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September 23, 1999

By Hand Delivery

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

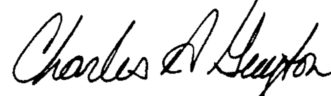
Re: DOCKET NO. 981890-EU

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") in Docket No. 981890-EU are the original and fifteen (15) copies of Florida Power & Light Company's Response to LEAF's Motion for Order to Compel Discovery to Florida Power & Light Company.

If you or your staff have any questions regarding this filing, please contact me.

Very truly yours,



Charles A. Guyton

Enclosure
cc: Parties of Record

AFA 2
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Generic Investigation Into the Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida	)	DOCKET NO. 981890-EI DATE: September 23, 1999

FLORIDA POWER & LIGHT COMPANY'S RESPONSE TO LEAF'S MOTION FOR ORDER TO COMPEL DISCOVERY

Florida Power & Light Company ("FPL") responds as follows to LEAF's Motion For Order To Compel Discovery filed September 16, 1999 in Docket No. 981890-EU.

FPL'S GENERAL OBJECTION

FPL has raised a general objection which it incorporates into each specific objection to each interrogatory. FPL's general objection is that discovery is not proper in this proceeding, for this is an investigation, and under the Administrative Procedure Act ("APA") and the Uniform Rules of Procedure, both of which are clearly applicable to the Commission, an investigation is not properly conducted as a formal evidentiary proceeding under Section 120.57, Florida Statutes, and discovery is available only in a formal evidentiary proceeding under Section 120.57.

The Commission voted at its December 1998 Agenda Conference to initiate an investigation. This is reflected clearly in the Commission's minutes as well as in the motion made. Consistent with the Commission's vote, the style of the case states: "IN RE: Generic Investigation Into Aggregate Electric Utility Reserve Margins Planned For Peninsular Florida." Even the Commission's subsequent procedural orders that improperly attempt to convert this proceeding into a formal

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evidentiary hearing nonetheless recognize that this proceeding is an investigation. No Commission action has been taken or proposed. This proceeding is clearly an investigation preliminary to Commission action.

It is unequivocally clear under the APA that an investigation preliminary to agency action is not to be conducted as a Section 120.57 proceeding. Section 120.57(5), Florida Statutes (1997) states: "This section does not apply to agency investigations preliminary to agency action." The instruction to the Commission could not be clearer. It is improper to conduct an investigation as a Section 120.57 proceeding.

The APA's clear instruction that investigations are not to be conducted as Section 120.57 proceedings is reinforced by the Uniform Rules of Procedure that govern the conduct of all Section 120.57 proceedings. Rule 28.106.101, Florida Administrative Code, the rule that explains the scope of Chapter 28-106, the chapter of the Florida Administrative Codes that addresses the conduct of Section 120.57 proceedings, states that Chapter 28-106 does not apply to "agency investigations or determinations of probable cause preliminary to agency action." In addition, the rule that addresses how Section 120.57 proceedings are properly initiated, Rule 28-106.201(2), Florida Administrative Code, makes it clear that such a proceeding is initiated by a petition filed in response to an agency action. There has been no proposed or final agency action in this proceeding, because this is an investigation preliminary to agency action.

The discovery being attempted by LEAF is pursuant to Chapter 28-106, Florida Administrative Code. LEAF's Motion to Compel at 3. Rule 28-106.101, F.A.C. clearly states that the entire chapter does not apply "to agency investigations or determinations of probable cause preliminary to agency action." Consequently, the discovery attempted by LEAF to FPL in this

investigation is not contemplated by or permissible under the very rules upon which LEAF relies.

Because this proceeding is an investigation, because an investigation is not properly conducted as a Section 120.57 proceeding, because a Section 120.57 proceeding is properly initiated only by agency action and there has been no agency action in this proceeding, and because discovery pursuant to Chapter 28-106 is not available in an investigation, FPL has objected to LEAF's attempt to conduct discovery.

LEAF's Response

LEAF's brief response is threefold: (1) the Commission has granted LEAF party status, (2) the Commission has authorized parties to conduct discovery, and (3) the Commission does not lack authority to allow such participation. FPL's response follows.

FPL's Responses

LEAF Is Not Properly a Party.

First, investigations are not proceedings in which party status is properly requested or granted. Party status is determined in proceedings to determine substantial interests, Section 120.57 proceedings. An investigation is a less formal proceeding in which no entity has its interests determined or substantially affected by an agency. An investigation is preliminary to agency action. The purported granting of party status in an investigation is an inappropriate confusion of the informal investigatory process with the more formal Section 120.57 proceeding to determine substantial interest process.

Second, LEAF has not and cannot meet the legal standard for demonstrating party status in a Section 120.57 proceeding. FPL without waving its objection that intervention in an investigation is inappropriate, notes that the Petition for Leave to Intervene filed by LEAF does not conform to

Rule 28-106.205 or to Rule 25-22.039 (as to Rule 25-22.039 titled Intervention, FPL would point out that although this Rule has been identified in Chapter 25-40.001 as an exception to the Uniform Rules of Procedure, the exception authorized was only as to the timing by which a petition for intervention must be filed.)

Looking to Rule 25-22.039, the Commission's procedural rule on intervention, LEAF's petition is deficient. The rule states that the petition "must conform with Commission Rule 25-22.036(7)(a)," but LEAF's petition cannot so comply because the rule referred to has been repealed. Order No. PSC-99-0413-NOR-PU. Moreover, the petition to intervene fails to include:

> allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

Since this requirement is the same as the requirement under the uniform rule addressing intervention, the failure of LEAF's petition to intervene to satisfy this requirement discussed below is equally applicable here.

Looking to Rule 28-106.205, the uniform rule applicable to intervention, LEAF's petition to intervene is deficient. LEAF's petition to intervene does not "conform to Rule 28-106.201(2)" as required.

a. The petition does not contain a "statement of when and how the petitioner received notice of the agency decision" as required by subsection 28-106.201(2)(c) (because there has been no agency decision, which reflects that this is not a proceeding determining substantial interests because there has not been an agency action, the event necessary to initiate a 120.57 proceeding).

b. The petition to intervene does not contain a "concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrants reversal or modification of the agency's proposed action" as required by Rule 28-106.201(2)(c) (once again certain allegations necessary for a petition have not been made because there has not been any agency action, which is contemplated under the APA and the Uniform Rules as the event initiating a 120.57 proceeding).

c. The petition to intervene does not contain a "statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action (because the agency has not taken proposed action, which is contemplated as preceding a 120.57 proceeding).

d. The petition to intervene does not contain a "statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the agency to take with respect to the agency's proposed action" as required by Rule 28-106.201(20(g).

In addition, nowhere in its petition to intervene does LEAF present allegations:

> sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to agency rule or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

This is an essential requirement under Rule 28.106.205 (and Rule 25-22.039). LEAF does not plead any constitutional, statutory or rule based right to participate. LEAF identifies no substantial interest that will be determined.

LEAF's attempt to allege that it has substantial interests that "will be affected through the proceeding" are deficient. 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 first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Id. Both requirements must be satisfied for a person to successfully demonstrate a substantial interest that will be affected by the determination in the proceeding. Id. Case law in Florida is fairly well developed regarding what it takes to satisfy each of these requirements. LEAF's allegations do not meet the requirements of standing case law.

LEAF Fails to Allege Injury.

Nowhere in its petition has LEAF alleged any **injury** as a result of the Commission's potential determination in this case. This is a fatal deficiency, for the Agrico test requires the allegation of **injury**. The fact that LEAF is interested in how the Commission acts in this proceeding is not a basis for standing. The following discussion addresses the necessity of a party such as LEAF alleging an injury rather than a mere interest:

> **We initially observe that not everyone having an interest in the outcome of a particular dispute over an agency's interpretation of law submitted to its charge, or the agency's application of that law in determining the rights and interests of members of the government or the public, is entitled to participate as a party in an administrative proceeding to resolve the dispute. Were that not so, each interested citizen could, merely by expressing an interest, participate in the agency's effort to govern,** a result that would unquestionably impede the ability of the agency to function efficiently and inevitably cause an increase in the number of litigated disputes well above the number that administrative and appellate judges are capable of handling. Therefore, the legislature must define and the courts must enforce

> certain limits on the public's right to participate in administrative proceedings. The concept of standing is nothing more than a selective method for restricting access to the adjudicative process, whether it be administrative or purely judicial, by limiting the proceeding to actual disputes between persons whose rights and interests subject to protection are immediately and substantially affected.
>
> ***
>
> Although one need not have his rights *determined* to become a party to a licensing proceeding, **party status will be accorded only to those who will suffer an injury to their substantial interests in a manner sought to be prevented by the statutory scheme.**

Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279, 1284 (Fla. 1st DCA 1988), rev. den., 542 So.2d 1333 (Fla. 1989)(emphasis added). By failing to allege any injury in its petition[1], LEAF has failed the Agrico standing test.

LEAF Pleads No Injury In Fact

Indirect, speculative, conjectural, hypothetical or remote injuries are not sufficient to meet the "injury in fact" prong of the Agrico standing test. Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987), rev. den., 513 So.2d 1063 (Fla. 1987); Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988), rev. den., 542 So.2d 1333 (Fla. 1989); International Jai-Alai Players Association v. Florida Pari-Mutual Commission, 561 So.2d 1224 (Fla. 3d DCA 1990. There must be either an actual injury or an immediate danger of a direct injury arising from challenged official conduct to meet this test.

In Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426

[1]In determining standing, the Commission is limited to the allegations of the pleading. Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987), rev. den., 513 So.2d 1063 (Fla. 1987).

(Fla. 1st DCA 1987), rev. den., 513 So.2d 1063 (Fla. 1987), the First District Court of Appeals elaborated on the immediate injury in fact requirement. It stated that, "Agrico requires that a party show that he will suffer an immediate injury as a result of the agency action." 506 So.2d at 432. The court went on to state:

> [A]bstract injury is not enough. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury **as a result of the challenged official conduct**. *See O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38L.Ed.2d 674 (1974) and *Jerry*, 353 So.2d at 1235. The court in *Jerry* therefore concluded that a petitioner's allegations must be of "sufficient immediacy and reality" to confer standing.
>
> Accordingly, our construction of *Agrico, Firefighters,* and *Jerry* leads us to the conclusion that a petitioner can satisfy the injury-in-fact standard set forth in *Agrico* by demonstrating in his petition either: (1) that he has sustained actual injury in fact at the time of filing his petition; or (2) that he is immediately in danger of sustaining some direct injury as a result of the challenged agency's action.

506 So.2d at 433 (emphasis added).

Applying the standard articulated in the Village Park case, it is clear that the allegations in LEAF's petition to intervene fail to allege either (1) that LEAF has already sustained injury in fact or (2) that LEAF is in immediate danger of sustaining some direct injury as a result of the challenged agency action. LEAF makes no attempt to allege it has already sustained an injury. Instead, it attempts to allege not that it is "immediately in danger of sustaining some direct injury" but that it has interests that may be affected.

LEAF's alleged interests are quite remote and speculative. LEAF has alleged that LEAF has a substantial interest "in the Commission's actions that may occur as part of a rulemaking docket following conclusion of the instant proceeding." LEAF's unidentified "interest", not injury or a

prospect of injury, is not one that "may occur" as a result not of any action in this proceeding, but as a result of a "rulemaking docket" that may or may not occur "following the conclusion of the instant proceeding." LEAF's interest is completely unidentified; how its interest would be impacted is completely unaddressed; and LEAF acknowledges that any affect on its interest would not be due to this proceeding but a rulemaking proceeding that may or may not take place after this proceeding. LEAF has not pled it is in immediate danger of sustaining some direct injury as a result of the challenged agency action.

LEAF also alleged that the Commission's determinations in this proceeding will affect the various supply and demand energy alternatives are used by electric utilities in meeting reliability concerns in the state and that such determinations will affect the environmental and health benefits of energy efficiency, the delivery of energy services, and increased use of cleaner energy resources to meet energy service needs. This docket is about reserve margins and how they are determined. It has nothing to do with the various supply and demand energy alternatives to be used by electric utilities. Even if it did, the only entities with interest being determined by such choices would be the electric utilities making the choices, not LEAF. The determination of reserve margins does not have an affect upon environmental and health benefits of energy efficiency or the increased use of cleaner energy resources. Even if the Commission were to adopt a reserve margin standard as a result of this proceeding, the impact of such a standard on environmental and health benefits or the use of cleaner energy resources is incredibly remote, if there would be any impact at all. There is not injury or threat of direct injury to these extraordinarily remote interests pled by LEAF.

LEAF also pled it has an interest in the protection of public health and the environment.

Those interest are not being determined nor will they be substantially affected by this proceeding. The Commission's decision in this case will not "substantially influence how electric power is provided to Floridians, what energy resources are relied on, and how much utilities should rely upon demand side energy services." At most the Commission would establish a reserve margin criterion for measuring reliability. How it would be met would not be determined in this proceeding but by utilities making subsequent management decisions, subject to subsequent review by the Commission, with a separate environmental review by another agency designed to protect the interests LEAF claims to protect. Once again, there is no injury or threat of immediate direct injury to LEAF.

Any impact the decision in this docket might have on LEAF is indirect and speculative. It cannot be reasonably concluded that LEAF has met the standard of showing that its substantial interests "will be affected," particularly when the case law setting forth what that requirement means requires a showing of either actual injury or immediate danger of direct injury. LEAF has pled a highly speculative interest rather than demonstrating that has suffered an injury in fact or that it is immediate danger of suffering an injury in fact. Remote, speculative and conjectural interests that cannot be shown to even be injuries do not pass the "injury in fact" requirement of Agrico. Village Park, 506 So.2d at 430,433; International Jai-Alai Players, 561 So.2d at 1226.

LEAF's Interests Fall Outside the Zone of Interest

The second prong of the Agrico standing test requires that, "the injury must be of the type or nature the proceeding is designed to protect." 406 So.2d at 482. This requirement is sometimes called the "zone of interest" test. See, Society of Ophthalmology, 532 So.2d at 1285. Typically, when applying the "zone of interest" test, the agency or court examines the nature of the injury

alleged in the pleading and then determines whether the statute or rule governing the proceeding is intended to protect such an interest. If not, because the party is outside the zone of interest of the proceeding, the party lacks standing.

LEAF's statement of substantial interests focuses solely on LEAF's interests in protecting the environment and health through advocating more energy efficiency and cleaner energy resources. The fundamental purpose of the statutes pursuant to which the Commission claims to be acting in this case is to assure grid reliability for retail customers. The various statutory sections under which the Commission acts are designed solely to protect the reliability of service to utility customers. These statutes are not intended to protect or otherwise address the environmental and health benefits. Indeed, those interest are protected by other agencies in other proceedings.

LEAF is not a proper party under the rules governing intervention or the case law governing standing. FPL should not have to respond to LEAF's discovery because LEAF is not properly a party to this investigation.

The Commission's Authorization of Discovery Is Inappropriate

LEAF cites four Commission orders in which it maintains that the Commission has authorized discovery by the parties: PSC-99-0839-PCO-EU; PSC-99-0760-PCO-EU; PSC-99-1274-PCO-EU; and PSC-99-1716-PCO-EU. FPL will address each, in turn.

Order No. PSC-99-0839-PCO-EU does not authorize discovery; it merely authorizes intervention. It improperly allowed LEAF's intervention for the reasons just discussed: an investigation is not a proceeding for intervention and party status, and LEAF lacks standing.

Order No. PSC-99-0760-PCO-EU states that the purpose of the docket was "to investigate planned, aggregate electric utility reserve margins in Peninsular Florida," and it was expressly issued

pursuant to Rule 28-106.211, Florida Administrative Code. As previously discussed, Rule 28-106.101, F.A.C., the rule that discusses the application of all rules in Chapter 28-106, including Rule 28-106.211, clearly states that the entire chapter does not apply "to agency investigations or determinations of probable cause preliminary to agency action." Thus, that order attempting to apply Chapter 28-106 to this investigation is a nullity.

Order No. PSC-99-1274-PCO-EU mistakenly treats the position advanced by FPL and others that the Commission may not conduct an investigation as a proceeding to determine substantial interests as a challenge to its grid jurisdiction. FPL recognizes the Commission statutory authority to maintain grid reliability and to conduct proceedings designed to maintain grid reliability. However, that jurisdictional authority is not authority to ignore the procedural requirements imposed by the Legislature. The Legislature, in the APA, has explicitly stated that investigations are not to be handled as Section 120.57 proceedings. The Commission has apparently ignored or misread that clear statutory mandate. The Commission's decision in Order No. PSC-99-1274-PCO-EU to conduct this investigation as a Section 120.57 proceeding despite the clear statement in Section 120.57(5) that "this section does not apply to agency investigations preliminary to agency action," makes that order inconsistent not with the Commission's authority to maintain grid reliability but with its requirement to follow the APA.

Similarly, Order No. PSC-99-1716-PCO-EU mistakenly interprets FPL's argument that an investigation may not be conducted as a Section 120.57 proceeding to determine substantial interests as a jurisdictional challenge to the Commission grid authority. FPL has not challenged the commission's authority in this area. Once again, the Commission ignores the plain language of Section 120.57(5).

SUMMARY OF GENERAL OBJECTION

Conducting this investigation as a Section 120.57 proceeding to determine substantial interests is a clear, reversible, procedural error which FPL and other parties have tried to help the Commission avoid making. No entity participating in this proceeding, including the Commission, is served by the Commission following a procedurally infirm path. The discovery sought by LEAF, discovery pursuant to Rule 28-106.206, is discovery pursuant to Chapter 28-106 and pursuant to Section 120.57. Such discovery is appropriate in a proceeding to determine substantial interests, but it is not permitted in a Commission investigation. Section 120.57(5) clearly states that Section 120.57 is not applicable to investigations, and Rule 28-106.101 states that Chapter 28-106, including Rule 28-106.206, the rule under which LEAF justifies its discovery, does not apply to "agency investigations."

FPL objects to LEAF's discovery to preserve its position that the procedural handling of this case is inconsistent with the legislative directive of the APA as well as the rule provisions of the Uniform Rules of Procedure. It is not too late for the Commission to avoid reversible error, but regardless of whether the Commission is inclined to reverse its mistake, FPL must preserve its position, and its objections to LEAF's discovery preserves FPL's position. FPL respectfully objects to the discovery being attempted by LEAF.

SPECIFIC OBJECTIONS

Interrogatories 1, 2, and 3

LEAF's interrogatories 1, 2 and 3 are vague. If they are not vague, why does it take LEAF the better part of a single-spaced page to explain what it meant? The problem is with the questions posed. FPL does not develop its plant availability factors by looking to availability solely during

peak, as these three questions seem to suggest; consequently, the questions are vague. Plant availability is measured over a year, so FPL cannot state what availability factor would be assigned to a unit available 50% during peak, however LEAF chooses to define it, without additional information.

Interrogatory 4

Once again the question is vague and LEAF's attempt to explain in its motion to compel provides little insight. LEAF does not define the term "dispatchable." Nor does LEAF limit the question to plants owned or controlled by FPL. The question does not ask whether the plant is dispatchable when available or when it is not available. LEAF instructs FPL to assume the obvious. If the answer is obvious, why is LEAF posing the question?

Interrogatories 5 - 9

FPL overlooked LEAF's instruction as to its term "capacity value" when objecting to LEAF's interrogatories and withdraws its objection on the ground of vagueness to these interrogatories. FPL retains its other objection.

Interrogatory 10

The cost information sought by LEAF in Interrogatory 10 is not relevant to this proceeding. This proceeding is about reserve margins and reliability. Relative costs of resource options is not a consideration in determining reliability criteria. Consideration of resource option costs comes into play in planning only after the utility has assessed whether it needs additional resources to meet reliability criteria. This case is not about the "evaluation of energy service options." That is a step of the planning process that is well beyond the scope of this docket, which is focused solely upon reliability.

Producing records in lieu of providing an interrogatory answer is an option to FPL under Rule 1.340, Florida Rules of Civil Procedure, not a requirement. FPL has not performed the record search or the computations necessary to answer Interrogatory 10. Those activities are not performed in the regular course of FPL's business. It is unduly burdensome to ask FPL to perform calculations and record searches that are outside the ordinary course of business or to perform record searches for LEAF to make such calculations, particularly when the information sought - cost information on a subset of wholesale purchases - is not relevant to the determination of reserve margins or reserve margin standards.

LEAF's Incurrence of Costs

LEAF's incurrence of costs in preparing its motion to compel pales in comparison to the costs FPL faces in attempting to protect against improper discovery in this investigation and the costs that would be associated with attempting to respond to irrelevant, vague and burdensome discovery posed by LEAF. FPL has a need to preserve error by objecting to discovery in an investigation and by objecting to irrelevant, vague and unduly burdensome discovery by LEAF. FPL has also incurred costs in objecting to LEAF's improper discovery and responding to LEAF's motion to compel. FPL is completely justified in raising its objections to LEAF's discovery and an award of costs to LEAF would be unjust to FPL.

Respectfully submitted,

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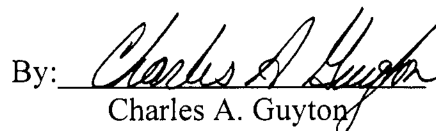
By: 
Charles A. Guyton

CERTIFICATE OF SERVICE
DOCKET NO. 981890-EU

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to Leaf's Motion for Order to Compel Discovery was furnished by Hand Delivery* or U.S. Mail this 23rd day of September, 1999 to the following:

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