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December 6, 1997

By Hand Delivery

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

**Re: In Re: Petition for Modification of Florida Power & Light
Company's Duct System Testing and Repair Program
Docket No. 970540-EG**

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company (FPL) are the original and fifteen (15) copies of Motion in Opposition to "Petition on Proposed Agency Action" of the Florida Apartment Association in Docket No. 970540-EG. Also enclosed is an additional copy of the motion which we request that you stamp and return to our runner.

ACK _____ If you or your Staff have any questions regarding this filing, please contact me at 222-2300

AFA _____

AFP _____

CAF _____

CMU _____

CRK _____

EAG *[Signature]*

LES _____

LMJ _____

enc -

RLM _____

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OTH _____

Very truly yours,

Charles A. Guyton

Charles A. Guyton

Miami
305 577 7000
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FPSC BUREAU OF RECORDS

West Palm Beach
561 650 7200
561 655 1509 Fax

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

**In Re: Petition for Modification of
Florida Power & Light Company's
Duct System Testing and Repair
Program**

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**Docket No. 970540-EG
Filed: January 6, 1998**

**MOTION IN OPPOSITION TO "PETITION ON PROPOSED
AGENCY ACTION" OF THE FLORIDA APARTMENT ASSOCIATION**

By letter dated December 5, 1997 and filed December 9, 1997, the Florida Apartment Association, filed a "protest to the FPSC agency action approving FP&L's petition to modify the existing Duct System Testing and Repair Program (Docket No. 970540-EG)." The letter also requested that, "any changes to the existing program be deferred pending such time as that a hearing on the issue may occur before the FPSC." Florida Power & Light Company became aware of the Florida Apartment Association's letter on December 17, 1997, and twenty days after becoming aware of the letter, pursuant to Florida Administrative Code Rule 25-22.036(2), Florida Power & Light Company files this motion in opposition to the "Petition on Proposed Agency Action" filed by the Florida Apartment Association and asks that the Commission deny the request for hearing, or in the alternative, dismiss the "petition." In support of its motion, FPL states

The Florida Apartment Association Failed To Serve FPL as required by Commission Rules.

FPL has not been served with a copy of the letter sent by the Florida Apartment Association to the Commission. FPL became aware of this letter through review of the Commission's files Florida Administrative Code Rule 25-22.028(2) requires that "[a] copy of all documents filed pursuant to these rules shall be served on each of the parties no later than the date of the filing " Florida Administrative Code rule 25-22.036(10) requires that, "where a petition on proposed agency

action is filed, a copy shall be served on all parties of record. Florida Apartment Association has failed to serve FPL as required by Rules 25-22.028(2) and 25-22.036(10).

The Florida Apartment Association Has Failed To Comply with Rules 25-22.029 and 25-22.036.

The Florida Apartment Association has failed to file, as required by Florida Administrative Code Rule 25-22.029, "a petition for a § 120.57 hearing, in the form provided by Rule 25-22.036." The Florida Apartment Association has not filed a petition, much less a petition in the form provided by Rule 25-22.036. The Florida Apartment Association letter has omitted the following essential requirements of Rule 25-22.036(7):

- (a)(1) the name of the Commission;
- (a)(2) "an explanation of how his or her substantial interests will be or are affected by the Commission determination;"
- (a)(3) "a statement of all known disputed issue of material fact. If there are none, the petition must so indicate;"
- (a)(4) "a concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief;"
- (a)(5) "a demand for relief; and"
- (a)(6) "other information which the ... petitioner contends is material."
- (f) " a statement of when and how notice of the Commission's proposed agency action was received."

While some of these omissions are of little substantive consequence, several of the omissions are crucial, such as the failure to explain how the petitioner's substantial interests will be affected, the disputed issues of material fact, the ultimate facts alleged and the legal authority entitling the petitioner to relief

The Florida Apartment Association Has Failed To Allege Standing To Protest.

The Florida Apartment Association has not alleged facts sufficient to demonstrate standing to participate as a party to these proceedings. To have standing to participate in a Section 120 57 proceeding on the basis that the person's substantial interests will be affected, the person must show "1) that he will suffer an injury in fact of sufficient immediacy to entitle him to a Section 120 57 hearing; and 2) that his injury must be of the type or nature the proceeding is designed to protect " 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). The "injury in fact" allegations must be that either (a) the petitioners have sustained actual injuries at the time of the filing of the petition, or (b) the petitioners are immediately in danger of sustaining some direct injury as a result of the Commission determination. Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987).

The Association has alleged no injury to itself or to its members as a result of the modification of FPL's Duct System Testing and Repair Program. It has only made the conclusory statement that, "the proposed changes would adversely affect these residents and communities " It is not enough to allege one's interests will be adversely affected; a petitioner must state with specificity how those interests will be injured. Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988). No effort has been made to address which proposed changes to the programs have the supposed detrimental effect. More importantly, there is no discussion of what the "adverse affect" would be.

The Florida Apartment Association has failed to allege an actual or immediate injury, thereby failing to satisfy the "injury in fact" requirement of Agrico. Having failed to allege an actual or

immediate injury in fact, the Florida Apartment Association necessarily has failed to allege that it has suffered or is about to immediately suffer an injury of the type the proceeding is designed to protect. So, the Florida Apartment Association's petition fails to meet either of the standing requirements of Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So 2d 478 (Fla 2d DCA 1981).

The Florida Apartment Association's letter also fails to allege it has standing in a representative capacity. To demonstrate standing, an association must demonstrate (1) that a substantial number of its members are substantially affected by the Commission's action, (2) that the subject matter of the proceeding is within the association's general scope of interest and activity, and (3) that the relief requested is of the type appropriate for a trade association to receive on behalf of its members. Florida Home Builders Association v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982); Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992). The Florida Apartment Association's letter has not alleged that it has members that are eligible for FPL's Duct System Testing and Repair Program. It has not alleged that a substantial number of its members are customers of FPL. It has not alleged that a substantial number of its members are customers of FPL and are substantially affected by the ~~proposed~~ program modifications. The Florida Apartment Association has not alleged that the subject matter of this proceeding, approval of a conservation program modification under Section 366.80, Florida Statutes, is within the scope of the association's interest and activity. The Florida Apartment Association has not requested relief, much less demonstrated that the relief it requests is of the type appropriate for a trade association.

The letter filed by the Florida Apartment Association entirely fails to demonstrate proper standing. It fails to make the showing necessary for an association to have standing. It also fails to allege the injury on behalf of individual members which would show their standing. Since representative standing is premised upon not only proper associational standing but also a demonstration that the individual members of the association would also have standing, the letter should be dismissed.

The Florida Apartment Association's "Petition" is so Woefully Inadequate That it Suggests That May Be Filed For Improper Purposes.

It is not entirely clear that the letter from the Florida Apartment Association is intended to be a request for hearing on the Commission's proposed agency action order. For instance, there is no mention of Order No. PSC-97-1480-FOF-EG which was issued approving the modifications to FPL's Duct System Testing and Repair Program. In addition, the letter was not served upon FPL as would be required by Rule 25-22.037(10) if it were intended to be a petition. Also, the letter did not even attempt to minimally comply with the requirement in Rule 25-22.029(4) that a petition on proposed agency action be in the form provided in Rule 25-22.036. Perhaps most importantly, the letter failed to request a hearing; instead it requested that, "any changes to the existing program be deferred pending such time as that a hearing on the issue *may* occur before the FPSC." (Emphasis added.) Thus, FPL recognizes that the Florida Apartment Association may have only been voicing its disagreement with the Commission action in Order No. PSC-97-1480-FOI-EG rather than requesting a hearing.

However, if the letter from the Florida Apartment Association is intended to be a protest of proposed agency action and a request for hearing, then FPL respectfully submits that the letter is so

egregiously deficient, as discussed earlier in this motion, that the deficiencies suggest that the letter is filed for improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. The filing of a protest letter which puts no facts in dispute, cites no authority, and only requests that program changes be "deferred pending such time as that a hearing on the issue may occur before the FPSC" suggests that the very purpose of the letter is to unnecessarily delay the program modifications and continue in effect a program that has proven not to be cost-effective unless modified. Such a protest would be an improper attempt to unnecessarily delay the program modifications and needlessly increase the cost of litigation.

FPL's petition to modify this program has now been pending before the Commission since May 6, 1997. The purpose of the program modification is to restore the program's cost-effectiveness so that all FPL customers, nonparticipants as well as participants, would benefit from the offering of the program. At present, FPL continues to offer a duct testing program that is cost-effective only to participating customers; the vast majority of FPL's customers are nonparticipants in the program, and the program as currently offered without the proposed modifications is not cost-effective to nonparticipant customers. FPL has worked hard to restore the program to a cost-effective status. There is no colorable argument offered by the Florida Apartment Association that the program modifications are unnecessary or inappropriate. At present all they have asked is that the modifications be deferred without offering any rationale. If their request proves to be as meritless as it currently appears, FPL is prepared to seek from the Florida Apartment Association, pursuant to Sections 120.569(1)(c), 120.5995(1), Florida Statutes (Supp. 1996), costs and attorneys fees expended due to unnecessarily and improperly forcing this matter to hearing.

Respectfully submitted,

Steel Hector & Davis LLP
215 South Monroe Street
Suite 601
Tallahassee, Florida 32312

Attorneys for Florida Power
& Light Company

By: 
Charles A. Guyton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of Florida Power & Light Company's Motion In Opposition To "Petition On Proposed Agency Action" Of The Florida Apartment Association was served by Hand Delivery (when indicated with an *) or mailed this 6th day of January, 1998 to the following:

Ms. Jan Milbrath
Florida Apartment Association
1133 W. Morse Blvd., Suite 201
Winter Park, Florida 32789

Cochran Keating*
Staff Attorney
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850



Charles A. Guyton