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February 14, 1997

Ms. Blanca S. Bayó, Director  
Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

RE: Docket No. 970022-EU  
In re: Petition of Florida Power & Light Company for Enforcement of Order No. 4285 in Docket No. 9056-EU

Dear Ms. Bayó:

Please find enclosed an original and 15 copies of the Reply of the City of Homestead to Florida Power & Light Company's Memorandum in Response to the City of Homestead's Motions for filing in the above-referenced docket. Please acknowledge your receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to the undersigned.

Thank you for your assistance in this matter.

Sincerely,

*Frederick M. Bryant*  
Frederick M. Bryant

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BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Power & Light  
Company for Enforcement of  
Order No. 4285 in Docket No.  
9056-EU.

Docket No. 970022-EU

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

The City of Homestead ("City"), by and through its undersigned attorneys, hereby files this reply to Florida Power & Light Company's Memorandum in Response to the City of Homestead's Motions ("FPL Response").

The first page and half of FPL's Response seeks to give the Commission "a brief statement as to the background of this matter..." The City has filed a Motion to Strike this "brief statement as to the background" as being immaterial and impertinent as there is no record basis before the Commission upon which FPL can make these statements. In fact, the City is without knowledge as to the factors involved whereby "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 for writ of mandamus against the City." The City was not informed of this conference and thus did not attend. It is totally improper for FPL to "give a brief statement of the background" as there is no record foundation for these statements. In addition, FPL in its response makes the statement "at that meeting" (referring to the November 14, 1996 meeting whereby the City's attorney and the FPL attorney met with Commission staff on an informal basis) "it was agreed that no facts were in dispute

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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.” This statement in FPL’s response is not only inappropriate it is totally inaccurate. The City nor its undersigned counsel made any such agreement.

FPL on page 2 of its Response states that “. . . FPL filed its Petition pursuant to the authority granted in Section 366.076(1), Florida Statutes. If this is the statutory authority relied upon by FPL for filing its Petition, (which is apparently the case, since the Petition contains no reference to any statutory authority or Commission rule as a basis for bringing this action), then based solely upon this statement by FPL, the Petition should be dismissed by the Commission. F.S. 366.076(1) is not applicable to the City. F.S. 366.11 entitled, “Certain Exemptions” provides that: “(1) No provision of this Chapter shall apply in any manner, other than as specified in s. 366.04, 366.05(7) and (8), 366.051, 366.055, 366.093, 366.095, 366.14 and 366.80–366.85 to utilities owned and operated by municipalities, whether within or without any municipality. . .” Therefore, this statutory basis for the Petition provided by FPL in its Response is not applicable to the City and, therefore, FPL’s Petition must be dismissed pursuant to the Motion to Dismiss for Failure to State a Cause of Action previously filed by the City.

On page 3 of its Response, FPL cites Section 366.05(10) as the statutory grant of power for the Commission’s subject matter jurisdiction to adjudicate FPL’s Petition. As noted above, by the express provisions of Section 366.11, Florida Statutes, F.S. 366.05(10) is not applicable to the City and, thus, the Petition should be dismissed pursuant to the City’s Motion to Dismiss for Lack of Jurisdiction.

FPL, on page 5 of its Response, cites to certain antitrust cases as an apparent justification for its Petition. While the relevance of these cases to the procedural and jurisdictional infirmities of the Petition is not explained in FPL's Response, FPL failed to cite Columbia Steel Casting Co. v. Portland General Electric Company, Case No. 93-3598 (1996 U.S. App. Lexis 33863), decided on December 27, 1996, in the United States Court of Appeals for the Ninth Circuit. In that case dealing with a territory agreement remarkably similar to the territory agreement between FPL and the City, the Court of Appeals affirmed a partial summary judgment of the lower court finding a Section 1 violation of the Sherman Act. The court held that the 1972 order of the Oregon Public Utility Commission approving the territory agreement between Portland General Electric and Pacific Power & Light did not articulate a state policy sufficient to isolate the territory agreement from antitrust violations as required by the Midcal clear articulation requirement. In other words, the State of Oregon did not approve the displacement of competition with territory monopolies in the Portland market with the clarity required by Midcal. Accordingly, the court held that the state action doctrine providing antitrust immunity was not applicable. It did not shield the territory agreement from antitrust violations. In any event, the Midcal test for an antitrust shield is not an issue in this proceeding, nor can it be.

On page 6 of its response, FPL apparently now concedes that the City owns both the land and the buildings occupied by Silver Eagle and Contender Boats but instead FPL argues the strained, if not blatantly ludicrous, position that the "facilities" referred to in the territory agreement should be interpreted by the Commission to mean "equipment, machinery, furniture, personnel and such other items as may facilitate the activity which is being conducted on or within the real estate." Based upon FPL's argument, if the City owns a building and land within FPL's service territory, but the City is

leasing some or all of the equipment in the building (such as a computer or copy machine or furniture), then the City would not be entitled to serve that building since it would not be a city-owned facility that is utilizing the electricity (i.e. a leased computer or copy machine). Or, if the City owned the land and building but leased a portion of the building to a private entity, i.e. the operator of the cafeteria in the City's building, then the City would not be entitled to serve that building, or at least the cafeteria. However, based upon FPL's argument and since the buildings in the Park of Commerce as conceded by FPL are owned by the City, then the wiring, fuse panel, meter can, electric outlets, lighting and air conditioning are also owned by the City and, thus, the City would be entitled to provide service to those facilities, but not any equipment or machinery placed in those buildings by the tenants. Taken to its most extreme and illogical point, FPL's position as to what constitutes "facilities" means that if FPL leases to the City a building in FPL territory for utilization by the City for city purposes (i.e. clerical office space) and the City owns the equipment and furniture in the building (i.e. computers and fax machines) then, under the terms of the Territory Agreement and the Commission Order, the City would be entitled to provide the electric service to these city-owned facilities. Such absurd interpretations cannot stand. The lack of creditability of FPL's arguments in its Response hardly justifies any further response by the City.

Therefore, the City respectfully submits that its Motions filed herein should be granted.



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Attorneys for the City of Homestead

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and 15 copies of the foregoing Reply of the City of Homestead to Florida Power & Light Company's Memorandum in Response to the City of Homestead's Motions were filed with **Ms. Blanca S. Bayó, Director, Division of Records and Reporting, Florida Public Service Commission, Room 110, Easley Conference Center, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850**; and that a true and correct copy of the foregoing was furnished by Hand Delivery to **Lorna R. Wagner, Esquire**, Division of Legal Services, Florida Public Service Commission, Room 370, Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850; and that true and correct copies of the foregoing were furnished by regular U.S. mail to **Wilton R. Miller, Esquire**, Bryant, Miller and Olive, P.A., 201 South Monroe Street, Suite 500, Tallahassee, FL, 32301; and **David L. Smith, Esquire**, Florida Power & Light Company, P.O. Box 029100, Miami, FL 33102-9100 on this \_\_\_\_ day of February, 1997.



Attorney

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