BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Lee County, Florida for a Declaratory Statement Concerning the Conservation Status of Electric Power and Energy Produced from Municipal Solid Waste Facilities	DOCKET NO. 970898-EQ FILED: SEPT. 5, 1997

LEE COUNTY'S RESPONSE TO FLORIDA POWER & LIGHT COMPANY'S MEMORANDUM OF LAW ADDRESSING THE LEGAL SUFFICIENCY OF LEE COUNTY'S PETITION

LEE COUNTY, FLORIDA ("Lee County"), pursuant to Rule 25-22.037(2), Florida Administrative Code, hereby files this memorandum in response to the Memorandum of Law Addressing the Legal Insufficiency of Lee County's Petition filed in this proceeding by Florida Power & Light Company ("FPL").

SUMMARY

While FPL has raised arguably relevant issues relating to the appropriatene s of a declaratory statement in this instance, Lee County believes that the requested statement is more appropriate than generic rulemaking in this case, and that the Commission has the discretion to issue the requested declaratory statement. The requested statement would apply to and affect Lee County, while potentially incidentally affecting some electric utilities in a permissive, non-mandatory way that will not determine any utility's substantial interests. With regard to Lee County's standing to seek the requested statement, Lee County has explained how the requested statement will affect Lee County's substantial interests, and Lee County believes that it, like other providers of conservation functions, has a valid interest within the zone of

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interests under FEECA and related statutes, in having the Commission declare its status.

Moreover, certain of FPL's assertions are either inaccurate or misplaced. In particular, FPL's assertion that all Lee County really wants is to be paid more for its capacity and energy than FPL currently pays for such energy, completely ignores the fact that if the County's power were sold pursuant to a contract for the sale of firm capacity and energy, ratepayers would receive additional value in terms of reliable capacity and in terms of avoided capacity costs by the purchasing utility.

ARGUMENT

I. LEE COUNTY'S PETITION PROPERLY REQUESTS THE COMMISSION'S DECLARATION OF THE APPLICABILITY OF STATUTES AND RULES TO LEE COUNTY. THE INCIDENTAL, PERMISSIVE, NON-MANDATORY, AND NON-DETERMINATIVE EFFECTS ON ELECTRIC UTILITIES DO NOT MAKE THE REQUESTED STATEMENT A RULE, NOR DO THESE EFFECTS NECESSARILY WARRANT RULEMAKING IN THIS INSTANCE.

A. The Incidental, Permissive, and Non-Mandatory Effects Of Lee County's Requested Declaratory Statement On Electric Utilities Do Not Make The Requested Statement A Rule, Nor Do They Necessarily Warrant Rulemaking In This Instance.

Lee County has requested the Commission's declaration that electric energy and capacity produced from the Lee County Resource Recovery Facility is properly considered as an energy conservation measure and that such capacity and energy may be counted toward meeting an electric utility's Commission-established conservation goals. FPL has criticized the County's petition for allegedly being an "improper attempt to address the applicability of statutes and rules to other persons." Lee County recognizes that the requested declaratory statement may have incidental effects on

another entity (i.e., an electric utility) but FPL and the Commission should recognize that these effects are incidental to the determination requested by the County and are neither mandatory nor determinative of any other party's substantial interests. To the degree that other parties' interests may be affected, albeit incidentally, the appropriate remedy is to afford them a point of entry in this proceeding. By filing its amicus curiae memorandum, FPL already has availed itself of an appropriate means of participating herein, and Lee County does not oppose FPL's limited participation; Lee County welcomes constructive debate on the issue raised by its petition.

FPL cites to Manasota-88, Inc. v. Gardinier[1] as support for its assertion that one person may not seek a declaratory statement for the purpose of determining the rights and duties of another person. FPL also cites to the Commission's Intermedia order[2] for the same proposition. While FPL's assertion of law is correct, neither of these cases involved a petitioner's request for an agency's declaration as to how statutes applied to the petitioner.

Manasota-88 involved an environmental organization's request for a declaration that certain air pollution permitting statutes applied to unrelated parties, viz., the entire Florida phosphate industry, and one phosphate manufacturer in particular. Intermedia involved a petition by a telecommunications company seeking the Commission's declaration that the leasing of fiber optic cable to

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[1] Manasota-88, Inc. v. Gardinier, Inc., 481 So. 2d 948 (Fla. 1st DCA 1986).

[2] 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.

an interexchange carrier rendered the lessor a "telephone company" under Chapter 364, Florida Statutes. In both of these cases, a party that was unaffected by the requested statement asked the agency for a declaration as to the status of unrelated third parties under applicable statutes. Manasota-88 and Intermedia are thus clearly distinguishable from the instant case, in which Lee County has asked for the Commission's declaration of the County's status under applicable statutes.

Section 120.565, Florida Statutes, focuses on the effects of statutes and rules on petitioners. Section 120.565 does not prohibit any declaratory statement that might have an incidental, permissive, non-determinative effect on a third party. For example, in State Department of Administration v. University of Florida, 531 So. 2d 377 (Fla. 1st DCA 1988), a declaratory statement was requested by the University of Florida and was issued by the State Retirement Commission, declaring that two employees, who served both as county extension agents and university faculty members, were eligible to participate in an optional retirement program. The Division of Retirement of the State Department of Administration appealed the declaratory statement, asserting, among other things, that the University did not have standing to petition for a declaratory statement regarding the employees' status. The First DCA affirmed the Retirement Commission's issuance of the statement because, even though the statement necessarily affected the subject employees, the University had alleged sufficient substantial interests to satisfy standing requirements. Id. at

380.[3]

Lee County has requested a declaration that will directly affect the County's interests (as described more fully below) and that would have only incidental effects on third parties. The requested statement, if granted, would declare that the Facility's capacity and energy is properly considered a conservation measure and that such capacity and energy may be counted toward a purchasing utility's conservation goals. The requested statement would thus clearly be permissive with respect to any such third party. Moreover, the requested statement, if granted, would clearly not be mandatory and would clearly not determine any such third party's substantial interests. The requested statement would provide clarification to Lee County, and would, if anything, benefit such incidentally affected third parties in a non-binding manner.

B. Lee County's Requested Declaratory Statement Is Neither a Broad Rule Nor a General Policy Statement.

Lee County's petition requests the Commission's declaration of the applicability of the cited statutes and rules as they apply to the electrical capacity and energy produced by the Lee County Resource Recovery Facility. Lee County's petition does not ask for a broad, general policy statement. Lee County, recognizing that this issue has not arisen before and may not arise again, asked for the declaratory statement solely with respect to the output of its Resource Recovery Facility rather than asking for a generic rule,

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[3] Interestingly, part of the University's substantial interest was that it advised employees with respect to their rights to participate in an optional retirement program, and made contributions to such program on their behalf.

applicable to all waste-to-energy facilities.

Of course, Lee County recognizes that there may be policy implications for the electric output of other waste-to-energy facilities that is purchased by Florida electric utilities, and that this subject may be susceptible to rulemaking in the future. Lee County does not deem this speculative effect to require rulemaking in this instance. Considering that this is an issue of first impression, Lee County believes that this declaratory statement may be granted by the Commission within the scope of incipient agency policy development, for which rulemaking is not required. See McDonald v. Department of Banking & Finance, 346 So. 2d 569, 580-81 (Fla. 1st DCA 1977). The requested declaratory statement is an appropriate vehicle for addressing the specific issue posed in the limited scope of this proceeding.

FPL cites to Florida Optometric Ass'n v. DPR[4] and Tampa Electric v. DCA[5] for the proposition that declaratory statements that apply to an entire class of persons are impermissibly broad. These cases are not directly applicable here because, unlike Lee County's case, they involved declaratory statements that would apply to entire classes of persons. Florida Optometric Association involved a statement that applied to all opticians in the State. Tampa Electric involved a statement by the Department of Community Affairs to the effect that all local governments in the state have the power to regulate land use. The statement requested by Lee

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[4] Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928 (Fla. 1st DCA 1990).

[5] Tampa Electric Co. v. Florida Department of Community Affairs, 654 So. 2d 998 (Fla. 1st DCA 1995).

County would apply, in a non-binding manner, to one of a small number of potential purchasing electric utilities.

Lee County submits that its requested statement, i.e., that the capacity and energy from the Lee County Resource Recovery Facility may be counted toward a utility's conservation goals, is not a "broad policy statement." The requested statement would be applicable only to the output of the Lee County Resource Recovery Facility. The fact that, if granted, Lee County's requested statement may permissively apply to any of a small number of potential purchasing utilities does not make this a "broad policy statement." Again, Lee County recognizes that there may be policy implications associated with this statement, and that this issue may be susceptible to rulemaking in the future. Nonetheless, these considerations do not mean that the first time that an issue is raised, it must be addressed through rulemaking. See McDonald, 346 So. 2d 569 at 580-81; Section 120.535(1)(a)1, Florida Statutes (1995).

It also is important to note that, while the requested statement could apply to any member of the small group of utilities that might purchase the Facility's capacity and energy, it will ultimately apply only to those that purchase firm power from the Facility. Further, the County is not requesting a statewide, once and for all time statement with respect to how each utility that might purchase the Facility's capacity and energy must treat purchases from any solid waste facility. Rather, the County seeks a specific statement that will be limited to the Lee County Resource Recovery Facility.

Finally, the Commission has the discretion to grant Lee County's petition, even if the Commission believes that the petition is not the perfect procedural vehicle for addressing the issue raised by the County. In South Florida Cogeneration Associates[6], the Commission declined to dismiss a petition for declaratory statement, even though the Commission observed that "the statement sought . . . does not merely concern the applicability of statutes, rules or orders to the [petitioner], but instead, would determine the status of [another entity]." The Commission noted that "a declaratory statement may not be the perfect vehicle for bringing the matter before the Commission, but we should not refuse to review the matter by dismissing the petition." Id.

II. LEE COUNTY'S PETITION DEMONSTRATES ITS SUBSTANTIAL INTERESTS AND APPROPRIATELY CITES TO THE STATUTES UNDER WHICH THOSE INTERESTS ARE AFFECTED.

FPL formalistically criticizes Lee County's petition for failing to plead standing, failing to plead any injury, and for raising an interest outside the zone of interest to be protected by the applicable statutes. Accepting, for the purposes of this response only, the proposition that declaratory statements require satisfaction of the Agrico standing test, Lee County submits that: (1) the County's petition adequately alleges the County's interests in the requested statement, (2) the County's injury -- impairment of the County's ability to sell the Facility's firm capacity and

[6] In Re: Petition for a Declaratory Statement Concerning Sale of Cogenerated Power by South Florida Cogeneration Associates to Metropolitan Dade County, 1993 WL 546603 (Fla. P.S.C.).

energy at its true value -- is clear enough from the petition, and (3) Lee County's interests are well within the zone of interests to be protected under the applicable statutes.

Lee County explains, at ¶4 of its petition, the County's interest in obtaining the Commission's declaration of the County's position under the applicable rules and statutes. If the Commission believes that the explanation provided is insufficient as a matter of pleading, then Lee County would respectfully request an opportunity to amend its petition to plead that the County's injury is both real and immediate: every day that Lee County sells its electricity on an as-available basis for two to two-and-one-half cents per kilowatt-hour (kWh), when this electricity may be worth four to five cents per kWh if sold on a firm basis, the County suffers real and immediate injury. To the extent that, as the County hopes, the requested declaratory statement may aid the County in selling the Facility's output for fair value, this injury will be mitigated.

As regards the "zone of interest" prong of the Agrico test, Section 377.709, Florida Statutes, expressly: (1) voices the Legislature's declaration that "it is critical to encourage energy conservation;" (2) recognizes that power production from facilities like the Lee County Resource Recovery Facility "represents an effective conservation effort;" and (3) directs the Commission to encourage the development of such facilities by establishing an advance funding program. In addition to the statements of legislative intent in Section 377.709, the Florida Energy Efficiency and Conservation Act ("FEECA") sets forth the Legislature's declaration that renewable energy sources, which

provide the vast majority of thermal energy input to the Lee County Resource Recovery Facility, and cogeneration, which is a close relative of small power production,[7] are to be encouraged. The Legislature has further declared that FEECA is to be liberally construed to further its purposes, including the conservation of expensive resources, particularly non-renewable petroleum fuels.

These statutes clearly express a legislatively-established policy to encourage the development of solid waste-to-energy facilities, like the Lee County Resource Recovery Facility, and to encourage measures that serve the energy conservation purposes of FEECA. In light of FEECA's instruction that it is to be "liberally construed", and in light of the provision that "[u]tility programs may include variations in rate design, load control, cogeneration, . . . or any other measure within the jurisdiction of the commission," Lee County believes that its economic interests are appropriately considered as within the zone of interests under the applicable statutes. Of course, economic interests can properly satisfy the zone of interests prong of the Agrico standing test. See, e.g., Boca Raton Mausoleum, Inc. v. Department of Banking & Finance, 511 So. 2d 1060 (Fla. 1st DCA 1987); Baptist Hospital, Inc. v. Department of Health & Rehab. Services, 500 So. 2d 620, 625 (Fla. 1st DCA 1986).

In the most practical sense, Lee County believes that the economic interests of a provider of any measure cognizable under FEECA must be considered to be within the zone of interests protected by that statute. The encouragement of such measures

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[7] These two forms of power production are treated exactly the same in Section 366.051, Florida Statutes.

necessarily involves economic considerations. How else are such measures to be encouraged, if not by making them more attractive economically to utilities, participants, and providers? How many conservation programs of any type would be encouraged without economic incentives, i.e., current cost recovery for the utility and incentive payments to the participants? How many of the utilities' existing energy conservation programs involve incentive payments (nearly all) and current cost recovery (all)?

Moreover, the economic interests of solid waste facilities like the Lee County Resource Recovery Facility are clearly recognized under Section 377.709, which requires the establishment of specific funding programs to encourage them, and under Section 366.051, which recognizes the benefits to the state of power produced by cogeneration and small power production. Read in pari materia with FEECA, it is clear that the Commission's statutes provide for the consideration of economic interests of providers of conservation services and of providers of electric power by both cogeneration and small power production.

In short, power produced by the Lee County Resource Recovery Facility is a conservation measure both (1) under the express language of Section 377.709, especially when read in pari materia with FEECA, and (2) under FEECA itself, because the Facility's output is based on renewable energy sources that would otherwise be uselessly discarded in landfills and because the Facility serves the specific FEECA purpose of conserving expensive resources, particularly non-renewable petroleum fuels. Encouragement of such measures necessarily implicates economic interests. The applicable statutes clearly require the encouragement of such facilities, and

such encouragement must be based on economic incentives. Accordingly, Lee County also satisfies the second prong of the Agrico test.

III. CERTAIN OF FPL'S ASSERTIONS ARE EITHER MISPLACED OR INACCURATE.

FPL erroneously asserts that all Lee County wants is a power "sales contract that will pay it more revenue (at the expense of utility customers)." FPL's Memorandum at 10. While it is true that Lee County desires to be compensated fairly for the value that both its capacity and energy provide, FPL's erroneous assertion that this compensation would be at the expense of ratepayers completely ignores the fact that the Facility's capacity, provided pursuant to a Commission-approved firm capacity and energy contract, would provide additional value and benefits to the purchasing utility's ratepayers by avoiding additional capacity expenditures. Thus, while the County seeks the opportunity to be paid more for the Facility's capacity and energy, the County recognizes that it can only obtain such payments if the County provides commensurate value to a purchasing utility's ratepayers. The County further recognizes, as pointed out in its petition (at ¶12), that any such sales would have to be cost-effective to the purchasing utility's ratepayers.[8]

FPL asserts that

> the Commission's rule which Lee County asks the Commission to interpret, Rule 25-17.0021, Florida Administrative Code, already defines

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[8] If FPL is already counting the Facility's capacity output as firm, or partially firm, capacity in its generation planning studies, even though it is provided only on an as-available basis, then the County is being unfairly undercompensated for its service.

> the term "conservation measure" without reference to purchases from WTE facilities . . . .

FPL's memo at 6. FPL goes on to note that "mention of purchases from WTE facilities" is "conspicuously absent" from the list of conservation measures specified in Rule 25-17.0021(3), Florida Administrative Code. Lee County submits that FPL simply mischaracterizes the cited rule. Nowhere in the rule is the term "conservation measure" defined, let alone defined exclusively to include only the "market segments" listed therein. Moreover, this Rule relates to utilities' proposed conservation goals, and requires that utilities' projections of possible conservation savings "shall be based upon, at a minimum, the . . . market segments and major end-use categories" listed therein.

Finally, FPL disingenuously states that FPL takes no "substantive position" on Lee County's petition, but FPL has in fact done so at least twice in its memorandum. For example, FPL asserts that Lee County's petition "should be denied" because the County "is opportunistically seeking a special status at the expense of Florida utility customers." This is clearly a substantive position, albeit incorrect, which Lee County rejects for the reasons discussed above.

FPL also has alleged that "[g]iving the declaratory statement sought will not encourage the development of renewable energy sources in Florida." FPL's conclusory allegation, however, is not supported by any facts or evidence. This substantive position also is mistaken: as it is obvious from the economic incentives that are provided for virtually all other conservation measures, it is clear that economic incentives tend to promote the development of their

target activities. With respect to the renewable-energy character of the Facility's capacity and energy, virtually all of the thermal energy input to the Facility comes from renewable-source material, e.g., food remains, wastepaper, packaging material, and biomass. Even as applied to Lee County only, the Commission's treatment of Lee County's capacity and energy in this proceeding may well make a difference in how much waste is processed for electric generation, with its concomitant public benefits, and how much is simply thrown away in conventional landfills.

CONCLUSION

WHEREFORE, Lee County respectfully requests that the Commission grant Lee County's petition for declaratory statement.

Respectfully submitted this 5th day of September, 1997.

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CERTIFICATE OF SERVICE
DOCKET NO. 970898-EQ

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 5th day of September, 1997:

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