

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to increase) DOCKET NO. 970265-EG
expenditure cap for BuildSmart) ORDER NO. PSC-97-0456-FOF-EG
pilot program by Florida Power &) ISSUED: April 22, 1997
Light Company.)
_____)

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA
DIANE K. KIESLING

ORDER DENYING PETITION AND NOTICE OF PROPOSED
AGENCY ACTION ORDER INCREASING EXPENDITURE CAP

BY THE COMMISSION:

Florida Power & Light Company's (FPL) BuildSmart pilot project was originally approved by us 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 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

DOCUMENT NUMBER-DATE

04053 APR 22 5

FPSC-RECORDS/REPORTING

ORDER NO. PSC-97-0456-FOF-EG
DOCKET NO. 970265-EG
PAGE 2

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.

In Proposed Agency Action Order No. PSC-97-0020-FOF-EG, January 6, 1997, Docket No. 961302-EG we addressed both of FPL's requests. We 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. 951536-EG) or no later than December 31, 1997." Proposed Agency Action Order No. PSC-97-0020-FOF-EG, page 3. We 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, our 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 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 we intended to allow it to spend \$80,000 in addition to any unspent monies from the previously approved \$6,750,000 expenditure cap.

Decision

I. Denial of Petition.

The petition is dismissed on procedural grounds as an unlawful reconsideration of a Proposed Agency Action Order. 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 us 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, we 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)."

II. Proposed Agency Action Increasing Expenditure Cap.

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Notwithstanding the procedural infirmities of Florida Power & Light's petition, we hereby, on our own motion, increase the expenditure cap for the BuildSmart pilot program to \$6,830,000. At the time of the antecedent pilot program filing, Docket No. 961302-EG, the amount of pilot program expenses FPL would incur through the end of 1996 was not known. It was assumed that the company would exhaust all of the previously granted expenditure cap of \$6,750,000. Because of this assumption, additional expenditures for 1997 were limited to \$80,000. However, based on the instant

ORDER NO. PSC-97-0456-FOF-EG
DOCKET NO. 970265-EG
PAGE 4

petition and FPL's fifteenth quarterly report, it is now clear that \$363,559 remained to be recovered under the \$6,750,000 expenditure cap. Thus, the \$80,000 expenditure cap increase recovery for 1997 will be in addition to the unspent \$363,559 for a total of \$443,559 available for recovery by FPL through the ECCR clause.

We have determined 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, and we therefore take the corrective action discussed herein. It is axiomatic in the law that we have the authority to determine whether there is a mistake in a prior order over which we retain 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).

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's petition to increase the expenditure cap for the BuildSmart pilot program is denied. It is further

ORDERED by the Florida Public Service Commission that Order No. PSC-97-0020-FOF-EG is hereby modified to permit Florida Power & Light to recover up to \$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). This modification increases the pilot project expenditure cap from \$6,750,000 to \$6,830,000. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

ORDER NO. PSC-97-0456-FOF-EG
DOCKET NO. 970265-EG
PAGE 5

By ORDER of the Florida Public Service Commission, this 22nd
day of April, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

LJP

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

I. Denial of Petition.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 day pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

II. Proposed Agency Action Increasing Expenditure Cap.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on May 13, 1997.

ORDER NO. PSC-97-0456-FOF-EG
DOCKET NO. 970265-EG
PAGE 7

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.