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OFFICE OF THE GENERAL COUNSEL
HAROLD A. MCLEAN
GENERAL COUNSEL
(850) 413-6199

Public Service Commission

May 14, 2002

Mr. Carroll Webb
Joint Administrative Procedures
Committee
Room 120 Holland Building
Tallahassee, Florida 32399-1300

Re: PSC Docket No. 020397-EQ

Dear Mr. Webb:

The Commission has received a Petition for Declaratory Statement from Florida Power & Light Company on May 3, 2002. A copy of the petition is enclosed. A notice will be published in the Florida Administrative Weekly on Friday, May 24, 2002.

Sincerely,

Christiana T. Moore

Christiana T. Moore
Associate General Counsel

cc: Division of the Commission Clerk
and Administrative Services

Enclosure

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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement by Florida Power & Light Company

Docket No.

02 MAY -6 PM 4:21

Filed: May 3, 2002

FLA PUBLIC SERVICE COMM.
OFFICE OF THE
GENERAL COUNSEL

FLORIDA POWER & LIGHT COMPANY'S PETITION FOR DECLARATORY STATEMENT

Pursuant to Section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, Florida Power & Light Company ("FPL") files this Petition for Declaratory Statement. FPL requests from the Florida Public Service Commission ("Commission") a declaratory statement that FPL may pay a Qualified Facility (QF), for purchase of renewable energy, an amount representing FPL's full avoided cost plus a premium borne by customers voluntarily participating in FPL's Green Energy Project. This program would charge to participating customers higher rates designed to recover costs incurred by FPL for renewable energy in excess of FPL's avoided cost as well as program costs. In support of this Petition, FPL states:

Petitioner's Name, Address, Telephone and Facsimile Numbers

1. The Petitioner's name is Florida Power & Light Company, a Florida corporation. FPL's address is 700 Universe Boulevard, Juno Beach, Florida 33408-0420. FPL's telephone and facsimile numbers are those shown in paragraph 2 for its representatives.

Attorneys' Names, Addresses, and Telephone and Facsimile Numbers

2. The names, addresses, telephone and facsimile numbers for FPL's attorneys are:

R. Wade Litchfield
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561.691.7101

Elizabeth C. Daley
Charles A. Guyton
Steel Hector & Davis LLP
215 S. Monroe Street, Suite 601
Tallahassee, FL 32301-1804

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Fax: 561.691.7135

Telephone: 850.222.2300
Fax: 850.222.8410

Notices, correspondence, orders and pleadings regarding this matter also should be sent to:

William G. Walker III
Vice President
Florida Power & Light Company
215 S. Monroe Street, Suite 810
Tallahassee, Florida 32301-1859
Telephone: 850.521.3910
Fax: 850.521.3939

Statutory Provisions and Agency Rules
On Which The Declaratory Statement Is Sought

3. The federal statute at issue in this petition is section 210 of the Public Utilities Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117 (1978)(codified as amended at 16 U.S.C, § 824a-3 (1988)), which provides in pertinent part:

> **§ 824a-3. Cogeneration and small power production**
>
> (a) Cogeneration and small power production rules
>
> Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to --
>
> (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and
>
> (2) purchase electric energy from such facilities.
>
> Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize

a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that,

in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase--

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

4. The federal rules at issue in this petition are at 18 Code of Federal Regulations, Sections 292.301 and 292.304(a)(2),which implement PURPA and provide in pertinent part:

§ 292.301 - Scope

Applicability. This subpart applies to the regulation of sales and purchases between qualifying facilities and electric utilities.

(a) Negotiated rates and terms. Nothing in this subpart:

(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms and conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or

(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

§ 292.304 - Rates for purchases.

(a) Rates for purchases.

(1) Rates for purchases shall:

(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and (ii) Not discriminate against qualifying cogeneration and small power production facilities.

(2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.

5. The Florida statute at issue in this petition is Section 366.051, Florida Statutes, which provides in pertinent part:

> [The Florida Public Service Commission] shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer. In fixing rates for power purchased by public utilities from cogenerators or small power producers, the commission shall authorize a rate equal to the purchasing utilities full avoided costs. A utility's "full avoided costs" are the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from the cogenerator or small power producers, such utility would generate itself or purchase from another source.

6. The Florida Public Service Commission rule at issue in this petition is Rule 25-17.0832(2), Florida Administrative Code, which implements section 366.051, Florida Statutes, and provides in pertinent part:

> Negotiated contracts will be considered prudent for cost recovery purposes if it is demonstrated by the utility that the purchase of the firm capacity and energy from the qualifying facility pursuant to the rates, terms and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a cost to the utility's ratepayers which does not exceed full avoided costs, giving consideration to the characteristics of the capacity and energy to be delivered by the qualifying facility under the contract.

Description Of How The Statutes and Rules May Substantially Affect The Petitioner In The Petitioner's Particular Set Of Circumstances

7. FPL, a public utility, is subject to Commission regulation pursuant to Chapter 366, Florida Statutes. As a public utility, FPL is subject to the applicable orders of the Commission as well as decisions of Florida and federal courts and the rules and orders of the Federal Energy Regulatory Commission ("FERC") as interpreted by the Florida Public Service Commission.

8. In 1999, FPL proposed a Demand Side Management ("DSM") Plan, pursuant to Rule 25-17.0021(4), F.A.C., including a Green Energy Project with a three-year project development period and a budget of $700,000. The Commission, in Order No. PSC-00-0915-PAA-EG, approved that plan. Thus, the Commission has previously approved the concept of a Green Energy program proposed by FPL.

9. Consistent with its approved DSM Plan, FPL has assessed the potential supply and demand for its Green Energy Project, which would allow customers to choose to purchase power at prices exceeding standard customer rates based upon the customers' desire to purchase power generated from technologies that afford enhanced protection to the environment. Based on market research, FPL has concluded that customer demand exists for its proposed Green Energy Project. As to Green Energy supply, FPL has received proposals from renewable energy suppliers. These proposals include the potential FPL purchase of power from Qualified Facilities (QFs) at prices in excess of FPL's avoided costs.

10. Absent any regulatory impediments, FPL is prepared to develop its Green Energy Project and to begin negotiations with the entities proposing to provide energy from renewable energy resources for FPL's potential Green Energy customers. However, FPL does not believe that, pursuant to PURPA, federal regulations implementing PURPA, Florida Statutes and rules implementing PURPA, and prior Commission decisions, FPL may pay a QF in excess of avoided cost unless such excess costs are borne by customers participating in the Green Energy Project and not by the general body of ratepayers. Accordingly, FPL seeks a declaratory statement from the Commission that FPL may pay a QF FPL's avoided costs, plus a premium borne by customers voluntarily participating in FPL's Green Energy Project, for renewable energy to sell to such customers. The charges to customers participating in the Green Energy Project would be

designed to cover the costs in excess of FPL's avoided costs that FPL would incur to purchase the power as well as the Green Energy Project costs. FPL believes this conclusion is consistent with federal and Florida statutes, rules and case law, none of which have addressed the issue of customers' voluntary payment of rates to recover costs in excess of the utility's avoided costs.

11. The FERC appears to state by rule that a utility may reach an agreement with a QF containing a rate term that differs from the avoided cost rate otherwise required by the rate provisions of the Public Utilities Regulatory Policies Act of 1978 (PURPA). See 18 C.F.R., § 292.301(b)(1). In the preamble to this rule issued upon its adoption, the FERC elaborated regarding paragraph (b)(1) of the rule:

> Paragraph (b)(1) reflects the Commission's view that the rate provisions of section 210 of PURPA apply only if a qualifying cogenerator or small power production facility chooses to avail itself of that section. Agreements between an electric utility and a qualifying cogenerator or small power producer for purchases at rates different than rates required by these rules, or under terms and conditions different from those set forth in these rules, do not violate the Commission's rules under section 210 of PURPA.

Federal Register 12217, February 25, 1980.

12. Subsequent to the promulgation of its QF pricing rules, the FERC has had at least two opportunities to address the issue of whether a state could require an electric utility to pay in excess of avoided costs. However, neither case involved an agreement in which the utility or its customers agreed to pay in excess of avoided cost. Rather, both cases involved a state statute requiring a utility to pay a rate to QFs that might be in excess of the utility's avoided costs. The states argued that even FERC had recognized in the preamble to its regulations that states might, independent of PURPA, require utilities to pay in excess of a utility avoided costs for QF power. In both instances, the FERC disclaimed the language in the preamble to its own regulations, reasoning that a state action requiring a utility to pay in excess of its avoided costs contradicted PURPA and FERC's implementing rules, and concluded that such state action had been preempted. Orange and Rockland Utilities, Inc., 43 FERC ¶ 61,067 (1988), stayed Orange and Rockland, Utilities, Inc., 43 FERC ¶ 61,547 (1988), vacated Orange and Rockland Utilities, Inc., 70 FERC ¶ 61,014; Connecticut Light & Power Co., 70 FERC ¶ 61,012 (1995), rehearing denied 71 FERC ¶ 61,035 (1995). Although the Orange and Rockland decision has been vacated and is no longer a viable precedent, Connecticut Light & Power continues to be viable and is the FERC's most recent pronouncement on the issue. However, neither of these cases addressed a rate paid under a voluntary contract. Both cases addressed a state-required rate that would have required customers to bear costs higher than the utilities' avoided cost.

13. In American Paper Institute v. American Electric Power Service Corporation, 461 U.S. 402, 52 PUR 4th 329, 335 (1983), the United States Supreme Court affirmed the FERC's avoided cost rule, noting in several instances that the avoided cost rate prescribed was the maximum rate authorized by PURPA. 52 PUR 4th at 337. The Court also noted that the full avoided cost rule adopted by the FERC "is not as inflexible as might appear at first glance." 52 PUR 4th at 336. The Court noted that waivers of the rule could be granted upon a showing that full avoided costs were not necessary to encourage cogeneration and small power production. Id. The Court also noted that a QF and a utility could negotiate a contract setting a price lower than full avoided cost. Id. The Court completed its discussion of flexibility under the FERC's avoided cost rate with the following observation: "The commission's rule simply establishes the rate that applies in the absence of a waiver or a specific contractual agreement." Id.

14. The policy underlying such decisions is that customers should not have to bear costs in excess of the utilities' avoided costs. In the case of FPL's proposal, however, only customers who elect to participate in the Green Energy Project will bear the costs in excess of FPL's avoided costs.

15. In other jurisdictions, courts have concluded that a utility may voluntarily pay a QF in excess of the utility's avoided costs, but that the recovery of excessive costs could be disallowed by state regulators, presumably to avoid imposing additional costs on customers. See, e.g., Public Utility Commission of Texas v. Gulf States Utilities Co., 809 S.W. 2d 201 (Texas 1991); Barasch v. Pennsylvania Public Utilities Commission, 546 A. 2d 1296 (Commonwealth Court of Pennsylvania 1988). Similarly, FPL submits that a state regulatory authority can approve a voluntarily negotiated price that, in total, may exceed the utility's avoided costs, but which imposes the excess costs on only those customers who voluntarily participate in the Green Program. In Gulf States Utilities Co., *supra*, the Supreme Court of Texas held that "state and federal regulations governing a utility's purchases of power from a QF do not apply to voluntary arrangements between a utility and a QF." 809 S.W. 2d at 209. Although the Texas Supreme Court was construing rules promulgated by the Texas Public Utility Commission, the court noted that the Texas rules were substantially similar to the FERC rules. 809 S.W. 2d at 208. In Barasch, *supra,* the Pennsylvania court made the following observations:

> The regulatory scheme adopted by FERC also permits utilities and QFs to negotiate agreements for utility purchases of power independently of the prescribed rates. 18 C.F.R. § 292.301. Thus, even if a state chooses to implement the FERC regulations by adopting rules of its own prescribing a purchase rate in detail, a utility and a QF may still negotiate a different rate, using the state-prescribed rate as a baseline. Because no large utility is exempt from the FERC regulation that requires filing of detailed utility cost data and projections with the state regulatory authority, 18 C.F.R. § 292,302, a QF negotiating an agreement with a utility knows what rate it could compel if the utility failed to bargain in good faith.
>
> Although privately negotiated contracts setting rates for QF power are essentially outside the federal and state rules, state public utility commissions have a duty to examine the costs of such contracts claimed by a utility for the purpose of setting its own rates, and will disallow those found to be excessive. Therefore, the state regulatory authority plays an indirect role in the negotiating process. ... Often the negotiated agreements make such advance [regulatory] approval a condition precedent to any obligations on the part of the purchasing utility.

546 A. 2d at 1300. (Emphasis added.)

16. Moreover, Green Energy statutes and programs in other jurisdictions suggest that a utility paying a QF in excess of its avoided costs is acceptable, provided it is pursuant to a program for subscription to renewable energy, i.e. the excess costs are borne by program subscribers. For example, the Georgia Legislature, in what appears to be an effort to carve out a statutory exception to avoided cost payments to QFs, amended a statute in 2001 to add the following language:

> No electric service provider will be required to purchase [energy from a cogenerator using solar, fuel cell or wind turbine systems] at a price above avoided energy cost unless that amount of energy that has been subscribed under any renewable energy program.

§ 46-3-53, Ga. Stat.

Also in 2001, the Minnesota Legislature passed a statute seemingly adopting a Green Energy approach. See § 216B.169, Minn. Stat. The statute requires utilities to offer a choice of electricity produced from renewables and states that the "rates to customers must be only the actual cost the utility incurs to generate or purchase the renewable energy and must be spread among all customer classes participating in the program." Id. The statute makes no attempt to limit what the utility may pay to purchase the renewable energy and authorizes its recovery from participating customers.

17. In Florida, neither the Commission nor Florida courts have directly addressed the issue of whether, in a Green Energy program, a utility may voluntarily pay a QF a rate in excess of the utility's avoided cost. As envisioned by PURPA and the FERC regulations implementing PURPA, Florida has implemented the provisions of PURPA. The current version of the Commission's cogeneration rules is found in Chapter 25-17, Florida Administrative Code.

18. The statute giving the Commission authority to establish guidelines relating to purchase of power by utilities from QFs explicitly provides a standard for the Commission to employ when fixing rates for such power purchases. See § 366.051, Fla. Stat. The statute provides that the Commission may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer. Id. In fixing such rates, the Commission shall authorize a rate equal to the purchasing utility's full avoided costs. Id. The statute 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 the cogenerator or small power producers, such utility would generate itself or purchase from another source." Id.

19. The Commission has implemented Section 366.051, Florida Statutes, by adopting extensive cogeneration rules. The rule addressing firm purchases by utilities from QFs is Rule 25-17.0832, Florida Administrative Code. The Commission has required utilities to have standard offer contracts for three categories of QFs: renewable resources, QFs of 100kW or less, and municipal solid waste facilities. Rule 25-17.0832(4), F.A.C. Utilities are also encouraged to negotiate contracts with other QFs. Rule 25-17.0832(2), F.A.C. Utilities are required to negotiate in good faith with QFs, and a QF believing a utility has not negotiated in good faith may petition the Commission for an order requiring a utility to enter into a contract with it at no more than the utility's full avoided cost. Rule 25-17.0834(1), F.A.C.

20. In its rules and orders, the Commission has chosen not to prescribe standard provisions for negotiated contracts. In Re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., regarding cogeneration and small power production, 92 FPSC 2:24, 30 (1992).

However, the Commission has adopted standards for recovery of costs under negotiated contracts. Rule 25-17.0832(2), Florida Administrative Code states:

> Negotiated contracts will be considered prudent for cost recovery purposes if it is demonstrated by the utility that the purchase of the firm capacity and energy from the qualifying facility pursuant to the rates, terms and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a cost to the utility's ratepayers which does not exceed full avoided costs, giving consideration to the characteristics of the capacity and energy to be delivered by the qualifying facility under the contract.

(Emphasis added.)

21. Rule 25-17.0832(3), F.A.C., provides further factors the Commission is to consider when addressing the recovery of costs of negotiated contracts. One factor is a determination of whether the cumulative present value of payments under the contract is no greater than one of two different measures of the utility's avoided cost. Thus, although the Commission has declined to set standard terms for negotiated contracts, including a price term, the Commission's rules essentially set avoided costs as the ceiling for cost recovery to avoid imposing costs in excess of avoided costs on customers. See In Re: Petition for determination that implementation of contractual pricing mechanism for energy payments to qualifying facilities complies with Rule 25-17.0832, F.A.C., by Florida Power Corporation, 95 PSC 2:263 (1995);[1] and In re: Petition for expedited approval of settlement agreement with Lake Cogen, Ltd., by Florida Power Corporation, 97 FPSC 11:202 (1997).[2]

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[1] "FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided cost, 'the incremental costs to the electric utility of electric energy or capacity or both which, but for the purchase of the qualifying facility or facilities, such utility would generate itself or purchase from another source.' 18 C.F.R. s. 292.101(b)(6). FERC's rules also contain a provision that permits utilities and QFs to negotiate different provisions of purchased power agreements, including price, as long as they are at or below a utilities' avoided cost. 18 C.F.R. s.292.301." 95 FPSC at 2:265.

[2] "We recognize the benefits of electricity produced by cogeneration and small power producers and the requirements to purchase such power when available. However both the Federal and state law limit the price to be paid for this type of power. To ensure that benefits remained with a utility's ratepayers, PURPA and Florida Statutes established that rates for the purchase of power from QFs shall not exceed a utility's avoided cost. Such assurance was necessary to avoid situations that would require a utility to purchase electricity from a QF when in fact it could produce or purchase alternative power at a lower cost.

"The Settlement Agreement . . . . increases costs to FPC's ratepayers by approximately $17.1 million NPV. Furthermore, contrary to Section 366.051, Florida Statutes, Section 210 of PURPA, and this Commission's rules, approval of the Settlement Agreement commits FPC's ratepayers to costs in excess of current avoided costs. For these reasons, we find the Settlement Agreement should be denied." 97 FPSC at 11:212.

22. This Commission's decisions interpreting PURPA, Section 366.051, Florida Statutes, and the Commission's rules implementing both statutes properly held, in the circumstances presented, that a utility may not pay in excess of its avoided costs for QF power. To have held otherwise would have imposed the excess costs on the utility's customers. However, the Commission has never directly addressed the issue of whether a utility may pay a QF more than its avoided cost as part of Green Energy program in which only the utility's avoided costs are borne by the general body of customers and costs in excess of avoided costs would be passed only to the specific customers who agree to pay such costs and not to the general body of customers. FPL believes that such a program is not inconsistent with state or federal law because non-participating customers would not bear any more than the utility's avoided cost. In effect, the price FPL would agree to pay under the Green Energy Project would be its avoided cost, plus a premium funded by participating customers.

23. FPL respectfully suggests that the Commission clarify its prior position and issue a declaratory statement that FPL may pay in excess of its avoided costs to a QF for renewable energy for a Green Energy program in which FPL's customers voluntarily agree to higher rates covering the costs above FPL's avoided cost. Nothing in FPL's request undermines the explicit intent of Chapter 366 to protect consumers, and nothing in the request presents any risk to FPL's customers.

24. The requested interpretation of PURPA and its implementing rules and Chapter 366, Florida Statutes, and its implementing rules would promote the interests of both FPL and its customers. FPL would benefit in that it would be able to provide a service of value to its customers and provide an impetus to develop renewable energy. Customers would benefit by gaining access to a voluntary program geared toward their desire for enhanced environmental and energy-resource protection. FPL's general body of customers would be protected, as envisioned by PURPA, in that they would not have to pay for QF power in excess of avoided costs and customers willing to pay more to facilitate the development of renewable energy resources would pay costs in excess of FPL's avoided costs.

25. FPL believes issuance of a declaratory statement in response to this petition is appropriate. As recently noted by the First District Court of Appeal, the purpose of a declaratory statement is to address the applicability of a statutory provision or an order or a rule of the agency in particular circumstances. Chiles v. Dep't of State, Division of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998). The issues raised in a declaratory statement petition no longer need be unique to the petitioner, as amendments in 1996 to section 120.565, Florida Statutes, now allow agencies to issue declaratory statements even if those statements may apply to persons other than the petitioner. Id. An agency's response to a declaratory statement petition "may offer useful guidance to others who are likely to interact with the agency in similar circumstances." Id. at 155. Thus, issuance of a declaratory statement is appropriate even if the Commission's response to FPL's petition affects other similarly situated investor-owned utilities.

For the reasons expressed, FPL respectfully requests that the Commission issue a declaratory statement in response to this petition finding that PURPA, Chapter 366, Florida Statutes, and Rule 25-17.0832(2), Florida Administrative Code, do not prohibit FPL in its Green Energy Project from entering into a contract with a QF or other generator under which FPL may make payments for renewable energy that exceed FPL's avoided costs, where the excess costs are borne by customers voluntarily participating in a Green Energy program..

Respectfully submitted,

____

Elizabeth C. Daley
Fla. Bar No. 0104507
Charles A. Guyton
Fla. Bar No. 0398039

Steel Hector & Davis LLP
Attorneys for Florida Power & Light Company
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301
Telephone: 850-222-2300

R. Wade Litchfield, Esq.
Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561-691-7101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Petition for Declaratory Statement has been furnished by United States Mail this 2nd day of May, 2002, to the following:

Jack Shreve
Public Counsel
Office of Public Counsel
c/o Florida Legislature
111 W. Madison Street
Room No. 812
Tallahassee, Florida 32399-1400

By:______________________
Elizabeth C. Daley