MEMORANDUM

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MARCH 9, 1998

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (C. KEATING) WCK RVE

RE: DOCKET NO. 970540-EG - PETITION BY FLORIDA POWER & LIGHT COMPANY FOR MODIFICATION OF DUCT SYSTEM TESTING AND REPAIR PROGRAM

98-0374-FOF-EG

Attached is an ORDER GRANTING MOTION TO DISMISS to be issued in the above referenced docket. (Number of pages in order - 10)

WCK/js
Attachment
cc: Division of Electric & Gas (Haff)
I:970540o2.wck

Order 3/10
Mailed 3/10

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power & Light Company for modification of Duct System Testing and Repair Program.	DOCKET NO. 970540-EG ORDER NO. PSC-98-0374-FOF-EG ISSUED: March 9, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER GRANTING MOTION TO DISMISS
AND MAKING ORDER NO. PSC-97-1480-FOF-EG FINAL

BY THE COMMISSION:

On May 6, 1997, Florida Power & Light Company (FPL) filed a petition for approval of modifications to its Duct System Testing and Repair Program. The proposed modifications were intended to restore the cost-effectiveness of this program by (1) reducing the average customer incentive from $629/kW to $369/kW of summer peak demand reduced and (2) excluding small, non-demand metered commercial/industrial customers from further program participation.

By Notice of Proposed Agency Action Order No. PSC-97-1480-FOF-EG (PAA Order), issued November 24, 1997, in Docket No. 970540-EG, we approved FPL's petition. On December 9, 1997, the Florida Apartment Association (FAA) timely filed a letter protesting the PAA Order and requesting a hearing on this matter. On December 31, 1997, FAA filed a second letter amending its original protest letter.

FPL alleges it was not served a copy of FAA's original protest letter and was not aware of the letter until December 17, 1997. Consistent with a December 17, 1997, "service date," FPL timely filed a motion in opposition to the original protest letter on January 6, 1998. FPL further alleges that it was not served a copy of FAA's amended protest letter until January 8, 1998, two days after FPL filed its motion in opposition. Accordingly, FPL timely filed an amended motion in opposition to the amended protest letter

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on January 12, 1998. Pursuant to Commission rules, FAA was required to file a responsive pleading, if any, by January 20, 1998. FAA untimely filed its response to FPL's amended motion on January 22, 1998. We choose to address the arguments raised in FAA's untimely response in order to provide a more thorough analysis of the issues involved. Further, we note that FAA is not represented by counsel in this matter.

FPL's motion in opposition is essentially a motion to dismiss FAA's amended protest letter. The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In determining whether FAA established a claim that is cognizable by this Commission, FAA's amended protest letter must be viewed in the light most favorable to FAA.

I. Standard for Association Standing

Standing to initiate a formal proceeding under Section 120.569, Florida Statutes, requires a person to demonstrate that its "substantial interests" will be determined by an agency. In addition, Rule 25-22.029(4), Florida Administrative Code, provides that "[o]ne whose substantial interests may or will be affected by the Commission's proposed agency action may file a petition for a Section 120.57 hearing. . . ."

Citing Florida Home Builders Association v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), and Friends of the Everglades v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992), FPL asserts that an association, in order to demonstrate standing, must show: (1) that a substantial number of its members are substantially affected by an agency'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 an association to receive on behalf of its members. FPL argues that FAA fails to satisfy any one of these requirements.

We note that Florida Home Builders, supra, involved an association's standing to bring a rule challenge under Section 120.56(1), Florida Statutes, which requires a person to show that it was "substantially affected" by the challenged rule. As stated above, standing to commence formal proceedings under Section

120.569, Florida Statutes, requires a person to show that its "substantial interests" will be determined. The association standing test established in Florida Home Builders, however, was extended to Section 120.57, Florida Statutes, hearings in Farmworker Rights Org. v. Department of Health, 417 So. 2d 753 (Fla. 1st DCA 1982) ("[f]or the purpose of standing, there is no significant difference between a [rule challenge] and a Section 120.57 hearing").

Subsequently, the First District Court of Appeal recognized that, in the context of standing, there can be a difference between the concepts of "substantially affected" persons and persons whose "substantial interests" are affected and suggested that Farmworker Rights is not applicable to every case in which an association seeks to institute a Section 120.57 proceeding. Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988). This language in the Court's decision appears aimed only at the first prong of the Florida Home Builders test which provides that an association must demonstrate that a substantial number of its members are substantially affected by the agency's action; the Court does not address the applicability of the second and third prongs.

We believe that Florida Home Builders and Florida Society of Ophthalmology, when read together, suggest that the appropriate test for association standing in this case is whether FAA, in its amended protest petition, has demonstrated (1) that a substantial number of its members have substantial interests which are affected by our proposed 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 an association to receive on behalf of its members. We believe that this view is supported by Friends of the Everglades, supra, which states that "[s]tanding under the Administrative Procedure Act (APA) is conferred on persons whose substantial interest will be affected by proposed agency action" and, citing Florida Home Builders, states that "[t]o meet the requirements for standing under the APA, an association must demonstrate that a substantial number of its members would have standing."

II. Discussion of Arguments and Analysis

FPL contends that FAA has not alleged facts sufficient to demonstrate standing to protest our PAA Order. In support of this contention, FPL primarily argues (1) that the FPL customers whose interests FAA purports to represent are not alleged to be FAA members and are not represented by FAA and (2) that FAA has not shown that the apartment owners and managers who are alleged to be FAA members are substantially affected by our PAA Order.

A. FAA's Representative Capacity

FPL notes that FAA, on page 1 of its amended protest letter, states 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...." FPL further notes that neither FAA, its 2000 member communities, nor the multi-family dwellings in these communities are eligible participants in FPL's Duct System Testing and Repair Program. FPL asserts that the interests FAA purports to represent are the interests of persons who are not FAA members but FPL customers who rent from FAA members. FPL asserts that FAA's membership consists of owners and managers of multi-family dwellings.

FPL points out the following excerpt from page 1 of FAA's amended protest letter:

> 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 energy efficiencies otherwise attainable, and leading to unnecessarily high utility bills.

FPL asserts that FAA members do not have costs for participation in the program because they are not eligible for the program; instead, it is the FPL customers who rent from FAA members that may incur such costs. Further, FPL asserts that any reduction in energy efficiencies would not affect FAA members but their tenants. Finally, FPL asserts that any "unnecessarily high utility bills" resulting from the program would not impact FAA members. In summary, FPL argues that it is clear from FAA's amended protest letter that FAA is attempting, without authority, to represent persons who are not FAA members but the tenants of FAA members and,

therefore, that FAA does not satisfy the first prong of the Florida Home Builders test.

In its response, FAA does not contest FPL's assertion that it cannot represent the interests of persons other than its own members. FAA attempts to focus on the interests of its members, as individual residential ratepayers and individual member communities. However, FAA states on page 5 of its response that residents residing in its member communities will suffer immediate injury due to the decreased program incentives.

We find that FAA, in its amended protest letter, has asserted, in reality, the interests of persons who are not part of its membership. In addition, we find that FAA has asserted the interests of non-members, among others, in its response. The interests of persons who are not FAA members are not sufficient interests upon which FAA may establish standing under the concepts of standing for a 120.57 hearing.

B. FAA Members' Interests

FPL notes that the only other interest pled by FAA in its amended protest letter is its "substantial interest in managing communities that provide affordable housing." FPL argues that this pled interest is deficient for two reasons and, therefore, that FAA cannot show that its members are substantially affected by our proposed action.

First, FPL argues that FAA is attempting again to protect the interests of the tenants of FAA members rather than the members themselves. FPL points out that FAA, in page 1 of its amended protest letter, supports its alleged interest in providing affordable housing by referring to the utility costs of multi-family residents and by concluding that rate increases to residents will likely result from the program modifications.

Second, FPL argues that FAA has made no allegation of injury due to our proposed action. FPL refers to the two-prong test established in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), for determining whether a person's substantial interests will be affected. The Agrico test requires that a person seeking to establish a substantial interest 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 is of the type or nature that the

proceeding is designed to protect. FPL argues that FAA has alleged that its interests will be affected but has not stated with specificity how those interests will be affected by the proposed action.

FPL argues that modification of the program does not affect the ability of FAA or its members to provide affordable housing. On page 1 of its amended protest letter, FAA alleges that "[t]he proposed 42% reduction in program incentives would likely need to be offset by community owners." FPL contends that there is no need for community owners to offset the proposed incentive reductions. FPL asserts that its customers alone face the decision of whether to participate at the lower incentive level; if FAA members decide to offset the lower incentives through some mechanism of their own, such action is a speculative, independent, intervening action of those FAA members, not the result of this Commission's PAA Order. FPL argues that the prospect of such a rent increase passes neither Agrico test: (1) it is not an immediate injury resulting from our proposed action but a speculative result dependent on FAA members creating an offset mechanism and passing the costs of the offset through rate increases; and (2) it is not the type of interest this proceeding is designed to protect.

FPL contends that FAA has not alleged that the subject matter of this proceeding is within its general scope of interest and activity and, therefore, fails to satisfy the second prong of the Florida Home Builders test for association standing. FPL argues that FAA failed to plead its general scope of interest and activity. In addition, FPL asserts that it is very unlikely that it is within FAA's general scope of interest to represent its members' tenants before Commission cases concerning the cost-effectiveness of conservation programs.

FPL further contends that FAA has not shown that the relief it requests is of the type appropriate for an association to receive on behalf of its members and, therefore, fails to satisfy the third prong of the Florida Home Builders test. Again, FPL argues that a hearing to protect the interests of non-FAA members is not the type of relief appropriate for an association to request on behalf of its members.

In its response, FAA contends that a substantial number of its members - owners and managers of multi-family dwellings - will suffer injury beyond their ability to provide affordable housing. FAA asserts that a substantial number of owners, property managers,

and management personnel maintain a residence at their community or communities in FPL's service territory. FAA argues that these members, as residential FPL ratepayers, are substantially affected by the proposed program modifications and therefore have standing in this proceeding. In addition, FAA asserts that owners/management typically assume responsibility for the utility costs of vacant units, which can comprise 5-15% of the units in a member community at any given time. FAA also restates its interest in providing affordable housing, asserting that its by-laws clearly direct its members to address and advance the issues of maximizing value and mutual benefit.

FAA further contends, in its response, that the subject matter of this proceeding is within its general scope of interest and activity. In support of this contention, FAA cites four particular "objectives" from its by-laws:

> b) To develop and maintain within the apartment industry a high appreciation of the objectives and responsibilities of apartment owners and operators in fully serving the public.
>
> e) To secure cooperative action in advancing the common purposes of its members; uniformity and equity in business usages and laws; and proper consideration of opinion upon questions affecting the apartment industry in the State of Florida.
>
> f) To promote and assist in the enactment, enforcement, and maintainment of beneficial local, state, and federal laws pertaining to the apartment industry and to otherwise promote and encourage better methods and practices in the industry.
>
> i) To serve, advance, and protect the welfare of the apartment industry, in such manner that adequate housing will be made available by private enterprise to all people in Florida.

FAA also cites section 1-d of its code of ethics which states: "Seek to provide better values, so that even a greater share to the public may enjoy the many benefits of apartment living." FAA maintains that the welfare of its members is directly linked to the welfare of those residing in their communities. Further, FAA asserts that "[a]ttempts to fully serve the public, promoting and

assisting in enactment, enforcement, and maintainment of beneficial laws (including FPSC orders) affecting the industry, providing adequate housing to all people in Florida, and providing the best overall housing value possible to the public are all related to the subject matter of this proceeding...."

Finally, FAA contends, in its response, that the relief it requests is of the type appropriate for an association to receive on behalf of its members. FAA reasserts that a substantial number of its members are substantially affected and, therefore, that it has the right to request a formal hearing just like any other group of affected FPL residential ratepayers.

We find that FAA, in its amended protest letter, is, in effect, asserting the interests of its members' tenants rather than its members. If the proposed incentive reductions ultimately lead to rent increases for FAA members' tenants, it is the tenants who will suffer an injury, not FAA. In addition, even if one considers this result an injury to FAA members' ability to manage communities that provide affordable housing, we believe that such an injury is too speculative and remote to demonstrate FAA's standing to request a formal hearing on this matter. See Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987). As FPL argued, its customers alone face the decision of whether to participate at the lower incentive level; if FAA members decide to offset the lower incentives through some mechanism of their own, e.g., increased rent, such action is a speculative, independent, intervening action of those FAA members, not the result of our PAA Order.

We do believe that FAA, in its response, has demonstrated that a substantial number of its members have substantial interests which are affected by this proceeding. We believe that the substantial interests of owners and managers that reside in their communities, as individual FPL ratepayers, are affected by this proceeding, just as any other FPL residential customer's interests would be affected. However, we find that the interests of FAA members as individual ratepayers are not within FAA's general scope of interest and activity. Each of the objectives cited by FAA concern the interests of "the apartment industry," not the interests of FAA's individual member-owners and managers in their personal, non-business dealings. These member-owners and managers may have standing as individuals to obtain a hearing on this matter, but FAA cannot establish standing as an association based on its members' personal interests.

C. Additional Matters

FPL asserts that FAA failed to timely serve FPL with copies of its protest letter and amended protest letter. FPL states that it makes this assertion simply to make us aware of FAA's failure to follow Commission rules. Finally, FPL alleges that FAA's protest may be filed for the improper purpose of delaying FPL's program modifications and, therefore, may needlessly increase the cost of litigation. However, FPL does not currently request any type of relief on these grounds.

III. Conclusion

In conclusion, we find that FAA has not established standing to protest and request a hearing on our PAA Order and that FAA's amended protest letter should be dismissed. FAA has not satisfied the requirements for association standing because (1) the interests pled by FAA in its amended protest letter are not the interests of its members and (2) the only interests alleged by FAA that could be construed as interests of its members are not matters within FAA's general scope of interest and activity or involve remote and speculative injury. When viewed in the light most favorable to FAA, its amended protest letter, even as supplemented by its response, does not establish a claim that is cognizable by this Commission.

In addition, we find that Order No. PSC-97-1480-FOF-EG, the PAA Order in this docket, should be made final and effective as of February 17, 1998, the date of our vote on this matter.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's motion to dismiss the Florida Apartment Association's amended protest letter is granted. It is further

ORDERED that Order No. PSC-97-1480-FOF-EG is made final and effective as of February 17, 1998.

By ORDER of the Florida Public Service Commission this 9th day of March, 1998.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

WCK

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.