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December 11, 1997

ORIGINAL

Blanca Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2549 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Via Federal Express

RE: Clay Electric Cooperative, Inc.
and Florida Power & Light Company
Docket No. 970512-EU

Dear Ms. Bayo:

I am enclosing herewith the original and fifteen (15) copies of the Response of Clay Electric Cooperative, Inc. to Florida Power & Light Company's Motion to Strike or Waive Issues for filing. Also enclosed is a 3.5 disk containing this document.

If you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

John H. Haswell

- ACK _____
- AFA _____
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG _____
- LEG 2 _____
- LIN 2 _____
- OPC _____
- RCH _____
- SEC 1 _____
- WAS _____
- OTH _____

JHH/lez
Enclosures
cc: Mark Logan, Esquire
Robert Elias
Grace Jaye
Herman Dyal

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In Re: Petition of Florida Power & Light)
Company to Resolve a Territorial Dispute with)
Clay Electric Cooperative in Baker County)

Docket No.: 970512-EU

Filed: December 12, 1997

**RESPONSE OF CLAY ELECTRIC COOPERATIVE, INC. TO
FLORIDA POWER & LIGHT COMPANY'S MOTION TO STRIKE OR WAIVE ISSUES**

Clay Electric Cooperative, Inc. ("Clay") by and through its undersigned attorneys responds herewith to the Motion to Strike or Waive Issues filed by Florida Power & Light Company ("FPL") on December 8, 1997. Although the motion is dated December 8, 1997, a copy of the motion was not served on Clay's counsel until December 10, 1997. Clay's response is as follows:

1. Neither the Prehearing Order nor Rule 25-22.056 place any limit on the number of words in a party's statement of an issue and position contained in that party's post hearing brief. The only limitation on a brief is that it, the post hearing statement, and proposed findings of fact may not exceed sixty pages in the aggregate. Clay has complied with that requirement.

2. Rule 25-22.056(3)(a) requires each party to file a post hearing statement of issues and positions as its primary thrust, and imposes a limit of fifty words on a party's position on each issue that it states in its post hearing statement of issues and positions. The fifty word limit may be waived for good cause shown. It is clearly the intent of Rule 25-22.056(3)(b) that failure to file the post hearing statement will result in a waiver of all issues, and may result in a dismissal of the party from the proceeding. While subsection (3)(b) says failure "...to file a post hearing statement in conformance with (3)(a), and no

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other post hearing memorandum is filed which conforms to this rule...", the question is then does conformance with (3)(a) mean failure to file the statement, or failure to limit the statement to fifty words or less as to each issue? The answer both logically and by Commission Order is contained in the Prehearing Order governing post hearing proceedings, which states on page 4:

"Rule 25-22.056(3), Florida Administrative Code, requires each party to file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. The rule also provides that if a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding."

It was obviously not the intent of the rule to strike a party's entire case because it had fifty-one words in a position statement. The rule is clearly aimed at a party who fails to file a post hearing statement at all, and not aimed at exceeding a fifty word limit which limit can be waived in any event. There is no provision in Rule 25-22.056(3)(a) or (b) that allows for a waiver of the requirement to file a post hearing statement.

3. Clay, nonetheless, did not exceed the fifty word limit except for Issue 8 where it was not possible to describe Clay's additional facilities without using at least fifty-nine descriptive words. Clay's counsel has followed, and has reasonably assumed that it is acceptable practice of not including non-descriptive words like "the, a, an, at, to, or of" in determining the fifty word limit. Hence, in Issue 1, Clay's position is stated in forty-one words, in Issue 5 it is forty-six words, in Issue 8 it is fifty-nine words, and in Issue 15 it is

forty-five words. Even if it is determined that all words, even non-descriptive words, articles or prepositions of two letters or less should be included in the fifty word limit, Clay has not abused the intent of the limitation in any respect. For instance, in Issue 3 Clay's fifty word (total of all words) position takes four lines of type. The forty-six words in both Issue 6 and Issue 11 took four lines of type as well. The fifty-two total words in Issue 15 took one word more than four lines of type. The fifty-eight total words in Issue 1 took four lines of type.

4. To the extent that the Commission were to insist on a fifty word limit without exception for one or two letter non-descriptive words, then Clay respectfully requests a minor modification of the fifty word limit as to its positions on Issue's 1, 5, 8 and 15.

Following the filing of FPL's frivolous Motion to Strike Clay's positions, Clay contacted the Office of Records and Recording, the PSC Staff counsel and counsel for FPL and learned that FPL failed to file a post hearing statement. Clay had assumed that it's failure to receive a copy of FPL's statement with FPL's brief, was simply an oversight by FPL. Since FPL did not file a post hearing statement as to each issue, whether over or under fifty words each, by operation of Rule 25-22.056(3)(b) and the language of the Prehearing Order, FPL has in fact waived all issues. The language of the rule and of the order is self-executing: "...that party shall have waived all issues...". (emphasis supplied)

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following:

Patrick M. Bryan, Esquire
Florida Power and Light Company
700 Universe Boulevard
Juno Beach, Florida 33408
(via regular mail)

Grace Jaye, Legal Division
Robert Elias, Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(via facsimile and overnight express)

Mark K. Logan
Bryant, Miller & Olive
201 South Monroe Street
Suite 500
Tallahassee, Florida 32301
(via facsimile and overnight express)

W. G. Walker, III, Vice President
Florida Power and Light Company
Regulatory Affairs
Post Office Box 029100
Miami, Florida 33102-9100
(via regular mail)

on this 12th day of December, 1997.



John H. Haswell