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ORIGINAL

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RECORDS AND
REPORTING

September 23, 1999

VIA HAND DELIVERY

Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
Betty Easley Conference Center
2540 Shumard Oak Boulevard
Room 110
Tallahassee, FL 32399-0850

Re: Petition of Florida Power & Light Company For Approval of a
Standard Offer Contract; Docket No. 990249-EI

Dear Ms. Bayó:

I enclose and hand you herewith for filing in the above-referenced matter,
the original and fifteen (15) copies of Florida Power & Light Company's Petition
for a Hearing.

If you have any questions or need further information please feel free to
call my office at the number listed above. Thank you for your assistance in this
matter.

Sincerely,

R. Wade Litchfield

- AFA 1
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG 1
- LEG _____
- MAS 5
- OPC _____
- PAI _____
- SEC 1
- WAW _____
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an FPL Group company

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FPSC-RECORDS/REPORTING

BEFORE THE ORIGINAL

FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power)	DOCKET NO. 990249-EG
& Light Company For Approval)	
of a Standard Offer Contract)	Filed: September 23, 1999

**OPPOSITION TO ORDER NO. PSC-99-1713-TRF-EG
OR PETITION FOR HEARING**

NOW BEFORE THIS COMMISSION, through undersigned Counsel, comes Florida Power & Light Company ("FPL" or the "Company") pursuant to Rule 28-106.201, Florida Administrative Code, and hereby requests a hearing under Sections 120.569 and 120.57, Florida Statutes. In support of this pleading, FPL states as follows:

1. FPL is a public utility subject to the jurisdiction of the Florida Public Service Commission ("Commission") under Chapter 366, Florida Statutes. FPL's General Offices are located at 9250 West Flagler Street, Miami, FL 33174.

2. Any pleading, motion, notice, order or other document required to be served upon the petitioner or filed by any party to this proceeding should be served upon the following individuals:

William G. Walker, III Vice President Florida Power & Light Company 215 South Monroe Street Suite 810 Tallahassee, FL 32301-1859 (850) 224-7517 (850) 224-7197 (telecopier)	R. Wade Litchfield Senior Attorney Florida Power & Light Company 700 Universe Boulevard Juno Beach, Florida 33408-0420 (561) 691-7101 (561) 691-7103 (telecopier)
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3. On March 3, 1999, FPL submitted for approval of the Commission a standard offer contract ("Standard Offer Contract"). In connection with FPL's Petition for Approval of a Standard Offer Contract, FPL also submitted a Petition for a Variance from Rule 25-17.0832(4)(e) of the Florida Administrative Code ("Petition for Variance").

4. FPL's Petition for Approval of a Standard Offer Contract and its Petition for Variance were addressed by the Commission at the July 27, 1999 Agenda Conference (the "Agenda Conference").

5. On September 2, 1999, the Commission issued Order No. PSC-99-1713-TRF-EG (the "Order"). FPL hereby petitions the Commission for a hearing pursuant to Sections 120.569 and 120.57, Florida Statutes.

6. The Order does not accurately reflect the Commission's decision at the Agenda Conference. Indeed, a significant portion of the Order expressly contradicts the decision and directives of the Commission. Specifically, the Order purports to find that the "avoided unit" upon which FPL's Standard Offer Contract is based is not proper under the Commission's rules.¹ In fact, at the Agenda Conference the Commission made it clear that it was not deciding which unit should serve as the avoided unit for purposes of FPL's Standard Offer Contract.² This fact was specifically clarified in response to a question from counsel for FPL.³ Rather, the Commission directed the Company and Staff to discuss further the issue and attempt to reach

¹ Order at pp.2-6, 14.

² Transcript of Agenda Conference at pp.31-32.

³ Id. at p.32 (lines 13-21).

agreement on the appropriate “avoided unit.”⁴ Commissioner Clark indicated that in the event that the Company and Staff were not able to reach agreement the issue would be returned to agenda for a decision by the Commission.⁵ Clearly, the Commission was hopeful that the Staff and FPL would reach agreement.

7. Following the Agenda Conference, in response to the Commission’s directive FPL and Staff began discussions and soon reached agreement on the subject of the avoided unit as well as other issues pertinent to a revised filing. Accordingly, FPL began to prepare its revised standard offer contract based on that understanding, and consulted with Staff on the mechanics of making the filing, i.e., whether FPL would simply submit revised pages of the standard offer contract.

8. Although FPL and Staff agreed on the type of revised filing FPL would make, counsel for Staff requested the Company not file its revised contract until FPL was formally granted the variance it had requested and the protest period had expired. At the time, FPL saw no reason to await an order granting the variance before submitting a revised standard offer contract that was based on the Commission’s directives at the Agenda Conference and the understanding reached with Staff on the “avoided unit” issue. Nevertheless, at the request of counsel for Staff, FPL delayed submitting the revised standard offer contract pending issuance of an order granting the Petition for Variance.

9. FPL understood that the Order was to be limited in scope and in purpose addressing only the Petition for Variance, and interim in nature in that a final order disposing of

⁴ Id. at p.32.

⁵ Id. at p.32 (lines 18-21).

the docket and addressing which unit should serve as the avoided unit would not be issued until FPL submitted the revised standard offer contract based on Commission guidance at the Agenda Conference and the agreement with Staff. Instead, rather than simply addressing the Petition for Variance, the Order purports to decide the very issue the Commission indicated it was not deciding that day, which FPL was directed to further discuss with Staff and on which agreement was reached. Specifically, the Order concludes that the proper unit upon which to base a standard offer contract is the utility's next planned unit, irrespective of whether that unit can actually be avoided. As drafted, the Order renders moot the intended discussions and agreement reached between FPL and Staff, the results of which were to be presented to the Commission in a revised standard offer contract that FPL was and is prepared to file. FPL offers no explanation for why the Order was drafted in a way that expressly contradicts the discussion and directives of the Commission at the Agenda Conference.

10. FPL respectfully requests that the Commission, on its own motion if necessary, correct the Order to accurately state the Commission's decision at Agenda Conference, which expressly deferred reaching any conclusion on the question of which unit should serve as the "avoided unit" and referred that issue for further discussion between Staff and the Company. This will permit the Company to submit for Commission approval a revised standard offer contract that reflects the Commission's guidance and the understanding reached with Staff.

11. Specifically, the Order should be shorn of any language that purports to decide the "avoided unit" issue or to support such a decision. Further, language should be included in the Order directing the Staff and FPL to discuss further the "avoided unit" issue and indicating that the Commission will decide the issue at a future Agenda Conference in the event the parties are unable to reach agreement. Finally, language alleging that FPL was dilatory in filing its Standard

Offer Contract also should be removed from this interim order. Such discussion is only germane to the extent that one concludes that the proper "avoided" unit is the Fort Myers' re-powering project and that the project could have been deferred or avoided had FPL timely issued a "proper" standard offer contract. These are the very issues that Staff and FPL were directed by the Commission to discuss and, based on the directives and discussion at the Agenda Conference, were incorrectly included in the Order.

12. FPL opposes the Order to the extent that it: (1) requires the Company to revise its standard offer contract using the Fort Myers' re-powering project, an unavoidable generating unit, as an "avoided unit;" and (2) suggests that FPL might have deferred or avoided the Fort Myers' re-powering project had the Company timely filed a "proper" standard offer contract. Therefore, in the event the Commission declines to issue a corrected Order, FPL requests that the Commission institute a proceeding under Sections 120.569 and 120.57, Florida Statutes, to address, among others, the following issues: Do the Commission's rules require the filing of a standard offer contract in cases where a generating unit cannot be deferred or avoided? Is a utility's next planned generating unit always the "avoided" unit for purposes of the Commission's rules, irrespective of whether that unit can be deferred or avoided? Do the Commission's rules contemplate utility payments for capacity from small qualifying facilities that do not actually defer or avoid capacity on the utility's system? Do the Commission's rules mandate utility and ratepayer subsidization of small qualifying facilities? Do the Commission's rules require a utility to pay small qualifying facilities more than the utility's avoided costs? If so, do such rules improperly exceed delegated legislative authority. These are purely legal questions that could be addressed in a hearing under Section 120.57(2), Florida Statutes.

13. There may be one disputed issue of material fact, to-wit, whether FPL could have deferred or avoided the Fort Myers' re-powering project had it "timely" issued a standard offer contract. However, this issue of fact is only relevant to the extent that the Commission concludes, through further proceedings under Section 120.57(2), that FPL is required to file a standard offer contract that includes capacity payments only in cases where the Company's next planned generating unit is or could be thereby deferred or avoided. Indeed, this issue of fact would not be relevant to a finding by the Commission that the rules require FPL to file such a contract irrespective of any capacity deferring benefits, for if capacity benefits do not matter then the timing of the filing is not an issue.

14. For these reasons, FPL submits that it would be both proper and appropriate to consider these legal questions initially in a hearing under Section 120.57(2), allowing the parties to brief the relevant issues. Depending on the outcome of the Section 120.57(2) hearing, further proceedings to address any disputed issues of material fact may not be required.⁶

⁶ The Commission has considered such an approach previously. See In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc., et al., Docket No. 950495-WS; Order No. PSC-99-0664-PCO-WS; 99 FPSC 4:197, 1999 Fla. Puc Lexis 658, *19 (considering whether to set the threshold legal issue for a Section 120.57(2) hearing before addressing a potential factual issue through a formal evidentiary hearing).

15. FPL submits that, consistent with the standards adopted by Congress in the Public Utility Regulatory Policies Act of 1978, Florida law does not authorize payments to qualifying facilities of amounts in excess of the utility's avoided costs.⁷ Section 366.051, Florida Statutes, defines a utility's full avoided costs as "the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility would generate itself or purchase from another source." Section 366.051 further provides that the Commission "may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer" but those rates shall be "equal to the purchasing utility's full avoided costs."

16. In the past, the Commission has adhered to the principle that payments to such independent power producers should not exceed the utility's avoided costs, stating: "[W]e believe our rules should encourage cogeneration and small power production *to the maximum extent it is cost effective . . .*"⁸ If such power producers require subsidization through the payment by FPL of "unavoided" or duplicative costs, those resources by definition are not cost effective. The Commission also has stated: "We must keep in mind that *our goal is to pay avoided costs, not additional costs*, for cogeneration and small power production."⁹ The Commission further has stated: "[We] do not believe other ratepayers should experience an increase in the cost to serve them as a result of the presence of [qualifying facilities]."¹⁰

⁷ Section 366.051, Fla. Stat. (1997).

⁸ Order No. 12634, 83 F.P.S.C. 150, 155 (F.P.S.C. 1983) (emphasis supplied).


⁹ *Id.* at 159 (emphasis supplied).

¹⁰ *Id.* at 159-160.

17. FPL submits that the Commission's rules should be interpreted consistent with this limiting principle. To read the Commission's rules otherwise, in a manner that would require the payment of costs in excess of the utility's avoided costs, is to interpret the rules in a way that would constitute an invalid exercise of delegated legislative authority under the Administrative Procedures Act.¹¹

WHEREFORE, for the above and foregoing reasons, Florida Power & Light Company respectfully requests a hearing in this matter pursuant to Sections 120.569 and 120.57, Florida Statutes, and, after due and lawful proceedings are had, that the Commission conclude that its rules do not authorize payments to cogenerators or small power producers in excess of the utility's avoided costs and do not contemplate the filing of standard offer contracts requiring utility payments for capacity where no capacity is deferred or avoided by the utility. Alternatively, Florida Power & Light Company requests that the Commission, on its own motion if necessary, conform the Order to the decisions made and directives issued at the Agenda Conference, allowing FPL to submit its revised standard offer contract for Commission approval.

Respectfully submitted,

By: 
R. Wade Litchfield
Florida Authorized House Counsel

Attorney for
Florida Power & Light Company
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Juno Beach, Florida 33408-0420
(561) 691-7101

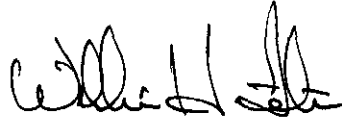
¹¹ Chapter 120, Fla. Stat. (1997).

CERTIFICATE OF SERVICE

I, THE UNDERSIGNED COUNSEL, HEREBY CERTIFY that a copy of Florida Power & Light Company's Petition for a Hearing, has been served via first class mail, postage prepaid to the persons or entities listed below, this 23rd day of September, 1999:

Administrative Procedures Committee
Room 120 Holland Building
Tallahassee, FL 32399-1300

Richard Zambo, Esquire
c/o Florida Industrial Cogen. Assoc.
598 SW Hidden River Ave.
Palm City, FL 34990



R. Wade Litchfield

