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July 8, 2002

**-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

**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 Request for Leave to Amend Petition to Intervene and Amended Petition to Intervene, 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 305-577-7000.

Very truly yours,

Gabriel E. Nieto

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for Determination of Need ) DOCKET NO. 020262-EI  
for Proposed Electrical Power Plant in )  
Martin County of Florida Power and )  
Light Company )  
\_\_\_\_\_ )

In re: Petition for Determination of Need ) DOCKET NO. 020263-EI  
For Proposed Electrical Power Plant in )  
Manatee County of Florida Power and )  
Light Company )  
\_\_\_\_\_ )

Filed: July 8, 2002

**Florida Power & Light Company's Response to  
FACT's Request for Leave to Amend Petition to  
Intervene and Amended Petition to Intervene**

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") Request for Leave to Amend Petition to Intervene and Amended Petition to Intervene, and states:

These proceedings were initiated on March 22, 2002 by FPL to determine the need for two proposed electrical power plants. To alleviate certain concerns raised by bidders in FPL's original request for proposals ("RFP"), FPL asked that these proceedings be placed in abeyance. This request was granted by the Commission on April 26, 2002, and FPL immediately issued a supplemental request for proposals (the "SRFP"). In the intervening period FPL has been conducting the SRFP, which is designed to address various bidders' stated concerns with FPL's initial RFP.

Shortly after FPL began the SRFP, FACT petitioned to intervene in these suspended need determination dockets and asked the Commission to immediately halt the

SRFP process. FPL responded by noting that (i) the relief sought by FACT was improper, (ii) there was nothing in FACT's papers that would compel bringing the SRFP to a halt, and (iii) in any event, FACT failed to properly allege standing. In response to the obvious deficiencies in its initial pleading, FACT has now sought leave to file an Amended Petition. While the Request for Leave to Amend corrects some deficiencies in the initial pleading -- most notably withdrawing the request for the Commission to halt the SRFP and conceding that an intervener takes the case as it finds it -- it nevertheless fails to demonstrate standing to participate.

FACT in its Amended Petition, as in its original papers, claims to be a "statewide, non-partisan, grassroots organization" of Florida retail electric customers. Yet FACT lists only six such customers as its members, and it remains unclear whether FACT is intervening to represent their interests as customers, or for some other undisclosed purpose. Indeed, there is nothing in the Amended Petition to indicate whether (i) FACT has other members or nonmember backers, (ii) who FACT's other members are, (iii) who funds FACT, or (iv) which of its members' and backers' interests FACT is truly here to further.

To demonstrate standing FACT must do more than merely allege that a few FPL customers are among its members. Such a theory of standing would let almost any organization even partially based in Florida intervene, regardless of whether the true interests being furthered are within the zone of interests of the Commission's governing statutes. *See Agrico Chemical Co. v. Department of Env'tl. Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981), *rev. denied*, 415 So. 2d 1359 and 1361 (Fla. 1982).

The test for associational standing has three essential requirements all of which must be both plead and proven: (i) that a substantial number of the association's members would have standing to intervene in their own right;<sup>1</sup> (ii) that the subject matter is within the association's general scope of interest and activity; and (iii) that the relief requested is appropriate for the association to request on behalf of its members. *See Florida Home Builders Ass'n v. Department of Labor and Employment Security*, 412 So. 2d 351, 353 (Fla. 1982); *Friends of the Everglades v. Board of Trustees*, 595 So. 2d 186, 188 (Fla. 1st DCA 1992).

FACT's Amended Petition fall far short of these requirements. A total of six customers out of what were alleged in its original papers to be "thousands" of members is hardly a substantial number. *See FACT's Petition to Intervene and Suggestion for Delay*, at 8. Moreover, there is nothing in the Amended Petition to demonstrate that one of FACT's organizational purposes is to challenge electric utility construction projects on behalf of its "members," a deficiency underscored by the fact that FACT has never once intervened in a similar proceeding. Given that FACT previously sought to halt a supplemental RFP designed to get a lower price for FPL's needed capacity, there is also a

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<sup>1</sup> In other words, the association must show that a substantial number of its members could meet the standing test set forth in *Agrico* and adopted by the Supreme Court in *Ameristeel Corp. v. Clark*, 691 So. 2d 473 (Fla. 1997). *See also International Jai-Alai Players Ass'n v. Florida Parimutuel Comm'n.* 561 So. 2d 1224, 1225 n. 1 (Fla. 3d DCA 1990). Among the more pertinent *Agrico* requirements are (i) that the alleged injury be direct and immediate, and not speculative or remote and (ii) that the true reasons for participation are within the zone of interest of the statutes governing the proceeding. *Id.* at 1226. Nothing alleged in the Amended Petition goes beyond the realm of remote speculation as to impacts to FPL customers. And, it remains to be seen whether FACT's purpose for seeking to participate is to further the interests of the general body of FPL customers, as opposed to some other interest.

serious question as to whether FACT is seeking relief appropriate to an organization that claims to have the needs of FPL's customers at heart.<sup>2</sup>

Additionally, an association, such as FACT, can participate in a proceeding only if its members would have standing to participate and the organization is intervening to "fairly represent members" who are affected by the administrative proceeding. *Id.* Likewise, there is nothing to show that FACT is here to further the interests of its FPL-customer "members" as opposed to whatever other members or backers it might have. Indeed, many of the claims and "suggestions" in FACT's initial papers seemed designed to protect only the interests of SRFP bidders and independent power producers, seemingly without regard to potential adverse impact on FPL customers.

FPL recognizes that many of the issues surrounding FACT's intervention are factual in nature and might not be resolvable on the pleadings. However, the law is clear that FACT has the burden of proving, not merely alleging standing, and FPL intends to hold it to that burden. *Agrico*, 406 So. 2d at 482 (requiring proof, not mere allegation of standing); *NAACP, Inc. ex rel. NAACP v. Florida Bd. of Regents*, 2002 WL 265851, 27 Fla. L. Weekly D462 (Fla. 1st DCA 2002). Indeed, if FACT truly were a "grassroots organization" of thousands of FPL customers, and were participating *solely* for their interest in cheap and reliable power, FPL would have no objection to its intervention. However, FACT's true purpose for participation and the nature of its true membership and backers, at best, remains to be seen. This factual controversy may necessitate a preliminary evidentiary hearing before the Commission or prehearing officer on the

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<sup>2</sup> All that FACT's Petition contains with respect to these requirements are conclusory invocation of the ultimate legal requirements. *See Amended Petition* at 10.

issues surrounding FACT's standing, after FPL has had an opportunity to conduct appropriate discovery on the matter.

**Conclusion**

FACT's Amended Petition fails to properly allege standing and should be dismissed. However, in the event the Commission determines to tentatively allow intervention, FACT should be held to strict proof of its standing claims. If FACT fails to prove any element of associational standing at trial or at an evidentiary hearing on its standing, it should be excluded from further participation in these proceedings.

Respectfully submitted,

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Such allegations are insufficient to properly raise a factual issue for determination. *See Rishel v. Eastern Airlines, Inc.*, 466 So. 2d 1136, 1138 (Fla. 3d DCA 1985).

**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 Request for Leave to Amend Petition to Intervene and Amended Petition to Intervene has been furnished by e-mail (\*), facsimile (\*\*), or hand delivery (\*\*\*) and United States Mail this 8<sup>th</sup> day of July, 2002, to the following:

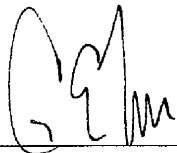
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