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William J. Tait, Jr., Esquire  
Florida Bar Number 0125081  
1061 Windwood Way  
Tallahassee, Florida 32311  
(850) 878-0500

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November 7, 2005


Ms. Blanca S. Bayo, Director  
Division of Commission Clerk and  
Administrative Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0870

Re: Consolidated Dockets Nos. 04-0660-EG and 04-0029-EG


Dear Ms. Bayo:

Enclosed for filing on behalf of Calcs Plus and its principals and individually, Jon Klongerbo and Dennis Stroer, are an original and fifteen (13) copies of Petitioner's Post Hearing Brief.

Sincerely,

  
/s/William J. Tait, Jr.  
William J. Tait, Jr.  
Florida Bar No. 0125081

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing COMPLIANCE DATA SERVICES, INC. ("Calcs-Plus") pre-filed testimony was served by electronic mail (\*) and U.S. Mail this 12<sup>th</sup> day of August, 2005, to Florida Power & Light Company with a courtesy copy to the Office of General Counsel at the Florida Public Service Commission as follows:

Martha Carter Brown\*  
Adrienne Vining\*  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

R. Wade Litchfield, Esquire  
Natalie F. Smith, Esquire\*  
Florida Power & Light Company  
700 Universe Boulevard  
Juno Beach, Florida 33408

  
William J. Tait, Jr.  
William J. Tait, Jr.

**BEFORE THE PUBLIC SERVICE COMMISSION**

**In re: Petition for approval of  
modifications to BuildSmart®  
Program by Florida Power & Light  
Company.**

**DOCKET NO. 040660-EG**

**In re: Petition for approval of  
numeric conservation goals by  
Florida Power & Light Company.**

**DOCKET NO. 040029-EG  
DATED: November 7, 2005**

**COMPLIANCE DATA SERVICES, INC. (“Calcs-Plus”) POST-HEARING  
BRIEF**

**STATEMENT OF THE CASE**

This case began with a protest of Florida Power and Light Company’s (“FPL”) BuildSmart® program, as proposed to be modified, on November 14, 2004, by Calcs-Plus, Inc., a Florida Small Business Corporation, and its principals, Dennis Stroer and Jon Klongerbo, (“Petitioners”), engaged in the business of providing energy efficiency services to builders in territory served by FPL. An earlier protest by the National Energy Raters Association, led by the same two principals, among others, was initiated in 2002 against FPL, Florida Power Corporation and any other Florida utility engaged in the practice, for alleged violation of Rule 25-17.003(4)(a), F.A.C. The Commission dismissed the earlier protest because it determined the protesting parties lacked standing.

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Initially, the instant protest was based on allegations that FPL's program, as proposed to be modified and implemented, would unfairly interfere with the Petitioners' business of providing energy efficiency services. FPL continues to offer the same, or similar, services as certified raters to builders in their territory and proposes to make such services available at no cost to the builder in violation of the Commission's rules requiring payment of the actual cost of providing such services by the recipient of the services. Moreover, the proposed modifications will further undermine the Petitioners' ability to market and provide their services. The costs incurred by FPL in providing its "free" services will be borne by FPL's residential ratepayers through a surcharge.

The protest was later amended to include allegations that FPL proposed modified program will unduly benefit both FPL and select program participants to the detriment of competing energy service businesses and its ratepayers. In addition, the ratepayers will be forced to pay not only all of FPL's direct program expenses, but also the costs for a program that fails to follow state law, Commission rules and policies and that does not meet FPL's own technical specifications and performance commitments.

It should also be recognized that utility programs in new residential construction under FEECA have traditionally been of special concern to the Commission since the almost simultaneous enactment of FEECA and the Florida

Energy Efficiency Building Code in the mid-1980s. Initially, the Commission adopted the policy of establishing no goals and allowing no cost recovery for residential new construction. This was modified in the mid-1990s, just after the enactment of the Florida Energy Efficiency Rating Act in 1993, at the urging of the Florida Energy Office, the Office of Building Codes and Standards, and various utilities and environmental/energy efficiency advocacy groups. All groups agreed that the public and utilities would benefit from programs that exceeded the minimum efficiency of the state-mandated energy code by significant margins and that encouraged wider use of effective building energy efficiency technologies and “best practices” in the competitive marketplace

### **STANDARDS OF REVIEW AND THEIR BASES**

I. The following criteria are used by the Commission in evaluating conservation programs for approval under FEECA:

- Whether the program advances the policy objectives of Rule 25-17.001, F.A.C., and Sections 366.80 through 366.85, FS, also known as the “Florida Energy Efficiency and Conservation Act” (“FEECA”) and whether the program complies generally with the requirements of Chapter 366, F.S., Rule 25-17, F.A.C., and applicable Commission rules and policies.
- Whether the program yields measurable results. Specifically, the Petitioners believe that the program, as designed, should set reasonable performance

objectives and meet nationally accepted standards – that is, it should have measurable results, comparable in both achieved energy savings and cost effectiveness with other programs throughout the state and the nation.

- Whether the program can be directly monitored. Specifically, the Petitioners believe that the program, as designed and implemented, should be subject to uniform, transparent, quality control standards and procedures and that the reported energy savings and demand reductions are accurate, reliable and comparable. Petitioners further believe that the Commission and FPL should avail themselves of the cost-effective quality control and monitoring procedures provided by the state through its statewide uniform system for rating the energy efficiency of buildings as provided by the Florida Building Energy Efficiency Rating Act of 1993 (§ 553.990, F.S. et seq. and Rule 9B-60, F.A.C.), where results are required to be stored in a centralized statewide database and can be monitored in a way that protects the confidentiality of individual homeowners.
- Whether the program is cost-effective. Specifically, the Petitioners believe that the program costs should be reasonable and prudent such that the proposed program design maximizes the use of other reasonably available resources, both within and outside FPL, so as to minimize financial burdens on ratepayers for cost recovery.

II. The Petitioners also believe that the Commission should apply the same standards to these demand side management (“DSM”) programs that are applied in evaluating reasonable and prudent costs in their least cost planning approach. The Commission should apply the same methodology, where appropriate, required for evaluation of new generation and alternatives to new generation; it should require that utilities report program costs to the Commission in terms of cost/kW peak demand avoided and cost/kWh saved; and it should compare program results with programs that have similar targets and performance objectives. Petitioners further believe that the Commission should compare proposed program results with programs offered by other utilities in Florida and throughout the United States as to performance, capacity for monitoring and cost to ratepayers.

### **SUMMARY OF FINDINGS OF FACT**

This case becomes relatively simple when the facts are reviewed. Basically, FPL proposes to provide itself (FPL) and participating builders significant benefits while placing the cost on others--its Florida ratepayers and competing private-sector energy service providers. As demonstrated by past behavior in implementing its BuildSmart® program, FPL proposed modified program permit it to avoid public scrutiny and to fail to deliver the promised energy savings its program advertises.

FPL has further created a barrier to more cost effective methods of attaining energy efficiency in new residential dwellings, which would require little or no cost to the ratepayer, by its misleading and deceptive practices and its avoidance of charging and collecting its tariff-based fees. This should be of particular concern to the Commission since FPL's proposed modified program not only ratifies its prior actions but also challenges the Commission's Core Mission, which states:

*“Customers are served best by markets that facilitate the efficient provision of safe and reliable utility services at fair prices. The mission of the Florida Public Service Commission is to promote the development of competitive markets - as directed by state and federal law - by removing regulatory barriers to competition, and by emphasizing incentive-based approaches, where feasible, to regulate areas that remain subject to rate of return regulation. Once markets become sufficiently competitive, the Florida Public Service Commission will eliminate regulatory involvement to the extent permitted by law. [emphasis supplied]*

FPL has claimed program credit for energy efficiency and related demand reduction from “tight ducts” that actually fail to meet approved and accepted State and National testing standards. This failure and FPL's false claims of tight duct systems has prevented substitute energy efficiency measures from being implemented in order to reach the minimum BuildSmart® efficiency levels required by their program.

FPL has further steadfastly avoided the use of the Florida's uniform procedures for rating the efficiency of homes, even though the use of these procedures is statutorily required to determine the relative energy efficiency of



Florida buildings and are also widely used by national programs to qualify homes for “beyond code” energy efficiency programs such as EPA’s ENERGY STAR<sup>®</sup> Homes program.

FPL has failed to meet the Commission-approved energy savings objectives for its BuildSmart<sup>®</sup> program by negligently employing a duct leakage testing methodology that fails to meet the adopted Florida Building Code standard and the national and international standards contained in ANSI/ASHRAE Standard 152-2004, “Method of tests for determining the design and seasonal efficiencies of residential thermal distributions systems.”

Despite receiving a clear determination in July 2002 from the state regulatory body regarding the appropriate test for duct tightness, FPL has chosen not to provide its participating builders the correct test. It hasn’t assisted builders with code compliance preparation and has further chosen not to provide builders with confirmed ratings. Both these highly valued activities would have imposed little, if any, additional expenditures. [Transcript, pages 13-14]

These FPL decisions to avoid existing state regulatory procedures raises serious concerns about the validity and accuracy of their program monitoring systems and provides no assurance to the Commission, program participants and ratepayers that their program was adequately monitored, received appropriate

quality control and provided reliable, accurate information on the energy efficiency and demand reduction reported.

By steadfastly avoiding public, state-regulated building energy rating and quality control procedures in the vast majority of cases and, in the small number of cases where they have been used, by providing such services at no charge (in violation of State regulation), FPL has:

- 1) Unjustly assured itself significant additional residential revenues for increased energy use in BuildSmart® homes,
- 2) Misled the Commission and the public as to the kW demand and kWh energy use savings actually achieved by their BuildSmart® program,
- 3) Given participating builders and homeowners (buyers) a false sense of financial security and environmental stewardship regarding the energy efficiency of their BuildSmart® homes,
- 4) Stifled the competitive market for state-regulated building energy performance rating services,
- 5) Charged the costs of eliminating competitors in the private marketplace and of implementing its substandard programs to its ratepayers, and
- 6) Simultaneously prevented the Commission and the public from scrutinizing their deceptive practices.

Specifically, Petitioners ask that the Commission find that FPL:

1. **Failed to collect tariff-based fees where owed and treated certain customers differently from others.** FPL admitted that it failed to charge and collect its tariff fee from customers that received 389 confirmed ratings [Exhibit 23]. FPL further reported program revenue collections far short of the amount that would have been collected if it had actually charged its minimum fee for years 2002, 2003 and 2004 [Exhibit 9]. The failure to impose these fees, estimated between \$200,000 and \$250,000, provided significant benefits to certain participants while penalizing ratepayers and the participants that paid fees.

2. **Failed to correct past program failures to meet FPL stated, and Commission approved, standards for performance [Exhibit 20].** Specifically, the Petitioners have shown, in a specific, statistically significant sample, that 95.49% of FPL's certified BuildSmart® homes failed FPL's technical standards for ducts and overall efficiency and that 82.71% failed to meet even FPL's minimum program standard for BuildSmart® homes (10% more efficient than the Florida Code) [Exhibit 20]. Although touted to achieve homes 30% more efficient than code, **no home in the sample** was more than 11% more efficient than the Florida Code! In fact, rather than correcting this failure, the modified program merely removes the 30% "gold" medallion standard and institutes a "prescriptive program" with only a 10% more efficient standard that can be met by simply incorrectly applying the "tight duct" credit. FPL estimates that over 80% of its

program participants will be served through this “prescriptive program” [Exhibit 17]. Considering FPL’s previous conduct of this program, what assurance does the Commission and FPL’s ratepayers have that these “prescriptive” standards will be met in the future without independent confirmation of the actual energy savings achieved? Why should FPL be held to lower performance standards for its “prescriptive program” than for its “flexible program” and why should FPL be held to lower quality control standards than those used under the national program for energy efficiency in new homes—the U.S. DOE/EPA ENERGY STAR<sup>®</sup> Homes program [Exhibits 9 and 17]?

3. **Failed to provide its promised average energy savings to the homeowner (buyer).** One consequence of its past failures is a 65% average reduction in energy savings for the homeowner. This means that, instead of saving a touted average of \$250 per home annually, the homeowner only saves \$87.50 annually or almost \$2,500 less over the FPL projected 15-year life of the efficiency measures involved. Another consequence is that FPL was able to sell 65% more kilowatt hours and generate substantial additional revenue for itself. The impact on its system benefits of lower maintenance and operating costs through shifting of its demand from its peak load remains positive but undetermined [Exhibit 20].

4. **Used a credit for tight ducts improperly to gain significant energy “savings” that were not there.** One of the major reasons for their catastrophic

failure rate was the fact that they initially “checked off” the leak free duct credit in their initial plan review and failed to test for it in their final certification. This resulted immediately in an approximate 10% savings, enough to qualify for their Bronze level of certification without incorporating any other energy efficiency measures! In fact, when fully evaluated, a number of homes in the evaluated BuildSmart® sample [Exhibit 8] did not attain minimum Florida energy code compliance! To obtain this leak free duct credit in the Florida building Code, a certified State energy rater must validate the results using the State’s recognized duct testing procedure and sign and file an official State document with the Building Department. FPL internally recorded and used the unverified and incorrect duct leakage results to qualify BuildSmart® homes for their program and promoted their program based on false premises and without verification and scrutiny from State officials. It is important to note that FPL’s procedure is not sufficient to qualify these homes for the Florida energy Code’s duct leakage credit. They were told in mid-2002 (prior to any home in the tested sample being built) that their test for duct leakage failed to meet proposed state Code standards for measuring total duct system leakage. These same duct testing standards were adopted and implemented nationally in 2004. Even though it was insufficient to meet Florida code requirements, this key performance component was claimed in

6,266 (77.87%) of the 8,047 certification inspections they have reported to have done in the past five and half years (2000 and mid-2005) [Exhibit 9].

5. **Failed to abide by regulated state standards for the provision of a “uniform system of measuring the efficiency of [residential] buildings” in all but 389 of the 8,047 (4.83%) BuildSmart® homes certified in the past five and half years.** This has lead to misleading and inaccurate information regarding energy efficiency in the residential marketplace and has significantly weakened the market for energy efficiency services. [Exhibit 9] Clearly, FPL could have chosen to assist its BuildSmart® participants by providing code compliance forms and confirmed ratings at virtually no additional cost to itself. This would have provided significant monitoring and quality control support and assurance that their program met state regulatory standards. Instead, it chose to discontinue providing code compliance support after receiving a determination in mid-2002 that its duct testing methodology would not meet state standards. It also chose not to provide the builder, and ultimate consumer-the homebuyer, the additional information and assurance provided by a confirmed energy rating in accordance with Florida regulations.

6. **Failed to properly inform customers and trade allies of true and accurate facts about the energy efficiency, or lack thereof, of residential units for which FPL held itself out to be a qualified, independent expert.** In spite of

the existence of a state-regulated procedure for determining and verifying the energy efficiency of homes in accordance with uniform, statewide standards, FPL chose to use only its own procedures for determining and verifying the energy efficiency of the homes in its BuildSmart® program. This implied to consumers and builders that FPL's methods were at least as good as the procedures adopted by state law and regulation. In fact, FPL's procedures were insufficient to meet even Florida's minimum Code standards for duct leakage credit qualification, much less to comply with the state's requirement that only the state's uniform system for rating the energy efficiency of buildings may be used for such purposes in Florida.

7. **Failed to follow proper quality control procedures and to adequately provide for monitoring of results.** Florida's energy rating regulations and standards specify that the results of building energy ratings be registered and stored in a database. As part of these regulated procedures, independent quality control checks are performed on the building files for each home that is submitted for registration [Exhibit 22 pages 101-103]. The cost of this independent verification, quality assurance and database storage service is only \$15 (increased to \$25 since Oct 01, 2005) per home, yet FPL chose not to avail itself of it for their BuildSmart® program. One must wonder why? Considering the fact that the BuildSmart® program design called for each home to be evaluated to determine

that it had achieved program goals, it is a simple matter of pressing a few key strokes on the computer to create an energy rating (something which a large number of FPL staff are certified to perform). One must also wonder why they did not do this? The facts lead inexorably to the conclusion that FPL is in the business of selling electricity and derives its profits from that service to a captive group of consumers. Energy efficiency resulting in lower energy usage will cut into its profit structure. The potential for abuse is tremendous and requires monitoring systems that can be transparent to the ratepayer and the regulator alike.

**8. Misstated measured results and misreported demand and energy savings to the Commission and the public.** As stated in the proposed findings under 2. and 3. above, FPL failed to achieve its stated goals for energy savings by 65% in a specific, statistically significant sample [Exhibit 20]. Interpolating the results from this sample to the reported savings for FPL's most recent five year period (2000-2004) would reduce the kWh energy savings reported of over 28 million to less than 10 million [Exhibit 2 at page 952]. In fact, FPL's reported penetration rate for the program of 15.82% by the end of 2004 grossly overstates the actual annual penetration rate that averages 3.18% over the period [Exhibit 2 at page 949].

**9. Overcharged ratepayers for its non-performing program.** The facts speak for themselves. Although we are sure that FPL can prove it spent the money



it received on the program, the program itself failed to meet the standards, approved by the Commission, by which FPL committed to abide and failed to provide the benefits projected in their various cost-benefit tests used to gain program approval.

10. **Stymied development of the statewide uniform system of measuring energy efficiency of residential buildings by instituting a “free” service, subsidized by its ratepayers, in what had been a competitive marketplace for such services.** Not only did FPL stymie the development of a competitive marketplace that the Legislature deemed necessary to “provide market rewards for energy-efficient buildings and to those persons or companies designing, building, or selling energy-efficient buildings” [Section 553.991, Florida Statutes]; but FPL compounded the problem by introducing inaccurate and misleading information into the marketplace. This was very problem that the Legislature intended to address in by enacting a law requiring a “statewide uniform building energy efficiency rating system. The legislature desired to assure the consumer that the information provided in the energy marketplace would be accurate, verifiable and, most of all, uniform and understandable. In addition, FPL’s provision of these services at no charge to the customer is in specific violation of Rule 25-17.003(4)(a), F.A.C., which requires that customers of these services be charged in accordance with tariffs filed by the utilities. Corporation De Gestion Ste-Foy, Inc.

v. Florida Power and Light Company, 385 So.2d 124 (Fla.App. 3<sup>rd</sup> DCA 1980); Brandon v. Lichty, 182 So. 897 (Fla. 1938). This constitutes a blatant violation of regulation that can only be interpreted as an attempt to deny private, for-profit firms entrée into the building energy rating marketplace.

11. **Provided participating builders with a false sense of security and an invalid measure of energy efficiency in their new home construction.** As stated elsewhere in this brief, both participating builders and their ultimate consumers, their homebuyers, gained a false sense of security that their home was energy efficient and would save significant energy expenditures. FPL often failed to even provide them the details as to the certification that a home was BuildSmart® and what level of energy efficiency their home had as compared to a standard minimum “Code” home. Even if they had, the information provided in 95% of the homes was not verified or confirmed by the state’s building energy rating system provider. The fact that FPL claimed duct leakage credit for the vast majority of the homes enrolled in their program, while such credit would not have been allowed under Code procedures, misled both builders and homeowners and resulted in homes that did not take advantage of alternative energy savings features to meet FPL goals. This deceptive practice has been shown to have often resulted in little or no energy savings compared to Florida’s minimum Code standards. [Exhibit 20]

**12. Charged ratepayers for their exorbitant costs to advertise its energy efficiency program, provide the public a false sense of its expertise and to improve its overall image in the Residential Conservation Services Program.**

FPL has liberally used ratepayer funds for mass media advertising for self promotion including but not limited to electronic media, sponsorships of non-energy efficient related entities of questionable value, trade show advertisements and promotions, with far-removed impacts on energy efficiency. FPL further does not disclose that these activities are ratepayer funded and are not to be a function of FPL good will.

**13. Failed to provide verifiable performance measures for its Residential Conservation Services program or to provide effective monitoring in that program.** Although the program is deemed “exempt” from cost-effectiveness test requirements, the Commission should still insist on verifiable performance measures and effective monitoring of FPL’s program. Moreover, a program that costs in excess of \$12 million annually should not remain exempt from Commission scrutiny and should be required to meet Commission standard criteria for FEECA cost recovery programs although the Commission may desire to exempt it from the Commission’s requirement to pass the RIM test.

## SPECIFIC ISSUE ANALYSIS

### **ISSUE 1: Is the BuildSmart® program cost-effective?**

*No. The modified BuildSmart® program does not meet the Commission's standards for cost-effectiveness. FPL has failed to accurately account for its costs and benefits and further it has specifically:*

- 1. failed to establish that its costs are prudent and reasonable;*
- 2. failed to establish that its projected benefits are real and reasonably projected;*
- 3. placed unreasonable and/or undue burdens on the ratepayer and competing businesses; and*
- 4. given itself (FPL) and selected others unreasonable and/or undue benefits to the detriment of its ratepayers and competing service providers.*

FPL failed to establish that its costs are prudent and reasonable and that its projected benefits are real and reasonably calculated to be achieved.

FPL provided no detailed testimony supporting its estimated energy savings or demand reductions either at a unit level or for the program as a whole. When questioned, their witnesses merely stated that they received the figures from some undocumented "program source" and did not question, nor ask for verification, of the figures used [Transcript-Page 154, Lines 10-23]; [cite also Haywood-both deposition (exhibit 13) and hearing testimony] . In actuality, Petitioners demonstrated that FPL's projected energy savings could be 65% less than estimated and that their peak demand reduction (load shifting) was equally suspect. [Exhibit 20]

In spite of Petitioner's showing [Exhibit 9; Transcript pages 240-242] that the same or better program results could be obtained by using less ratepayer money

and more participant fees, FPL continued to ignore alternative program options and continued to focus on its deliberate design to maximize ratepayer cost recovery and minimize participant costs, especially for its target audience for its new “prescriptive program approach”—the production builder. It reduced its energy savings rate for that program to a minimum requirement of 10% and estimated that 80% of the participants in its program would select this new approach [Exhibit 16]. In fact, FPL has long been marketing towards this major (production) builder client as shown by the increasing percentage of major builder participation in their program since 2003—where the most recent rate of actual participation (2005 to July) was 88% [Exhibit 17]. The trend shows a significant decline in the number of builders participating and a significant increase in the major builder category. The new approach increased the results of the participant test from its current 1.12 to 1.75 and decreased the RIM test results from 1.58 to 1.06. [Exhibit 19] This fact clearly demonstrates that it is FPL’s intention to significantly increase the benefits that accrue to selected program participants at the maximum expense to its general ratepayers, who receive no direct energy savings benefit from their program.

This was accomplished by deliberately “fixing” of the amount the program could charge in ratepayer recovery, then designing the program to benefit the large production builder, increase the utility benefits from demand shifting and reduce the overall homeowner benefits of energy savings. FPL provided no independent

market studies to show either the need for this dramatic increase in subsidies to participating builders or for its rejection of Florida's traditional (and code required) performance approach to designing energy efficiency programs. It merely conducted an undocumented in-house "situational analysis" that concluded these modifications were necessary. [Transcript, page 77] FPL made little, if any, attempt to identify other programs in the state and country that successfully provided both utility and significant homebuyer benefits; that enjoyed significant market penetration; and that did not unduly benefit the utility or certain participating customers to the detriment of ratepayers not involved in the program and other energy service providers in the competing economic marketplace [Transcript Pages 83- 84]. As a result, FPL proposes a program modification that dramatically increases benefits to certain participants; reduces overall homeowner benefits and increases the relative utility benefits in avoiding peak demand (higher maintenance and operating costs and lower profits); imposes undue burdens on competing energy-efficiency service providers; and fails to incorporate either Florida's performance approach to building energy efficiency or Florida's statutory Building Energy Efficiency Rating System.

**ISSUE 2: Is the modified BuildSmart program directly monitorable and will it yield measurable results?**

*No. The BuildSmart program, as implemented and proposed to be modified, fails to provide measurable results that meet the Commission's standards and fails to be directly monitorable.*

The area of utility programs in the new residential construction area under FEECA has traditionally been of special concern to the Commission since the relatively simultaneous enactment of both FEECA and the Florida Energy Efficiency Building Code in the mid-1980s. Initially, the Commission adopted the policy of establishing no goals, and allowing no cost recovery, for residential new construction. This was modified in the mid-1990s, just after the enactment of the Florida Energy Efficiency Rating Act in 1993, at the urging of the Florida Energy Office, the Office of Building Codes and Standards, various utilities and environmental/energy efficiency advocacy groups [Exhibit 12, pages 16-28]. All groups agreed that the public and utilities could benefit from programs in which the state-mandated code minimums would be exceeded **by significant margins** and new technologies and building “best practices” could be introduced into the competitive marketplace [emphasis provided].

In order to measure results that exceed the state code minimum standards, the state adopted the “Florida Building Energy-Efficiency Rating Act.” [Sections 553.990-553.998, Florida Statutes] The purpose of this law is “to provide for a statewide uniform system for rating the energy efficiency of buildings.” In meeting the requirements of the Act, the administering agency provides for certification and monitoring of all persons providing such information and a statewide database of residential ratings that allows for quality control and

effective monitoring of persons measuring the energy efficiency of buildings and the accuracy, verifiability and reliability of such measurement.

When the services that FPL provides under the BuildSmart® program are reviewed, they clearly fit within the definition of a rater under the statewide uniform system and are the same or similar to practices of certified raters in the State of Florida [Exhibit 15 and Transcript pages 285-287]. The key performance measure for the program--exceeding the minimum standards set by the Florida Building Code--rely upon a "*means of analyzing and comparing the relative energy efficiency of buildings*" as specified in Section 553.995(2), Florida Statutes. The only difference in the practices of FPL is that they avoid the public filing of the results of their work--either through assistance to the builder in filing his initial code compliance form or in confirming their measure of the homes energy efficiency with the state-wide rating provider's data-base.

FPL fails to provide adequate monitoring of meeting its performance goals and technical standards and fails to provide quality assurance and accurate, reliable information to the program participating builder and the ultimate consumer, the homeowner. In so doing, FPL fails to meet standards set forth in Florida Law and, actually, damages the state's program to assure its residents and citizens fair, accurate and verifiable information on the energy efficiency of its residential units.



**ISSUE 3: Does the modified BuildSmart® program advance the policy objectives of FEECA, Section 366.080 et seq., Florida Statutes, Commission Rule 25-17.001, Florida Administrative Code, and applicable Commission policies?**

*No. The BuildSmart® program, as implemented and proposed to be modified, clearly fails to meet the standards imposed by Florida Law and Commission Rules and Policies. As stated in responding to issue 2, the Commission has always articulated special concerns relating to residential new construction programs under FEECA. The program, as proposed by FPL, clearly fails to address these special concerns and, further, not only directly damages the free, competitive marketplace for providing and assuring energy efficiency and conservation in the building of new residential buildings but also subverts the state's efforts to assure fair, accurate and verifiable information as to the energy usage of such buildings. In fact, the FPL proposed modification directly ignores the mandates of Commission rules and other state laws.*

The modified BuildSmart® program conflicts with the Commission's Core Mission and by extension, the Commission's policies where "[T]he mission of the Florida Public Service Commission is to promote the development of competitive markets - as directed by state and federal law - by removing regulatory barriers to competition, and by emphasizing incentive-based approaches"

As seen in Exhibit 15, FPL provides all the services that a certified rater provides, except for those that would verify their calculation of the home's energy efficiency as meeting state standards by filing their results as code calculations or energy ratings and as measures of home energy efficiency in the state-wide database. In only 389 of the 8,047 homes certified by FPL over the past 5 ½ years has FPL met the requirement of filing their energy efficiency calculations with the

state regulatory agency. [Exhibit 23] They also do not provide their results to the builder or the homebuyer [Transcript, page 105]

**ISSUE 4: Should the Commission approve the modified BuildSmart® program?**

*No. For the above reasons, the Commission should not only disapprove the modified BuildSmart® program but should also immediately conduct an inquiry into the BuildSmart® program and further impose sanctions against FPL for failing to implement the program as previously approved by the Commission in a proper manner. See the suggested relief proposed by the Petitioners.*

**ISSUE 5: Does FPL's Residential Conservation Service Program comply with the requirements of Section 366.82(5), Florida Statutes, Rule 25-17.003, Florida Administrative Code, and applicable Commission policies?**

*No. The \$4,615,517.00 spent in advertising and promoting itself as a trusted advisor in energy efficiency and conservation matters is not only image enhancing but also an inaccurate statement of true company actions and promotes FPL's program of undercutting competitive providers and subverting the state's attempt to provide fair, accurate and reliable information in the energy marketplace. Further, the failure of FPL to provide performance measures and monitoring for a program costing in excess of \$12 million annually should be investigated by the Commission.*

**ISSUE 6: Should the Commission approve FPL's Residential Conservation Service Program?**

*Only as modified; see Issue 5 response. The Commission should not only disapprove the expenditure of \$4,615,517 for its advertising campaign but also require FPL to notify all participants of the availability of rating services, including qualified raters listed for the county and/or region in which the home is located, and a Commission approved summary sheet of the advantages of obtaining a rating when a customer requests an audit or files a customer-generated audit. The Commission should further order FPL to provide it ways and means of developing and providing measurable results and monitoring for the program.*

**ISSUE 7: Should this docket be closed?**

*No. The Commission should conduct a full inquiry into the BuildSmart® database and review the advertising needs and expenditures of the Residential Conservation Service and require the establishment of a Residential Conservation Services program with measurable results and effective monitoring.*

**REQUESTED RELIEF**

Petitioners further request the Commission to provide the following relief and require the following corrective actions:

**I. IN RELATION TO THE BUILDSMART® PROGRAM**

A. Petitioners request the Commission to order a refund of all monies collected from ratepayers for the BuildSmart® program after November 14, 2004.

B. Petitioner further requests the Commission to initiate sua sponte an inquiry pursuant to Sections 350.121, 366.08 & 366.093, Florida Statutes (2005), and Rule 25-22.006, Florida Administrative Code, into the Florida Power & Light (“FPL”) BuildSmart® Program Database. This inquiry should focus **on the accuracy of the data in that database as to calculation of e-ratios, fee payments, and services provided.** One outcome of the inquiry should data and analysis to support the adoption of a uniform standard for monitoring and quality control across all spectrums of utility programs and non-utility programs. The system should meet the following standards (among others): ease of administration, centralized database, measures of market penetration, enforceability, understandability, ability to generate needed market analysis, provision of quality

control in providing accurate and reliable data as to energy usage to the builders and homebuyers of new residential dwellings. The Commission should consider using the provisions of the Florida's Building Energy Efficiency Rating Act as a minimum requirement for assessment, reporting and quality assurance in utility new home programs.

C. Due to the egregious nature of their program error and the gross negligence demonstrated by FPL while holding itself out as a trusted energy expert and advisor, including spending millions of dollars advertising itself as such, and the negative impact its actions have had, and continue to have, on the state's effort to assure its citizens and residents of valid, accurate, comparative and understandable information relating to energy efficiency in their homes, the Commission should impose a penalty pursuant to Section 366.095, FS of not less than \$500.00 per home that was not given a energy rating ("qualified home") in accordance with Florida's laws. FPL reported 7,658 qualified homes received BuildSmart certification over the past 5 ½ years (2000-mid-2005) as to achieving savings at least 10% or better than a home built to Florida Code minimum standards.

[Exhibit 9] A total penalty of at least \$3,829,000 should be imposed.

The monies collected from this penalty assessment should then be applied by the Commission, subject to legislative appropriation, to provide compensation to homeowners harmed by FPL in the form of a \$500.00 allowance (rebate) that may

be used to obtain a confirmed rating and for any subsequent expenditure for an energy efficient measure adopted and installed on the qualified home. The Commission should provide a six-month period in which a current owner can apply for a rebate voucher for any expenditure, including obtaining a confirmed rating of the qualified home in order to provide the valid, accurate, comparative and understandable information that was originally promised for the program to its participants and, in addition, provide the homeowners information on how they could currently make their home more energy efficient and, hopefully, meet the original standards their home was certified as meeting.

Any money left after the six month compensation period should then be applied by the Commission to fund a voucher program, financial incentives and technical assistance from certified Raters, including those employed by utilities, to achieve EPA ENERGY STAR status and/or federal tax credits for highly-efficient new site-built homes. These federal tax credits, which accrue to the builder, require that heating and cooling energy use be 50% less than the code minimum standard. This 50% standard is difficult to achieve, especially in Florida, and it will require independent field verification by an agent with qualification of or equivalent to a certified energy rater for tax credit qualification. Florida can substantially increase the number of homes that qualify for this federal tax credit by providing incentives to homeowners to find builders who are willing to take on

this challenge in exchange for the federal tax credit. In addition, the moneys should be used to support public service TV announcements, at prominent times, encouraging FPL ratepayers and Florida builders to take maximum advantage of the incentives to improve the energy efficiency of new homes.

D. Petitioner requests Commission to order FPL to charge full cost recovery for all ratings and rating-type services it provides pursuant to its BuildSmart® program pursuant to Rule 25-17.004, F.A.C.

E. Petitioner further requests Commission to order FPL to pay damages in the amount of \$400,000 to Petitioners. [Transcript, page 184, line 4]

F. Petitioners further request that the Commission inform the Department of Community Affairs of its findings as they relate to the provision of the same or similar services covered by a confirmed Building Energy Efficiency Rating and reinstitute the joint staff effort to review the ways and means in which the Department's and Commission's responsibilities may be carried out in a mutually supportive manner and the impact of the programs they each regulate may be made more efficient and less costly to the taxpayer and ratepayer, respectively.

G. Due to the egregious nature of their program error and the gross negligence demonstrated by FPL while holding itself out as a trusted energy expert and advisor, including spending millions of dollars advertising itself as such, and the negative impact its actions have had, and continue to have, on the state's effort to

assure its citizens and residents of valid, accurate, comparative and understandable information relating to energy efficiency in their homes, the Commission should impose the maximum penalty pursuant to Section 366.095, FS. This penalty of \$5,000 should be applied to each one of the violations of PSC Rule 25-17.004, F.A.C., in which FPL failed to collect the amount set by its tariff for a BERS rating. In their response to Petitioner's Interrogatory #8, FPL reported 389 ratings provided BuildSmart® participants which would result in a total penalty of \$1,950,000.00. The monies collected from this penalty assessment should then be applied by the Commission, subject to legislative appropriation, to fund a program to support the development of a true competitive market for energy efficient rating and inspection services, to maximize the use of the federal tax credits for new and existing homes in this state, to improve the determination and correction of leakages in ducts for both new and existing houses and to assure better quality control in the provision of all energy efficient rating and inspection services.

## **II. IN RELATION TO THE RESIDENTIAL CONSERVATION SERVICES PROGRAM**

Petitioners request that the Commission not approve the following items in the FPL proposed cost recovery for its Residential Construction Services program and require the following corrective actions:

H. Petitioner requests the Commission to disapprove the expenditure of \$4,615,517 for its advertising campaign.

I. Petitioner further requests that the Commission require notification of the availability of rating services, including qualified raters listed for the county and/or region in which the home is located, and a Commission approved summary sheet of the advantages of obtaining a rating when a customer requests an audit or files a customer-generated audit.

J. Petitioner further requests that FPL be ordered to provide the Commission of ways and means of developing and providing measurable results and monitoring for the program.

### **III. ADDITIONAL RELIEF SOUGHT**

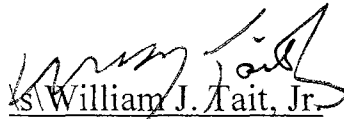
K. In addition to the relief requested for the Residential Conservation Service and BuildSmart® programs, Petitioners would urge the Commission to order sua sponte an investigation into the duct testing and improvement programs in utility energy efficiency and conservation programs for all utilities subject to FEECA and solicit voluntary participation by all other electric and gas utilities in Florida. It should be noted that, in the over 15 years since the original study was carried out in Lakeland, Florida, a tremendous amount of information has been gathered, technologies improved and knowledge gained to support a common approach and standard to be set for all utility programs.



## CONCLUSION

Petitioners respectfully request that the Commission not approve the BuildSmart® and Residential Conservation Services Programs as proposed by FPL, make specific findings of fact and order the relief requested.

Respectfully submitted,



William J. Tait, Jr.

FL BAR No. 0125081

1061 Windwood Way

Tallahassee, Florida 32311

Telephone: (850) 878-0500

Facsimile: (850) 942-5890

e-mail: [jimtait@comcast.net](mailto:jimtait@comcast.net)

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing **COMPLIANCE DATA SERVICES, INC. ("Calcs-Plus") POST-HEARING BRIEF** was served by electronic mail (\*) and U.S. Mail this 7<sup>th</sup> day of November, 2005, to the Office of General Counsel at the Florida Public Service Commission and to Florida Power & Light Company as follows:

Martha Carter Brown\*

Adrienne Vining\*

Florida Public Service Commission

2540 Shumard Oak Boulevard

Tallahassee, FL 32399-0850

Patrick M. Bryan, Esquire\*

Natalie F. Smith, Esquire\*

Florida Power & Light Company

700 Universe Boulevard

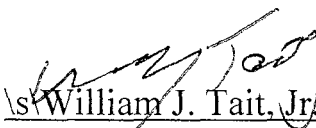
Juno Beach, Florida 33408

Harold McLean

Office of Public Counsel

111 West Madison Street, Room 812

Tallahassee, Florida 32301

  
William J. Tait, Jr.  
William J. Tait, Jr.