

FLORIDA PUBLIC SERVICE COMMISSION  
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Tallahassee, Florida 32399-0850

MEMORANDUM

MARCH 20, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PAUGH) *79P RUE PE-PC*  
DIVISION OF ELECTRIC AND GAS (COLSON) *JD*

RE: DOCKET NO. 970265-EG - PETITION TO INCREASE EXPENDITURE  
CAP FOR BUILDSMART PILOT PROGRAM BY FLORIDA POWER & LIGHT  
COMPANY.

AGENDA: APRIL 1, 1997 - REGULAR - (PUSHED) AGENCY ACTION (ISSUE 2)  
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\970265.BCM

CASE BACKGROUND

Florida Power and Light's (FPL) BuildSmart pilot project was originally approved by the Commission as part of its New Home Construction Research Project in December of 1992 pursuant to Order No. PSC-92-1451-FOF-EG, Docket No. 921034-EG. The project was approved with an expenditure cap of \$5,900,000 to be recovered through the Energy Conservation Cost Recovery Clause (ECCR) and with a time limit of two years. Subsequent to the initial approval, FPL requested and was granted four extensions of time for a cumulative total of five years and two increases in its expenditure cap for a cumulative total of \$6,750,000. The instant request is for a third increase in the expenditure cap of the pilot program.

The BuildSmart pilot program extensions and expenditure increases have been requested by FPL in order to maintain 'program continuity' while the utility seeks approval of the permanent BuildSmart program. To that end, FPL filed a petition seeking approval of the permanent program in December of 1995, Docket 951536-EG. The permanent program petition was amended by FPL in July of 1996 in order to address staff's concerns that the program

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was not cost effective. The Commission found that FPL's reallocation of costs in its amended petition were not appropriate and denied approval of the permanent program on January 27, 1997, Order No. PSC-97-0092-FOF-EG. FPL has timely protested that Order and a hearing has been set for October 10, 1997.

The instant petition for a third increase in the expenditure cap arises out of FPL's antecedent pilot program filing, Docket No. 961302-EG. That petition, filed in October of 1996, contained two requests: (1) the fourth extension of the pilot program until the Commission takes final action on the permanent BuildSmart program; and (2) a recovery of costs associated with the extension estimated by FPL to be \$80,000. Paragraph 12 of the petition states that the requested \$80,000 is "in excess of the \$6,750,000 of costs originally estimated" for the program. While somewhat ambiguous, FPL was asking for the third increase in the expenditure cap for the pilot program.

Proposed Agency Action Order No. PSC 97-0020-FOF-EG, January 6, 1997, Docket No. 961302-EG addressed both of FPL's requests. The Commission granted the request for a fourth extension of time until "...an Order is issued regarding FPL's petition for a permanent BuildSmart program (Docket No. 95-1536-EG) or no later than December 31, 1997." Proposed Agency Action Order No. PSC 97-0020-FOF-EG, page 3. The Commission also granted the requested \$80,000 but reduced the expenditure cap:

*Previously, we issued Order No. PSC-96-0404-FOF-EG approving a spending cap of \$6,750,000 for the New Home Construction R & D Project and allowing the BuildSmart pilot program's prudent and reasonable expenses to be recovered through the Energy Conservation Cost Recovery Clause (ECCR) through December 31, 1996. As of the third quarter of 1996, FPL has spent 6.26 million on the New Home Construction R & D Project. In order to avoid a lapse in cost-recovery, FPL requests that we allow the BuildSmart pilot program to continue and approve recovery or [sic] reasonable and prudent expenses through ECCR for approximately \$80,000 from January 1, 1997 through December 31, 1997.*

Proposed Agency Action Order No. PSC 97-0020-FOF-EG page 3.  
(emphasis added)

In effect, this action authorizes the expenditure of the \$80,000 but reduces the expenditure cap from \$6,750,000 to \$6,340,000 (\$6,260,000 previously spent plus \$80,000). FPL did not file a petition for formal proceeding to protest the expenditure cap



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issue. Instead, it has filed a de novo proceeding for an increase in the cap, alleging that the language in Proposed Agency Action Order No. PSC-97-0020-FOF-EG is a mistake and that the Commission intended to allow it to spend \$80,000 in addition to any unspent monies from the previously approved \$6,750,000 expenditure cap.

### **DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission consider Florida Power & Light's petition to increase the expenditure cap for the BuildSmart pilot program?

**RECOMMENDATION:** No. The Commission should dismiss the petition on procedural grounds as an unlawful reconsideration of a Proposed Agency Action Order.

**STAFF ANALYSIS:** Notwithstanding the fact that the instant request has been filed as a de novo proceeding, it appears to be an untimely request for reconsideration of an issue already addressed in Proposed Agency Action Order No. PSC-97-0020-FOF-EG, Docket No. 961302-EG. The standard of review is whether the principal issue now before the Commission was presented and decided in the prior proceeding. Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966). The expenditure cap increase was requested in the prior petition, it was addressed in the staff recommendation, the Commission approved the staff recommendation, and the Proposed Agency Action Order was consistent with the staff recommendation. If the Proposed Agency Action Order was inconsistent with what FPL understood the outcome of the proceedings to be, its remedy was to protest the Proposed Agency Action Order. Instead, FPL has filed a petition seeking an increase in the expenditure cap which is tantamount to a reconsideration of the issue presented in the prior petition. Our rules expressly disallow reconsideration of a Proposed Agency Action Order. Rule 25-22.060(1)(a) Florida Administrative Code states: "The Commission will not entertain a motion for reconsideration of a Notice of Proposed Agency Action issued pursuant to Rule 25-22.029, regardless of the form of the Notice and regardless of whether or not the proposed action has become effective under Rule 25-22.029(6)."

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**ISSUE 2:** Should the Commission, on its own motion, modify its prior determination and increase the expenditure cap for the BuildSmart pilot program to \$6,830,000?

**RECOMMENDATION:** Yes. The Commission should increase the expenditure cap for the BuildSmart pilot program to \$6,830,000.

**STAFF ANALYSIS:** As previously stated, the instant petition for an increase in expenditure cap arises out of FPL's antecedent pilot program filing, Docket No. 961302-EG. At the time of that filing, staff did not know what amount of the \$6,750,000 cap FPL would use to recover expenses for the pilot project through December of 1996. FPL had only reported its expenses through the third quarter of 1996 which were \$6,259,740. In its Petition, FPL stated that the \$80,000 would be in excess of the \$6,750,000 cap set by Commission Order. Staff erroneously concluded that FPL would recover up to \$6,750,000 of expenses through 1996 and \$80,000 through December of 1997. Therefore, staff recommended that FPL be allowed to recover approximately \$80,000 through the ECCR clause from January 1, 1997 through December 31, 1997. According to the instant petition and FPL's fifteenth quarterly report, \$363,559 still remain to be recovered under the \$6,750,000 cap. Therefore FPL is requesting to recover approximately \$363,559 through the ECCR clause plus \$80,000 for a total of \$443,559 in additional expenses in 1997. This request will increase the pilot program expenditure cap from \$6,750,000 to \$6,830,000 consistent with the petition that was filed in Docket No. 961302-EG.

If the Commission determines that Order No. PSC-97-0020-FOF-EG granting FPL \$80,000 in expenses for 1997 but reducing the pilot program's expenditure cap was based on mistake or inadvertence, the Commission may take the corrective action requested herein. It is axiomatic in the law that the Public Service Commission has the authority to determine whether there is a mistake in a prior order over which it retains jurisdiction and to correct the error. Sunshine Utilities v. Florida Public Service Commission, 577 So. 2d 663 (Fla. 1st DCA 1991); Reedy Creek Utilities Co. v. Florida Public Service Commission, 418 So. 2d 249 (Fla. 1982).

Therefore, Staff recommends that FPL be allowed to recover approximately \$443,559 of prudent expenditures for the BuildSmart pilot project through December of 1997 or until an Order is issued on the permanent BuildSmart program (Docket No. 951536-EG).

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** Yes. If no person whose substantial interests



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are affected by the Commission's proposed agency action, files a protest within twenty-one days of the issuance of this Order, this docket should be closed.

**STAFF ANALYSIS:** If no person whose substantial interests are affected, files a request for a Section 120.57, Florida Statutes, hearing within twenty-one days of the issuance of this Order, no further action will be required and this docket should be closed.