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February 10, 1997

Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
Room 110, Betty Easley Conference Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. **970022-EU** (In Re: Petition of
Florida Power & Light Company for Enforce-
ment of Order No. 4285 in Docket No. 9056-EU,
which approved a territorial agreement and
established boundaries between the Company
and the City of Homestead)

Dear Ms. Bayó:

Enclosed for filing are the original and fifteen (15) copies
of Florida Power & Light Company's Memorandum in Response to the
City of Homestead's Motions. Please acknowledge receipt and filing
of the above by stamping the copy of this letter attached and
returning same to me.

Yours truly,


Wilton R. Miller

WRM:lms
Enclosures
CC: Lorna R. Wagner, Esquire
Frederick M. Bryant, Esquire

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by Florida Power &)
Light Company for Enforce-)
ment of Order No. 4285 in)
Docket No. 9056-EU, which)
approved a territorial) DOCKET NO. 970022-EU
agreement and established)
boundaries between the)
Company and the City of)
Homestead.)
_____)

FLORIDA POWER & LIGHT COMPANY'S MEMORANDUM IN
RESPONSE TO THE CITY OF HOMESTEAD'S MOTIONS

FLORIDA POWER & LIGHT COMPANY ("FPL") has no objection to the CITY OF HOMESTEAD ("City") intervening in this matter or being heard in oral argument if that is the desire of the Commission. A brief statement as to the background of this matter may be helpful to the Commission in resolving this matter. Upon learning of the service being provided to Silver Eagle Distributors, Ltd., and Contender Boats by the City in FPL's service territory, FPL orally notified the Commission, through members of its staff, of the violation of the Commission's Order and inquired as to whether or not the Commission would be interested in filing with FPL a petition in Circuit Court for enforcement of order or a writ of mandamus against the City. Commission staff urged FPL to advise the City of the violation and to try to work the matter out between the two utilities. Pursuant to that request, FPL met with the Mayor and principals of the City's utility and their counsel in Homestead on July 30, 1996. Homestead, through its counsel, denied that a violation had occurred and argued that since the City owned the real estate within and on which the facilities are located, the

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FPSC-RECORDS/REPORTING

facilities are within an exemption granted by the Commission's Order. Subsequent to that meeting, FPL requested a meeting with PSC staff to discuss the matter further and notified counsel for the City of the meeting which took place on November 14, 1996. At that meeting, attended by counsel for the City, it was agreed that no facts were in dispute and that the only issue was whether or not the facilities fell within the exemption granted to the City in Commission Order No. 4285 in Docket No. 9056-EU. FPL, through its attorneys, then agreed to file an appropriate pleading to bring the issue properly before the Commission for interpretation and decision.

Since the determination and interpretation of the meaning of an order of the Commission is inherently within the jurisdiction of the Commission and that the taking of testimony or introduction of further evidence would probably not be necessary or required, FPL filed its Petition pursuant to the authority granted in section 366.076(1), Florida Statutes, which provides that "[u]pon petition or its own motion, the commission may conduct a limited proceeding to consider and act upon any matter within its jurisdiction," If, after reviewing the Order the Commission should determine that the activities at the facilities located on and within the real estate leased to Silver Eagle Distributors, Inc., and Contender Boats are not municipal facilities and that the City is in violation of its Order, it would be appropriate for the Commission to then issue its Order directing the City to comply with its previous Order. Failure of the City to obey that Order would then

place a duty upon the Commission to seek an enforcement order from the Circuit Court in Dade County as provided by Section 120.69(1)(a), Florida Statutes.

As previously stated, FPL has no objection to the City's Motion to Intervene.

As to the City's Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter, FPL believes it is well-settled in both statutory and case law that the Commission's jurisdiction over the subject matter of its orders is broad and comprehensive in both its express and implied powers. Among other grants of power, the Legislature expressly provides in Section 366.05(10), Florida Statutes:

The Legislature finds that violations of commission orders or rules, in connection with the impairment of a public utility's operations or service, constitute irreparable harm for which there is no adequate remedy at law. The commission is authorized to seek relief in circuit court including temporary and permanent injunctions, restraining orders, or any other appropriate order. Such remedies shall be in addition to and supplementary to any other remedies available for enforcement of agency action under s. 120.69 or the provisions of this chapter. The commission shall establish procedures implementing this section by rule.

See also Coca-Cola Co., Food Division, Polk County v. State, Dept. of Citrus, 406 So.2d 1079, 1081-2 (Fla. 1981), wherein the Florida Supreme Court held as follows:

"The powers of this and similar agencies include both those expressly given and those given by clear and necessary implication from the provisions of the statute." *City Gas Company v. Peoples Gas System, Inc.*, 182 So.2d 429, 436 (Fla. 1965). The implied powers attendant to those expressly given include those which are "indispensable or useful to the valid purposes of a remedial law", *State ex rel. Railroad Commis. v.*

Atlantic Coast Line R. Co., 60 Fla. 465, 54 So. 394, 397 (1911); those "necessary for the exercise of the [right] or the performance of the [duty]", *Girard Trust Co. v. Tampashores Development Co.*, 95 Fla. 1010, 117 So. 786, 788 (1928); those "necessary to accomplish the [stated governmental purpose]", *Hancock v. Karel*, 127 Fla. 451, 173 So. 274, 275 (1937), citing *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789, 792 (1919); and those "necessary to carry out the power or right and make it effectual and complete", *Deltona Corporation v. Florida Public Service Commission*, 220 So.2d 905, 907 (Fla. 1969). Thus to determine whether the commission has the implied authority to require declarations of origin, we must examine the code to determine both its purposes and the duties which it places on the commission.

All that is necessary for this Commission to do in the instant case is interpret the meaning of one clause in its Order and to carry out its constitutional duty to enforce it according to the Commission's finding and within its lawful authority. The Supreme Court of Florida in Public Service Commission v. Fuller, 551 So.2d 1210, 1212 (Fla. 1989), has found that "[t]he subject matter of [an] order is within the particular expertise of the PSC...." Along the same line, the Florida Supreme Court, in approving and adopting a holding similar to that of State ex rel. Orscheln Brothers Truck Lines, Inc. v. Public Service Commission, 232 Mo.App. 605, 110 S.W.2d 364, 366, held as follows:

"It will not do to say that the commission cannot interpret its own orders. Denial of the power of the commission to ascribe a proper meaning to its orders would result in confusion and deprive it of power to function. In interpreting its orders it does not act judicially, but as a fact-finding agency."

We approve the above language and hold it to be applicable to orders of the Florida Commission.

Coast Cities Coaches v. Mack, 64 So.2d 774, 780 (Fla. 1953).

It is FPL's view that not only does the Commission have jurisdiction over the subject matter but that the Commission is unquestionably charged with the duty to supervise and enforce its orders for the purpose of preventing uneconomic duplication of generation, transmission and distribution facilities. Section 366.04(5), Florida Statutes (1995); Public Service Commission v. Fuller, 551 So.2d 1210, 1212 (Fla. 1989); Utilities Commission of City of New Smyrna Beach v. Florida Public Service Commission, 469 So.2d 731 (Fla. 1985).

Furthermore, for the Commission to assure, via its regulation of public utilities, that State action immunity from antitrust liability will exist, there must be (1) a clearly articulated State policy to displace competition with regulation and (2) active State supervision of the conduct in question. California Retail Liquor Dealers Assn. v. Midcal Aluminum, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); Praxair, Inc. v. Florida Power & Light Company, et al., 64 F.2d 609 (11th Cir. 1995); TEC Cogeneration Inc. et al v. Florida Power & Light Company, et al., 76 F.3d 1560 (11th Cir. 1996). In the latter two cases, the Commission appeared as an amicus curiae arguing for the finding of State action immunity and against erosion of the State's regulatory oversight of public utilities' activities.

As to the City's Motion to Dismiss for Failure to State a Cause of Action, based upon the authorities hereinabove cited, it is sufficient to allege that the City is in violation of the Order of the Commission. As to the City's argument that its ownership of

the real estate makes it the owner of the facilities, this point was adequately covered in FPL's petition and will therefore only be briefly summarized here: The real estate simply lies underneath or surrounds a facility. A facility is comprised of equipment, machinery, furniture, personnel and such other items as may facilitate the activity which is being conducted on or within the real estate. Buildings may be owned by many entities but the facilities within those buildings are doctors' offices, law offices, hardware stores, boat manufacturing plants, beer sales and distribution centers, and on and on *ad infinitum*. As pointed out in FPL's petition, the equipment which allows both tenants of the City to conduct their operations on and within the real estate owned by the City is the property of the tenants under their complete control and may be removed upon termination of the lease. The City's only function as legal owner of the property is to provide land upon which each facility can rest.

FPL does not seek an adjudication from the Commission as to either the lawfulness of the leases or the City's conduct except to the extent that the City's conduct is in violation of the

Commission's Order. The City's Motion to Dismiss for Failure to Join Indispensable Parties is, therefore, without merit.

Respectfully submitted,



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Attorneys for Florida Power &
Light Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and fifteen copies of the foregoing Florida Power & Light Company's Response to the City of Homestead's Motions have been filed with the Florida Public Service Commission, Division of Records and Reporting, Room 110, Betty Easley Conference Center, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850; and that a true and correct copy has been furnished by hand delivery to Lorna R. Wagner, Esquire, Division of Legal Services, Florida Public Service Commission, Room 370, Gerald L. Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850; and that a true and correct copy has been furnished by United States Mail, postage prepaid, to Frederick M. Bryant, Esquire, Williams, Bryant, Gautier & Donohue, P.A., Post Office Box 1169, Tallahassee, FL 32302, Attorney for the City of Homestead, this 10th day of February, 1997.



WILTON R. MILLER