STEEL
HECTOR
&DAVIS

Steel Hector & Davis
215 South Monroe, Suite
Tallahassee, Florida
904 222 2300
904 222 8410 Fax

Charles A. Guyton
904 222 3421

ORIGINAL

January 12, 1998

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 Amended "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

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

Very truly yours,

Charles A. Guyton

ACK
AFA
APP
CAF
CMU
CTR
EAG
LEG 1
LIN
OPC enc
RCH
SEC 1
WAS
OTH

Miami
305 577 7000
305 577 7001 Fax

West Palm Beach
561 650 7200
561 655 1509 Fax

Key West
305 292 7272
305 292 7271 Fax

582 951 4100
582 951 4106 Fax

DOCUMENT NUMBER-DATE
00805 JAN 12 98
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Modification of Florida Power & Light Company's Duct System Testing and Repair Program	))))	**Docket No. 970540-EG** **Filed: January 12, 1998**

MOTION IN OPPOSITION TO AMENDED "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 ("FPL") became aware of the Florida Apartment Association's letter on December 17, 1997, and twenty days after becoming aware of the letter, on January 6, 1998, pursuant to Florida Administrative Code Rule 25-22 036(2), FPL filed a motion in opposition to the "Petition on Proposed Agency Action" filed by the Florida Apartment Association and asked that the Commission deny the request for hearing, or in the alternative, dismiss the "petition."

On January 8, 1998, the day after filing its motion in opposition to the Florida Apartment Association's original "petition," FPL's legal counsel received from the Florida Apartment Association an unsigned copy of a more detailed letter of protest dated January 6, 1998 Apparently, a signed copy of the unsigned letter to FPL was mailed to the Commission (not FPL) by the Florida Apartment Association on December 29, 1997 and received by the Commission on December 31, 1997.

Although the Florida Apartment Association has not requested leave to amend its original protest letter ("petition") pursuant to Florida Administrative Code Rule 25-22.036(8), FPL is treating the more detailed letter from the Florida Apartment Association as an amended petition and responding to it in this Motion In Opposition filed pursuant to pursuant to Florida Administrative Code Rule 25-22.036(2). FPL asks the Commission to deny the request for hearing, or in the alternative, dismiss the "amended petition." In support of this motion, FPL states:

THE FLORIDA APARTMENT ASSOCIATION DOES NOT HAVE STANDING TO PROTEST AND REQUEST A HEARING.

The Florida Apartment Association ("Association") has not alleged facts sufficient to demonstrate standing to participate as a party to this proceeding. The Association is attempting to act entirely in a representative capacity in this proceeding. It states in its amended letter that it is "representing more than 2000 member communities and the more than 250,000 multi-family residences in these communities throughout the FPL service area...." Association amended letter at 1. Neither the Association, its 2000 member communities, nor the multi-family residences in these communities are eligible participants in FPL's Duct System Testing and Repair Program, as currently offered or as proposed to be amended. The interests that the Association purports to represent are the interests of persons who are not members of the Association - the FPL customers who rent from the member owners of multi-family dwellings. The Association has no authority, standing or capacity to represent persons who are not members of the Association.

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 amended letter does not meet any of these requirements.

(1) The Association Has Not Shown That A Substantial Number Of Its Members Are Substantially Affected By The Commission's Action.

Assuming as it must for purposes of a motion to dismiss the accuracy of the Association's assertion that it represents 2000 member communities in FPL's service area, FPL acknowledges that 2000 members would be a "substantial number of the Association's members." However, what the Association fails to allege or show is how those members (owners or managers of multi-family dwellings) will be substantially affected by the Commission's approval of the proposed modification of FPL's Duct System Testing Program.

The interests the Association purports to be protecting are not the interests of apartment owners and managers but the interests of the persons to whom they lease apartments - customers of FPL. This is most easily seen by looking to the interests in the amended petition which the Association purports to be protecting. It states, in pertinent part:

> These residences and communities will be adversely affected by approval of FPL's request, by substantially raising their costs for participation in the Duct System Testing and Repair Program, reducing the energy efficiencies otherwise attainable, and leading to unnecessarily high utility bills.

The Association's members do not have "costs for participation in the Duct System Testing and Repair Program;" they are not eligible for the program. It is the persons to whom these members of

the Association rents dwellings - FPL residential customers - that have such costs. Similarly, if as a result of proposed modifications to the program there is a reduction in "the energy efficiencies otherwise attainable," that reduction is not to the members of the Association but to the FPL residential customers to whom they rent. Finally, if there were "unnecessarily high utility bills" as a result of the program modification, once again it would be an impact not on the Association or its members, but on the persons to whom they rent - FPL residential customers - who are not members of or represented by the Association. The simple fact demonstrated by the interests pled in the Association's petition is that it is undertaking, without any authority, to represent not its members, but the persons to whom its members rent dwellings.

The only other interest pled by the Association is that, "[t]he FAA has a substantial interest in managing communities that provide affordable housing." Association amended letter at 1. This pled interest is deficient for two reasons. First, as with the earlier pled interests, this is an attempt to protect the interest of the persons renting from the members of the Association rather than the Association itself. This is confirmed by looking to the very next sentence in the amended letter where the utility costs of multi-family **residents** are discussed, and the ultimate conclusion in the following sentence that there will be rent increases **to residents**; once again the focus is on the FPL residential customers who are leasing from the members of the Association, not on the members of the Association. Second, this passage makes no allegation of an **injury** to an interest **due to Commission action**. To demonstrate standing, a petitioner must show that there is an injury to a substantial interest as a result of agency action.

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) (Emphasis added). 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 it "has a substantial interest in managing communities that provide affordable housing." It is not at all apparent how this interest has been or will be injured by the Commission's approval of the proposed program modifications. 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 by the agency action. Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla 1st DCA 1988).

The simple fact is that modification of the program does not affect the ability of the FAA or its members to provide affordable housing. There is no "need" for community owners to "offset" the proposed incentive reductions as hypothesized by the Association ("the proposed 42% reduction in program incentives would likely need to be offset by community owners") It will be the decision of the FPL customer whether to participate at the lower incentive level. If apartment owners decide to "offset" the lower FPL incentive through some mechanism of their own, as suggested by the

Association's letter, that is a speculative, independent, intervening action of the apartment owners, not the result of a Commission action. Moreover, such a gesture would have the effect of making housing more rather than less affordable. If, in turn, the apartment owners independently attempted to pass the cost of its independently adopted "offset" mechanism to residents through rent increases, such an impact on the cost of affordable housing would be the result of the conduct of the apartment owners, not the result of the Commission's action.

This highly conjectural prospect of a rent increase passes neither test of the Agrico standing test. It is not an immediate injury in fact resulting from the Commission's action, it is a highly speculative result dependent upon no less than two intervening decisions which, if made, would be made by members of the Association ((1) creating an offset mechanism and (2) passing the cost of the mechanism through rent increases). Moreover, the prospect of a rent increase due to the conduct of apartment owners is not the type of interest this proceeding is designed to protect

(2) The Association Has Not Alleged That the Subject Matter of the Proceeding Is Within the Association's General Scope of Interest and Activity,

The subject matter of this proceeding is whether a Commission approved conservation program which is no longer cost-effective as currently offered should be modified to make it cost-effective. The Association has made no attempt to plead what its general scope of interest and activity is. There is no mention of it in the amended letter. The Commission does not know from the pleading whether the Association is incorporated, and if so, whether participation in this type of proceeding is within the corporation's purpose or authority. The Commission does not know if there is any document setting forth the membership requirements and responsibilities of the Association's members and the corresponding responsibility and focus of the Association. However, it is highly

doubtful that the purpose of the Association is to represent the interest not of its members but of the persons to whom its members rent property. It is most improbable that it is within the general scope of interest of the Association for the Association to represent the lessees of its members in proceedings before the Florida Public Service Commission in cases involving the cost-effectiveness of conservation programs. Clearly that has not been alleged in the amended letter, so the letter fails to meet the second standard for representational standing set forth in the Home Builders case

(3) The Association Has Not Shown That The Relief Requested Is Of The Type Appropriate For A Trade Association To Receive On Behalf Of Its Members.

The Association makes no attempt in its letter to meet this legal requirement The Association cannot make this showing based on the interests it has pled, for those interests are not the interests of its members but the interests of the persons to whom its members lease apartments The relief requested, a hearing to protect the interests of persons other than its members, is not the type of relief appropriate for a trade association to request "on behalf of its members" The Association is acting well beyond protecting the interests of its members, and the relief it seeks is not appropriate.

(4) The Association's "Petitions" and Request For Hearing Should Be Dismissed.

The amended 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 FAILED TO SERVE FPL AS REQUIRED BY COMMISSION RULES.

FPL was not served with a copy of the original letter sent by the Florida Apartment Association to the Commission. FPL became aware of that 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 The Florida Apartment Association has failed to serve FPL as required by Rules 25-22.028(2) and 25-22.036(10) Moreover, FPL was not served with a copy of the amended letter filed by the Association with the Commission. After inquiry by FPL of the Association, FPL was provided, a week after the filing, an unsigned copy. Even a pro se petitioner should have the basic understanding that it needed to provide notice to FPL that it was attempting to protest a Commission action involving FPL. The Commission should be cognizant of this petitioner's repeated omissions and failure to follow Commission rules.

THE ASSOCIATION'S "AMENDED PETITION" MAY BE FILED FOR IMPROPER PURPOSES.

FPL respectfully submits that the amended letter requesting a hearing may be 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 after thorough Commission review of a program which clearly needs to be modified has the effect of keeping the existing program with its higher incentives in place until after a hearing. If it turns out that this was the only

purpose of the protest letter and that the Association has no basis upon which to protest, 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. During the technical review by the Commission, the Association never attempted intervention nor contacted FPL with concern about the program modification. From the start the purpose of the program modification has been 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 If the Association's request for a hearing is not dismissed as it should be and their case 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.

FPL RESPECTFULLY REQUESTS THAT THIS MOTION BE ADDRESSED EXPEDITIOUSLY

This program revision has been pending for over eight months without the benefit of any insights from the Association. Their request for a hearing, if granted, will further delay the implementation of this simple, straightforward program modification. The Association does not

have standing to protest the approval of these program modifications. The amended petition should be dismissed, and the approved modifications should go into effect as authorized.

FPL has a series of other program modifications which were approved at the same time as the modifications for the Duct System Testing and Repair Program were approved. Within the next month FPL will be conducting training for all its newly modified programs. If the Commission acts expeditiously on this motion, FPL may be able to keep in place the training it has scheduled for this program at the same time training will be performed for other newly modified DSM programs, saving significant customer dollars. Therefore, FPL asks that the Commission expeditiously schedule its consideration of this case, particularly its consideration of this motion. To facilitate expeditious scheduling, FPL has hand delivered its motion upon the Association so that a Staff Recommendation might be able to be filed by January 22 for consideration at the February 3, 1998 Agenda.

Respectfully submitted,

Steel Hector & Davis LLP
215 S. Monroe St., Suite 601
Tallahassee, Florida 32312

Attorneys for Florida Power
& Light Company

By: Charles A. Guyton
Charles A. Guyton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of Florida Power & Light Company's Motion In Opposition To Amended "Petition On Proposed Agency Action" Of The Florida Apartment Association was served by Hand Delivery this 12th 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