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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Approval of Demand-Side Management Plan by Florida Power & Light Company	**Docket No. 941170 - EG** **Filed: July 17, 1995**

MOTION IN OPPOSITION TO JOINT PETITION ON PROPOSED AGENCY ACTION

Florida Power & Light Company ("FPL"), pursuant to Florida Administrative Code Rule 25-22.037(2), moves that the Commission deny, or in the alternative dismiss, the Joint Petition on Proposed Agency Action of the The Independent Savings Plan Company ("ISPC") and Solar City, Inc. ("SOLAR") filed June 30, 1995 requesting a hearing in this proceeding.

The joint petition does not comply with the requirement of Florida Administrative Code Rule 25-22.036(7)(a)2. to include "an explanation of how his or her substantial interests will be or are affected by the Commission determination." ISPC and SOLAR do not having standing. The Commission may deny a petition on proposed agency action "if it does not adequately state a substantial interest in the Commission determination ...." Florida Administrative Code Rule 25-22.036(9)(b)1.

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ISPC and SOLAR also attempt to relitigate issues previously litigated before the Commission and decided by the Commission. In the goals proceeding before the Commission, the impact on the solar industry of discontinuance of FPL's solar water heating incentives and the cost-effectiveness of such incentives was fully litigated and goals without solar water heating measures were approved. The attempt to relitigate these issues is barred by the doctrine of administrative finality.

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FPL's grounds are more fully developed in the attached supporting Memorandum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Florida Power & Light Company's Motion In Opposition To Joint Petition On Proposed Agency Action and supporting Memorandum, were served by Hand Delivery (when indicated with an *) or mailed this 17th day of July, 1995 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Approval of Demand-Side Management Plan of Florida Power & Light Company	))	**Docket No. 941170 - EG Filed: July 17, 1995**

MEMORANDUM OF LAW SUPPORTING FLORIDA POWER & LIGHT COMPANY'S MOTION IN OPPOSITION TO JOINT PETITION ON PROPOSED AGENCY ACTION

Under the Administrative Procedures Act, specifically Section 120.57(1)(b)1, Florida Statutes (1993), the Commission has discretion whether to grant or deny a request for a Section 120.57(1) request for hearing. The Independent Savings Plan Company ("ISPC") and Solar City, Inc. ("SOLAR") have filed a joint request for hearing in the form required by the Commission's procedural rules; they have filed a petition on proposed agency action.[1] The joint petition on proposed agency action should be denied or dismissed because it fails to allege facts sufficient to demonstrate standing, as required by Commission rules.

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[1] Rule 25-22.029 Point of Entry Into Proposed Agency Action Proceedings, provides in subsection (4) that, "[o]ne whose substantial interests may or will br affected by the Commission's proposed action may file a petition for a § 120.57 hearing, in the form provided by Rule 25-22.036." Rule 25-22.036, in turn, applies to all § 120.57 proceedings before the Commission (subsection (1)), and requires the initial pleading where the Commission has issued notice of proposed agency action to be entitled "Petition on Proposed Agency Action" (subsection (2)). Subsection (7) of Rule 25-22.036 addresses the form and content of initial pleadings other than notices and orders, including petitions on proposed agency action.

I

ISPC AND SOLAR MUST DEMONSTRATE STANDING

Under Rule 25-22.036(7)(a)2. all initial pleadings, including petitions on proposed agency action, must include "an explanation of how his or her substantial interests will be or are affected by the Commission determination." The Commission may deny a petition on proposed agency action "if it does not adequately state a substantial interest in the Commission determination...." Rule 25-22.036(9)(b)1.

To have standing to participate in a Section 120.57 proceeding on the basis that the person's substantial interests will be affected, the person must show: "1) that he will suffer an injury in fact of sufficient immediacy to entitle him to a Section 120.57 hearing; and 2) that his injury must be of the type or nature the proceeding is designed to protect." Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), rev. den. 415 So.2d 1359, 1361 (Fla. 1982). "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Id. Both requirements must be satisfied for a person to successfully demonstrate a substantial interest that will be affected by the determination in the proceeding. Id.

A. Injury in Fact

Abstract, indirect, speculative, hypothetical, or remote injuries are not sufficient to meet the "injury in fact" standing requirement. International Jai-Alai Players Association v. Florida Pari-Mutuel Commission, 561 So.2d 1224 (Fla. 3d DCA 1990); Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987); Agrico Chem. Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981); Department of Offender Rehabilitation v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1978). There must be allegations

1st DCA 1988); Grove Isle, Ltd. V. Bayshore Homeowners' Ass'n, Inc., 418 So.2d 1046 (Fla. 1st DCA 1982). In this case, neither ISPC nor SOLAR have demonstrated they will suffer an injury in fact as a result of FPL's Demand-Side Management Plan.

ISPC's and SOLAR's petition states that ISPC finances the retail sales of solar water heating products in areas in which FPL's solar water heating program incentives have been available, that it no longer is a direct retail seller of solar systems, and that other authorized contractor/merchants who utilize ISPC financing now receive incentive payments. Further, ISPC states that it finances sales of solar water heating products in areas served by Florida Power Corporation ("FPC"), Gulf Power Company ("Gulf") and Tampa Electric Company ("TECO"). SOLAR, which owns 100% of ISPC's stock, is a wholesale distributor of solar heating equipment selling solar equipment and products to licensed contractors and others, who then sell the equipment and products at retail. These retail sales are alleged to occur throughout Florida, in territory served by FPL, FPC, Gulf and TECO. The petition then claims that "the proposed termination of FPL's residential solar water heating program and the failure of FPC, Gulf and TECO to establish a viable solar water heating program will "negatively impact the solar water heating industry in Florida," thus affecting ISPC's and SOLAR's substantial interests. ISPC and SOLAR Joint Petition on Proposed Agency Action,

pp. 2-3, para. 5-6. These allegations fail to establish an injury in fact of sufficient immediacy to entitle ISPC and SOLAR to a Section 120.57 hearing in this proceeding.

At the outset, it is key to recognize that this proceeding involves establishment only of FPL's solar water heating programs and policies. FPL's Demand-Side Management Plan does not direct, influence, or otherwise affect FPC's, Gulf's and TECO's solar programs and policies. Thus, this particular proceeding will not cause any injury whatsoever to ISPC and SOLAR by affecting establishment or implementation of FPC's, Gulf's and TECO's programs and policies. Thus, any "injuries" to ISPC and SOLAR that are alleged to result from FPC, Gulf or TECO programs and policies are irrelevant to this proceeding. Irrelevant injuries do not satisfy the injury in fact test. International Jai-Alai Players Ass'n, 561 So.2d at 1226.

Turning to the allegations of how ISPC and SOLAR purportedly are affected by modification[2] of FPL's solar water heating efforts, ISPC's and SOLAR's petition merely alleges the conclusion that the "solar industry" (not ISPC or SOLAR) will be "negatively impacted" by termination of FPL's solar water heating program (and other actions irrelevant to FPL), and that ISPC's and SOLAR's substantial interests will thereby be affected. These allegations do not meet the Agrico immediate injury in fact standard. They do not allege either (a) that ISPC and SOLAR have sustained actual injuries at the time of filing their petition, or (b) that ISPC and SOLAR are immediately in danger of sustaining some direct injury as a result of the challenged Commission action. See, Village Park, 506 So.2d at 433.

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[2] The allegation that FPL is terminating its solar water heating program is not accurate. FPL is modifying its existing Conservation Water Heating Program, in part, by moving solar water heating to a research and development project in the hopes of finding some way to make offering solar water heating measures cost-effective. FPL DSM Plan Document at 28. FPL will terminate solar hot water heating incentives.

No direct injury to ISPC or SOLAR is alleged. This is not surprising since both ISPC and SOLAR are, at least, two steps removed[3] from participating FPL customers who receive incentives. Remote injuries do not pass the Agrico immediate injury in fact test. International Jai-Alai Players Ass'n, 561 So.2d at 1226.

No attempt is made to explain or show what the "negative impact" on the "solar industry" will be. Allegations of conclusions are not sufficient; the petitioners have to state with specificity how their (not the solar industry's) interests will be injured. Society of Ophthalmology, 532 So.2d at 1286.

ISPC and SOLAR do not allege that they represent the "solar industry." Neither ISPC nor SOLAR is a trade association, and they make no showing of facts necessary to demonstrate standing as an association to represent others.[4] Consequently, even if they had sufficiently demonstrated the "negative impact" on the "solar industry," they would not have shown how they had suffered or are likely to immediately suffer a direct injury to their interests. At most these allegations reflect an indirect, conjectural interest that may or may not be affected by approval or even implementation of FPL's DSM Plan. Whether there is any injury depends on the intervening actions of third parties

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[3] ISPC provides financing for retail sellers who, in turn, sell systems to FPL customers. ISPC is as indirectly interested as a bank or finance company that would provide financing. SOLAR sells systems to retailers who, in turn, sell systems to FPL customers. SOLAR is an indirectly interested wholesaler who sells to retail solar dealers, who are also probably served by wholesale office products or piping suppliers.

[4] To demonstrate associational standing, an organization must show that (a) a substantial number of its members are affected by the agency action, (b) the subject matter of the agency action is within the association's general scope of interest, and (c) the relief requested is of the type appropriate for a trade association to receive on behalf of its members. See, Florida Home Builders Ass'n v. Dept. of Labor and Employment Security, 412 So.2d 351 (Fla. 1982); Farmworkers Rights Ass'n v. Dept. Of Health and Rehabilitative Services, 417 So.2d 753 (Fla. 1st DA 1982).

- FPL customers and retail sellers of solar systems after the implementation of FPL's proposed plan. In that regard, ISPC's and SOLAR's interests are quite similar to the homeowners' interests found to be insufficient to be an immediate injury in fact in the Village Park case. There, as here, any potential injury rested not on approval but on implementation and was contingent on subsequent intervening acts of third parties. 506 So.2d at 433-34. Indirect, speculative interests that may lead to some threat of injury in the future contingent on intervening actions are not of sufficient immediacy to warrant invocation of the administrative review process. Id.

The other interest asserted by ISPC and SOLAR is that as customers of investor-owned electric utilities, they have "an interest" in the promotion and encouragement of solar water heating. Petition, pp. 3-4, para. 7. However, per Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988), having a general "interest" in the policies of investor-owned utilities does not rise to the level of an injury in fact necessary to have standing to request a hearing under Section 120.57.[5] There, the court found allegations of economic interests were not of sufficient "immediacy" to establish an injury in fact and noted:

> Not everyone having an interest in the outcome of a particular dispute over an agency's interpretation of law submitted to its charge, or the agency's application of that law in determining the rights and interests of the members of the government or the public, is entitled to participate as a party in an administrative proceeding to resolve the dispute. **Were that so, each interested citizen could, merely by**

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[5] In the Florida Society of Ophthalmology case, the Society of Ophthalmology requested a Section 120.57 hearing on the certification applications of all optometrists proposed to be certified by the State Board of Optometry. The Society argued its members' substantial interests would be affected by the optometrists' certifications because allowing optometrists to prescribe certain ocular drugs would encroach on the ophthalmologists' right to practice medicine, the quality of eye care would decline as a result of optometrists being certified to prescribe these drugs, and optometrist certification would confuse the public, causing the ophthalmologists to suffer economic injury.

> **expressing an interest, participate in the agency's effort to govern,** a result that unquestionably would impede the ability of the agency to function efficiently .... [P]arty status will be accorded only to those who will suffer an injury to their substantial interests sought to be prevented by the statutory scheme.

Id. At 1284 (emphasis added).

In this case, ISPC's and SOLAR's general "interest" in investor-owned electric utilities' policies is shared by all customers of these utilities. Per Florida Society of Ophthalmology, this "interest" does not constitute a specific immediate injury, and, therefore, is insufficient to meet the injury in fact requirement of the Agrico standing test.

B. Zones of Interest

In addition to requiring an injury in fact of sufficient immediacy, the Agrico standing test also requires that "the injury must be of the type or nature the proceeding is designed to protect." Agrico Chem. Co. v. Department of Envtl. Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1982). This is the so-called "zone of interest" requirement. Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988). In determining whether a petitioner has met the zone of interest requirement, the agency or court examines the nature of the injury alleged in the pleading and then determines whether the statute or rule governing the proceeding is intended to protect such an interest. Many cases reject participation in a Section 120.57 hearing when the person seeking the hearing alleges adverse economic injuries akin to those alleged in ISPC's and SOLAR's Petition.

In Agrico, the court determined that economic injuries alleged by the challenger to result from issuance of a permit were not of the type intended to be protected by the statute (in that case, Chapter 403, F.S.) governing that proceeding. The court stated: "[w]hile the petitioners in the instant

case were able to show a high degree of potential economic injury, they are wholly unable to show that the nature of the injury was one under the protection of Chapter 403." Id. at 481. Thus, the challenger was determined not to have standing under Section 120.57. Similarly, in International Jai-Alai Players Ass'n v. Florida Pari-Mutuel, 561 So. 2d 1224 (Fla. 3d DCA 1990), the court determined that statutory provisions governing jai-alai scheduling were not designed to protect the economic interests of jai-alai players who alleged they would be injured by scheduling changes implemented pursuant to the statutory provisions. See also, Shared Services Inc. v. State Dept. of Health and Rehabilitative Services, 426 So.2d 56 (Fla. 1st DCA 1983); City of Sunrise v. South Florida Water Management District, 615 So.2d 746 (Fla. 4th DCA 1993).

Some statutory schemes have been construed by the courts as properly considering economic interests, and, in such instances, courts have found allegations of adverse effects to economic interests to be sufficient to meet the "zone of interest" requirement of the Agrico standing test. For example, in Boca Raton Mausoleum v. Department of Banking and Finance, 511 So. 2d 1060 (Fla. 1st DCA 1987), the court determined that reduced contributions to the perpetual fund resulting from the reduced sale of burial spaces was a type of injury contemplated by the Florida Cemetery Act. In Baptist Hospital, Inc. v. Department of Health and Rehabilitative Services, 500 So. 2d 620, 625 (Fla. 1st DCA 1986), the court determined that economic injury is a significant substantial interest for purposes of conferring standing in certificate of need proceedings. Thus, the general rule regarding whether economic interests fall within the zone of interest in Section 120.57 is that a claim of standing by third parties based solely upon economic interests is not sufficient unless the statute itself contemplates consideration of such interests. Boca Raton Mausoleum, 511 So. 2d 1060, 1064 (Fla. 1st DCA 1987).

In this case, ISPC's and SOLAR's alleged economic interests as a financier and as a wholesaler of solar water heating systems do not fall within the zone of interest of the Florida Energy Efficiency and Conservation Act ("FEECA"), Sections 366.80 - .85, Florida Statutes (FEECA), Section 403.519, Florida Statutes (the governing statute), or Florida Administrative Code Rule 25-17.0021 (the governing rule).[6] FEECA's statement of legislative intent in Section 366.81, Florida Statutes, begins by recognizing the importance of "utiliz[ing] the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens. Section 366.81 also states that "the use of solar energy" is to "be encouraged," but this same sentence, which also encourages cogeneration, has been interpreted by the Commission as being limited by "cost-effectiveness."[7]

Nothing in FEECA or Rule 25-17.0021 provides intent to protect the kinds of interests ISPC and SOLAR assert in this proceeding. ISPC's and SOLAR's livelihoods depend on financing and sales of solar heating equipment that are not cost-effective under the Rate Impact Measure and Participants tests.[8] Thus, the sole interests ISPC and SOLAR assert in this proceeding are economic interests in protecting their livelihoods through protecting their business markets. FEECA was never

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[6] The other statutes referred to in the joint petition, Sections 288.041 and 187.201, Florida Statutes, do not provide the petitioners a statutory right to intervene in Commission cases. Therefore, they are not relevant to whether the petitioners have standing.

[7] Under the Commission's cogeneration rules, cogeneration must be cost-effective - at or below avoided cost. See, Rule 25-17.080-091, F.A.C. Encouraging a FEECA option does not mean offering it when it is not cost-effective.

[8] The Commission in the Conservation Goals proceeding approved FPL's goals based on conservation measures cost-effective under the RIM and Participants tests. Order No. PSC-94-1313-FOF-EG at 22, 32. Those goals did not include any solar measures. The Commission also made a finding that "FPL reports a negative cost-benefit ratio of 0.8 and 0.26 under the RIM and TRC tests respectively." Id. at 26.

intended to serve as a vehicle for promoting particular businesses or protecting business markets. Thus, the wholesale sales, financing, and business marketing interests asserted by ISPC and SOLAR in this proceeding are beyond the scope of the energy conservation purposes FEECA is designed to promote and protect. ISPC and SOLAR have failed to meet the "zone of interest" requirement of the Agrico standing test. Accordingly, their petition for a Section 120.57 hearing should be dismissed.

II.

ISPC'S AND SOLAR'S ATTEMPT TO RELITIGATE ISSUES IS BARRED

In their petition ISPC and SOLAR make allegations and raise issues of fact that have already been addressed by the Commission. ISPC and SOLAR seek to relitigate matters the Commission has resolved in the lengthy goals proceeding. These allegations should not be considered by the Commission, and cannot form the basis for an ISPC and SOLAR cause of action. ISPC and SOLAR are barred from raising these issues by the doctrine of administrative finality.

The doctrine of administrative finality has been developed in Florida largely through cases on appeal from this Commission. It was first recognized and applied in Peoples Gas System, Inc. v. Mason, 187 So.2d 325 (Fla. 1966), where the Supreme Court outlined the concept:

> [O]rders 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 on 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.

Peoples Gas, 187 So.2d at 339. Subsequent cases have noted exceptions for changed circumstance and extraordinary circumstances, but the doctrine has repeatedly been applied by Florida courts to the decisions of administrative agencies. See, Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979); Richter v. Florida Power Corp., 366 So.2d 798 (Fla. 2d DCA 1979); Russell v. Dept. Of Business and Professional Regulation, 645 So.2d 117 (Fla. 1st DCA 1994).

A. The Impact of Discontinuance of FPL's Residential Solar Water Heating Program on the Solar Industry Has Already Been Litigated

In their petition, ISPC and SOLAR seek to put at issue what the effect on the solar industry would be of discontinuance of FPL's water heating program. This issue was fully and fairly litigated in the recent goals proceeding. The Commission's decision in that case was not to include solar water heating measures in the conservation goals approved for FPL, and, instead, to have FPL seek an alternative source of funding to promote the installation of solar water heating and other renewable measures. FPL relied upon this determination by the Commission in the formulation of its DSM plan. Consequently, the doctrine of administrative finality bars ISPC and SOLAR from attempting to relitigate this issue.

B. Consideration of the Cost-Effectiveness of Solar Water Heating Measures is Barred

In their petition, ISPC and SOLAR attempt to put at issue whether FPL's solar water heating offerings are cost-effective. In the recent goals proceeding, the Commission examined the cost-effectiveness of FPL's solar water heating measures and made a specific finding that FPL's analysis showed they were not cost-effective. Order No. PSC-94-1313-FOF-EG at 26. FPL has relied on this Commission determination and not included solar water heating measures among the programs

that it offers in its DSM plan. The doctrine of administrative finality bars ISPC and SOLAR from attempting to relitigate this issue before the Commission.

CONCLUSION

ISPC and SOLAR have totally failed to "adequately state a substantial interest in the Commission determination." Their Joint Petition on Proposed Agency Action should be denied pursuant to Florida Administrative Code Rule 25-22.036(9)(b)1. In addition, they seek to relitigate matters resolved by the Commission; such efforts are barred by the doctrine of administrative finality.

Respectfully submitted,

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