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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. 914470-EG
Filed: August 11, 1995

941170

## MEMORANDUM OF LAW IN SUPPORT OF LEAF'S OPPOSITION TO FLORIDA POWER & LIGHT MOTION TO DISMISS OR DENY LEAF'S PETITION FOR A HEARING

The Administrative Procedure Act ("APA"), Chap. 120 Fla. Stat. (1993), states a policy in support of public access to administrative agency proceedings. The Florida Energy Efficiency and Conservation Act ("FEECA"), §§366.80 et seq. and 403.519 Fla. Stat. (1993) states a public policy in support of public health and welfare. Both statutes are to be liberally construed in the public interest. LEAF's intervention in this proceeding was both timely and proper. FPL has waived its opportunity to challenge LEAF's participation in this docket. Further, Florida Power and Light ("FPL") seeks to preclude from the last stage of ongoing multi-faceted administrative proceedings a not-for-profit organization whose interests have been shown to be substantial and within the interests the applicable statute seeks to protect and which has participated fully in previous related proceedings in the interests of its members and the public.

FPL's arguments regarding LEAF's standing also conflict with its arguments concerning relitigation, collateral estoppel and finality which implicitly recognize LEAF's participation in the earlier, related dockets to which this case is integrally related. Further, the Commission has the authority to officially recognize

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documents submitted in the previous related proceedings regarding LEAF's status as a substantially affected person pursuant to 120.557 Fla. Stat. (1993) and Rule 25-22.036 Fla. Admin. Code.

Under the applicable case law in Florida, LEAF has standing to intervene in the subject docket. Its Petition to Intervene and Petition for Hearing state sufficient injury in fact and that its injuries are within the zone of interests to be protected by the relevant statute. To the extent that the Commission would seek more specific allegations, it has the opportunity to require such showing through discovery, amended pleadings and/or testimony.

FPL's arguments regarding relitigation, collateral estoppel and finality misapprehend either the gist of LEAF's claims, the Commission's orders regarding DSM Plan approval, or both. LEAF's claims in this docket are based on the four corners of the Commission's order proposing to approve FPL's DSM Plan.

I

## LEAF HAS STANDING TO INITIATE A HEARING

LEAF does not dispute that an organization or individual must meet the requirement that it have a substantial interest that is or will be affected by a proposed agency action and that it needs to meet the two-pronged test relating to injury-in-fact and zone of interest set forth in Agrico Chemical Co. v. DER, 406 So.2d 478 (Fla 2d DCA 1981). It strenuously objects to FPL's view of how

that requirement must be met, especially in the context of this proceeding. Public policy and relevant case law support LEAF's standing in this proceeding.

## A. Public Policy

LEAF is a not-for-profit organization whose purposes include protection of public health and the environment; it has a broad distribution of members in Florida throughout the service territories of the various utilities, including that of FPL. It has no pecuniary or competitive interest in the proceedings of the Commission, but has continuously and steadfastly sought to promote environmentally benign energy resources, energy efficiency and the reduction of the need for electric power plants. LEAF may fairly be characterized as a "public interest" organization with a specific area of interest as to electric energy matters in Florida.

The APA was enacted in 1979 as part of a reform of public processes, in large part for the purpose of expanding public access to the activities of administrative agencies. See, Florida Home Builders Ass'n. v. Dept. of Labor, 412 So.2d 351 (Fla. 1982) (in which the court allowed standing of a trade organization to challenge an agency rule pursuant to §120.56 Fla. Stat. [1993, citing the high cost and administrative burden otherwise associated with individual appeals]); see also, Farmworker Rights Org. v. Dept. of Health, 417 So.2d 753 (Fla. 1st DCA 1982) (extending that holding to a challenge to an agency proceeding under §120.57 Fla.

Stat. [1993] in which the appellant public interest organization objected to the certificate of need for a hospital). In determining whether a party has a right to participate in an administrative proceeding, it is important to consider the principle behind the tests relating to standing: to ensure that the party has a sufficient interest in the outcome so that it will adequately represent the interest asserted. Gregory v. Indian River County, 610 So.2d 547, 554 (Fla. 1st DCA 1992). As noted in that case: "The obvious intent of Agrico was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues which are to be resolved in the administrative proceedings." Id. (emphasis added). Accord, Brasfield & Gorrie v. Ajax Const., 627 So.2d 1200, 1203 (Fla. 1st DCA 1993).

Further, examination of administrative standing is based on the policies, purposes and scope of the substantive statute under which review of an agency action is sought. In this case, the relevant statute, FEECA, includes the following legislative findings: "[I]t is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect he health, prosperity and general welfare of the state and its citizens" and that FEECA is "to be liberally construed in order to meet the complex problems" associated with energy conservation. §366.81 Fla. Stat. (1993). It is clear that the legislative intent expressed includes protection of the public interest in health, including environmental health, and a sustainable energy future for

Florida. Those same purposes are central to the mission of LEAF. In determining standing, the intent of statutes enacted to protect the public welfare, such as FEECA, " 'should be construed to advance [its] purpose and to avoid [its] being circumvented.' " Fairbanks, Inc. v. Dept. of Trans., 635 So.2d 58, 60 (Fla. 1st DCA 1994). In the instant case, such a construction of FEECA clearly results in a public policy decision favoring standing for organizations such as LEAF in proceedings relating to energy conservation and efficiency.

Additionally, public policy should preclude FPL from raising standing at this point in the process of a series of proceedings which FPL concedes are related and in which it concedes LEAF has participated. See FPL Memorandum, pp. 16-19. While FPL is arguing that LEAF has no standing, it is simultaneously arguing that LEAF has already litigated certain issues or is otherwise prevented from raising issues by reason of LEAF's earlier actions in proceedings from which the instant proceeding arises. In a case in which parties to previous proceedings before the Department of Natural Resources regarding certain development permits subsequently sought to appeal a later-required permit and were challenged on standing grounds, the court held that the appellants had standing. Town of Palm Beach v. DNR, 577 So.2d 1383 (Fla. 4th DCA 1991).

In any event, the Commission has already approved LEAF's party status by granting LEAF's Petition to Intervene in this docket, thus affirming LEAF's standing. Order PSC 95-0102-PCO-EG. After the Commission authorized its intervention, LEAF, at considerable

proceeding." The Commission acts only by rule or order. Chap. 120 Fla. Stat. (1993) In no case does an action of the Commission directly or physically result in harm to public health, welfare or the environment. Orders and rules must be carried out by, in this case, regulated parties. Approval by the Commission of the DSM Plan will result in FPL's implementation of that Plan without the need for any further approval by any other agency. The theory of standing advanced by FPL would prevent anyone from challenging its Plan simply because the Commission's action, itself, does no immediate, palpable harm. However, by its own terms, the Commission's action is final for purposes of bringing a challenge. [[cite notice of review in PSC order]] If the Plan cannot be challenged now, it can never be challenged because the time to do so would pass. LEAF's allegations of injury must be reviewed in the context of the administrative action taken.

FPL cites Village Park Mobile Home Assn. v. Dept. of Bus. Reg., 506 So.2d 426 (Fla. 1st DCA 1987) as an example of speculative injury for which standing was denied. In Village Park, residents challenged approval of the park owner's prospectus. As the court noted, the prospectus was a disclosure document only, for the purpose of advising prospective future tenants of various matters; it had no force or effect itself and was not applicable to appellants. Further, appellants had other avenues to redress their concerns regarding the value of their homes. In this case, the DSM Plan is far more than a disclosure document; it is a specific plan which FPL is committed to implement over a period of

years. Its effects will begin immediately, but may not actually be felt in full immediately; however, the Commission's approval gives it full force and effect. Once approved, the Plan is no longer subject to challenge and its implementation, as approved, is the very problem of which LEAF complains. See, Friends of the Everglades v. Bd. of Trustees, 595 So.2d 186 (Fla. 1st DCA 1992); Hillsboro-Windsor Condo. Assn. v. DNR, 418 So.2d 359 (Fla. 1st DCA 1982).

Another case relied on by FPL is Florida Dept. of Offender Rehab. v. Jerry, 353 So.2d 478 (Fla. 2d DCA 1981) which involved a challenge to a rule by a prisoner after he served his punishment regarding the imposition of the penalty. In that case, the court ruled he did not have standing because at the time he brought the challenge, he was not subject to a penalty and it was speculative to conclude he would engage in behavior in the future which would result in the penalty; he was essentially seeking "an administrative declaration of his rights". Id. at 1232. The circumstances of that case are so unusual that it should be limited to its facts; certainly in this case there is no claim that the injury was suffered in the past and is conjectural as to its repetition. Further, the Supreme Court of Florida, in its Home Builders decision, cast a giant shadow on the continued validity of this case, stating that, to the extent it conflicted with the court's holding in Home Builders, the Jerry case was disapproved.

FPL cites Florida Society of Ophthalmology v. Bd. of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988) for the proposition

that injuries that are too speculative or conjectural should be rejected. That case involved rules for certification of optometrists to perform certain activities, pursuant to a statutory amendments. Appellants requested a hearing on "each and every optometrist's application for certification" before such applications were even filed. Id. at 1281. Appellants alleged prospective economic injury and were attempting to assert the rights of patients. The court found that, absent clear statutory authority, competitive economic interests could not be considered and that appellants were essentially seeking to challenge the statutory policy behind the regulations.

FPL's reliance on Grove Isle Ltd. v. Bayshore Homeowners Assn., 418 So.2d 1046 (Fla. 1st DCA 1982) is also misplaced. That case involved the appeal of a Department of Natural Resources ("DNR") jurisdictional determination regarding the need for a lease of submerged lands for a development. Appellees alleged interference with their use and enjoyment of the area and pollution of the vicinity. The court found that appellees failed to show how they would be harmed by the lease itself since that requirement did not affect the need for permits for the project. The court stated:

> [T]he petitioners have failed to demonstrate how they are substantially affected more than the general public by DNR's decision not to require Grove Isle to pay rent for the submerged land.... Id. at 1048 (emphasis added).

Grove Isle is further distinguished in Town of Palm Beach v. DNR, 577 So.2d 1383 (Fla. 4th DCA 1991). In that case, the Town, an adjoining property owner and the Sierra Club challenged a

jurisdictional determination of DNR regarding a coastal permit. The Town and a landowner alleged their properties would be adversely affected; Sierra Club alleged its members used the surrounding area and that it was interested in protecting the beaches of Florida. The court found all appellants had standing and distinguished Grove Isle by noting that, in that case, the rent issue did not foreclose appellees from participating in other permit processes. It found that the appellants before it had no other process available and that there was no difference between that non-exercise of jurisdiction and the issuance of a permit. The instant case is no different. The injuries alleged by LEAF are similar in relevance to those of the Sierra Club in Palm Beach and will result from approval and implementation of a plan; there is no other avenue of appeal.

Regarding FPL's apparent claim that substantial numbers of LEAF's membership must be shown to be customers of FPL, the Commission should reject such a narrow reading of the APA and FEECA. LEAF members who live and work in other areas of the state may also be affected by FPL's actions regarding implementation of energy efficiency measures and the avoidance or deferral of the construction of polluting power plants. Further, while LEAF's members must be "substantially affected," that does not mean that some specific percentage of members must be FPL customers or reside within its service territory. In Federation of Mobile Home Owners v. Dept. of Bus. Reg., 479 So.2d 252 (Fla. 2d DCA 1985), appellant alleged that it represented tenants in mobile home parks throughout

Florida and sought a declaratory statement related to circumstances it alleged were occurring in at least three parks. In finding that appellant had standing, the court determined that it had made a showing of more than curiosity. The court rejected appellee's argument that the three parks were only a small faction of tenants, finding that, while the petition referred to three parks, it was made on behalf of others as well. The court also specifically addressed the adequacy of standing as alleged by appellant, stating: "While the petition could have more specifically alleged the number of members substantially affected, we believe the threshold standing requirements of Florida Home Builders have been met." Id. at 255. In the instant case, particularly in the context of the previous related proceedings, the Commission should find the same as to LEAF.

In the alternative, should the Commission determine that LEAF has not sufficiently alleged standing at this point, the Commission should allow LEAF the opportunity to do so through discovery, amended pleadings and/or testimony. See, Rule 25-22.034; 25-22.036(8) Fla. Admin. Code. This is clearly an allowable avenue in cases where questions have been raised about standing in administrative proceedings. In Agrico Chemical Co. v.DER, 406 So.2d 478 (Fla. 2d DCA 1981), the court noted:

> If their standing is challenged in that hearing by the permit applicant and the protestants are then unable to produce evidence to show that their substantial environmental interests will be affected by the permit grant, the agency must deny standing.... Id. at 482. (emphasis added).

Other cases support the ability of parties to have an opportunity to show standing by the means addressed above. See, Friends of the Everglades v. Bd. of Trustees, 595 So.2d 186 (Fla. 1st DCA 1992) (Appellants used amended petition to further establish standing); Friends of Fort George v. Fairfield Communities, 24 Fla. Supp. 2d 192 (1986) (Testimony taken to determine standing of intervenor Southern Fisheries Assn.).

## C. Zone of Interest

FPL seeks to portray LEAF's interest in public health and the environment as outside the zone of interest of FEECA. A plain reading of the legislative intent and the directive of the Legislature to construe the statute liberally shows how mistaken FPL's crabbed interpretation of FEECA is. The public health and welfare, as well as the future prosperity of the state, is dependent on a healthy, livable environment. The Legislature clearly did not direct that energy efficiency be undertaken merely an end in itself, like some eccentric saving string for the sake of having it. The purpose behind all these activities, including the actions of the Legislature, as well as LEAF and the Commission in the conservation goals proceedings, is to ensure our environmental health and our energy future. As a public interest organization, LEAF has invested substantial time, money and human resources in its efforts to improve Florida's energy future by providing information to the Commission and its staff, by seeking to obtain

additional energy and demand savings in various Commission proceedings, and, where possible, by working directly with the utilities themselves to improve their delivery of energy efficiency. Such organizations, when working towards purposes generally consistent with statutory goals, have been granted standing by Florida courts. See, Farmworker Rights Org. v. Dept. of Health, 430 So.2d 1 (Fla. 1st DCA 1983). The cases cited by FPL in support of its arguments evidence a lack of understanding of FEECA and LEAF's role in Commission proceedings.

LEAF's corporate purposes and "track record" in proceedings before the Commission are matters that should be considered in determining whether LEAF's interests and alleged injuries are within the zone of interest to be protected. In Friends of the Everglades v. Bd. of Trustees, 595 So.2d 186 (Fla. 1st DCA 1992), the court stated that application of Agrico required analysis of not only the type and nature of the injury asserted, but the purpose and scope of the administrative proceeding. In that case, the court declined to consider appellant's lobbying efforts as establishing an interest, but did note efforts by appellants on behalf of the resource it sought to protect. The court also distinguished Grove Isle Ltd. v. Bayshore Homeowners Assn., 418 So.2d 1046 (Fla. 1st DCA 1982) and Suwannee River Area Council v. State, 384 So.2d 1369 (Fla. 1st DCA 1980), both relied on by FPL, as involving determinations which, in themselves, were unrelated to the interests of the potential intervenors. In addition, the court noted that, in the case before it, appellants were already enjoying

a present benefit that would be affected by the agency's action. Here, LEAF has already shown its commitment of resources on behalf of the interests FEECA seeks to protect; the approval of the DSM Plan is directly related to LEAF's interests; and LEAF and its members may be said to be presently enjoying the benefits of energy conservation and efficiency efforts to date that may be affected by the Commission's approval of FPL's Plan.

Similarly, in Town of Palm Beach v. DNR, 577 So.2d 1383 (Fla. 4th DCA 1991), the court distinguished Grove Isle and Suwannee and held that appellant Sierra Club's interest in protection of Florida's beaches was within the zone of interest of a statute designed to protect beach and dune systems. The fact that the interests of LEAF in this proceeding do not specifically apply to a precise environmental or public health amenity at a specific physical location does not require a different result.

## D. LEAF Has Party Status

As LEAF's Petition for Hearing notes, the Commission has already affirmed LEAF's standing and granted LEAF party status by granting LEAF's petition to intervene in this proceeding. Order PSC-95-0102-PCO-EG. Though Rule 25-22.036(9), Fla. Admin. Code, authorizes denial of untimely or inadequate petitions, neither FPL, nor any other party, challenged the Order and the time for its reconsideration or appeal has passed. As a result, FPL has admitted "all facts set forth" in LEAF's Petition to Intervene.

Rule 25-22.037, Fla. Admin. Code.

Thus, FPL has waived its right to object to granting LEAF party status in this proceeding. The findings implicit in the Order authorizing LEAF's intervention in this case -- that the allegations in LEAF's Petition to Intervene are sufficient to authorize LEAF's intervention -- are now the law of the case. Rule 25-22.037, Fla. Admin. Code, as well as the doctrines of res judicata and administrative finality thus bar FPL from now challenging the Commission's finding.

FPL cites Manasota-88, Inc. v. Agrico Chemical Co., 576 So.2d 783 (5th DCA 1991) to support its claim that the Order granting LEAF's intervention is a nullity. In that case the court granted a third party's Petition for Hearing on a Department of Environmental Regulation ("DER") default permit.[1] The court reasoned that post-default intervention was proper since "a party...may not intervene in that type of proceeding (i.e., an environmental permit proceeding) until the DER gives formal notice of the action it intends to take regarding a pending permit application." (Id., at p. 783, emphasis supplied). Unlike that case -- where no DER rule authorized intervention before the agency gave formal notice of its proposed action -- the Commission's rules specifically authorize the Order granting LEAF's Petition to Intervene prior to proposed agency action. Rule 25-22.036(9)(a)2,

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[1]Chapter 403, Fla. Stat., provides that permit applications are granted by default should DER fail to timely act on the application.

Fla. Admin. Code provides that: "where a...petition...has been filed, and Commission action has not been proposed, the Commission may...issue notice of proposed agency action where a rule or statute does not mandate a hearing as a matter of course, and after the time for responsive pleadings has passed." The Commission's Order granting LEAF's Petition to Intervene complied with this criterion and should not be deemed a nullity.

FPL claims that "under the Commission's procedural rules, a formal proceeding subject to a potential Section 120.57 hearing is not initiated until the filing of an 'Initial Pleading'" (p. 13 of FPL Memorandum). However, FPL cites no statute, rule, or case law to support this claim. The company then concludes that "prior to FPL filing its petition (initial pleading)...there was no formal proceeding into which LEAF could intervene..." Though FPL cites a rule provision to support this argument, it ignores other provisions of that same rule which define "initial pleading" to include both Petitions by substantially affected persons and Commission Orders or Notices. Rule 25-22.036(2), Fla. Admin. Code. Thus, even if an "initial pleading" were required, the Commission's action in opening a docket, issuing a procedural order (PSC 941486-PCO-EI, issued 12/2/94), and granting the Peoples Gas Petition to Intervene (Orders PSC 941574-PCO-EG and PSC 941574A-PCO-EG, issued 12/19/94 and 1/13/95) -- all prior to LEAF's intervention -- would meet any such requirement.

II

## LEAF DOES NOT SEEK TO RELITIGATE ANY ISSUE

Contrary to FPL's allegation, LEAF does not seek to relitigate issues addressed during the goals-setting docket. Rather, LEAF seeks a hearing regarding the compliance of the DSM Plan FPL submitted in this docket with the standards established in rules and orders adopted by the Commission. See, Rule 25-17.0021(4), Fla. Admin. Code; Section 366.82(3), Fla.Stat. (1993); the Commission's Final Order in the conservation goals case (PSC-94-1313-FOF-EG), the Commission's Procedural Order in this case (PSC-94-1486-PCO-EI), and the Commission's Proposed Agency Action Order Approving DSM Plans in this case (PSC-95-0691-FOF-EG).

Paragraph four of LEAF's Petition for Hearing states that LEAF has a substantial interest in this proceeding since it will, *inter alia*, impact how much its members pay for energy services. FPL somehow mistakenly equates this statement to an effort by LEAF to have the Commission set TRC-based goals in this proceeding. That is not the case. As previously stated, LEAF seeks a hearing regarding the compliance of the FPL's DSM Plan with the standards established in the Commission's rules and orders.

FPL objects that two matters disputed in LEAF's Petition -- whether each component program advances the policy objectives set forth in Rule 25-17.001, Fla. Admin. Code, and the FEECA statute; and whether each component program is cost-effective -- constitute

efforts to relitigate issues. Characterizing these issues as "relitigation" is ludicrous since they are -- word for word -- the very criteria the Commission Order at issue uses to judge FPL's DSM plan.

FPL also claims that, since its DSM plan is comprised of conservation measures evaluated in the goal-setting case, the Commission may not here evaluate the plan or plan components filed by FPL in this docket. The Commission should reject this approach since it circumvents Commission evaluation of FPL's proposed DSM plan as directed in Rule 25-17.0021(4), Fla. Admin. Code; Section 366.82(3), Fla. Stat. (1993); the Commission's Final Order in the conservation goals case (PSC-94-1313-FOF-EG), the Commission's Procedural Order in this case (PSC-94-1486-PCO-EI), and the Commission's Proposed Agency Action Order Approving DSM Plans in this case (PSC-95-0691-FOF-EG).

## III

## LEAF'S PETITION STATES A CAUSE OF ACTION

The Commission should reject FPL's effort to secure denial of LEAF's petition for failure to state ultimate facts. The Commission's rule directs a "concise statement of the utimate facts alleged." Rule 25-22.037(7)(a)4, Fla. Admin. Code, (emphasis supplied). Case law clearly establishes that "the term 'ultimate

facts' should not be interpreted in a technical, restrictive, and hairsplitting way." 40 Fla. Jur. 2d Pleadings, §23 (p. 34). Also, in ruling on FPL's Motion, the Commission must consider each allegation in LEAF's petition as true. 40 Fla. Jur. 2d, Pleadings, §175 (p. 238) and §176 (p. 242).

On its face, LEAF's Petition clearly and concisely states both the ultimate fact -- FPL's Plan is not reasonable -- and the underlying matters disputed. FPL's allegations to the contrary seem particularly disingenuous given its concurrent claim that factual disputes raised in LEAF's Petition constitute attempts to relitigate issues already decided. In any event, should FPL seek additional detail, it is free to conduct discovery and, were a factual basis discovered, seek summary judgment or other such relief as authorized by Chapter 25-22, Fla. Admin. Code. Further, even assuming, arguendo, LEAF's Petition were facially deficient, the Commission should authorize LEAF to amend its Petition to correct any such deficiencies as authorized by Rule 25-22.036(8), Fla. Admin. Code.

## IV

## LEAF'S CAUSE OF ACTION IS WITHIN THE SCOPE OF THE PROCEEDING

LEAF's Petition states that "for purposes of evaluating DSM performance, a method to document key program assumptions, such as baseline usage, incentive levels, and free-ridership rates should be determined in this docket." With no explanation, FPL claims,

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and fifteen copies of the foregoing Legal Environmental Assistance Foundation, Inc. Opposition (including supporting Memorandum) to Florida Power and Light Company's Motion in Opposition to LEAF's Petition were hand delivered to the offices of Blanca Bayo, Director, Division of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0870, and that a true copy was hand delivered to the offices of Martha Carter Brown and Shelia L. Erstling, Staff Counsel, Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0870, and that a copy was sent by U.S. Mail to Charles Guyton, Esquire, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301; Jack Shreve, Esquire, and Roger Howe, Esquire, Office of the Public Counsel, 111 West Madison Street, Pepper Building, Room 812, Tallahassee, Florida 32399; Robert B. Hicks, Esquire, The Independent Savings Plan Company, 6302 Benjamin Road, Suite 414, Tampa, FL 33634; Robert Sheffel Wright, Esquire, Landers and Parsons, 310 West College Avenue, Third Floor, Tallahassee, FL 32301; and Ms. Mollie Lampy, Esquire, RR 2, Box 419C, Altamont, NY 12009, this 11th day of August, 1995.

Debra Swim

Debra Swim, Esquire