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August 25, 1997

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Blanca S. Bayó, Director
Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-0850

By Hand Delivery

Re: Petition of Lee County for declaratory statement concerning conservation status of electric power and energy produced from Lee County Resource Recovery Facility
Docket No. ~~951636-EG~~ 970898-EG

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and fifteen (15) copies of Motion for Leave to File an Amicus Curiae Memorandum of Law Addressing the Insufficiency of Lee County's Petition and Amicus Curiae Memorandum of Law Addressing the Insufficiency of Lee County's Petition.

If you or your Staff have any questions regarding this filing, please contact me.

Very truly yours,

Charles A. Guyton

Charles A. Guyton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Lee County for declaratory statement concerning conservation status of electric power and energy produced from Lee County Resource Recovery Facility	))))	Docket No. 970898-EG Filed: August 25, 1997

FLORIDA POWER & LIGHT COMPANY'S MOTION FOR LEAVE TO FILE AN AMICUS CURIAE MEMORANDUM OF LAW ADDRESSING THE INSUFFICIENCY OF LEE COUNTY'S PETITION

Pursuant to Rule 25-22.037(2), F.A.C., Florida Power & Light Company ("FPL") moves the Commission for leave to file an amicus curiae memorandum of law addressing the insufficiency of the Lee County petition in this proceeding. FPL believes that Lee County is improperly invoking the declaratory statement statute and rules to seek a rule amendment or statement of general policy applicable not to Lee County but to electric utilities as a class. It is also clear that Lee County's petition fails to demonstrate standing. The dilemma FPL faces is that it does not believe (1) there is a need for the declaratory statement sought, (2) that there is "uncertainty" as to whether purchases from Waste to Energy facilities are properly counted as "conservation" toward electric utilities goals, and (3) that while it certainly has more interest than Lee County in the declaration sought by Lee County, that FPL's interest (like Lee County's) constitutes an injury sufficient to satisfy the standing test in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981).

Under these circumstances, intervention is not any more appropriate than a determination that Lee County has standing to maintain this action. Thus, FPL seeks leave to participate as amicus curiae for the limited purpose of addressing the insufficiency of Lee County's petition.

FPL's participation would be limited to the filing of the attached memorandum of law, and FPL would not offer a substantive position on the declaration sought by Lee County.

While the Commission's procedural rules do not address amicus curiae status, the Commission has previously allowed such participation in actions before it. See, In re: Petition of Florida Power and[sic] Light Company for a Declaratory Statement Regarding Request for Wheeling, 89 FPSC 2: 298; In re: Investigation of the ratemaking and accounting treatment for the dismantlement of fossil-fueled generating stations, 91 FPSC 7: 136; In re: Complaint by Telcom Recovery Corp. Against TRANSCALL AMERICA, INC. D/b/a ATC LONG DISTANCE regarding billing discrepancy, 93 FPSC 8: 447; But cf., In re: Investigation regarding the appropriateness of payment for Dial-Around (10XXX, 950, 800) compensation from interexchange telephone companies (IXCs) to pay telephone providers (PATS), 93 FPSC 7: 379 (denied because it was, in effect, an untimely motion for reconsideration); In re: Petition for Declaratory Statement Regarding Exemption from Public Service Commission Regulation for Cellular Radio Telecommunications Carrier by Cellular World, Inc., 92 FPSC 2: 646 (denied as essentially an untimely petition for reconsideration). FPL respectfully submits that its limited amicus curiae participation will aid the Commission in its disposition of this matter.

Respectfully submitted,

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Tallahassee, Florida 32301
Attorneys for Florida Power
& Light Company

By: Charles A. Guyton
Charles A. Guyton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Motion for Leave to File an Amicus Curiae Memorandum of Law Addressing the Insufficiency of Lee County's Petition was served by Hand Delivery (when indicated with an *) or mailed this 25th day of August, 1997 to the following:

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TAL/21608-1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Lee County for declaratory statement concerning conservation status of electric power and energy produced from Lee County Resource Recovery Facility	)))))	Docket No. 970898-EG Filed: August 25, 1997

FLORIDA POWER & LIGHT COMPANY'S AMICUS CURIAE MEMORANDUM OF LAW ADDRESSING THE INSUFFICIENCY OF LEE COUNTY'S PETITION

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TABLE OF CONTENTS

INTRODUCTION

Florida Power & Light Company ("FPL") has sought amicus curiae participation for the limited purpose of challenging the sufficiency of Lee County's petition for a declaratory statement and addressing the impropriety of issuing the declaratory statement sought. In light of its limited participation, FPL is not articulating a substantive position on Lee County's request.

Lee County's petition is legally deficient, and the Commission should decline to issue the declaratory statement. Lee County improperly seeks a declaratory statement regarding the interpretation and application of statutes and rules to third parties, electric utilities. Lee County also improperly seeks through the vehicle of a declaratory statement request a Commission pronouncement of general policy regarding how electric utilities should treat potential purchases from Lee County's Waste to Energy ("WTE") facility. Lee County does not have, and certainly has not adequately pled, standing sufficient to entitle it to the declaratory statement sought. Given these circumstances, a declaratory statement should not be issued.

All Lee County really seeks is special treatment. It wants a special status so that it can enhance the prospect that it can negotiate a new contract and increase the revenues it receives for the output of its WTE facility. In deciding whether to afford Lee County the special treatment it seeks, the Commission should consider a number of factors.

First, the Lee County facility is already built. Giving the declaratory statement sought will not encourage the development of renewable energy sources in Florida.

Second, Lee County already sells the output of its WTE facility and makes that resource available to the Florida grid; if Lee County's interest is to improve its bargaining position to sell under another contract, then the interests of Florida utility customers are adverse to the County's

Electric utility customers already pay for the output from this plant; if this declaratory statement were to enhance Lee County's bargaining position and result in another contract with a higher revenue stream, then Florida utility customers will be required to pay more for the output.

Third, Lee County is seeking to enhance its potential bargaining position so that it may terminate its existing, Commission-approved agreement for the sale of its output. The Commission should ask itself whether it should act in a fashion to encourage Lee County to terminate its existing Commission-approved agreement.

Finally, issuing a declaratory statement in this case invites all purveyors of potential energy conservation measures to petition the Commission to protect their economic interests. If the Commission grants this request, then the Commission must stand ready to address requests for special treatment from other purveyors of putative energy efficiency equipment seeking solely to protect their economic interest at the expenses of ratepayers. Declaratory statements under FEECA should be reserved to the parties actually affected within the meaning of the statute - utilities and utility customers seeking to protect their interest as ratepayers.

LEE COUNTY'S PETITION FOR A DECLARATORY STATEMENT IS AN IMPROPER ATTEMPT TO ADDRESS THE APPLICABILITY OF STATUTES AND RULES TO OTHER PERSONS

Both the statute and Commission rule pursuant to which Lee County seeks its declaratory statement require that the petitioner show how a statute, rule or order applies **to the petitioner**. Section 120.565, Florida Statutes, (1996 Supp.) states in pertinent part:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the

> agency, as it applies to the petitioner's particular set of circumstances.

Similarly, the Commission's declaratory statement rule, Rule 25-22.020(1), F.A.C. provides:

> (1) Any person may seek a declaratory statement as to the applicability of a specific statutory provision or of any rule or order of the Commission as it applies to the Petitioner in his or her particular set of circumstances only.

Building upon the scope of the statutory language in Section 120.565, Florida Statutes, Florida courts recognize that it is improper to use a declaratory statement to determine the applicability of a statute or rule to the conduct of another person. The Commission has reached the same conclusion in interpreting its declaratory statement rule.

In Manasota-88, Inc. v. Gardinier, 481 So.2d 948 (Fla. 1st DCA 1986), the First District Court of Appeal upheld the denial of a declaratory statement where Manasota-88, an environmental group, sought declarations as to the applicability of the air pollution permit statutes to the phosphate industry in general and as to Gardinier in particular. The court noted that the declaratory statement petitions "were denied because they sought a declaration as to the effect of the statutes o. third parties, contrary to Section 120.565," and affirmed their denial.

The Commission has reached the same conclusion. In 1990 Intermedia Communications of Florida, Inc. sought a declaratory statement from the Commission that its lease of dark fibers from Tampa Electric Company would not make Tampa Electric a telephone company subject to Commission jurisdiction. The Commission declined to issue the declaratory statement, holding:

> [A]n agency may not issue a declaratory statement to one person for the purpose of determining the rights and duties of another person. Section 120.565 states unequivocally that " [a] declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the

> agency as it applies to the petitioner in his particular set of circumstances only." It does not say that an agency can determine the applicability of statutes, rules or orders to a third party.

In re: Petition for Declaratory Statement Regarding Lease of "Dark Fiber" and Other Facilities from Tampa Electric Company by Intermedia Communications of Florida, Inc., 90 FPSC 5: 42.

Applying the plain language of Section 120.565 and Rule 25-22.020(1) and this case law to the petition shows that the Commission should deny the declaratory statement sought. Lee County seeks to determine the applicability of certain statutes and rules to electric utilities that might purchase the output of the Lee County WTE facility rather than the applicability of the statutes and rules to Lee County. Lee County's prayer for relief seeks an order:

> declaring that firm capacity and energy produced by the Lee County Resource Recovery Facility and purchased by an electric utility subject to the energy conservation goals requirements of FEECA, **may be counted toward the purchasing utility's energy conservation goals** established by the Commission pursuant to Section 36.82(2), Florida Statutes, and Commission Rule 25-17.0021, F.A.C. (Emphasis added.)

The declaration sought by Lee County is whether an electric utility which might purchase firm energy and capacity from the Lee County facility may treat the purchase as counting against the utility's conservation goals. The declaratory statement sought would solely address how the purchase by a utility should be counted in regard to the utility's conservation goals.

Lee County's economic interest in how the conservation statutes and rules are applied to electric utilities is no different than Manasota's interest in how air pollution permitting statutes should be applied to Gardinier or Intermedia's interest in how telephone statutes should be applied to TECO. In each instance the answer might indirectly affect the requesting party, but the declaratory statement sought was how a statute or rule should be applied to a third person.

Lee County's attempt to have the Commission issue a declaratory statement as to how utilities should treat purchases from the Lee County facility for purposes of conservation goals is an improper attempt to have the Commission issue a declaratory statement regarding a third party. It is inconsistent with the plain meaning of Section 120.565, Florida Statutes, the plain meaning of Rule 25-22.020, Florida Administrative Code, the holding in the Manasota case, and the Commission's decision in the Intermedia case. The request should be denied.

LEE COUNTY'S PETITION FOR A DECLARATORY STATEMENT IS AN IMPROPER ATTEMPT TO ELICIT A RULE OR GENERAL POLICY STATEMENT

In Florida Optometric Association v. Department of Professional Regulation, 567 So.2d 928 (Fla. 1st DCA 1990), the First District Court of Appeal addressed the limited scope of declaratory statements:

> [D]eclaratory statements are not to be used as a vehicle for the adoption of broad agency policies. Nor should they be used to provide interpretations of statutes, rules or orders which are applicable to an entire class of persons. Declaratory statements should only be granted where the petition has clearly set forth specific facts and circumstances which show that the question presented relates only to the petitioner and his particular set of circumstances.

567 So. 2d at 936. Similarly, in Tampa Electric Co. v. Florida Department of Community Affairs, 654 So. 2d 998 (Fla. 1st DCA 1995), the First District Court of Appeal held that the Department's declaratory statement providing that local governments have power to regulate use

of land, including use of land for power lines, was impermissibly broad.[1] These cases hold that a declaratory statement proceeding may not be used for a statement of broad agency policy.

Lee County seeks in its petition a broad statement of Commission policy that would apply to all electric utilities which might purchase firm energy and capacity from its WTE facility. It seeks the broad policy statement that any electric utility which makes a firm purchase of capacity and energy from the Lee County facility may count such a purchase toward its conservation goals. No specific utility is identified, and it is clearly not necessarily FPL, for as Lee County points out in its petition, under the existing contract with FPL Lee County sells only its energy, not its capacity. Clearly, Lee County's request contemplates a new contract; in fact, Lee County states it is seeking the statement to aid "its ability to pursue contracts with electric utilities...." Lee County petition, ¶ 4. Lee County seeks a broad policy statement so that any potential purchaser would be able to count the purchase against its conservation goals.

Although not in its prayer for relief, in its Petition Lee County also speaks of requesting a declaratory statement that a purchase from its facility is an "energy conservation measure." See Lee County Petition at page 1. Given that the Commission's rule which Lee County asks the Commission to interpret, Rule 25-17.0021, Florida Administrative Code, already defines the term "conservation measures" without reference to purchases from WTE facilities,[2] Lee County's

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[1] The court reasoned that the agency's declaratory statement "sets forth a general policy of far-reaching applicability. Clearly, the declaratory statement would apply to all local governments seeking to regulate any utility's construction of power lines." 654 So. 2d at 999.

[2] Conspicuously absent from the 22 types of conservation measures specified in Rule 25-17.0021(3), Florida Administrative Code, is any mention of purchases from WTE facilities. Unlike a power purchase, all the measures specified actually reduce system demand and energy

request to extend the rule to include a new category under the definition of a "conservation measure" is an improper attempt to seek a rule in a declaratory statement proceeding.

Whether Lee County's request for a declaratory statement is a request for a statement of general applicability among utilities or a request to amend or adopt a new rule defining "conservation measures," it is improper under the Florida Optometric Association and Tampa Electric Company cases. Since declaratory statements may not be used to announce a rule or general policy statement, Lee County's request for a declaratory statement should be denied.

LEE COUNTY HAS FAILED TO DEMONSTRATE STANDING

The statute under which Lee County seeks a declaratory statement, Section 120.565, Florida Statutes, requires the petitioner to be "substantially affected." This standing requirement was added during the 1996 legislative session, and it appears to be a codification of prior case law applying former Section 120.565, Florida Statutes.[3]

In assessing i. a party is substantially affected in declaratory statement proceedings, courts have relied upon the two pronged standing test from Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), rev. den. 415 So.2d 1359, 1361 (Fla. 1982). Under Agrico, a party must demonstrate "1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his

[3] In Sarasota County v. Department of Administration, 350 So.2d 802 (Fla. 2nd DCA, 1977), the court held that "a preliminary test of substantial interest is proper at the initial stage when the request is made." 350 So. 2d at 804. The court went on to state that the denial of a declaratory statement did not confer standing on a petitioner. Id at 805.

substantial injury is of a type or nature which the proceeding is designed to protect." 406 So.2d at 482. Both requirements must be satisfied.

Indirect, speculative, conjectural, hypothetical or remote injuries are not sufficient to meet the "injury in fact" prong of the Agrico standing test. See, International Jai-Alai Players Association v. Florida Pari-Mutual Commission, 561 So.2d 1224 (Fla. 3d DCA 1990); Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988), rev. den., 542 So.2d 1333 (Fla. 1989). There must be either an actual injury or an immediate danger of a direct injury to meet this test. Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987), rev. den., 513 So.2d 1063 (Fla. 1987).

The second prong of the Agrico standing test, that the injury must be of the type or nature the proceeding is designed to protect, is sometimes called the "zone of interest" test. See, Society of Ophthalmology, 532 So.2d at 1285. Typically, when applying the "zone of interest" test, the agency or court examines the nature of the injury alleged in the pleading and then determines whether the statute or rule governing the proceeding is intended to protect such an interest.[4] If not, because the party is outside the zone of interest of the proceeding, the party lacks standing. One important conclusion in the established case law is that absent clear statutory authority, economic interests do not satisfy the "zone of interest" requirement.[5]

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[4] See, Suwannee River Area Council Boy Scouts of America v. State Department of Community Affairs, 348 So.2d 1369 (Fla 1st DCA 1980); Grove Isle, Ltd. v. Bayshore Homeowners' Association, 418 So.2d 1046 (Fla 1st DCA 1982); Boca Raton Mausoleum v. Department of Banking and Finance, 511 So.2d 1060 (Fla. 1st DCA 1987). In each instance the court looked to the controlling statute to gauge whether the injuries alleged by the person were of the nature to be protected .

[5] See, Agrico; Shared Services, Inc. v. State Department of Health and Rehabilitative Services, 426 So.2d 56 (Fla. 1st DCA 1983); Society of Ophthalmology, 532 So.2d at 1279-80;

It is important to note that there is a critical omission in Lee County's pleading. Lee County has not pled any injury. The following discussion from Society of Ophthalmology case addresses the importance of Lee County alleging an interest rather than an injury:

> Although one need not have his rights *determined* to become a party to a licensing proceeding, **party status will be accorded only to those who will suffer an injury to their substantial interests in a manner sought to be prevented by the statutory scheme.**

532 So.2d at 1284 (emphasis added). By failing to allege any injury in its petition, Lee County has failed both prongs of the Agrico standing test.

In regard to the "injury in fact" prong of the Agrico test, Lee County has not demonstrated that as a result of the "uncertainty" of whether firm purchases from its facility should be counted toward a purchasing utility's conservation goals that it has either suffered an actual injury in fact or that it faces an immediate danger of injury as required under the Village Park case. Moreover, the interest it postulates, an enhanced ability to pursue firm contracts if its power is treated as counting toward a utility's conservation goals, is highly questionable.[6] The potential effect of the declaratory statement sought on Lee County's ability to pursue a higher paying contract for its

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International Jai-Alai Players, 561 So.2d at 1226; City of Sunrise v. South Florida Water Management District, 615 So.2d 746 (Fla. 4th DCA 1993); In re: Petition of Monsanto Company for a Declaratory Statement Concerning The Lease Financing of a Cogeneration Facility, 86 FPSC 9: 211 .

[6] There are a number of factors which directly impact Lee County's ability to pursue a contract: its offering price, its performance offering, the term of its proposed sale. None of these factors are affected directly or indirectly by whether or not the purchase would be treated toward the purchasing utility's conservation goals. Even if the purchase could be counted toward conservation goals, there are a number of factors which might totally outweigh or make irrelevant that consideration: a utility might already be able to achieve its goals without such a purchase, or a utility might choose to use conservation measures which could be modified or terminated rather than entering into a long-term, fixed obligation such as a power purchase.

WTE output is far too abstract, speculative and conjectural to satisfy the injury in fact standard in Agrico. "[A]bstract injury is not enough. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical." Village Park, 506 So.2d at 433.

As to the "zone of interest" prong of Agrico, the interest pled by Lee County, an effect on its ability to negotiate a more favorable contract for its WTE facility output, is not an interest intended to be protected under FEECA. This is not an instance where the negotiation of a contract will result in the development of a renewable energy resource; the facility is already built. This is not an instance where additional oil will be conserved. Under its existing contract the unit is already displacing some petroleum. If the unit continues to operate but under a firm contract, its displacement of petroleum on a utility's system may actually decline (if it would avoid highly efficient, gas-fired combined cycle capacity which would have the effect, if built, of displacing even more petroleum usage on a utility's system). The only real interest Lee County seeks to protect is its ability to pursue another sales contract that will pay it more revenue (at the expense of utility customers). This economic interest is not an interest that FEECA, Section 377.709, Florida Statutes, Section 366.051, Florida Statutes, and Rule 25-17.0021(1) are designed to protect. Lee County's interest fails the "zone of interest" prong of Agrico as well.

Lee County has failed to plead standing. It has failed to plead any injury. The interest it postulates, an enhanced ability to negotiate a more favorable contract for the sale of its WTE facility output, is highly speculative and outside the zone of interest of the statutes and rules it invokes. Lee County's request for a declaratory statement should be denied for lack of standing.

CONCLUSION

Lee County's request for a declaratory statement should be denied. Lee County is opportunistically seeking a special status at the expense of Florida utility customers. Lee County already has a Commission-approved contract that was knowingly and willingly signed without duress. In the hopes of terminating that contract and negotiating a more favorable contract, the County improperly seeks a declaratory statement which (1) would be a policy statement of general applicability to all electric utilities, and (2) which applies statutes and rules to third persons. Lee County pleads no injury, and the questionable economic interest it pleads is grossly short of the Agrico standing requirements. The Commission's resources are far better spent addressing real controversies under FEECA. Lee County's request for a declaratory statement should be denied.

Respectfully submitted,

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Attorneys for Florida Power
& Light Company

By: _____
Charles A. Guyton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Amicus Curiae Memorandum of Law Addressing the Insufficiency of Lee County's Petition was served by Hand Delivery (when indicated with an *) or mailed this 25th day of August, 1997 to the following:

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