

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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SERVICE COMMISSION
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FLORIDA POWER & LIGHT COMPANY,
Petitioner,

DOAH CASE NO. 99-4264-RX

vs.

PUBLIC SERVICE COMMISSION,
Respondent.

990000-PU

**FLORIDA POWER CORPORATION'S
RESPONSE TO FLORIDA PUBLIC SERVICE COMMISSION'S
MOTION TO DISMISS**

FLORIDA POWER CORPORATION (FPC), by its attorneys, hereby responds to the Motion to Dismiss filed by Respondent Florida Public Service Commission (PSC) and states:

1. Although FPC has not been granted leave to intervene in this proceeding, pursuant to its pending Petition for Leave to Intervene, FPC files this Response to the PSC's Motion to Dismiss in the interests of efficiency and in light of the scheduled hearing date of November 4, 1999.

2. FPC hereby joins in the response filed by Florida Power & Light (FPL) to the PSC's Motion to Dismiss and incorporates and adopts FPL's arguments into this Response.

3. The PSC's Motion to Dismiss is indicative of the confusion created by the continued existence of Rule 25-22.036(3). FPC is not attempting to challenge the PSC's ability to initiate investigatory proceedings or even a "limited proceeding" pursuant to section 366.076(1), Florida Statutes. Further, FPC is not attempting to challenge the PSC's ability to gather evidence or to require testimony under oath. Instead, FPC seeks to protect its own due process rights by challenging the PSC's ability to initiate formal adjudicatory proceedings,

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pursuant to sections 120.569 and 120.57, Florida Statutes, without initiating the proceeding in accordance with the notice of proposed agency action and other important, procedural requirements set out in the Florida Administrative Procedure Act and applicable Uniform Rules.

4. Despite PSC's arguments, this proceeding is a challenge to the facial validity of Rule 25-22.036(3). Like every other agency in the State of Florida, the PSC is subject to the Florida Administrative Procedure Act and the Uniform Rules of Procedure unless it is granted an exception from the Uniform Rules by the Administration Commission. As written, Rule 25-22.036(3) is *facially* prohibited by Section 120.54(5)(a)1, Fla. Stats., which states: "On filing with the department, the uniform rules *shall be the uniform rules for each agency* subject to this chapter *unless the Administration Commission grants an exception* to the agency under this subsection." (Emphasis added). As FPL and FPC have described in their petitions, in view of the *facial* inconsistency of Rule 25-22.036(3) with the Uniform Rules of Procedure, the PSC sought an exception for Rule 25-22.036(3). The Administration Commission denied the PSC's request for an exception, finding one unnecessary based on the PSC's assurance that the rule was outside the scope of the Uniform Rules. (FPL Exh. 8, p. 1) The Administration Commission held that the rule applies to proceedings "which do *not* involve, or which precede, proposed agency action determining substantial interests." (FPL Exh. 9, p. 3) (emphasis added).

5. Despite its assurances to the Administration Commission, the PSC's position has been that Rule 25-22.036(3), on its face, allows the PSC to initiate whatever type of proceeding it chooses, including formal adjudicatory proceedings pursuant to sections 120.569 and 120.57, Florida Statutes, which determine parties' substantial interests. Thus, Rule 25-22.036(3) is *facially* invalid. It conflicts with and does not comply with the requirements to initiate formal adjudicatory proceedings set out in the Florida Administrative Procedure Act and the Uniform

Rules of Procedure enacted by the Administration Commission, which require, *inter alia*, that the agency provide notice of proposed agency action and ultimate facts alleged. The Reserve Margin Docket is simply an example of how this facially invalid rule continues to cause confusion in proceedings before the PSC. The PSC initiated that proceeding without any notice of what, if any, action the PSC might ultimately take to determine the substantial interests of the parties to that proceeding (including FPL and FPC) and without any allegations of ultimate facts the agency intended to establish. Using Rule 25-22.036(3), the PSC has thus arrogated to itself the power to do whatever pleases to whomever it pleases as long as that party was asked some question during the hearing to create a “record” for agency action.

6. As long as this Rule remains in existence, the PSC will believe that it has the ability to initiate formal adjudicatory proceedings to determine substantial interests, on its own motion, at any time it feels necessary without providing the procedural protections afforded by the Uniform Rules and the Administrative Procedures Act.

7. The PSC’s arguments that FPC and FPL do not have standing to bring this rule challenge are not well founded. It is obvious that FPC and FPL are electric utilities subject to the rules and regulations promulgated by the PSC. It is also obvious that FPC and FPL are involved in numerous and varied proceedings before the PSC every year. In fact, the PSC has admitted the allegations contained within paragraph 5 of FPL’s Petition which states: “[p]etitioner [FPL], a public utility and an electric utility as defined by section 366.02, Florida Statutes, has been designated unilaterally by the PSC as an appropriate party in the reserve margin docket and will be affected by any orders resulting from that docket.” See Respondent’s Answer at 2.

8. FPC and FPL have substantial interests in ensuring that the PSC initiates adjudicatory proceedings, which purport to determine substantial interests, strictly in accordance

with the Florida Administrative Procedure Act and the Uniform Rules of Procedure. Rule 25-22.036(3), on its face, contravenes the requirements of the Administrative Procedure Act and Uniform Rules, which dictate how adjudicatory proceedings that purport to determine substantial interests are initiated. This contravention of the Administrative Procedure Act and Uniform Rules contained within Rule 25-22.036(3) adversely affects FPC's due process rights in any proceeding initiated by using the Rule. If FPC and FPL were *not* entitled to bring this rule challenge, that would essentially mean that *no* party could use the rule-challenge provisions to attack a procedural rule. Instead, the only recourse of regulated parties would be to suffer through to the conclusion of fundamentally defective proceedings, raising any challenge to the procedural rule at the conclusion of the case. But Section 120.56(1) and (3), Fla. Stats., and Rule 28-106.201, Fla. Admin. Code, contain no such exception for procedural rules, immunizing them from challenge.

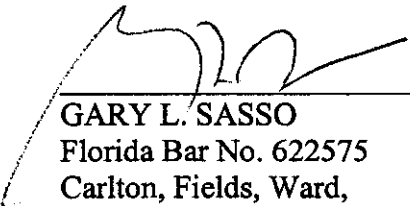
9. Due to the existence of Rule 25-22.036(3), FPC has been unilaterally made part of an adjudicatory proceeding that was originally initiated by the PSC as an "investigation." Instead of an investigatory proceeding preliminary to agency action, FPC was later informed by the PSC that its substantial interests would be determined by decisions made in the proceeding and that third-party discovery would be allowed. These injuries to FPC's due process rights are FPC's injuries in fact. Clearly, these injuries are within the "zone of interests" sought to be regulated by Rule 25-22.036(3) and protected by the Florida Administrative Procedure Act inasmuch as agency rules, the Uniform Rules, and the Administrative Procedure Act exist for the very purpose of ensuring that agency proceedings in this State are handled in a procedurally appropriate and fair manner.

10. As regulated entities subject to Rule 25-22.035(3), and parties who have been told by the PSC that the Rule is the basis for at least one pending adjudicatory proceeding involving the parties, FPC and FPL have standing to challenge Rule 25-22.035(3). In fact, if FPC and FPL do not have standing in this proceeding, it is hard to imagine any other party or entity who would have standing to challenge this rule.

Respectfully submitted,

FLORIDA POWER CORPORATION

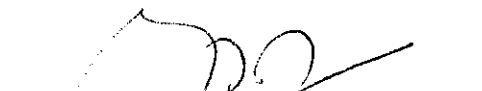
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via fax and U.S. Mail to all counsel of record listed below this 27th day of October, 1999.



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¹ Ms. Bayó is served as the PSC representative pursuant to rule 28-106.110, Florida Administrative Code.