergency motion to hold the need determination cases in abeyance, so that it could have additional time to issue a supplemental RFP that would address the intervenors' complaints. Order No. PSC-02-0703-PCO-EI at 1-2.

3. FPL's emergency motion was granted, it solicited new RFPs, which were also evaluated by FPL, which evaluation, once again, resulted in FPL determining that its self-build options were the most cost-effective at both plant sites. Subsequently, on July 16, FPL filed amended petitions for determination of need at both plant sites, which petitions are currently before this Commission.

4. On July 11, 2002, Prehearing Officer Commissioner Deason entered his Order No. PSC-02-0934-PCO-EI granting FACT's amended petition to intervene stating, in part:

In its amended Petition, FACT states that it is a statewide, non-partisan, grassroots public interest organization, ". . . representing the interests of its members in taxpayer, consumer, healthcare, environmental and public utility issues, among others." FACT alleges that a number of its members are retail residential customers of FPL, whose substantial interests will be affected by the outcome of these need determination dockets. FACT provided the names and addresses of 6 FACT members who are retail electric customers of FPL, but asserted that other FACT members are also retail customers of FPL. FACT asserts that the Commission's decision in these dockets will affect the rates its members' pay to FPL for electricity, and therefore they have an interest in the Commission's determination whether FPL has proposed the most-cost effective means to acquire additional generating capacity. FACT also points out that the Commission must consider whether FPL has taken all reasonably available conservation measures to avoid or defer the need for new generating capacity. FACT states that; "[f]ailure to implement cost-effective conservation measures in lieu of building new power plants will, by definition, increase customer rates more than is otherwise necessary."

In its Amended Petition to Intervene, FACT has adequately alleged that the substantial interests of a substantial number of its members may be affected by the Commission's decision in these dockets, and that those interests are both the type of interest the Commission's need determination proceedings are designed to protect and the type of interest FACT is entitled to represent on behalf of its members. For these reasons, FACT's Amended Petition to Intervene is granted. (Emphasis supplied.)

5. Following the ordering paragraphs of Order No. PSC-02-0934-PCO-EI appeared the standard administrative and appellate review opportunity language required by Florida Law, which read:

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule

25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

6. As stated above, the order granting FACT intervenor status in these dockets was entered on July 11, 2002. The tenth day by which a party adversely affected by this order could have sought reconsideration by the full Commission ran on July 21, 2002 without FPL, or any other party, seeking review of Commissioner Deason's order. Likewise, the 30 day period in which to seek appellate review to the Florida Supreme Court expired without FPL seeking such review. To date, no party, including FPL has sought administrative or appellate review of Order No. PSC-02-0934-PCO-EI and the time for doing both has expired. Consequently, FACT has been a party to these docket since July 11, 2002 and remains so by virtue of an order that could have been reviewed, but which was not.

7. FPL's petitions in these dockets were filed pursuant to Section 403.519, Florida Statutes, which reads in its entirety:

403.519 Exclusive forum for determination of need.--On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. The commission shall publish a notice of the proceeding in a newspaper of general circulation in each county in which the proposed electrical power plant will be located. The notice shall be at least one-quarter of a page and published at least 45 days prior to the scheduled date for the proceeding. The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity and shall serve as the commission's report required by s. 403.507(2)(a)2. An order entered pursuant to this section constitutes final agency action.

(Emphasis supplied.)

8. Pursuant to Order No. PSC-02-0992-PCO-EI, (the order "establishing procedure," amongst other things), the parties to the case were to file their preliminary list of issues by July 23, 2002. The Commission Staff's July 24, 2002 Preliminary List of Issues is attached as Exhibit 1. While listing the issues clearly required to be addressed by the Commission by the underlined portions of Section 403.519, Florida Statutes, above, the Staff's list does not identify FACT's party status in this case as an issue yet to be decided.

9. FPL's preliminary list of issues is attached as Exhibit 2. Like the Staff list of issues referenced in Paragraph 8 above, FPL's list focuses on those issues that must statutorily be addressed and answered by the Commission pursuant to Section 403.519, Florida Statutes, and does not list the party status of FACT as a continuing issue.

10. On August 1, 2002, FPL served upon FACT its First Request for Production of Documents to the Florida Action Coalition Team (Nos. 1-15), a copy of which is attached as Exhibit 3.

11. Also on August 1, 2002, FPL served upon FACT its First Set of Interrogatories to the Florida Action Coalition Team (Nos. 1-13), a copy of which is attached as Exhibit 4.

12. On August 8, 2002, FPL served upon FACT its Amended Notice of Taking Deposition Duces Tecum, a copy of which is attached as Exhibit 5.

13. Thereafter, on August 12, 2002, FACT served FPL, by both facsimile and U.S. Mail, with FACT's objections to FPL's First Request for Production of Documents and its First Set of Interrogatories, which are attached, respectively, as Exhibits 6 and 7.

14. On August 19, 2002, FACT served upon FPL its Objections to FPL's Amended Notice of Taking Deposition Duces Tecum, a copy of which is attached as Exhibit 8.

15. On August 21, 2002 FACT served upon FPL its Responses to First Request for Production of Documents and First Set of Interrogatories and provided, amongst other responses, the names of an additional 6 FACT members, who are also FPL customers, as well as a number of documents reflecting FACT's organizational affiliations and public issue advocacy history. These documents are attached as consolidated Exhibit 9.

16. On August 21, 2002, FPL served upon FACT its Motions to Compel FACT to Respond to its First Set of Interrogatories and First Request for Production of Documents and Motion to Compel Intervenor's Deposition, which are attached, respectively, as Exhibits 10 and 11.

17. On August 23, FACT wrote FPL explaining that it would now attempt to file the instant pleading - Motion for Protective Order - on Monday, August 26, 2002, to be followed by responses to FPL's two motions to compel by the close of business, Wednesday, August 28, 2002. A copy of that letter is attached as Exhibit 12.

MOTION FOR PROTECTIVE ORDER

ARGUMENT

FPL failed to timely challenge the Commission order granting FACT party status

18. As cited to above, on July 11, 2002, Prehearing Officer Commissioner Deason

entered Order No. PSC-02-0934-PCO-EI granting FACT's amended petition to intervene. The order was neither qualified in its grant of party status to FACT, nor did it establish an obligation that FACT "prove up" the allegations in its amended petition to intervene at final hearing. In fact, the only qualified portions of the order related to the "boiler plate" provisions notifying the parties of their available review opportunities if dissatisfied with the order. That is, the "boiler plate" advised that review was available, but stressed that such review had to be both timely sought and with the appropriate body.

19. Section 120.569(1), Florida Statutes, requires this Commission, and all applicable agencies, to give parties notice of all orders published in the proceedings they are in, and to make the parties aware of all administrative and judicial review available to them from orders adversely affecting them, as well as the procedures to be followed in seeking review and the applicable time limitations for seeking such review. This statute is the basis for the "boiler plate" review language discussed above. This section reads as follows:

120.569 Decisions which affect substantial interests.--

(1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s. 120.574. Unless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) applies in all other cases. Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney of record at the address of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

(Emphasis supplied.) As cited in Paragraph 5 above, Order No. PSC-02-0934-PCO-EI specifically notified FPL, or any other adversely affected party, that it had ten days to seek reconsideration of a Prehearing Officer's order, or to seek judicial review by the Florida Supreme Court, pursuant to Rule 9.100, Florida Rules of Appellate Procedure, which rule allows 30 days from order rendition to seek review. Again, FACT has not been given notice that FPL elected to seek review of Commissioner Deason's order, either by the full Commission, or at the Florida Supreme Court, and can find no evidence that FPL availed itself of those routes to challenge FACT's grant of party status.

20. It should be noted that FPL's failure to timely avail itself of the review procedures immediately available to it does not preclude FPL from seeking review of FACT's party status on review of the Commission's final order at the Florida Supreme Court. In fact, the Commission's

standard "boiler plate" review language puts FPL and others on notice that judicial review to the courts is typically only available on an interlocutory basis "if review of the final agency action will not provide an adequate remedy." By case law, such a showing usually requires a demonstration to the court that the petitioner would suffer "irreparable harm" if the order below were not reversed prior to entry of the final agency action. Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987). FACT would submit that FPL would likely have had great difficulty in making such a case of irreparable harm to the Supreme Court by the mere existence of FACT as a party in these proceedings. FPL's difficulty in carrying this burden would seem especially difficult given FACT is on the record as saying it will not offer the testimony of any witness, and, in fact, has missed the August 20, 2002 deadline for offering such prefiled witness testimony in any event. Consequently, FACT is left with the task of "hurting" FPL's case through the adoption of issues in the case and through cross-examination!

21. Florida courts have recognized the necessity for finality in administrative orders, just as in judicial orders. In Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966), the Court stated:

The effect of these decisions is that orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

While it's true that Peoples Gas involved this Commission effectively changing a final order some four and one-half years later, the principle of finality and certainty is equally applicable to non-final orders and the situation at hand. If the review provisions contained in Order No. PSC-02-0934-PCO-EI were not applicable to the sole decision made in the order - namely, the granting of party status to FACT - what could they have been in reference to? FACT was granted intervenor status by the order, FPL failed to seek review of that party status, or to seek a prehearing evidentiary hearing on the issue, or to seek qualified party status for FACT subject to proof of standing at final hearing, as it might have. Consequently, FACT should now be entitled to rely on that unchallenged order.

22. FPL will undoubtedly assert that proof of party standing is always subject to being heard at final hearing and will likely cite to any number of Division of Administrative Hearings

(DOAH) cases in support of that contention. FACT would submit, however, that all of the cases it could find suggesting that contested standing automatically had to be "proven up" at final hearing, in fact, said no such thing and are both factually and legally distinguishable from the instant case and, likely, all Commission cases.

23. In its Motion to Compel Intervenor's Deposition, FPL, at page 3, cites to Edgewater Beach Owners Ass'n, Inc. v. Bd. of County Commissioners of Walton Co., 1995 WL 1052993 (DOAH) Case No. 95-0437DRI), *on remand from Edgewater Beach Owners Ass'n, Inc. v. Bd. of County Commissioners of Walton Co.*, 645 So. 2d 541, 543 (Fla. 1st DCA 1994) for the proposition that "an administrative law judge found, on remand from the First District Court of Appeal, that a petitioner lacked standing to appeal a development order because 'the greater weight of the evidence' showed the petitioner had failed to present facts necessary to 'prove up' the petitioner's allegations of standing that the appellate court initially found to be sufficient." While fundamentally true, this recitation doesn't tell the complete story, and, FACT would suggest, could leave the Commission with the false impression that the Court required that standing be demonstrated in that case, or that it requires it in all similar cases.

24. Edgewater started when the Edgewater Beach Owners Association filed a petition with the Florida Land and Water Adjudicatory Commission (FLWAC) challenging a Walton County resolution reviving an expired development of regional impact order. After FLWAC dismissed the Owners Association's amended petition for lack of standing, the Owners Association took an appeal, which resulted in the First District Court of Appeal reversing and remanding on the basis that it had "concluded that the amended petition contained sufficient factual allegations to show that petitioner was 'an owner of . . . affected property' within the meaning of the law, and thus it had standing to bring the action." It was only after the Court remanded the case to FLWAC that it, in turn, forwarded the case to DOAH for hearing.

25. The Owners Association's basis for standing rested on its retention pond being affected by the challenged development. At hearing the administrative law judge determined that the retention pond would not be affected by the development and that it, therefore, lacked standing to challenge the project. It is instructive to note, as did the law judge, that, as the "party challenging the amended development order, petitioner [Owners Association] bears 'both the ultimate burden of persuasion and the burden of going forward.'" FACT would suggest that being the moving party, as opposed to being a mere intervenor in a case where FPL carries the burden of showing the need for its sought after generating units, is critically important because whether there was any relief at all in that case depended upon whether there was standing for the Owners Association, i.e., whether their retention pond was affected. FACT's standing plays no such critical role in the instant case and, more importantly, there is a question whether the Owners Association had the benefit of an unchallenged order granting party status to the case, as does FACT here. In fact, it appears clear that the Owners Association had no such unqualified order granting it intervenor status, since it was not an intervenor. Furthermore, it appears that DOAH, as a general practice, typically grants challenged intervenors (1) initial party status subject to proof of standing at final hearing and (2) pursuant to orders providing no notice of opportunity for reconsideration or judicial review.

26. The second DOAH case cited by FPL in its Motion to Compel Intervenor's Deposition, Ocala/Silver Springs Hilton v. Ocala Park Centre Maintenance Assoc., 1997 WL 1052617 (DOAH Case No. 95-3848, April 24, 1997) illustrates what appears to be a common

DOAH practice of granting intervenor or party status with the specific qualification that standing be proven at the final or formal hearing. In Ocala/Silver Springs Hilton, the administrative law judge wrote at page 3: "On November 8, 1996, an Order was entered denying both motions to dismiss without prejudice, but requiring Hilton and the Association to each prove-up their respective standing at formal hearing." Although the order in question was neither available on the DOAH website, nor in its current files due to the relative age of the case, more recent examples of such orders were found illustrating what appears to be a common DOAH practice that is not followed at the Commission.

27. As reflected in the attached Exhibits 13 and 14, respectively, in the case of William Howard Solomon v. Florida Communities Trust (DOAH Case No. 00-2089), Administrative Law Judge Hood entered orders granting intervenor status to the City of Jacksonville and the Mandarin Community Club, but with the specific ordering paragraph qualification in each order that: "the motion to intervene is granted subject to proof of standing during the final hearing." Furthermore, for whatever reason, these orders, unlike Commission orders, contain no recitation of what administrative or judicial review rights are available to a party adversely affected by the orders. Subsequently, Judge Hood's Recommended Order in the case at page 4 reflected the preliminary and conditional grant of intervenor status for the Mandarin Community Club with the statement: "An order dated July 31, 2000, granted the MCC's Motion to Intervene subject to proof of standing during final hearing and denied the Request for Preliminary Hearing on Standing. See Order in William Howard Solomon v. Florida Communities Trust at page 4, which is attached as Exhibit 15.

28. While FACT is unable, to date, to locate more administrative law judge orders specifically granting qualified intervenor status with the requirement that standing be proved at final hearing, and without no administrative and appellate review options provided, FACT was able to locate 12 additional DOAH recommended or final orders in which the "preliminary statement" included a recitation that "Intervention was granted subject to proof of standing at final hearing." The cover pages and initial relevant pages leading to this qualified intervenor statement in each of these 12 orders are attached as consolidated Exhibit 16. The referenced statement appears on the last included page of each order and is identified with a vertical line in the adjacent right hand margin.

29. The Commission has the authority, indeed the obligation, pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, to issue protective orders where appropriate. The rule provides:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed

only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

30. Inasmuch as FPL has completely failed to preserve its ability to challenge FACT's party status, the issue of the relevancy of its discovery directed to FACT should be measured solely by whether the discovery is within the scope of the remaining issues in the case. Rule 1.280(b), Florida Rules of Civil Procedure provides:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(Emphasis supplied.)

31. In conclusion, FPL could have sought reconsideration of Commissioner Deason's order granting FACT intervenor status, but chose not to. FPL could have sought appellate review of the order, but chose not to. FPL could have requested that either Commissioner Deason or the full Commission grant FACT conditional intervenor status, subject to "proof of standing during the final hearing" as is stated in Judge Hood's attached orders and referenced in the other 13 attached DOAH orders, but it did not. The attached DOAH orders clearly and specifically reserved jurisdiction over the disputed question of standing, whereas Commissioner Deason's order granting FACT standing clearly does not. The Commission should find that FPL waived any further right at the Commission proceedings (clearly FPL can address the issue on any appeal of the Commission's final order in these cases) to dispute FACT's party status by not electing to utilize the review options presented to it.

32. If the Commission determines that the standing issue has been waived, then it should look solely to Section 403.519, Florida Statutes, to determine whether FPL's discovery to FACT is permissible. The key language of the statute requiring decisions of the Commission relative to the generating plant "need" states:

In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.

If attention is paid to the issues of (1) need for electric system reliability and integrity, (2) the need for adequate electricity at a reasonable cost, (3) whether the proposed plant is the most cost-effective alternative available and (4) consideration of the conservation measures taken by, or reasonably available to, the applicant or its members which might mitigate the need for the proposed plant, the Commission will easily see that none of the discovery directed at FACT is either (1) relevant to the subject matter of the pending action, or (2) reasonably calculated to lead to the discovery of admissible evidence. Having to prepare and present documents, write interrogatory responses and prepare for and sit for a deposition will necessarily result in annoyance, oppression and undue burden and expense to FACT of the type protective orders are designed to protect against. Under these circumstances the Commission should order "that the discovery not be had."

ALTERNATIVE MOTION FOR ORDER LIMITING DISCOVERY

ARGUMENT

33. In the event the Commission determines that FPL did not waive its ability to question FACT's party status by ignoring the review options afforded by Commissioner Deason's order, then the Commission should still protect FACT from annoyance, oppression and undue

burden and expense by strictly limiting any FPL discovery to the issue of "associational standing" and any other issues related to the core purpose of these hearings under Section 403.519, Florida Statutes. FACT has, above, reiterated the issues raised by Section 403.519, Florida Statutes, and suggests that none of the discovery presently directed to FACT is relevant to those issues, or reasonably calculated to lead to the discovery of admissible evidence related to those issues.

34. If "associational standing" is still viable for FPL's discovery, what are the issues to be considered in determining whether the discovery is permissible? In Florida Home Builders Ass'n v. Dept. Of Labor, 412 So.2d 351 (Fla. 1982), the Florida Supreme Court established the elements of proof for associational standing, saying:

After reviewing the legislative history and purpose of chapter 120, we have concluded that a trade or professional association should be able to institute a rule challenge under section 120.56 even though it is acting solely as the representative of its members. To meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.

As reflected in NAACP, Inc. v. Florida Board of Regents, 1D00-3138 (Fla. App. 1

Dist. 2002), the concept of "associational standing" has been greatly expanded to include not just trade and professional associations in rule challenges, but other similar challenges by environmental, taxpayer and other associations, not only in rule challenges, but in Section 120.569, Florida Statutes, proceedings involving "decisions which affect substantial interests."

35. If FPL is to be allowed to test FACT's associational standing, then FACT would urge the Commission to, pursuant to Rule 1.280(c)(4), Florida Rules of Civil Procedure, order "(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters." Specifically, and first, FACT would request that the Commission issue its detailed order limiting discovery to these specific subjects:

- (a) Whether FACT is an "association" within the meaning of Florida Home Builders and subsequent case law evolved from it;
- (b) The total number of coalition team members currently associated or affiliated with FACT;
- (c) The number of coalition team members that are FPL customers and, thus, will be "substantially affected" by the Commission's determination on the "need" of the two plants and whether they are the most cost-effective alternative available;
- (d) Whether the "subject matter" of these proceedings, namely the determination of

the need for these generating units and their cost-effectiveness is within FACT's "general scope of interest and activity;" and

(e) Whether FACT seeking to ensure that the Commission makes the correct decision on the "need" for the generating units and that the units are the most cost-effective is of a type relief (cost-effective and appropriate) for it to receive on behalf of its members.

36. Conversely, FACT would request that the Commission protect it from annoyance, oppression and undue burden and expense by specifically prohibiting FPL from seeking discovery on the following issues, which are irrelevant to the issues, privileged or both:

(a) A listing of the names and addresses of all FACT members, or all FACT members that are customers of FPL;

(b) Any questions as to FACT's financial condition, or sources of funding;

(c) Questions related to the hiring of FACT's attorney of record in these dockets, Michael B. Twomey, the basis for his compensation and the person or persons responsible for compensating him, which questions are privileged as attorney-client and are not relevant to any of the issues in this case, whether the focus be the need determination or the limited questions involving "associational standing;" and

(d) Questions related to how FACT decided to "intervene in FPL's Determination of Need proceeding"

37. Forcing FACT to answer questions at deposition, through interrogatory responses, or through production of documents that are not directly relevant to either the "need determination" issues or the "associational standing issues" or questions that appear reasonably calculated to lead to the discovery of admissible evidence on these issues will unnecessarily subject FACT to annoyance, oppression, and undue burden or expense.

38. Accordingly, FACT would respectfully request that the Commission, if it allows discovery on the issue of associational standing, enter its written order specifically delineating what FPL may permissibly ask and not ask pursuant to the requests contained in Paragraphs 35 and 36 above.

REQUEST FOR STAY **ARGUMENT**

39. The Commission should grant a stay of discovery when the discovery being sought is alleged to be impermissibly annoying, burdensome, embarrassing, oppressive, or unduly expensive and when the time that the discovery will be precluded pending resolution of motions seeking to limit the discovery is relatively limited in duration. Deltona Corporation v. Bailey, 336 So.2d 1163 (Fla. 1976). FACT has previously communicated to FPL FACT's objections to all FPL's discovery, including the Bach deposition and indicated that it will not make Ernie Bach available for deposition on August 28, 2002, and will not provide further responses to FPL's First Request for Production of Documents or First Set of Interrogatories until directed to do so by order of this Commission. Canella v. Bryant, 235 So.2d 328 (Fla. 4th DCA 1970);

WHEREFORE, the Florida Action Coalition Team respectfully requests that the Florida Public Service Commission enter its written order granting FACT a Protective Order protecting it from all pending FPL discovery, for the reasons stated in the body of this motion; or,

alternatively, an Order strictly limiting FPL's discovery to the core "need determination" issues in this case, as well as those strictly related to the "associational standing" issue, as requested in the body of this motion. Lastly, FACT requests that the Commission grant it an immediate stay from having to respond to FPL's pending discovery requests pending the Commission's final resolution of FACT's instant motion.

Respectfully submitted,

Michael B. Twomey
Attorney for Florida Action Coalition Team
Post Office Box 5256
Tallahassee, Florida 32314-5256
Phone: 850-421-9530
FAX: 850-421-8543
miketwomey@talstar.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been transmitted electronically, by hand delivery* and/or by U.S. Mail this 26th day of August, 2002:

Martha Carter Brown, Esq.
Lawrence Harris, Esq.
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Mbrown@psc.state.fl.us

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
Timothy J. Perry, Esq.
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Jmcglothlin@mac-law.com

Jon C. Moyle, Jr., Esq.
Cathy M. Sellers, Esq.
Moyle Flanigan Katz Raymond &
Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
Jmoylejr@moylelaw.com

D. Bruce May, Jr., Esq.
Karen D. Walker, Esq.
Holland & Knight LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Dbmay@hkllaw.com

John W. McWhirter
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, & Arnold, P.A.

R. Wade Litchfield, Esq.
Jay Molyneaux, Esq.
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420

Charles A. Guyton, Esq. *
Steel, Hector & Davis, LLP
215 South Monroe Street
Suite 601
Tallahassee, FL 32301

R.L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, Maryland 21202-7110

Mr. William G. Walker, III
Vice President
Florida Power & Light Company
215 S. Monroe Street, Suite 810
Tallahassee, FL 32301-1859

400 North Tampa Street, Suite 3350
Tampa, Florida 33602

John T. Butler, Esq.
Steel Hector & Davis, LLP
200 S. Biscayne Blvd., Suite 4000
Miami, FL 33131-2398

Attorney

EXHIBIT 3

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition To Determine Need For) **Docket No. 020262-EI**
an Electrical Power Plant in Martin County)
by Florida Power & Light Company.)
_____)
In re: Petition To Determine Need For) **Docket No. 020263-EI**
an Electrical Power Plant in Manatee County)
by Florida Power & Light Company.)
_____) **Filed: September 16, 2002**

**FACT'S MOTION FOR PROTECTIVE ORDER TO FULL COMMISSION
PENDING RESOLUTION OF MOTION FOR RECONSIDERATION**

The Florida Action Coalition Team ("FACT"), pursuant to Rules 28-106.204 and 28-106.206, Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, hereby moves the Florida Public Service Commission ("Commission") to enter its order finding that FACT does not have to answer Florida Power & Light Company's ("FPL's") First Set of Interrogatories, First Request for Production of Documents, or provide Ernie Bach for deposition by FPL pending the full commission's resolution of FACT's Motion for Reconsideration of Order No. PSC-02-1260-PCO-EI, which motion will be filed by September 23, 2002, pursuant to Rule 25-22.0376, Florida Administrative Code. Absent such protection, FACT may be forced to disclose privileged information that will irreparably harm it. In support of its motion, FACT states as follows:

1. On July 11, 2002, Prehearing Officer Commissioner Deason entered his Order No. PSC-02-0934-PCO-EI granting FACT's amended petition to intervene stating, in part:
In its amended Petition, FACT states that it is a statewide, non-partisan, grassroots public interest organization, ". . . representing the interests of its members in taxpayer, consumer, healthcare, environmental and public utility issues, among others." FACT alleges that a number of its members are retail residential customers of FPL, whose substantial interests will be affected by the outcome of these need determination dockets. FACT provided the names and

addresses of 6 FACT members who are retail electric customers of FPL, but asserted that other FACT members are also retail customers of FPL. FACT asserts that the Commission's decision in these dockets will affect the rates its members' pay to FPL for electricity, and therefore they have an interest in the Commission's determination whether FPL has proposed the most-cost effective means to acquire additional generating capacity. FACT also points out that the Commission must consider whether FPL has taken all reasonably available conservation measures to avoid or defer the need for new generating capacity. FACT states that; "[f]ailure to implement cost-effective conservation measures in lieu of building new power plants will, by definition, increase customer rates more than is otherwise necessary."

In its Amended Petition to Intervene, FACT has adequately alleged that the substantial interests of a substantial number of its members may be affected by the Commission's decision in these dockets, and that those interests are both the type of interest the Commission's need determination proceedings are designed to protect and the type of interest FACT is entitled to represent on behalf of its members. For these reasons, FACT's Amended Petition to Intervene is granted. (Emphasis supplied.)

2. Following the ordering paragraphs of Order No. PSC-02-0934-PCO-EI appeared the standard administrative and appellate review opportunity language required by Florida Law, which read:

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a

preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

3. As stated above, the order granting FACT intervenor status in these dockets was entered on July 11, 2002. The tenth day by which a party adversely affected by this order could have sought reconsideration by the full Commission ran on July 21, 2002 without FPL, or any other party, seeking review of Commissioner Deason's order. Likewise, the 30 day period in which to seek appellate review to the Florida Supreme Court expired without FPL seeking such review. To date, no party, including FPL has sought administrative or appellate review of Order No. PSC-02-0934-PCO-EI and the time for doing both has expired. Consequently, FACT has been a party to these docket since July 11, 2002 and remains so by virtue of an order that could have been reviewed, but which was not.

4. On August 1, 2002, FPL served upon FACT its First Request for Production of Documents to the Florida Action Coalition Team, which included, among others, requests for:

- a. A list of the exact current membership of FACT;
- b. The name and address of each FACT member who is a retail residential customer of FPL;
- c. All documents relating to FACT's engagement of the services of Michael B. Twomey, including the basis for his compensation and the parties responsible for his compensation;
- d. as well as other requests either not related to the associational representation issue or the need determination issues.

5. Also on August 1, 2002, FPL served upon FACT its First Set of Interrogatories to the Florida Action Coalition Team, which, among others, included the following questions:

- a. Please list the exact current membership of FACT;
- b. Please list the name and address of each FACT member who is a retail residential customer of FPL;
- c. Please explain how and when FACT engaged the services of Michael B. Twomey, including the basis for his compensation and the person or persons responsible for compensating him.
- d. as well as other questions either not related to the associational representation issue or the need determination issues.

6. On August 8, 2002, FPL served upon FACT its Amended Notice of Taking Deposition Duces Tecum, which directed the deponent, Ernie Bach, to bring to the deposition, amongst other things, copies of documents concerning the . . . membership of the Florida Action Coalition Team ("FACT") and copies of documents concerning the decision by FACT members or representatives to intervene in FPL's Determination of Need proceeding.

7. Thereafter, on August 12, 2002, FACT served FPL, by both facsimile and U.S. Mail, with FACT's objections to FPL's First Request for Production of Documents and its First

Set of Interrogatories.

8. On August 19, 2002, FACT served upon FPL its Objections to FPL's Amended Notice of Taking Deposition Duces Tecum.

9. On August 21, 2002, FPL served upon FACT its Motions to Compel FACT to Respond to its First Set of Interrogatories and First Request for Production of Documents and Motion to Compel Intervenor's Deposition.

10. On August 26, 2002, FACT filed its Fact's Motion for Protective Order; Motion for Order Limiting Discovery; and Motion for Stay in Relation to Florida Power & Light Company's First Request for Production of Documents and First Set of Interrogatories.

11. Last Friday, on September 13, 2002, Commissioner Deason entered his order completely denying FACT's motions and completely granting FPL's motions to compel by ordering that the "Florida Action Coalition Team shall make its founder, Ernie Bach, available for deposition immediately, and the Florida Action Coalition Team shall respond to FPL's other discovery within five days of the date of this order."

12. Commissioner Deason's September 13, 2002 Order contains precisely the same "notice of further proceedings or judicial review" language FPL failed to avail itself of in Commissioner Deason's order granting FACT party status, namely: "Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer. . . ." FACT will request that the full commission review Commissioner Deason's order and, pursuant to the cited rule, FACT has until September 23, 2002 to prepare and file its motion for reconsideration. Pending the filing of its motion for reconsideration and the full commission's decision with respect to it, FACT should not be placed in the position of having to presently provide discovery, which the full commission, or a court, may ultimately find FPL is not entitled to receive. This is particularly important where the information sought is privileged lawyer-client communications or is otherwise protected and where its disclosure would result in irreparable harm to FACT that could not be cured by a reversal of Commissioner Deason's decision, either by the full commission or a court.

13. FACT's primary position on reconsideration will be that Commissioner Deason's granting FACT's amended petition to intervene was unqualified, was not challenged by FPL within the statutory time limits, and is now beyond further interlocutory commission review or interlocutory appellate review. Failing in that argument, FACT will argue that any discovery allowed by FPL must be strictly limited to the relevant issues surrounding "associational standing" and the substantive issues raised by FPL's petitions in these dockets and the intervenors' responses thereto. It is clear that FPL's pending discovery requests exceed those limitations by requesting privileged information, including lawyer-client communications, which, once disclosed, can never be "undiscovered" so as to regain the protections afforded by the privilege.

14. The Commission has the authority, indeed the obligation, pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, to issue protective orders where appropriate.

The rule provides:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought,

and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

15. Whether FPL should be allowed discovery and, conversely, whether FACT should be protected from having to provide certain information is dependent upon whether the information sought falls within the scope of the permissibly discoverable. All information possessed by a party is not available to opponents in a case and it is Rule 1.280(b), Florida Rules of Civil Procedure that provides the limitations on what can be had. The rule states:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(Emphasis supplied.)

16. In the event the Commission determines that FPL did not waive its ability to question FACT's party status by ignoring the review options afforded by Commissioner Deason's order, then the Commission should still protect FACT from annoyance, oppression and undue burden and expense by strictly limiting any FPL discovery to the issue of "associational standing" and any other issues related to the core purpose of these hearings under Section 403.519, Florida Statutes.

17. If "associational standing" is still viable for FPL's discovery, what are the issues to be considered in determining whether the discovery is permissible? In Florida Home Builders Ass'n v. Dept. Of Labor, 412 So.2d 351 (Fla. 1982), the Florida Supreme Court established the

elements of proof for associational standing, saying:

After reviewing the legislative history and purpose of chapter 120, we have concluded that a trade or professional association should be able to institute a rule challenge under section 120.56 even though it is acting solely as the representative of its members. To meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.

18. If FPL is to be allowed to test FACT's associational standing, then FACT would urge the Commission, pursuant to Rule 1.280(c)(4), Florida Rules of Civil Procedure, to order "(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters." Specifically, and first, FACT would request that the Commission issue its detailed order limiting discovery to these specific subjects:

(a) Whether FACT is an "association" within the meaning of Florida Home Builders and subsequent case law evolved from it;

(b) The total number of coalition team members currently associated or affiliated with FACT;

(c) The number of coalition team members that are FPL customers and, thus, will be "substantially affected" by the Commission's determination on the "need" of the two plants and whether they are the most cost-effective alternative available;

(d) Whether the "subject matter" of these proceedings, namely the determination of the need for these generating units and their cost-effectiveness is within FACT's "general scope of interest and activity;" and

(e) Whether FACT seeking to ensure that the Commission makes the correct decision on the "need" for the generating units and that the units are the most cost-effective is of a type relief (cost-effective and appropriate) for it to receive on behalf of its members.

19. Conversely, FACT would request that the Commission protect it from annoyance, oppression and undue burden and expense by specifically prohibiting FPL from seeking discovery on the following issues, which are irrelevant to the issues in the case, privileged or both:

(a) A listing of the names and addresses of all FACT members, or all FACT members that are customers of FPL;

(b) Any questions as to FACT's financial condition, or sources of funding;

(c) Questions related to the hiring of FACT's attorney of record in these dockets, Michael B. Twomey, the basis for his compensation and the person or persons responsible for

compensating him, which questions are privileged as lawyer-client and are not relevant to any of the issues in this case, whether the focus be the need determination or the limited questions involving "associational standing;" and

(d) Questions related to how FACT decided to "intervene in FPL's Determination of Need proceeding."

20. Forcing FACT to disclose membership lists or names of members and their addresses would unreasonably and unconstitutionally infringe upon their rights of free speech and association. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958)

21. Forcing FACT to answer questions at deposition, through interrogatory responses, or through production of documents that address questions of how FACT came to the decision to participate in this case, how it came to retain the undersigned as its counsel, how the undersigned is to be compensated and by whom, as well how FACT is funded are not only completely irrelevant to the issues identified for hearing in this case, they are also protected by the lawyer-client privilege provided by Section 90.502, Florida Statutes. Corry v. Meggs, 498 So.2d 508 (Fla. 1st DCA 1986)

22. Compelling FACT to answer discovery that is not directly relevant to either the "need determination" issues or the "associational standing issues," or that are questions that appear reasonably calculated to lead to the discovery of admissible evidence on these issues, will unnecessarily subject FACT to annoyance, oppression, and undue burden or expense. Furthermore, if privileged matters are forced to be disclosed, FACT will be irreparably harmed, because, once violated, the privileged information cannot be taken back.

23. Accordingly, FACT would respectfully request that the full Commission, if it allows discovery on the issue of associational standing, enter its written order specifically delineating what FPL may permissibly ask and not ask pursuant to the requests above. Deltona Corporation v. Bailey, 336 So.2d 1163 (Fla. 1976); Canella v. Bryant, 235 So.2d 328 (Fla. 4th DCA 1970).

WHEREFORE, the Florida Action Coalition Team respectfully requests that the full Florida Public Service Commission enter its written order granting FACT a Protective Order protecting it from all pending FPL discovery of privileged matters pending the full Commission's final resolution of FACT's motion for reconsideration of Order No. PSC-02-1260-PCO-EI.

Respectfully submitted,

Michael B. Twomey

Attorney for Florida Action Coalition Team

Post Office Box 5256

Tallahassee, Florida 32314-5256

Phone: 850-421-9530

FAX: 850-421-8543

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been transmitted electronically, by hand delivery* and/or by U.S. Mail this 16th day of September, 2002:

Martha Carter Brown, Esq.

R. Wade Litchfield, Esq.

Lawrence Harris, Esq.
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Mbrown@psc.state.fl.us

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
Timothy J. Perry, Esq.
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Jmcglothlin@mac-law.com

Jon C. Moyle, Jr., Esq.
Cathy M. Sellers, Esq.
Moyle Flanigan Katz Raymond &
Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
Jmoylejr@moylelaw.com

D. Bruce May, Jr., Esq.
Karen D. Walker, Esq.
Holland & Knight LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Dbmay@hkklaw.com

John W. McWhirter
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602

John T. Butler, Esq.
Steel Hector & Davis, LLP
200 S. Biscayne Blvd., Suite 4000

Jay Molyneaux, Esq.
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420

Charles A. Guyton, Esq. *
Steel, Hector & Davis, LLP
215 South Monroe Street
Suite 601
Tallahassee, FL 32301

R.L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, Maryland 21202-7110

Mr. William G. Walker, III
Vice President
Florida Power & Light Company
215 S. Monroe Street, Suite 810
Tallahassee, FL 32301-1859

Miami, FL 33131-2398

Attorney

EXHIBIT 4

2. Last Friday, on September 13, 2002, Commissioner Deason entered his order, Order No. PSC-02-1260-PCO-EI, denying FACT's motions and granting FPL's motions to compel by ordering that the "Florida Action Coalition Team shall make its founder, Ernie Bach, available for deposition immediately, and the Florida Action Coalition Team shall respond to FPL's other discovery within five days of the date of this order."

3. On September 16, 2002, FACT filed its "Fact's Motion for Protective Order to Full Commission Pending Resolution of Motion for Reconsideration" requesting that the full commission enter a protective order "finding that FACT does not have to answer Florida Power & Light Company's ("FPL's") First Set of Interrogatories, First Request for Production of Documents, or provide Ernie Bach for deposition by FPL pending the full commission's resolution of FACT's Motion for Reconsideration of Order No. PSC-02-1260-PCO-EI, which motion will be filed by September 23, 2002, pursuant to Rule 25-22.0376, Florida Administrative Code." FACT alleged in that motion that "[a]bsent such protection, FACT may be forced to disclose privileged information that will irreparably harm it." This motion has not yet been ruled upon by the full commission.

4. Commissioner Deason's September 13, 2002 Order contains precisely the same "notice of further proceedings or judicial review" language FPL failed to avail itself of in Commissioner Deason's order granting FACT party status, namely: "Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer. . . ." FACT will request that the full commission review Commissioner Deason's order and, pursuant to the cited rule, FACT has until Monday,

September 23, 2002 to prepare and file its motion for reconsideration. Pending the filing of its motion for reconsideration and the full commission's decision with respect to it, FACT should not be placed in the position of having to presently provide discovery, which the full commission, or a court, may ultimately find FPL is not entitled to receive. This is particularly important where the information sought is privileged lawyer-client communications or is otherwise protected and where its disclosure would result in irreparable harm to FACT that could not be cured by a reversal of Commissioner Deason's decision, either by the full commission or by a court.

5. While Commissioner Deason's September 13, 2002 order stated that FACT "shall make its founder, Ernie Bach, available for deposition immediately," that requirement is both legally and logically inconsistent with the statutory right of FACT to timely seek review of the order requiring it to provide such discovery, including participation at the deposition. Stated differently, FACT cannot avail itself of its legal right to seek review of the requirement to sit for the protested deposition, and other discovery, if it is compelled to provide the disputed discovery before it has an opportunity to seek the review it is entitled to. The discovery bell cannot later be unring if it is coerced prior to both the opportunity to seek review of the order requiring it and an opportunity for the review to be ruled upon.

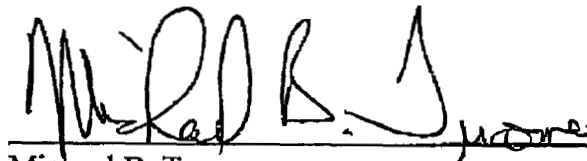
6. FPL's discovery should be strictly limited to the relevant issues surrounding "associational standing" and the substantive issues raised by FPL's petitions in these dockets and the intervenors' responses thereto. It is clear that FPL's pending discovery requests, including the deposition and the requested documents sought by the subpoena duces tecum exceed those limitations by requesting privileged information, including lawyer-client communications, which,

once disclosed, can never be "undiscovered" so as to regain the protections afforded by the privilege. FACT will suffer "irreparable harm" if it is forced to give the deposition before it has an opportunity to see the review it is entitled to. Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987).

7. Courts and the Commission have the authority and the duty to quash a subpoena duces tecum if the production is "unreasonable and oppressive." Rule 1.410(c), Florida Rules of Civil Procedure. Compelling FACT to provide the discovery required by Commissioner Deason's order prior to an opportunity for that order to be reviewed is both legally and factually unreasonable and oppressive to FACT, especially where time still remains for FACT's coming motion for reconsideration of the order in question to be reviewed by the full commission on October 1, 2002.

WHEREFORE, the Florida Action Coalition Team respectfully requests that the Florida Public Service Commission enter its order quashing the subpoena duces tecum compelling Ernie Bach to appear for a telephonic deposition at 1:30 p.m. today, Friday, September 20, 2002

Respectfully submitted,



Michael B. Twomey
Attorney for Florida Action Coalition Team
Post Office Box 5256
Tallahassee, Florida 32314-5256
Phone: 850-421-9530
FAX: 850-421-8543
miketwomey@talstar.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been transmitted electronically, by hand delivery* and/or by U.S. Mail this 20th day of September, 2002:

Martha Carter Brown, Esq.
Lawrence Harris, Esq.
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Mbrown@psc.state.fl.us

R. Wade Litchfield, Esq.
Jay Molyneaux, Esq.
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
Timothy J. Perry, Esq.
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Jmcglothlin@mac-law.com

Charles A. Guyton, Esq. *
Steel, Hector & Davis, LLP
215 South Monroe Street
Suite 601
Tallahassee, FL 32301

Jon C. Moyle, Jr., Esq.
Cathy M. Sellers, Esq.
Moyle Flanigan Katz Raymond &
Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
Jmoylejr@moylelaw.com

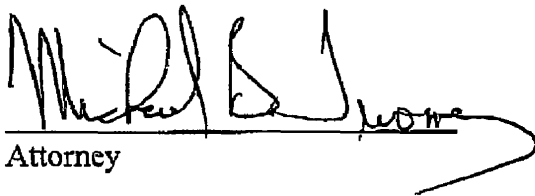
R.L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, Maryland 21202-7110

D. Bruce May, Jr., Esq.
Karen D. Walker, Esq.
Holland & Knight LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Dbmay@hklaw.com

Mr. William G. Walker, III
Vice President
Florida Power & Light Company
215 S. Monroe Street, Suite 810
Tallahassee, FL 32301-1859

John W. McWhirter
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602

John T. Butler, Esq.
Steel Hector & Davis, LLP
200 S. Biscayne Blvd., Suite 4000
Miami, FL 33131-2398


Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Docket No. 020262-EI)
 Petition to determine need for an electrical)
 power plant in Martin County by Florida)
 Power & Light Company.)
 and)
Docket No. 020263-EI)
 Petition to determine need for an electrical)
 power plant in Manatee County by Florida)
 Power & Light Company.)

Subpoena Duces Tecum

9/19/02 AT 1:55 P.M. &
 BY MICHAEL R. COMPTON
 CERTIFIED PROCESS SERVICE #099
 SECOND JUDICIAL CIRCUIT OF FLORIDA

THE STATE OF FLORIDA

TO: Mr. Ernest Bach, 700 Starkey Road, Largo, FL 33771
c/o Mr. Michael Twomey, 8903 Crawfordville Rd., Tallahassee, FL 32305-9160

YOU ARE COMMANDED to appear before the Florida Public Service Commission at Airport Business Center, 4500 140th Avenue North, Suite 101, Clearwater, FL 33762, via telephone at 1-800-857-2747, pass code 30859, on September 20, 2002, at 1:30 p.m., to testify in this action, and to have with you at that time the following: copies of documents concerning the organization, officers, and membership of the Florida Action Coalition Team ("FACT") and copies of documents concerning the decision by FACT members or representatives to intervene in FPL's Determination of Need proceedings. If you fail to appear, you may be held in contempt.

YOU ARE SUBPOENAED to appear by the following attorney(s) and, unless excused from this subpoena by these attorneys or the Commission, you shall respond to this subpoena as directed.

DATED on September 19, 2002.

Blanca S. Bayó, Director
 Division of the Commission Clerk and
 Administrative Services
 Florida Public Service Commission

By: Kay Flynn
 Kay Flynn, Chief
 Bureau of Records and Hearing Services

(SEAL)

Elizabeth G. Daley, Esq.
Steel Hector & Davis LLP
215 South Monroe Street, Suite 601
Tallahassee, FL 32301-1804
Attorney for Florida Power & Light Company

EXHIBIT 5

From: "Mike Twomey" <miketwomey@talstar.com>
To: "mike twomey" <miketwomey@talstar.com>, "Ernie Bach" <ernieb@gte.net>, "Martha Brown" <MBrown@PSC.STATE.FL.US>, "Charles Guyton" <Charles.Guyton@steelhector.com>, "Bruce May" <dbmay@hkllaw.com>, "Jon Moyle" <jmoylejr@moylelaw.com>, "Wade Litchfield" <wade_litchfield@fpl.com>, "Betsy Daley" <Betsy.Daley@steelhector.com>, "John McWhirter" <jmcwhirter@mac-law.com>, "Vickie Kaufman" <vkaufman@mac-law.com>, "John Butler" <John.Butler@steelhector.com>, "Joe McGlothlin" <jmcglotlin@mac-law.com>
Date: 9/20/02 8:59AM
Subject: No Bach at depo today or until after full commission ruling

Dear All,

Below is the text of my message to Charlie Guyton and Betsy Daley (copied to Martha Brown) of about 2:30 yesterday afternoon outlining FACT's intention with respect to the noticed deposition of Ernie Bach and other outstanding discovery requests. They responded by serving me with a subpoena duces tecum later in the day. (For those of you not aware of it, the commission has no contempt powers, so subpoenas threatening contempt are both incorrect legally and needlessly and deceptively threatening).

I'm going to file a motion to quash the subpoena and we have no intention of producing Ernie Bach at the appointed time and will not do so until Commissioner Deason's order denying our motion for protective order is ruled upon by the full commission.

Best,

Mike Twomey

Dear Betsy and Charlie,

I want to outline FACT's intentions with respect to the pending FPL discovery requests so that you can know what to expect and when. I'm taking the liberty of copying Martha so that she will know as well and so she can attempt to facilitate an early agenda placement for any outstanding matters requiring the full commission's consideration on October 1.

FACT currently has pending its September 16 motion for protective order to the full commission of Commissioner Deason's order. I expect to file as early as possible on Monday, September 23, FACT's motion for reconsideration to the full commission of Commissioner Deason's discovery order in which FACT will challenge the entire order.

Notwithstanding FACT's motion for protective order, I propose as early as possible tomorrow morning to hand deliver to you revised responses to your discovery requests, which responses

will provide answers about FACT's organizational structure, membership, officers, voting actions, and to a number of other questions you raised. In addition to the 14 persons we previously named as wanting FACT representation in these dockets, we will provide you with the names of another 53 FPL customers requesting FACT representation through their witnessed statements.

We do not intend to provide Ernie Bach for oral deposition prior to the full commission ruling on our coming motion for reconsideration. If we lose on the issue of having to provide him (hopefully Martha can get the issue on early on October 1), then we will provide him for deposition that afternoon. If the full commission rules in our favor, then we will not provide him at all.

I wanted to let you know our intentions so that you could best use your remaining time in preparing for the hearing.

Best regards,

Mike Twomey

From: "Mike Twomey" <miketwomey@talstar.com>
To: "Betsy Daley" <Betsy.Daley@steelhector.com>, "Charles Guyton" <Charles.Guyton@steelhector.com>
Date: 9/19/02 2:45PM
Subject: Tomorrow's deposition, additional discovery responses, etc.

Dear Betsy and Charlie,

I want to outline FACT's intentions with respect to the pending FPL discovery requests so that you can know what to expect and when. I'm taking the liberty of copying Martha so that she will know as well and so she can attempt to facilitate an early agenda placement for any outstanding matters requiring the full commission's consideration on October 1.

FACT currently has pending its September 16 motion for protective order to the full commission of Commissioner Deason's order. I expect to file as early as possible on Monday, September 23, FACT's motion for reconsideration to the full commission of Commissioner Deason's discovery order in which FACT will challenge the entire order.

Notwithstanding FACT's motion for protective order, I propose as early as possible tomorrow morning to hand deliver to you revised responses to your discovery requests, which responses will provide answers about FACT's organizational structure, membership, officers, voting actions, and to a number of other questions you raised. In addition to the 14 persons we previously named as wanting FACT representation in these dockets, we will provide you with the names of another 53 FPL customers requesting FACT representation through their witnessed statements.

We do not intend to provide Ernie Bach for oral deposition prior to the full commission ruling on our coming motion for reconsideration. If we lose on the issue of having to provide him (hopefully Martha can get the issue on early on October 1), then we will provide him for deposition that afternoon. If the full commission rules in our favor, then we will not provide him at all.

I wanted to let you know our intentions so that you could best use your remaining time in preparing for the hearing.

Best regards,

Mike Twomey

CC: "Martha Brown" <MBrown@PSC.STATE.FL.US>

From: "Mike Twomey" <miketwomey@talstar.com>
Date: 9/16/02 4:27PM
Subject: Re: FACT deposition

Betsy,

Sorry I am slow in getting back to you today.

FACT wants to go to the full commission for reconsideration of Deason's order before sitting for a deposition that will clearly involve questions regarding lawyer-client privileged matters. Consequently, we are seeking a protective order from the full commission, which I just sent you by separate message, and will be filing our motion for consideration within the time limits allowed by Deason's order. We will attempt to voluntarily answer as many of the other discovery requests as we can that do not clearly involve privileged matters, but we plan to seek reconsideration of Deason's entire order. Consequently, we must decline to make Ernie Bach available this Friday, which date was clearly conditioned on a final resolution of the discovery disputes, which we are not at yet.

Best,

Mike Twomey

Betsy Daley wrote:

> Mike, FPL expects Mr. Bach to comply with the prehearing officer's
> order that Mr. Bach be available for deposition. See Order Granting
> FPL's Motions to Compel Discovery and Denying FACT's Motion for
> Protective Order (Sept. 13, 2002), at page 4 ("FACT shall make its
> founder, Ernie Bach, available for deposition on this [standing]
> subject.") We will notice the deposition and plan to take Mr. Bach's
> deposition by telephone on Sept. 20 at 1:30 p.m. in Clearwater, which
> is the time and place you offered in your email of 9/12. Best
> regards, Betsy Elizabeth C. Daley
> Steel Hector & Davis LLP
> edaley@steelhector.com
> 215 S. Monroe St., Suite 601
> Tallahassee, Florida 32301-1804
> 850.222-2300 - tel
> 850.222.8410 - fax
> 850.212.0562 - cell
> www.steelhector.com
>
> >>> "Mike Twomey" <miketwomey@talstar.com> 09/12/02 03:35PM >>>
> Betsy, FACT takes the position that the bulk of the discovery FPL seeks
> is not relevant and that, in any case, FPL waived its right to
> presently pursue the associational standing issue by failing to seek
> reconsideration or review of Commissioner Deason's order granting FACT
> party status. FACT does not intend to follow that same road and
> intends to fully take advantage of its Ch. 120 review rights,
> including any presented by Commissioner Deason's pending discovery
> orders. Likewise, FACT does not propose irreversibly to let the tooth
> paste out of the tube in a discovery sense by sitting for a deposition

> if FACT might later be proved correct that FPL was never entitled to
> the discovery or is precluded from having it now.
>
> FACT will comply with a discovery order that is "final" in the sense
> that there are no pending statutory or rule interlocutory review
> options remaining to it. To that end FACT will appropriately seek a
> stay if it determines that its previous motions and Commissioner
> Deason's ultimate order do not presently provide a stay pending review
> of any adverse requirements imposed on FACT by the order. We do not
> plan to present Ernie Bach for the deposition tomorrow.
>
> To the extent that FACT's interlocutory review options are somehow
> considered and somehow concluded by the end of next week, Ernie Bach
> advises me that he will be available for a telephone deposition at the
> same location you had previously scheduled on the afternoon (after
> 1:30 p.m.) of Friday, September 20, 2002. Again, such a time would be
> acceptable, but ONLY IF FACT's remaining review options had been
> considered and FACT were ordered to produce Mr. Bach. Additionally,
> Ernie Bach has directed me not to accept service on his behalf in
> connection with setting any additional deposition dates.
>
> Best,
>
> Mike Twomey
>
> Betsy Daley wrote:
>
>> Mike, FPL would not consider Commissioner Deason's order to be an
>> automatic stay, but rather an order with which the parties must
>> comply - whether or not any party intends to appeal. Martha
>> indicated to me that Deason would likely sign one or the other order
>> tomorrow (9/13). If such order is in FPL's favor, we would expect
>> and request that you comply with the order by making Bach available
>> tomorrow by phone. We also request that you give us, as soon as
>> possible, an available date for you and Bach for next week - to
>> tentatively calendar in case FPL receives a favorable order later
>> than 9/13. We also would like to know whether you would accept
>> service for Bach in order to prevent our having to subpoena him.
>> Best regards, Betsy Elizabeth C. Daley
>> Steel Hector & Davis LLP
>> edaley@steelhector.com
>> 215 S. Monroe St., Suite 601
>> Tallahassee, Florida 32301-1804
>> 850.222-2300 - tel
>> 850.222.8410 - fax
>> 850.212.0562 - cell
>> www.steelhector.com
>>
>>>> "Mike Twomey" <miketwomey@talstar.com> 09/12/02 12:15PM >>>>
>>
>> Betsy,
>>
>> I had received a call from Martha Brown late yesterday indicating
>> that
>> she thought Commissioner Deason would soon sign an order on
>> discovery

>> granting FACT's motion for protective order and denying FPL's
>> motions to
>> compel. I just now (11:45 a.m.) received another call from Martha
>> indicating that she was drafting yet another order for Deason's
>> consideration reflecting the opposite outcome, so that he would have
>>
>> both views to consider before deciding. She wasn't clear on when
>> either
>> such order would become available.
>>
>> I don't know what this portends, although this latest message does
>> not
>> sound as optimistic for FACT prevailing. However, until I get a
>> definitive order stating that FACT's motion for protective order is
>> denied and describing the scope of discovery that must be given, it
>> is
>> my intention to not allow the discovery, including presenting Ernie
>> Bach
>> for his deposition tomorrow. We had agreed to the scheduling of
>> tomorrow's deposition with the expectation that we would have more
>> rapidly had a ruling on our respective motions, which, in turn,
>> would
>> have allowed time to seek reconsideration of an order adverse to
>> FACT to
>> the full commission or to otherwise seek the appellate review.
>> Until we
>> have a definitive order, I consider that the FACT motion for
>> protective
>> order serves as an automatic stay on the discovery being sought.
>> Furthermore, FACT intends to avail itself of the review
>> opportunities
>> afforded by Commissioner Deason's order if that order is adverse to
>> FACT. FACT considers that such review of a discovery order will be
>> meaningless if the objected to discovery is had while the review is
>> pending. Accordingly, FACT intends to maintain the status quo
>> pending
>> the receipt of Commissioner Deason's order and a review of it by the
>>
>> full commission if the order is adverse to FACT.
>>
>> So, we will not make Ernie Bach available tomorrow without an order
>> requiring the same, and we will not make him available even in the
>> face
>> of such an order if the order is viewed as being sufficiently
>> prejudicial to FACT without first taking advantage of any review
>> offered
>> by the order.
>>
>> Best,
>>
>> Mike Twomey
>>
>>
>>
>>
>>
>

CC: "Betsy Daley" <Betsy.Daley@steelhector.com>, "Charles Guyton" <Charles.Guyton@steelhector.com>, "mike twomey" <miketwomey@talstar.com>

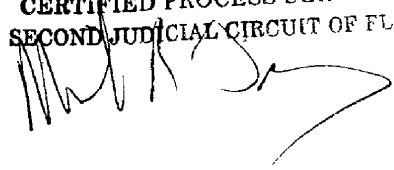
EXHIBIT 6

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Docket No. 020262-EI)
Petition to determine need for an electrical)
power plant in Martin County by Florida)
Power & Light Company.)
and)
Docket No. 020263-EI)
Petition to determine need for an electrical)
power plant in Manatee County by Florida)
Power & Light Company.)
_____)

Subpoena Duces Tecum

RCVD. 9/19/02 AT 1:55p.m.
SRVD. 9/19/02 AT 5:30p.m.
MICHAEL R. COYNE
CERTIFIED PROCESS SERVICE
SECOND JUDICIAL CIRCUIT OF FLORIDA



THE STATE OF FLORIDA

TO: Mr. Ernest Bach, 700 Starkey Road, Largo, FL 33771
c/o Mr. Michael Twomey, 8903 Crawfordville Rd., Tallahassee, FL 32305-9160

YOU ARE COMMANDED to appear before the Florida Public Service Commission at Airport Business Center, 4500 140th Avenue North, Suite 101, Clearwater, FL 33762, via telephone at 1-800-857-2747, pass code 30859, on September 20, 2002, at 1:30 p.m., to testify in this action, and to have with you at that time the following: copies of documents concerning the organization, officers, and membership of the Florida Action Coalition Team ("FACT") and copies of documents concerning the decision by FACT members or representatives to intervene in FPL's Determination of Need proceedings. If you fail to appear, you may be held in contempt.

YOU ARE SUBPOENAED to appear by the following attorney(s) and, unless excused from this subpoena by these attorneys or the Commission, you shall respond to this subpoena as directed.

DATED on September 19, 2002.

Blanca S. Bayó, Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing Services

(SEAL)

Elizabeth C. Daley, Esq.
Steel Hector & Davis LLP
215 South Monroe Street, Suite 601
Tallahassee, FL 32301-1804
Attorney for Florida Power & Light Company

AFFIDAVIT OF SERVICE

THE FLORIDA PUBLIC SERVICE COMMISSIONER - Subpoena Duces Tecum

Case Number: 020262-EI

IN RE: DOCKET NO. 02:

Petition to determine need for an electrical power plant in Martin County by Florida Power & Light Company.

vs

DOCKET NO. 020263-EI:

Petition to determine need for an electrical power plant in Manatee County by Florida Power & Light Company.

For:

Elizabeth Daley
Steel Hector & Davis, L L P.
215 South Monroe Street
Suite 601
Tallahassee, FL 32301-1804

Received by Process Service of America LLC on the 19th day of September, 2002 at 1:55 pm to be served on **MR. ERNEST BACH, c/o Mr. Michael Twomey, 8903 Crawfordville Road, Tallahassee, FL 32305-9160**

I, Michael R. Compton, being duly sworn, depose and say that on the **19th day of September, 2002 at 5:30 pm, I:**

Individually Served the within named person with a true copy of this **THE FLORIDA PUBLIC SERVICE COMMISSIONER - Subpoena Duces Tecum** with the date and hour endorsed thereon by me, pursuant to State Statutes.

Additional Information pertaining to this Service:

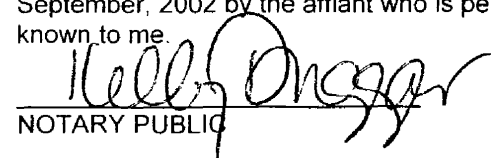
SERVED MR. MICHAEL TWOMEY, HIS TELEPHONE # (850) 421-9530
HAD MR. TWOMEY SIGN FOR THE SUBPOENA DUCES TECUM, SEE SIGNATURE BELOW STAMP.

I certify that I am over the age of 18, have no interest in the above action, and am a Certified Process Server, in good standing, in the Second Judicial Circuit in which the process was served.



Michael R. Compton
Certified Process Server #099

Subscribed and Sworn to before me on the 20th day of September, 2002 by the affiant who is personally known to me.



NOTARY PUBLIC

Process Service of America LLC
P.O. Box 5848
Tallahassee, FL 32314-5848
(850) 877-9809

Our Job Serial Number: 2002006284



Kelly Duggar
MY COMMISSION # DD045667 EXPIRES
July 29, 2005

BONDED THRU TROY FAIR INSURANCE, INC.

Copyright © 1992-2001 Database Services, Inc. - Process Server's Toolbox V5.5f

EXHIBIT 7

VERIFIED RETURN OF SERVICE

STATE OF FLORIDA

COUNTY OF

BEFORE THE FLORIDA PUBLIC
SERVICE COMMISSION

Case Name: In Re: Docket No. 020262-EI and Docket No. 020263-EI

Case No.

Type of Process: Witness Subpoena Duces Tecum for Hearing

Firm: STEEL, HECTOR & DAVIS, LLP
215 S. Monroe St., #601
Tallahassee, FL 32301-1804

Attorney: Elizabeth C. Daley, Esq.

Received this process on Thursday, September 19, 2002 at 12:30 p.m. to be served upon:
Ernest Bach at 700 Starkey Rd., Unit 365, Largo, FL 33771.

I, S. Blank, state the following:

That service was perfected at 7:15 p.m. on Thursday, September 19, 2002, in Pinellas County, Florida by:

SUBSTITUTE TO RESIDENT pursuant to Florida Statute Section 48.031(1)(a) by leaving a copy with an individual identifying himself as GEORGE.

NOTE: I fully believe the individual identifying himself as "George" was Ernest Bach. Description: approximately 65 years old, gray hair, full gray beard, glasses, about 5'8" or 5'9". He said Mr. Bach was in Port Richey visiting his sick father and would be back on Saturday. However, Mr. Bach's 2000 red Pontiac bearing license plate ERNIEB was present.

Signed on September 19, 2002.



S. Blank, Appt. No. #APS36366

Innovative Process Service & Investigations

Post Office Box 17177

Clearwater FL 33762-0177

(727) 523-9611

I ACKNOWLEDGE that I have no interest in the above action, am of legal age, and have proper authority in the jurisdiction in which this service was made, and that I have no interest in the above action pursuant to F.S. 92.525(2). "Under penalty of perjury, I declare that I have read the foregoing Verified Return of Service and that the facts stated therein are true."

EXHIBIT 8

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination
of Need for proposed Electrical
Power Plant in Martin County of
Florida Power and Light Company

DOCKET NO. 020262-EI

In re: Petition for Determination
of Need for Proposed Electrical
Power Plant in Manatee County of
Florida Power and Light Company

DOCKET NO. 020263-EI

CERTIFICATE OF NONAPPEARANCE

I, Susan M. Valsecchi, Registered Professional
Reporter, do hereby certify that on the 20th day of
September, 2002, I appeared at 4500 140th Avenue North,
Suite 101, Clearwater, Florida for the deposition of Ernie
Bach scheduled to begin at 1:30 p.m., and that said witness
failed to appear by 2:05 p.m.

IN WITNESS WHEREOF, I have hereunto subscribed
my name, this, the 23rd day of September, 2002, in the City
of Clearwater, County of Pinellas, State of Florida.



Susan M. Valsecchi
Commission # DD 046263
Expires Sep. 10, 2005
Bonded Thru
Atlantic Bonding Co., Inc.

Susan M. Valsecchi, RPR
Notary Public, State of Florida
My Commission Expires 9/10/05