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May 30, 2002

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**-VIA HAND DELIVERY-**

Ms. Blanca S. Bayó, Director  
Division of the Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

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**Re: Docket Nos. 020262-EI and 020263-EI**

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and seven (7) copies of Florida Power & Light Company's Response to FACT's Petition to Intervene and Suggestion for Delay, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows 2000, and the word processing software in which the document appears is Word 2000.

If there are any questions regarding this transmittal, please contact me at 222-2300.

Very truly yours,

Charles A. Guyton

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for Determination of Need )  
for Proposed Electrical Power Plant in )  
Martin County of Florida Power and )  
Light Company )  
\_\_\_\_\_ )

DOCKET NO. 020262-EI

In re: Petition for Determination of Need )  
For Proposed Electrical Power Plant in )  
Manatee County of Florida Power and )  
Light Company )  
\_\_\_\_\_ )

DOCKET NO. 020263-EI

Filed: May 30, 2002

**Florida Power & Light Company's Response to  
FACT's Petition to Intervene and Suggestion for Delay**

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), responds as follows to the Florida Action Coalition Team ("FACT") Petition for Leave to Intervene and Suggestion for Delay, and states:

1. These proceedings were initiated on March 22, 2002 by FPL to determine the need for two proposed electrical power plants. As noted by FPL at that time, expedient approval of the two plants would be necessary for their target in-service dates to be met. And, meeting these in-service dates is, in turn, needed for FPL to achieve its minimum reserve margin requirement in 2005 and 2006.

2. Prior to filing for the need determinations, FPL conducted a detailed Request for Proposals ("RFP") in accordance with Rule 25-22.082, F.A.C. (the "Bid Rule"). In late February through early April, several bidders in that RFP process (i) intervened in these proceedings and (ii) initiated or joined an independent complaint

docket, in both instances taking issue with certain procedural aspects of the RFP that had been conducted by FPL.

3. In response to the concerns raised by the various bidders, in an effort to alleviate any real or perceived concern with FPL's bidding process, and to focus the need proceedings upon the real issue of which options are the most cost-effective to FPL's customers, FPL determined in mid-April to conduct a supplemental RFP. This process was meant to address several procedural issues raised by the bidders, and also to allow all bidders to submit new proposals with knowledge of the factors that had affected selection of the two FPL self-build options in the original RFP. It was thought by FPL that this potentially would lead to more favorable third party bids and streamline the need determination process for whatever options are ultimately chosen at the end of the supplemental RFP evaluation.

4. FPL filed on April 22, 2002 an Emergency Motion to Hold Proceedings in Abeyance so that it could conduct a supplemental RFP. The Prehearing Officer agreed with FPL's request for a supplemental RFP on April 26, 2002. The need determination proceedings were therefore suspended, and FPL and various bidders are proceeding with the supplemental RFP process described in that motion. *See* Interim Order on Procedure, Order No. PSC-02-0571-PCO-EI. The Prehearing Officer's decision to suspend the proceedings was later ratified by the full Commission on May 23<sup>rd</sup>, when it ruled on FPL's request for a waiver of the strict time limitations of Rule 25-22.080(2). *See* Order No. PSC-02-0703-PCO-EI (granting petition for emergency waiver of Rule 25-22.080(2)). FPL is presently in the process of evaluating the various bids, and a selection has yet to be made as to which generation options will be determined the best for FPL.

5. Now, nearly a month into the supplemental RFP, a process to which all the parties to the need cases have agreed, FACT has attempted to intervene in these now-suspended proceedings, and essentially asks the Commission to unravel the result it has fashioned and stop the supplemental RFP process in its tracks. FACT's Petition to Intervene essentially asks for the following relief:

- (a) That FACT be allowed to intervene and granted party status; and
- (b) That the Commission "delay" the completion of the supplemental RFP process until such time as certain revisions to the Bid Rule are made, so that the revised Bid Rule can govern the RFP.

As support for the later request, FACT points only to the same claims regarding the conduct of the original RFP that FPL is attempting to address in the supplemental RFP. In other words, the concerns FACT raises are all moot, as none will be relevant to these proceedings in the event they are reconvened. In that eventuality, the evaluation of the *supplemental* RFP and the selection of whatever options are chosen are what will control. Issues relating to the conduct of the original RFP will not be germane to anything, and are certainly not a basis for the ironic and cynical request to put a halt to the very supplemental RFP in which those issues are being addressed.

6. There is simply no occasion to grant the relief requested by FACT. First, as the proceedings are presently suspended and might never resume, there is no occasion for any entity to intervene at this time. Second, and even more fundamentally, there is no justification for FACT's request that the Commission "delay" the supplemental RFP for an indefinite period of time until it completes a separate rulemaking process, thereby putting FPL's 2005-2006 system reliability in serious peril.

7. There is no present occasion for FACT to intervene in these proceedings. Indeed, given the present posture of the cases, FACT cannot show that it is substantially

affected and thereby meet the requirements for intervention. The proceedings in which FACT seeks to intervene have been held in abeyance. Those proceedings may never be reinitiated. Intervention under such circumstances is totally inappropriate. Moreover, the various issues raised by FACT all relate to the supposition that FPL will “choose itself” in the supplemental RFP. That is the sole stated basis for FACT’s claim of injury. However, that result is by no means certain. Given that FPL may withdraw one or both of its petitions for need determination and thereby render FACT’s Petition moot, and that no action will occur in these proceedings in the interim, the best course of action would be to deny FACT’s Petition, without prejudice to its later re-filing for intervention if the proceedings resume. In the alternative, the Commission could simply defer ruling on FACT’s Petition to Intervene until after the supplemental RFP is complete and it is determined whether either or both need proceedings would be reinitiated. But, in any case, the suspended proceedings, at present, have no effect on the stated interests of FACT. If either of the two FPL self-build options is chosen, upon the resumption of the proceeding(s) the Commission would have a proper occasion to revisit FACT’s request to intervene and give full consideration to the issue of its standing.<sup>1</sup> But, unless and until that occurs, and intervention is premature at best.

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<sup>1</sup> While FACT claims to have standing by virtue of members that are residential retail customers of FPL, any allegations to support standing must be proven, not simply plead. *See Agrico Chemical Co. v. Department of Env'tl. Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981); *State of Florida Department of Health and Rehabilitative Services v. Alice P.*, 367 So.2d 1045 (Fla. 1<sup>st</sup> DCA 1979). Therefore, even if FACT is at some point granted intervention, such intervention should be conditioned on FACT proving the allegations in its Petition, and in particular, showing that it is a “grassroots organization” with thousands of FPL residential customers as members and that its FPL customer members are a significant number of FACT’s members.

8. There is also no occasion to grant the substantive relief requested by FACT -- the euphemistically-phrased “delay” of the supplemental RFP, which in reality would be an indefinite suspension of any competitive bidding process and a *de facto* moratorium on expansions to FPL’s generating resources no matter how badly needed.

9. FACT’s request is, in actuality, a request for reconsideration of the Prehearing officer’s order suspending these proceedings and the Commission’s granting of the requested rule waiver, both of which were meant to authorize the expedient resolution of the supplemental RFP process. However, nothing stated in the Petition to Intervene would justify granting such relief. There is no invocation of any “point of fact or law that was overlooked or not considered by the decision maker in rendering its order,” the only occasion in which reconsideration of an order will be granted. *See, e.g., In re: Petition for determination of need for the Osprey Energy Center in Polk County by Seminole Electric Cooperative and Calpine Construction Finance Company, L.P.*, 01 FPSC 4:329, citing *Diamond Cab Co, v. King*, 146 So. 2d 889 (Fla. 1962). And, as to the Prehearing Officer’s order suspending the proceedings, the time to seek reconsideration of that decision has long since passed and the request for reconsideration embedded in the Petition to Intervene is therefore untimely.<sup>2</sup> Any request that the Commission disavow its prior decision and send the parties on a new course at the request of a late-intervener stretches the bounds of reasonableness and certainly should not be entertained at this stage.

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<sup>2</sup> The Petition speaks only to the RFP process generally. It makes no request directly related to the change in final hearing date accommodated by the order granting FPL emergency request for rule waiver, Order No. PSC-02-0703-PCO-EI.

10. Moreover, it is well-established that an intervener takes the case as it finds it. Rule 25-22.039, F.A.C.; *In re: Petition for Approval of Modifications to Tariff Provisions Governing Transportation of Customer-Owned Gas and Tariff Provisions to Implement Rule 25-7.0335, F.A.C., by Tampa Electric Company*, Order No. PSC-00-1617-PCO-GU (September 11, 2000). Therefore, FACT may not now seek to redirect the course of these proceedings or redefine the issues to be decided. As a putative intervener, FACT simply has no right to recast the proceedings to its liking, much less to bring the proceeding back to square one and derail an ongoing supplemental RFP process initiated with the consent and approval of the Commission and the concurrence of every party to the case at the time it was begun.

11. Even putting aside all these formidable reasons to simply deny FACT's request as improper, there is nothing in the Petition to Intervene that would in any way justify the "delay" that FACT requests. FACT's stated bases for having the Commission revisit its decision to allow the supplemental RFP are all premised on the highly specious claim that the supplemental RFP process will result in FPL choosing its own units over all others despite the relative economics of the bids. Of course, there is nothing to support this, beyond certain issues raised about the process employed in the original RFP, all of which are now moot. And, any such concern would be dealt with in the determination of need proceeding that would follow FPL's choosing of a self-build option, in which FPL would need to prove its cost-effectiveness.

12. FACT's request for delay boils down to the claim that if the supplemental RFP process were conducted under certain proposed rule revisions currently under consideration by the Commission, a lower project cost *might* result and this *might*

influence FPL's retail rates. Again, there is absolutely no support for this claim, and it certainly does not justify preventing the supplemental RFP and placing FPL's reserve margin in peril. Regardless of how the RFP is conducted, at the end of the day there will have to be a showing that the proposed alternative is the most cost effective available. Given that requirement, any claim that a different RFP process might somehow influence rates is far too remote and speculative to be considered. Courts and agencies have long refused to consider claims that are far less attenuated. *See Ameristeel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997); *International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Comm'n*, 561 So. 2d 1224 (Fla. 3d DCA 1990).

13. Moreover, the supplemental RFP is being conducted pursuant to and is fully consistent with the law as it exists *now*. The present version of Rule 25-22.082 is in full force and effect; it has not been repealed or suspended by the Commission. FPL is entitled, and indeed required, to operate pursuant to the present version of the rule in the conduct of the supplemental RFP. Any new rule the Commission may adopt after FPL's RFP process is complete would certainly not be applied retroactively to judge the results of the RFP. And similarly, postulation about what the rule *might* say in the future and how it *might* govern future projects is no reason to derail the current process. Indeed, the Commission should not in ruling on this request prejudge its decision in its pending rulemaking proceeding as to whether or the extent to which it intends to amend its rule.

14. Finally, the Commission should consider that any "delay" of the supplemental RFP process would place FPL's system reliability in serious peril. FPL needs 1,122 MW of new generating capacity in-service by June 2005 to meet its reserve margin requirement. Absent that addition, its reserve margin would fall to 14.1% (far



below the Commission approved 20% minimum). The schedule to complete construction of any new generation option (whether one of the self-build options or a new plant by an RFP bidder) within that time is already exceedingly tight. Any further delay will make it all but impossible to hit the target. And certainly, an indefinite suspension of the supplemental RFP until the Commission completes a rulemaking process (which FPL presumes would include any rule challenge proceedings pursuant to section 120.54, Florida Statutes) will all but guarantee that the needed capacity will not be available on time, and that reliability targets will fall by the wayside.

### **Conclusion**

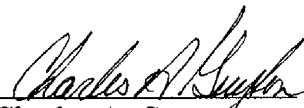
For the forgoing reasons the Commission should deny FACT's Petition to Intervene (without prejudice to its re-filing in the event the proceedings are reconvened) or in the alternative should defer ruling on the Petition. In either case, there is no occasion to delay the supplemental RFP as FACT suggests, and any such request should be denied.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**  
**Docket Nos. 020262-EI and 020263-EI**

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to FACT's Petition to Intervene and Suggestion for Delay has been furnished by e-mail (\*), facsimile (\*\*), or hand delivery (\*\*\*) and United States Mail this 30<sup>th</sup> day of May, 2002, to the following:

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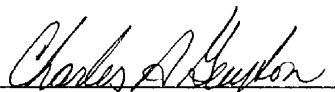
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