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In Re: Joint Petition for)
 Approval of Standard Offer)
 Contracts of FLORIDA POWER)
 CORPORATION and AUBURNDALE)
 POWER PARTNERS, LIMITED)
 PARTNERSHIP)

Docket No. 940819-EQ

Filed: November 16, 1994

**EMERGENCY MOTION TO DISMISS PETITION ON PROPOSED AGENCY ACTION
 AND REQUEST FOR COSTS AND ATTORNEYS FEES**

Auburndale Power Partners, Limited Partnership ("APP"), by and through undersigned counsel, pursuant to Rule 25-22.037, Florida Administrative Code, files this Emergency Motion to Dismiss the Petition on Proposed Agency Action submitted by Mr. Evander Bend in this docket. In support of its Emergency Motion, APP states:

Request for Emergency Treatment

APP respectfully requests that the Commission decide this matter on an emergency basis due to the long-pending nature of this proceeding, and the fact that the parties anticipate the delivery of power under the approved assignment beginning on January 1, 1995 from APP's Auburndale, Florida Facility. The issues in this proceeding have been before the Commission since April 19, 1994. As stated in the Joint Petition for Expedited Approval of Contract Modifications (the "Joint Petition") filed by APP and Florida Power Corporation ("FPC"), time is of the essence in preserving the viability of the assignment of the LFC No. 47 Corp. ("LFC") Standard Offer Contracts to APP. A delay in the final Commission approval of the assignment could deprive FPC and its ratepayers of the benefits which will flow from the assignment. Thus, APP respectfully requests that the Commission set this Emergency Motion

for oral argument immediately and, as soon thereafter as practicable, issue an order dismissing the Petition.

Background

1. On October 24, 1994, the Commission issued a Notice of Proposed Agency Action in this docket, the subject of which is a Proposed Order Approving Contract Modifications, Order No. PSC-94-1306-FOF-EQ (the "Order"). The Order approves, for purposes of cost recovery, the assignment of LFC's Standard Offer Contracts with FPC to APP pursuant to the terms and conditions of the Consent and Agreement, and the administration of those contracts from APP's Auburndale facility.

2. On November 14, 1994, Evander Bend (the "Petitioner") filed a Petition on Proposed Agency Action (the "Petition") in this docket requesting that the Commission grant Petitioner a formal administrative hearing and issue a final order denying the relief requested in by APP and FPC in their Joint Petition. The Petitioner alleges that his substantial interests are affected by the Order because he is a ratepayer of FPC.

Legal Argument

3. The Petitioner has failed to assert a sufficient interest to establish the requisite standing to initiate a formal proceeding under Section 120.57, Florida Statutes. Rule 25-22.029(4), Florida Administrative Code, provides that "[o]ne whose substantial interests may or will be affected by the Commission's proposed action" may file a petition for a hearing pursuant to Section 120.57, Florida Statutes. Thus, the Petitioner must demonstrate

that he has substantial interests that may or will be adversely affected by the Order such that he has standing to initiate a formal administrative proceeding.

4. It is settled in Florida that in order to have standing to initiate a formal administrative proceeding, an individual must show: (1) that he or she will suffer injury in fact which is of sufficient immediacy to entitle him or her to a formal proceeding; and (2) that the injury is of a type or nature which the proceeding is designed to protect. Agrico Chem. Co. v. Department of Env'tl. Regulation, 406 So.2d 478, 482 (Fla. 1st DCA 1981), review denied, 415 So.2d 1361 (Fla. 1982); In re: Application for certificate to provide interexchange telecommunications service by ATLAS COMMUNICATION CONSULTANTS, INC., 94 F.P.S.C. 1:358, 360, Docket No. 9303969-TI, Order No. PSC-94-0114-FOF-TI (January 31, 1994); In re: Petition for closure of standard offer contract subscription limit and for approval for cost recovery of two negotiated power purchase agreements with Wheelabrator North Broward, Inc. and Wheelabrator South Broward, Inc. by FLORIDA POWER & LIGHT COMPANY, 92 F.P.S.C. 6:511, 513, Docket No. 911140-EQ, Order No. PSC-92-0565-FOF-EQ (June 24, 1992). For reasons set forth below, Petitioner fails to meet the requirements of the Agrico test and, therefore, lacks the requisite standing to initiate formal proceedings.

5. The Petition fails to meet the Agrico test because the Petitioner has not adequately alleged that entry of the Order will subject him to any injury of sufficient immediacy that would

entitle him to a formal administrative proceeding. In order to suffer injury in fact, a party must be exposed to any injury or threat of injury that is both real and immediate, not conjectural or hypothetical. Florida Dept. of Offender Rehabilitation v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1978), cert. denied, 359 So.2d 1215 (Fla. 1978). Furthermore, for a ratepayer to suffer injury in fact from a Commission proceeding, there must be a direct nexus between a Commission decision and the ratepayer's payment of increased rates. See In Re: Petition for limited proceeding to implement water conservation plan in Seminole County by SANLANDO UTILITIES CORPORATION., 94 F.P.S.C. 8:256, 260, Docket No. 930256-WS, Order No. PSC-94-0987-FOF-WS (August 15, 1994).

6. This Petition is inherently deficient because the Petitioner fails to allege any injury that he will suffer as a result of the Order. The Petitioner claims that his substantial interests will be affected simply because he is a ratepayer of FPC. That bare allegation is insufficient to entitle Petitioner to a formal administrative proceeding. Petitioner's efforts to establish standing as a ratepayer also fail in other respects. First, assuming for sake of argument that Petitioner is in fact an FPC ratepayer, there is nothing in the Order which suggests that the assignment of the Standard Offer Contracts to APP will result in an increase in FPC's rates. In fact, it is undisputed that the pricing provisions in the Standard Offer Contracts will remain unchanged after the assignment. Second, there is no direct nexus between the Commission's act of approving the Joint Petition and

any change in FPC's rates. Indeed, any change in FPC's rates would have to result from a subsequent and separate FPSC proceeding.¹ Thus, the Order will not result in any injury in fact to the Petitioner in the form of increased utility rates.²

7. The speculative and conclusory allegations contained in the Petition are insufficient to establish Petitioner's substantial interest in this docket. The Commission should not grant a formal hearing based on the vague, unsubstantiated suggestions that a proposed agency action "may" have an undefined and indeterminate impact upon someone, especially where it appears that the proceeding is being pursued for purposes other than those properly within the jurisdiction of the Commission.

Request for Costs and Attorneys Fees

8. Section 120.59(6), Florida Statutes, provides that a prevailing party shall be entitled to recover costs and a reasonable attorneys fee from the nonprevailing adverse party in cases where the nonprevailing party participated in the proceeding for an "improper purpose." Subsection 120.59(6)(e)1. defines "improper purpose" to mean:

participation in a proceeding pursuant to s.
120.57(1) primarily to harass or to cause

¹ Section 366.06, Florida Statutes (1993).

²See Village Park Mobile Home Ass'n, Inc. v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987), review denied, 513 So.2d 1063 (Fla. 1987) (agency approval of a prospectus did not, or would not, cause mobile home park residents to suffer injury in fact because any harm suffered would result from implementation of the prospectus and not from the agency approval).

unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.

(emphasis supplied).

9. Here, it is apparent that Petitioner seeks to attack the PAA in an effort to delay the assignment of the LFC Standard Offer Contracts to APP so as to potentially place the assignment in jeopardy. As described above, Petitioner has not adequately alleged any legitimate basis for standing in this case and appears to be participating for the purpose of delaying Commission approval of the Joint Petition. Accordingly, the Commission should find that Petitioner has participated in this case for an improper purpose and is liable for costs and attorneys fees pursuant to Section 120.59(6), Florida Statutes.

WHEREFORE, APP respectfully requests that the Commission:

- a. dismiss Evander Bend's Petition on Proposed Agency Action for lack of standing;
 - b. award costs and attorneys fees against Petitioner;
- and,
- c. grant such other relief as the Commission deems appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand devlivery to Richard E. Benton, 3837-A Killearn Court, Tallahassee, FL 32308 and by U.S. Mail to Martha Brown, Staff Counsel, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, FL 32301; J. Bradford Hines, Florida Power Corporation, Office of General Counsel, P.O. Box 14042, St. Petersburg, FL 33733; John R. Marks, III, Katz Kutter, Haigler, Alderman, Marks & Bryant, P.A., 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301 this 16th day of November, 1994.



D. Bruce May

TAL-53322.1