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August 5, 1997

VIA FEDERAL EXPRESS

Blanca S. Bayo, Director
Florida Public Service Commission
Division of Records & Recording
2540 Shumard Oak Blvd. - Room 110
Tallahassee, FL 32399

Re: Docket No. **970410-EI**
Proposal to Extend Plan for the Recording of Certain Expenses for the Years
1998 and 1999 for Florida Power & Light Company

Dear Ms. Bayo:

Enclosed please find for filing with the Public Service Commission the original and fifteen copies of the following documents:

1. AmeriSteel Corporation's Motion for Continuance; *08022-97*
2. Motion for Leave to File an Amended and Supplemental Petition and Protest to Proposed Agency Action of AmeriSteel Corporation; *-08023-97*
3. Amended and Supplemental Petition and Protest to Proposed Agency Action of AmeriSteel Corporation; *08024-97*
4. AmeriSteel Corporation's Request for Oral Argument; and *-08025-97*
5. Direct Testimony of Mark A. Cicchetti on behalf of AmeriSteel Corporation. *-08026-97*

Thank you for your assistance in filing the above. Should you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

SALEM, SAXON & NIELSEN, P.A.

Marian B. Rush

Marian B. Rush

MBR/cb3

Enclosures

cc: Attached Service List
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(PSC DOCKET NO. 970410-EI)**

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Proposal to Extend Plan for)
the Recording of Certain Expenses) Docket No. **970410-EI**
for the Years 1998 and 1999 for) Filed: August 6, 1997
Florida Power & Light Company)

**AMENDED AND SUPPLEMENTAL
PETITION AND PROTEST OF PROPOSED AGENCY ACTION
OF AMERISTEEL CORPORATION**

At its agenda conference held on July 15, 1997, the Florida Public Service Commission ("Commission") heard oral argument on AmeriSteel Corporation's ("AmeriSteel") Petition and Protest of Proposed Agency Action (the "Petition") relating to PSC Order No. PSC-97-0499-FOF-EI ("PAA") filed in this docket, as well as Florida Power & Light Company's ("FPL") Motion to Dismiss the Protest. The PAA extends a plan, approved in 1995, that allows FPL to take additional charges to offset revenue growth. Charges will be taken to accelerate recovery of regulatory assets, modify capital cost recovery of generating assets and other unspecified depreciation expense. In the docket which originally approved this plan, the Commission found AmeriSteel's substantial interests were affected by the plan and granted AmeriSteel's request to intervene as a party over FPL's objections. In this docket, the Commissioners' questioning at oral argument suggested a dramatic reversal of established Commission policy and practice regarding the standing of utility customers such as AmeriSteel to participate in rate related dockets where utility earnings are affected, but an immediate change in rates is not proposed. AmeriSteel submits this Amended and Supplemental Petition and Protest ("Amendment"), to address the contemplated change in policy regarding customer standing requirements, to restate AmeriSteel's objection to the PAA and to discuss legal deficiencies in the PAA. The Amendment is in addition to AmeriSteel's previously filed Petition

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which it incorporates herein by reference. In support of this Amendment, AmeriSteel states as follows:

I. THE NAME AND ADDRESS OF PETITIONER IS AS FOLLOWS:

AmeriSteel Corporation
5100 West Lemon Street, Suite 312
Tampa, FL 33609

1. Documents relating to this proceeding may be served on AmeriSteel by serving them on the following individuals:

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II. STATEMENT OF THE EFFECT OF THE COMMISSION'S DETERMINATION IN THIS DOCKET ON AMERISTEEL'S SUBSTANTIAL INTERESTS

A. AmeriSteel Has A Substantial Interest That Will Be Directly Affected By The Outcome Of The Commission's Determination In This Proceeding

2. AmeriSteel operates a steel recycling and manufacturing facility that is located in Jacksonville, Florida. The Jacksonville plant uses an electric arc furnace to melt scrap steel and casts the resulting molten steel into long strands in a continuous casting process. The plant produces rebar and rods that are used in a variety of highway, building construction and other applications.

3. AmeriSteel's Jacksonville mill receives electric service from FPL. FPL lists AmeriSteel as one of its top 20 electricity customers in documents filed with the Federal Energy Regulatory Commission. As a large customer of FPL, AmeriSteel has a substantial interest in regulatory accounting changes that affect recovery of investments charged to ratepayers and FPL reported earnings. AmeriSteel has a significant interest in ensuring that FPL does not take unnecessary or unwarranted charges. The proposal to extend the Plan described in this docket creates a huge amount (roughly \$200 million per year) of additional charges that will offset FPL's revenue and earnings growth in the years 1998 and 1999, and should serve to prevent FPL from experiencing excess earnings in those years. If the plan is approved, FPL will take approximately \$1 billion in added charges and accelerated asset recovery between 1995 and 1999. These charges have had and will continue to have a significant effect on any assessment of excess FPL profits.

B. All FPL Customers Have Standing to Participate in This Docket

4. The Commission's rules provide the standard for a customer and other parties to challenge proposed Commission actions. FAC 25.22-029(4) (Point of Entry Into Proposed Agency Action Proceedings) provides:

One whose substantial interests *may or will* be affected by the Commission's proposed action may file a petition for a § 120.57 hearing, in the form provided by Rule 25-22.036. (emphasis supplied.)

5. The PAA will depress FPL's earnings substantially in 1998 and 1999, just as the plan has lowered FPL earnings in 1995 and 1996. The action will directly affect all FPL's customers' substantial interests in FPL's cost recovery, earnings and rate levels. Consistent with prevailing Commission policy and practice, AmeriSteel has standing to intervene as a party in this docket.

(1) **Customers Have A Substantial Interest In All Changes In Utility Cost Recovery That Must Be Approved By The Commission**

6. At oral argument, Staff Chief Counsel for Electric & Gas Elias stated:

Mr. Elias: Well, certainly before today I was always of the opinion that a customer of the utility had standing to challenge an expense that was to be included in regulated earnings, and that that in and of itself—[Mr. Elias interrupted by a question.]....

Oral Argument (TR 73-74). This statement accurately summarized the prevailing Commission practice in applying Rule 25-22.029(4). In a traditional rate case, all customers of a utility have an undisputed substantial interest in every aspect of a utility's recovery of costs in rates. This customer interest is not limited to the reasonableness of the overall level of rates, but encompasses each element of the revenue requirement upon which base rates are calculated. These include the level of expenses, depreciation rates and amortization schedules, decisions to defer or accelerate cost recovery, rate design, and all other manner of accounting, finance, regulatory policy, and other issues within its jurisdiction that the Commission considers when setting rates. There is no element of the rate setting process that does not affect the substantial interests of each and every FPL ratepayer. Customers cannot be allowed to participate in some rate related matters but precluded from others.

7. If a utility seeks any Commission approval required by law or rule to change its pattern of recovery of costs incurred in the provision of utility service, a customer's interest in those changes are exactly the same as they would be in a docket where a utility proposes to increase its rates. No matter how the proceeding is captioned or docketed, the proposed action is rate related. The proposed action directly affects the utility's earnings and its revenue requirement, and it "may or will" affect rates charged to customers as well.

8. Ratepayers always have a substantial interest in the level of an electric utility's earnings. Once base rates are set, rates can be reduced if earnings are found to be excessive.

Customers have an undisputed substantial interest in receiving the lowest reasonable rates for electricity, and once base rates are set they have a vested interest in seeing a utility avoid unfair and unreasonable charges, and exceed the top end of the authorized return range. The Commission has an obligation to consumers to oversee utility financial performance vigilantly and to initiate excess earnings investigations and adjust rates accordingly when earnings based on prevailing base rates would be excessive. The Commission's earnings surveillance program is grounded on the premise that factors affecting earnings calculations are central to customer interests in reasonable rates. Piecemeal changes to expenses that must be approved by the Commission and that alter FPL's revenue requirement and expected earnings have a direct impact on that substantial customer interest.

9. Due to an economic climate highly favorable to the utility, *i.e.*, steady growth in sales and declining O&M and capital costs, FPL has avoided a base rate increase for many years, and by all accounts is not likely to seek a base rate increase in the foreseeable future. It has, however, sought and received Commission approval to change depreciation and amortization schedules and accelerate recovery of deferred costs without a proposed change in rates in several instances. Individually and collectively, these actions have reduced FPL's reported earnings and thereby prevented or delayed FPL from exceeding the top of its authorized return. FPL customers have a clear, direct, and substantial interest in these individual dockets, just as they would if the expense changes were proposed in a rate case. The PAA allows FPL to take roughly \$200 million per year in added charges, the added expense will depress FPL's regulated earnings in those years. This directly affects any excess earnings evaluation for this period that may lead to lower rates. Consequently, the action "may or will" affect the substantial interests of every FPL ratepayer. (See, FAC 25-22.029(4)). AmeriSteel, which pays electricity bills exceeding \$1 million each month and

is one of FPL's largest customers, has a substantial interest in the Commission's determination in this docket.

(2) **Current Commission Policy Recognizes Customer Standing In Dockets To Modify Depreciation Practices And Other Changes In Cost Recovery That Require Commission Approval But Do Not Propose Rate Increases**

10. Commissioner Clark suggested at oral argument that the Commission has not previously considered "this issue," *i.e.*, customer standing to challenge changes to cost recovery in a docket that does not propose to change rates directly. This, however, is not accurate.

11. While the court's decision in *Agrico*¹ generally defines the criteria for establishing standing to seek formal hearing on a proposed agency action, none of the court cases interpreting *Agrico* have addressed the substantial interests of ratepayers in a PSC proceeding relating to the expenses of a regulated utility. The Commission, however, has addressed this issue squarely in its application of Rule 25-22.029(4). In the 1989 docket which addressed Southern Bell's request for authority to charge \$140 million in accelerated depreciation, the Florida Cable Television Association's (FCTA) requested to intervene. As the basis for its intervention. FCTA alleged that:

as customers of Southern Bell who would be called into pay rates and provide revenues designed to fund the depreciation resubscription sought by Southern Bell, FCTA's members have an interest in assuring that the utility does not impose unfair and unreasonable charges and burdens on ratepayers beyond those rates and rate related practices required to fairly compensate Southern Bell for telephone service they receive.²

¹ *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2d DCA 1981).

² Order No. 21651, issued August 1, 1989, in Docket No. 890256-TL.

The Commission granted FCTA's intervention. More important, the prior case in this series, Docket No. 950359-EI,³ involved a case with the same utility (FPL), the same customer (AmeriSteel), and the very plan for adding expenses to offset revenue growth that the PAA in this docket would extend for two more years. In that case, the order issued by Chairman Clark rejected FPL's objections to AmeriSteel's intervention, noted FCTA's arguments with approval and determined that AmeriSteel's substantial interests were affected. The order further stated:

The Commission would benefit from full exploration of the policy issues to be addressed in this docket. FPL has asked the Commission to change its traditional approach to depreciation policy and practice because of the Company's concern about the adverse consequences of stranded investment to its customers. [AmeriSteel's] participation will provide a balance to the concerns of FPL. Having this information will permit the Commission to better assess how the public interest will be served in this docket.⁴

Thus, the fact of the matter is this Commission previously has ruled that customers' substantial interests are affected in the precise circumstances presented in this docket and discussed at oral argument.⁵ The Commission has not denied a customer standing in such rate related cases before. Accordingly, based on current Commission practice and the applicable Commission rules, AmeriSteel is entitled to standing to participate as a party in this docket.

³ Docket No. 950359-EI, *Petition to Establish an Amortization Schedule for Florida Power & Light Company's Nuclear Generating Units to Address the Potential for Stranded Investment*.

⁴ Order No. 95C-95-1035-PCO-EI, issued August 21, 1995, by Chairman Susan F. Clark in Docket No. 95-0359-EI.

⁵ The circumstances between this docket and Docket No. 950359-EI are distinguishable only by the fact that in 1995, FPL filed a petition seeking accelerated cost recovery to protect against "potential stranded investment." In this docket, as discussed below, there is no request from the utility, no reasons given for the PAA, and there is no substantive record to support the PAA.

C. A Change In Commission Policy Concerning The Standing Of Customers Requires Findings Not Contained In The PAA

12. The Commission recognized at oral argument that denying AmeriSteel standing to participate as a party would serve as a bar against any customer from participating in such dockets. Staff recognized that this would constitute a dramatic change in policy that would preclude utility customers from participating as parties in a host of Commission proceedings. This contemplated ruling on standing proposes to reverse the established practice and policy described above and such a change must be justified by the Commission. There is, however, no statutory, regulatory, or rational basis for refusing to let anyone other than a petitioning utility to participate in these dockets.

13. “[W]hen an agency elects to adopt incipient policy in a non-rule proceeding, there must be adequate support for its decision in the record of the proceeding.” *Florida Cities Water v. Florida Public Service Commission*, 384 So.2d 1280, 1281 (Fla. 1980). The agency must establish its policy by “expert testimony, documentary opinions, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary actions.” *Florida Power & Light Co. v. State*, 693 So. 2d 1025, 1027-28 (Fla. 1st DCA 1997); *Anglickis v. Department of Professional Regulation*, 593 So.2d 298, 300 (Fla. 2^d DCA 1992); *Health Care and Retirement Corporation of America, Inc. v. Department of Health and Rehabilitative Services*, 559 So.2d 665, 667-68 (Fla. 1st DCA 1990). In other words, if the Commission applies incipient or developing policy, it must support and defend that policy with competent, substantial evidence on the record in the proceedings. *Health Care and Retirement Corporation of America, Inc.* at 668. If the agency’s exercise of discretion is inconsistent with prior agency practice and there is no explanation of such deviation in the record, the court shall remand the case back to the agency. *Id.*

14. In *Florida Medical Center v. Department of Health and Rehabilitative Services*, 463 So.2d 380 (Fla. 1st DCA 1985), the court further pointed out that Florida Medical Center had been singled out for application of the emerging agency policy whereas such policy was not even considered by HRS in its favorable consideration of several other applications. The agency (HRS) failed to distinguish Florida Medical Center's application adequately from other such applications so as to justify the application of the incipient agency policy. *Florida Medical Center* at 382. If the Commission changes its intervention requirements for customers in this docket, AmeriSteel's situation is analogous to Florida Medical Center in that AmeriSteel is being singled out. AmeriSteel would be the first party to be required to pass this more stringent and previously unannounced test for intervention. As discussed above, the record must set forth the reasons for such a radical change in agency policy. There is nothing in this record to support this new policy. See, *City of Delray Beach v. Department of Transportation*, 456 So.2d 944, 946 (Fla. 1st DCA 1984).

15. As discussed below, in this case there actually is no petitioning utility. There is no request for this action from FPL. Although it is required to demonstrate that the Plan's proposed changes are reasonable, FPL has offered no facts or supportive evidence of any kind and the PAA makes no findings of fact or conclusion of law or policy. There is no substantive record of any kind. It is difficult to imagine a circumstance where the participation of an interested and concerned consumer is more desperately needed.

**D. This Docket Is Designed To Protect AmeriSteel's Substantial Interests
And No Other Present Or Future Dockets Can Protect That Interest**

16. In approving the Plan extension for 1998 and 1999, the PAA states:

This plan neither precludes an earnings review nor a review of the plan during the context of a proceeding to reset base rates.⁶

It has been suggested that the interests of AmeriSteel, or all customers for that matter, in rate reductions are preserved by this language. This plainly is not the case.

17. Once the action proposed in this docket is final, FPL will take additional expenses of roughly \$200 million per year in 1998 and 1999 and this will reduce reported earnings in those amounts in those years. Any earnings review initiated after this action will reflect the depressing effect on earnings of those expenses. This is a fundamental issue. The PAA should have made a finding regarding the effect the proposed action would have on FPL's expected earnings and excess earnings. The PAA's failure to address this matter constitutes a serious deficiency in the order. Moreover, notwithstanding the suggestion in the above quoted sentence of the PAA that *de novo* review of the plan would be allowed in a base rate case, a Final Order in this docket would effectively serve as a *res judicata* bar against challenges to the Plan in such a proceeding. It is fundamentally unfair for the Commission to determine that an action is reasonable without making any of the findings required by law and shift the burden to consumers in subsequent cases to prove that that action was unreasonable.

18. In short, this docket is the proper proceeding to test the reasonableness of the plan and approved by the PAA. This docket is intended to, and will, determine those questions.

* PAA Order No. PSC-97-0499-FOF-EI, issued April 29, 1997.

E. FPL Is Facing An Excess Earnings Situation In 1998 And 1999

19. As discussed above, all FPL customers have a substantial interest in a Commission action authorizing accelerated depreciation and changes, the amortization of expenses or reserve accruals from the levels determined in setting FPL's base rates. A customer should not be required to demonstrate that "But For" a Commission proposed action, a utility would experience excess earnings and that refunds or rate reductions should be ordered. In fact, if such a showing is essential to customer standing, the PAA should have provided a finding of fact on this matter that could be accepted or disputed. The burden of addressing the effect of the Plan on earnings and expected excess earnings lies first and finally with FPL. The suggested standard for a customer to establish a substantial interest in a PAA clearly "puts the cart before the horse."

20. In any event, however, FPL is facing an excess earnings situation in 1998 and 1999 that is directly affected by the PAA. As the Commission and Staff know through their ongoing review of FPL's earnings, excess earnings have been avoided to this point due to prior Commission actions authorizing accelerated recovery of steam generator replacement costs and various other expenses and regulatory assets. The Direct Testimony and exhibits of Mark Cicchetti being simultaneously filed demonstrates that FPL is expected to report earnings greater than the top of its authorized range in 1998. The Commission's action in this docket will have a pronounced effect on FPL's reported earnings, and will result in reported FPL earnings either below the top of the company's authorized return or substantially less excess earnings than would otherwise occur. Thus, action proposed in this docket affects the substantial interests of AmeriSteel and all other FPL electricity customers through its direct and immediate effect on FPL's excess earnings.

III. THE NOTICE OF PROPOSED AGENCY ACTION FILED IN THIS PROCEEDING FAILS TO MEET THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURES ACT, AND IS FATALLY DEFECTIVE

21. The Commission's depreciation rules require FPL to demonstrate that proposed changes in capital recovery schedules are prudent. 25-6.0436(10)(a) F.A.C.. By proposing to fill any identified theoretical depreciation reserve deficiencies (PAA, Attachment A, Item 1), and by assigning any unused dollars under the plan to an unspecified depreciation reserve (PAA Attachment A, Item 6), the PAA authorizes such changes without the required showing from FPL. For this reason alone, the PAA should be withdrawn. Also, the § 120.80(13), Florida Statutes, exception which provides that a hearing on proposed agency action may only address the "material issues in dispute," is relevant only as to the scope of this proceeding, and does not serve as a bar to procedural due process rights regarding party status.

A. Insufficiency of the Record

22. The record in this proceeding consists of: (1) the Request to Establish Docket form dated April 2, 1997 submitted by Staff; (2) the PAA authorizing FPL to extend its plan for recording certain expenses through 1998 and 1999, issued April 29, 1997; (3) AmeriSteel's Petition and Protest to the PAA, FPL's Motion to Deny and Dismiss, and AmeriSteel's Response to FPL's Motion to Deny and Dismiss; and (4) the Staff Recommendation finding AmeriSteel has demonstrated a substantial interest in this proceeding, dated July 8, 1997.

23. The PAA was issued by the Commission only twenty seven (27) days after the Request to Establish Docket was filed. No Petition or other request for relief was filed. The PAA is not based upon *any* oral or written evidence, finding of fact, conclusion of law, expert testimony,

or policy considerations as required under Florida's Administrative Procedures Act (the "APA"), the Florida Administrative Code ("FAC"), PSC precedent, or Florida case law. Failure of the PAA to meet these requirements constitutes fundamental error by the Commission, and results in the PAA being fatally defective.

24. Because FPL has not filed any petition or provided a factual predicate against which the Commission's actions may be measured, it is hardly surprising that the PAA fails to articulate the findings and conclusions required by law. Nor is it surprising that FPL would attempt to blame AmeriSteel for not specifying objections to findings of fact that were never rendered. Rather than endorse a defective PAA and improperly adopt a change in policy that rejects a legitimate customer request to intervene, however, the Commission should simply withdraw the PAA and instruct FPL to make a legally sufficient filing. The Commission cannot simply assume that the expense recovery plan is reasonable, prudent, and correct without any evidence or showing by FPL. See, Rule 25.6.0436(10)(a), F.A.C.

B. Insufficiency Of The PAA

25. The Florida Administrative Procedures Act ("APA"), Chapter 120, Florida Statutes, is intended to protect consumers' procedural due process rights before Florida's administrative agencies. "The APA prescribes the process by which disputed facts are found, and requires an agency to explain the exercise of its discretion and subjects that explanation to judicial review." *Florida Power & Light Co. v. State*, 693 So.2d 1025, 1027 (Fla. 1st DCA 1997), citing *McDonald v. Florida Dep't of Banking and Finance*, 346 So.2d 569, 577 (Fla. 1st DCA 1977). Other than a reference to the schedule attached to the PAA, there is nothing which puts any person or agency on

notice as to what the Commission is proposing to do in this docket, neither is there reference or citation to any record evidence to support the Commission's actions.

26. The APA requires the PAA to be based upon a substantive record which explains the underlying facts and legal basis for the Commission's decision. For example, § 120.569(2)(j), Fla. Stats., specifically provides that "...the final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated...". Similarly, § 120.569(2)(k), Fla. Stats., specifically provides that "[f]indings of fact, if set forth in a manner which is no more than mere tracking of the statutory language, must be accompanied by a concise and explicit statement of the underlying facts of record which support the findings." Finally, § 120.57(1)(h), Fla. Stats., specifically provides that "[f]indings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized." The APA requires a *record* of competent substantial evidence which the Commission must review, and on which the PAA must be based. No such record of evidence exists in this proceeding.

27. Florida courts have consistently interpreted the provisions of the APA to support this position. The APA "requires an agency to explain the exercise of its discretion and subjects that explanation to judicial review". *McDonald, supra*, at 577. In that case, the First District Court of Appeals found that there must exist a:

"...record in which the APA requires competent substantial evidence to support findings of fact on which agency action depends." *Id.*, at 579. "[An agency's] final order must display the agency's rationale. It must address countervailing arguments developed in the record and urged by a hearing officer's recommended findings and conclusions or by a party's written challenge of agency rationale in informal proceedings, or by proposed findings submitted to the agency by a party."

Id., at 583. The PAA filed in this proceeding fails to meet these requirements, and is therefore "fatally defective". See, *Florida Power & Light Co. v. State*, 693 So.2d 1025, 1027 (Fla. 1st DCA 1997), citing, *Harvey v. Nuzum*, 345 So.2d 1106, 1107 (Fla. 1st DCA 1977).

C. Judicial Review Of The PAA

28. The PAA filed in this proceeding is so deficient, and so lacking in substantial competent evidence of record to support it, so as to defy judicial review. Section 120.68(7), Fla. Stats., provides that cases shall be remanded to an agency for further proceedings where that appellate court finds, among other things: (a) material disputed facts, but no hearing; or (b) agency action depends on any finding of fact not supported by competent, substantial evidence in the record of hearing. "[T]he critical reason for requiring an administrative agency to state their conclusions and orders with specificity is to facilitate judicial review." *Florida Power & Light Co. v. State*, 693 So.2d 1025, 1027 (Fla. 1st DCA 1997), citing, *Lewis v. Florida Dep't of Professional Regulation*, 410 So.2d 593, 594 (Fla. 2^d DCA 1982), citing, *Veasey v. Board of Public Instruction*, 247 So.2d 80, 81 (Fla. 4th DCA 1971). When an entity charged with finding facts fails to perform that duty, the appropriate remedy is to remand the matter to the hearing officer, (in this case the entire Commission), to do so. See, *Friends of Children v. Florida Dep't. of Health and Rehabilitative Services*, 504 So.2d 1345, 1348 (Fla. 1st DCA 1987); see also, *Boulton v. Morgan*, 643 So.2d 1103, 1105 (Fla. 4th DCA 1994).

D. The PAA Is Not Justifiable As A "Policy Determination" Of The Commission

29. The suggestion at the July 15, 1997 agenda conference that the PAA is sufficient or appropriate because it constitutes a "policy determination" by the Commission, is insufficient. The APA requires rulemaking proceedings for the implementation of policy statements of general applicability, and there are remedies available against any such policy statement which has not been adopted through appropriate rulemaking proceedings. See, *McDonald, supra*, at 580. "[P]olicy must be established by testimony, documentary opinion, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action." *E.M. Watkins & Co. v. Board of Regents*, 414 So.2d 583, 588 (Fla. 1st DCA), *review denied mem.*, 421 So. 2d 67 (Fla. 1982); see also, *Manasota-88, Inc. v. Gardinier, Inc.*, 481 So.2d 948, 950 (Fla. 1st DCA 1986). There has been no petition to initiate rulemaking proceedings in this docket, and no notice of rulemaking proceedings from the Commission.

IV. MATERIAL ISSUES OF DISPUTED FACT: AMERISTEEL HAS IDENTIFIED MATERIAL ISSUES IN DISPUTE ADEQUATELY AND WITH SUFFICIENT SPECIFICITY

30. FPL'S Motion to Dismiss asserts that § 120.80(13) Fla. Stats., mandates that issues of material fact not disputed in a protest to a Commission PAA are deemed stipulated. This statute section addresses the scope of the proceeding, not AmeriSteel's standing to intervene in this docket. Moreover, in determining how to apply § 120.80(13) to this docket, the true problem is the absence of any findings of fact in the PAA, not a lack of specificity in AmeriSteel's protest. This deficiency in the PAA follows directly from the fact that there is no applicant for this action in the record. No facts have been alleged that extending the plan into 1998 and 1999 is needed or is in any way in the

public interest. Since no substantiation of the plan has been offered, there is no record upon which the Commission could base the findings of fact it is statutorily required to include in the PAA.

31. Notwithstanding the absence of a formal request, a substantive record, or any findings of fact in the PAA, AmeriSteel's Petition and Protest objected to the proposed action in its entirety and identified basic material factual and policy elements of the Plan extension that it protested. These areas of material factual dispute were further specified in AmeriSteel's Response in Opposition to FPL's Motion to Dismiss. For clarity and completeness they are listed below.

32. Known Issues of Material Facts in Dispute:

(a) Whether the action approved in the PAA is unreasonable, imprudent and contrary to the public interest?

(b) Whether it is reasonable and prudent to employ FPL's 1996 base rate revenue forecast to determine the level of added expenses to be charged under the Plan?

(c) Whether it is reasonable and prudent for the Plan to allow for additional charges for fossil dismantlement and nuclear decommissioning reserves prior to a complete examination of detailed studies of these issues in 1998?

(d) Whether there is a basis for the regulatory policy proposed in the PAA to establish a "level accounting playing field between FPL and potential non-regulated competitors?

(e) Whether the Commission should consider all regulatory and accounting issues raised by a policy to establish a level accounting playing field between FPL and potential non-regulated competitors, including the need to re-examine FPL's capital structure?

(f) Whether the proposed action provides benefits to or imposes burdens upon current FPL customers?

(g) Whether the Commission should consider offsetting corrections where depreciation reserve surpluses exist?

(h) Whether it is prudent to place all unused or unallocated dollars set aside by the Plan in an unspecified depreciation reserve?

(i) Whether the effect of the proposed action on FPL's revenue requirement, earnings and cash flow is unreasonable and contrary to the public interest?

(j) Whether it is reasonable and prudent to take additional amortization in 1998 and 1999 for regulatory assets such as unamortized loss on reacquired debt?

(k) Whether, absent approval of the Plan, FPL would experience excess earnings, unreasonable rates and excessive compensation in 1998 and 1999?

(l) Whether approval of the Plan would produce intergenerational inequity concerns?

V. CONCISE STATEMENT OF ULTIMATE FACTS AND BASIS FOR RELIEF

33. FPL's failure to request the plan extension has produced a PAA that is legally defective. Until FPL makes a proper application offering supportive evidence sufficient to demonstrate that the plan extension is in the public interest, there is no substantive record upon which the Commission can rest the conclusion and findings of fact it is required to make in an order. 120.569 Fla. Stats.; 25-6.0436(10)(a), F.A.C.

34. If the Commission finds, as a matter of regulatory policy, that ratepayers do not have standing to challenge accelerated recovery of regulatory assets without an increase in base rates, the Commission must articulate the factual and legal basis for this policy in a properly promulgated rule. The PAA in this docket does not comply with the legal requirements for adopting a rule or an incipient change in policy. Thus, the PAA is defective because it lacks the factual and legal predicates for a final order or rule.

35. FPL has the burden of proving the prudence of the proposed plan extension. That burden cannot be shifted by avoiding a required filing by the Commission's rules and forcing customers or other interested parties to articulate precise challenges to facts never stated, evidence never offered, and policies never announced, simply to establish standing to challenge an action based on no record of any kind. Apart from the absence of any substantive record, the proposed

action will have a substantial effect on FPL's reported earnings. This directly affects customer's present and future interests in reduced rates as a result of excess earnings.

36. FPL's consistently increasing sales and declining O&M and capital costs have been pushing its earnings toward the top of its currently authorized return for some time. Earnings have stayed below the top of the range because the Commission has approved accounting changes in several prior dockets allowing FPL to accelerate the amortization or recovery of costs associated with the provision of utility service. The Commission cannot find that the plan extension is in the public interest unless it examines and renders findings of fact on the impact of the plan on FPL's expected earnings.⁷

37. In AmeriSteel's view, any record based examination of the proposed plan will demonstrate that:

(a) the core feature of the plan – taking added expenses to offset revenue growth – is unreasonable, imprudent, and contrary to the public interest;

(b) the added charges and accelerated write-downs of the assets listed in Attachment A to the PAA are unnecessary and unjustified; and

(c) the interest of consumers are better served by denying any extension of the plan approved in Docket No. 950359-EI.

VI. REQUEST FOR RELIEF AND CONCLUSION

38. Based on the matters raised in its original Petition and Protest as well as this Amended and Supplemental Petition and Protest, AmeriSteel requests that:

⁷ Further, the currently authorized return is itself excessive based on prevailing market conditions.

(a) the Commission withdraw the PAA in this docket until Florida Power & Light has filed a legally sufficient application upon which required findings of fact can be based; or

(b) the Commission deny FPL's motion to Dismiss, determine that AmeriSteel's substantial interests are affected by the PAA in this docket and grant its Petition to Intervene, and direct that a schedule be established for discovery, the filing of testimony and formal hearings in this matter.

Respectfully submitted,

FLORIDA STEEL CORPORATION

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Dated: August 5, 1997

**CERTIFICATE OF SERVICE
(PSC DOCKET NO. 970410-EI)**

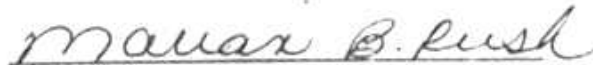
I HEREBY CERTIFY that a true and correct copy of Amended and Supplemental Petition and Protest of Proposed Agency Action of AmeriSteel Corporation has been furnished via U.S. Mail on the 5th day of August, 1997, to the following:

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