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September 18, 2002

BY HAND DELIVERY

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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COMMISSION
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020995-EI

**In Re: Joint Petition of Florida Power & Light Company and Cedar Bay
Generating Company, L.P., for Approval of the First Amendment
to Their Power Purchase Agreement**

Dear Ms. Bayó:

I am enclosing for filing the original and seven (7) copies of the Joint Petition of Florida Power & Light Company and Cedar Bay Generating Company, Limited Partnership for Approval of First Amendment to Their Agreement for the Purchase of Firm Capacity and Energy 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.

Please note the exhibits that go with this Joint Petition will be filed under separate cover tomorrow, September 19.

If there are any questions regarding this transmittal, please contact me at 305-577-2939.

Sincerely,

John T. Butler
John T. Butler, P.A.

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Rockard
FPSC BUREAU OF RECORDS

Enclosure
cc: Jack Shreve, Esq.

DOCUMENT NUMBER - DATE
09975 SEP 18 02
FPSC - COMMISSION CLERK

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint petition of Florida Power & Light Company and Cedar Bay Generating Company, L.P., for approval of the First Amendment to their Power Purchase Agreement.)
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Docket No. 020995-EI
Filed: September 18, 2002

JOINT PETITION
OF FLORIDA POWER & LIGHT COMPANY AND
CEDAR BAY GENERATING COMPANY, LIMITED PARTNERSHIP
FOR APPROVAL OF FIRST AMENDMENT TO THEIR AGREEMENT
FOR THE PURCHASE OF FIRM CAPACITY AND ENERGY

Florida Power & Light Company ("FPL") and Cedar Bay Generating Company, Limited Partnership ("Cedar Bay"), the successor in interest to AES Cedar Bay, Inc., hereby jointly petition, pursuant to Rule 25-17.0836, F.A.C., the Florida Public Service Commission (the "Commission") for approval of the First Amendment, dated August 19, 2002 (the "First Amendment") to the Restated Agreement for the Purchase of Firm Capacity and Energy Between AES Cedar Bay, Inc. and Florida Power & Light Company, dated July 2, 1990 (the "Power Purchase Agreement"). Copies of the Power Purchase Agreement and the First Amendment are attached hereto as, respectively, Exhibits 1 and 2. The grounds for this Petition are:

INTRODUCTION

1. FPL is an investor-owned public utility regulated by the Commission pursuant to Chapter 366, Florida Statutes (2000). FPL purchases electricity from Cedar Bay's cogeneration facility located outside Jacksonville, Florida (the "Facility"), and FPL makes capacity and energy payments to Cedar Bay in accordance with the provisions of the Power Purchase Agreement. FPL recovers such capacity and energy payments through its Commission-approved Capacity

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Cost Recovery Clause and its Fuel and Purchase Power Cost Recovery Clause (the “Cost Recovery Clauses”).

2. Cedar Bay is a limited partnership organized and existing under the laws of the State of Delaware. Cedar Bay owns and operates the Facility, sells electricity exclusively to FPL from the Facility, and receives capacity and energy payments from FPL in accordance with the provisions of the Power Purchase Agreement. It is the successor in interest to AES Cedar Bay, Inc., the original owner of the Facility and signatory to the Power Purchase Agreement.

3. FPL’s address is 9250 West Flagler Street, Miami, FL 33174. Correspondence, notices, orders and other documents concerning this Petition should be sent to:

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Suite 4000
200 South Biscayne Boulevard
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William G. Walker, III
Vice President, Regulatory Affairs
Florida Power & Light Company
9250 W. Flagler Street
Miami, FL 33174
(305) 552-4981 (voice)
(305) 552-2398 (facsimile)

4. Cedar Bay’s address is P.O. Box 26324, Jacksonville, FL 32226.

Correspondence, notices, orders and other documents concerning this Petition should be sent to:

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BACKGROUND

5. On December 20, 1990, the Commission issued Order No. 23907 in Docket No. 900686-EQ, which approved the Power Purchase Agreement as a cogeneration agreement under Rule 25-17.0832, F.A.C.¹ As part of this approval, the Commission made a finding that “payments for energy and capacity made by FPL pursuant to the [Power Purchase Agreement] may be recovered from FPL’s customers.” Order No. 23907 at 6.

6. Since 1994, FPL has recovered through the Cost Recovery Clauses the payments made to Cedar Bay for purchases from the Facility, as approved by the Commission.

7. The Power Purchase Agreement provides for FPL to make a Monthly Capacity Payment to Cedar Bay each month based upon the Facility’s Capacity Factor for that month. The Capacity Factor for each month is based upon the Annual Capacity Factor and Annual On-Peak Capacity Factor and those, in turn, are based upon the average of, respectively, the twelve prior months’ Monthly Capacity Factors and the twelve prior months’ Monthly On-Peak Capacity Factors. The actual formula used to determine the Monthly Capacity Payment for a particular month varies depending upon the range in which the Capacity Factor falls. The capacity payments are calculated based on the Capacity Factor achieved that month and the corresponding contractual formula. Depending on where the Capacity Factor falls in any given month, Cedar Bay may receive payments equal to the “base capacity credit,” payments below the “base capacity credit,” or payments above the “base capacity credit.”

8. Subject to certain conditions and limitations, the Power Purchase Agreement gives FPL the right to control the dispatch of the Facility. In general, when FPL is not

¹ Order No. 23907 approved the Second Amendment to the original Agreement for the Purchase of Firm Capacity and Energy between AES Cedar Bay, Inc. and FPL. The Power Purchase Agreement to which this petition relates is a restatement of the original Agreement, which incorporates the Second Amendment.

dispatching the Facility, the Power Purchase Agreement provides that, in calculating the Monthly Capacity Factor and Monthly On-Peak Capacity Factor, Cedar Bay shall receive credit for the actual energy output of the Facility, capped at certain levels. However, during periods when FPL is dispatching the Facility, the credit Cedar Bay receives is based upon a formula set forth in the Power Purchase Agreement, referred to herein as "Factor B." Specifically, the Factor B formula for calculating (a) the Monthly Capacity Factor is based upon the lesser of (i) the Facility's Available Committed Capacity or (ii) the product of the Annual Capacity Factor and the Committed Capacity; and (b) the Monthly On-Peak Capacity Factor is based upon the lesser of (i) the Facility's Available Committed Capacity or (ii) the product of the Annual On-Peak Capacity Factor and the Committed Capacity.² Thus, under the existing formulas for calculating the Monthly Capacity Factor and Monthly On-Peak Capacity Factor, the amount of capacity payment Cedar Bay receives for any given month can depend upon whether or not the Facility is being dispatched by FPL. Specifically, FPL's interpretation of the Power Purchase Agreement results in Cedar Bay receiving smaller payments during periods of dispatch than it might if the Facility were not being dispatched, even if the Facility is available for its full Committed Capacity of 250 MW. As a result, Cedar Bay historically has been concerned about how and when FPL decides to dispatch the Facility and, therefore, has challenged whether FPL is "properly" dispatching the Facility in accordance with the Power Purchase Agreement.

THE LITIGATION

9. Disputes have arisen between FPL and Cedar Bay from time to time concerning FPL's decisions to dispatch the Facility. In particular, the parties have disagreed as to how,

² The Committed Capacity is the maximum output of the Facility that Cedar Bay has contractually committed to provide to FPL, which is 250 MW, and the Available Committed Capacity is the amount of electricity, within certain parameters, that the Cedar Bay Facility is actually capable of producing at a particular time, capped at the Committed Capacity.

consistent with the Power Purchase Agreement, FPL is to determine the incremental cost of power delivered from the Facility for the purpose of FPL's dispatch decisions. Historically, it has been FPL's position that FPL had unfettered discretion to dispatch Cedar Bay subject only to the FPL Operating Limits specified in the Power Purchase Agreement. FPL took the position that this discretion included, *inter alia*, the right to take into account in its dispatch decisions capacity payments that FPL would be required to make to Cedar Bay. In contrast, Cedar Bay's position has been that FPL may not properly take such capacity payments into account.

10. Cedar Bay filed a complaint regarding this dispute on December 26, 1997, in the Circuit Court for the Fourth Judicial Circuit, in and for Duval County, Florida styled *Cedar Bay Generating Company, Limited Partnership v. Florida Power & Light Co.*, Case No. 97-07037-CA (the "Litigation"). Cedar Bay asserted that FPL, in determining whether and at what levels to dispatch the Facility, was improperly taking the capacity payments into account. On August 12, 1999, the Circuit Court entered an order awarding damages to Cedar Bay in excess of \$13 million, reflecting additional capacity payments that the Court determined FPL should have made to Cedar Bay under the Power Purchase Agreement. The Commission approved FPL's recovery of those payments through the Capacity Cost Recovery Clause. Order No. PSC-01-2516-FOF-EI, Docket No. 010001-EI, dated December 26, 2001.

11. Following the August 12, 1999 order, the Court on September 7, 1999, entered a declaratory judgment (the "Declaratory Judgment") that provided, *inter alia*:

1. [FPL] is not authorized to consider any portion of Cedar Bay's capacity payment in determining whether and when to dispatch the Cedar Bay cogeneration facility;
2. FPL is not authorized to make capacity payments on the basis of Monthly and Annual Capacity Factors which have been calculated based on past instances of improper dispatch that the jury implicitly found violated the implied covenant

of good faith and fair dealing; instead, the [Power Purchase Agreement] requires that FPL make capacity payments as if the Cedar Bay cogeneration facility had been properly dispatched in the past. “Proper dispatch” means dispatch without any reference to Cedar Bay’s bonus capacity payments, as more fully outlined at trial by Cedar Bay’s damages experts.

12. As a result of the Court’s findings, the parties agree that FPL was thereafter precluded from dispatching the Facility during On-peak Hours, except during those instances when the energy-only cost of the Facility was above FPL’s As-Available Avoided Energy Costs (or due to safety or reliability concerns). Recently, such circumstances have been rare. This has resulted in FPL not using the Facility for regulation purposes during On-peak Hours.

13. However, FPL and Cedar Bay have had continuing disagreements as to whether FPL's dispatch of the Facility and its payments to Cedar Bay subsequent to the issuance of the Declaratory Judgment comport with the above-quoted provisions of the Declaratory Judgment. For example, Cedar Bay believes that it is not “proper” dispatch during Off-peak Hours for FPL to dispatch the Facility (a) based on considerations of capacity payments to Cedar Bay or (b) at or near the Facility’s Committed Capacity. FPL, on the other hand, believes that it retained the right under the Declaratory Judgment to dispatch the Facility during all Off-peak Hours and that it has dispatched the Facility without regard to capacity payments it makes to Cedar Bay. The parties have engaged in lengthy negotiations to resolve their disagreements. Ultimately, they have concluded that their mutual interests will be best served -- because, among other things, the potential for continuing disagreements over the remaining life of the Contract will be minimized -- by revising the basis for calculating the Monthly Capacity Factor and Monthly On-Peak Capacity Factor during periods of dispatch, so that they are generally based on the capacity that the Facility is able to produce. By so doing, a major source of dispute over whether FPL is

properly dispatching the Cedar Bay Facility will be removed, such that FPL's dispatch decisions are less likely to be a subject of controversy in the future.

THE FIRST AMENDMENT

14. On August 19, 2002, FPL and Cedar Bay executed the First Amendment, which is intended to implement the resolution and compromise of their continuing dispute over the calculation of the Monthly Capacity Factor and Monthly On-Peak Capacity Factors. By its terms, the effectiveness of the First Amendment is conditioned upon, *inter alia*, the approval of the Commission. The First Amendment consists of several elements which represent compromises on a variety of issues relating to that dispute. These elements, together, constitute a complete settlement "package" and should be viewed collectively rather than in isolation.

15. The essential elements of the First Amendment are as follows:

(a) During periods of dispatch, the hourly energy used to calculate the Monthly Capacity Factor and the Monthly On-Peak Capacity Factor will generally be the capability of the Facility during that hour, capped at 250 MWh during Off-peak Hours and 258 MWh during On-peak Hours.

(b) The formulas for calculating the Monthly Capacity Payment from the Capacity Factor, and the Capacity Factor ranges to which the formulas apply, have been revised. These revisions will require the Facility to achieve a higher capacity factor than under the Power Purchase Agreement in order to obtain payments above the base capacity credit.

(c) The Annual Capacity Factors and Annual On-Peak Capacity Factors used in determining the Monthly Capacity Payments for April 1, 2001 through March 31, 2002, will be recalculated by substituting a Deemed Monthly Capacity Factor and a Deemed Monthly On-Peak Capacity Factor (together, the "Deemed Factors"), respectively, for the previously-

determined Monthly Capacity Factor and Monthly On-Peak Capacity Factor for each month of that period. Monthly Capacity Payments then will be recalculated for monthly billing periods beginning April 1, 2001, utilizing the Deemed Factors and in accordance with the terms and conditions of the First Amendment. Any positive difference between the amount already paid by FPL and the amount which results from the recalculation will be paid by FPL to Cedar Bay within 30 days of the effective date of the First Amendment; any negative difference between the amount already paid by FPL and the amount which results from the recalculation will be paid by Cedar Bay to FPL within 30 days of the effective date of the First Amendment.

(d) FPL will pay \$100,000 to Cedar Bay within 20 days of the First Amendment's effective date. Initially, the parties had agreed that the recalculation of the Monthly Capacity Payments described in the foregoing paragraph should commence for monthly billing periods beginning March 1, 2001. After negotiations continued longer than anticipated, the parties agreed that the recalculation should commence for monthly billing periods beginning April 1, 2001. The \$100,000 payment is a compromise figure designed to take into account the one-month shift in the recalculation date.

(e) In those instances when Cedar Bay operates above 250 MW in Off-peak Hours and above 258 MW in On-Peak Hours, the Parties will for these additional megawatts split equally the savings differential between FPL's As-Available Avoided Energy Cost and Cedar Bay's energy cost (the "Energy Split") and FPL will make no additional capacity payments.

EFFECT OF THE FIRST AMENDMENT ON FPL AND ITS CUSTOMERS

16. The First Amendment is fair and reasonable to FPL and its customers. It resolves a complex and vigorously contested ongoing dispute over the scope and nature of FPL's rights

with respect to dispatch of the Facility and the calculation of Monthly Capacity Payments. Given the complexity of the dispute, the parties believe that it has the potential to resurface throughout the remaining life of the Power Purchase Agreement, notwithstanding guidance given by the Court in the Declaratory Judgment. FPL and Cedar Bay anticipate that resolution of this dispute will promote a better relationship between them concerning FPL's dispatch decisions, which is likely to result in more efficient utilization of the Facility as a generating resource to meet FPL's supply-side requirements. Moreover, by agreeing to resolve and compromise its dispute with Cedar Bay as provided in the First Amendment, FPL and its customers will avoid the uncertainty and substantial cost of continuing the Litigation, as well as the potential adverse consequences of the outcome of the Litigation.

17. The parties have determined that the retroactive payments FPL is required to make pursuant to the First Amendment through July 31, 2002 will total approximately \$4.9 million. (The amount ultimately paid by FPL for the period up to the effective date of the First Amendment could be higher or lower than \$4.9 million depending upon the performance of the Facility and FPL's dispatch of the Facility.) The \$4.9 million payment is largely a function of the Deemed Factors which were negotiated as part of the First Amendment for the period April 1, 2001, to March 31, 2002.³

18. The First Amendment's revised formulas and ranges to be used in calculating the Monthly Capacity Payments prospectively are reasonable. The main elements that will affect the

³ The specific Deemed Factors agreed to by the parties were the result of a hard-fought compromise, reflecting the fact that Cedar Bay's capacity payments since August 1999 were calculated and paid solely based upon FPL's interpretation of the Power Purchase Agreement and Declaratory Judgment. While the parties established Deemed Factors for twelve specific months, the Deemed Factors are intended to reflect and implement a negotiated compromise of disputed capacity payments covering a period of approximately three years. Because the impact of the Deemed Factors quickly and substantially diminishes after March 31, 2002, and the other terms that affect the calculation of capacity payments have been changed on a going-forward basis, the \$4.9 million is not necessarily representative of the future effect of the First Amendment on FPL and its customers.

capacity payments under the First Amendment relative to the Power Purchase Agreement will be (a) the future performance of the Facility; (b) the expansion in the “dead band” above which Cedar Bay can earn capacity bonus payments; and (c) the frequency of dispatch as described more fully in ¶ 8 above. The First Amendment ties capacity payments more directly to the performance of the Facility than is the case under the Power Purchase Agreement. If the Facility significantly improves its performance, Cedar Bay may earn more than it would under the Power Purchase Agreement; if its performance is unchanged or worsens, its payments under the First Amendment will in most instances be less than it would receive under the Power Purchase Agreement. Of course, if Cedar Bay succeeds in improving performance, FPL and its customers will benefit from the attendant reliability and economic gains (*e.g.*, more energy will be available to FPL). The capacity payments also will vary because the First Amendment has an expanded “dead band.” Therefore, even though the First Amendment, in some cases, makes it easier for the Facility to achieve higher capacity factors, reflective of actual performance, some increases in the capacity factor will not translate into increased capacity payments as compared to the capacity payments under the Power Purchase Agreement (but FPL and its customers still will receive increased reliability and economic advantages from the improved performance).

19. The interaction between the Facility’s performance and FPL’s capacity payments to Cedar Bay can be illustrated using a few examples.⁴ If the Facility operates at its historic average level of performance, Cedar Bay will earn less in capacity payments than it would under the Power Purchase Agreement as Cedar Bay interprets the Agreement and the Declaratory Judgment. Cedar Bay has calculated that the equivalent forced outage rate (“EFOR”) of the

⁴ The examples of potential payments that are shown in ¶ 19 are illustrative only. Actual payments to Cedar Bay under the First Amendment will be based on the Facility’s actual performance and billing determinants.

Facility has averaged 6% over the term of the Agreement to date.⁵ If that level continues over the term of the First Amendment, Cedar Bay calculates that FPL, from August 2002 through the termination date of the Agreement, will pay Cedar Bay approximately \$14.9 million less in net present value terms⁶ (and approximately \$25.7 million less in nominal terms) than it would pay if Cedar Bay were to prevail in litigation with respect to its interpretation of the Power Purchase Agreement and the Declaratory Judgment. In contrast, if the Facility's performance were to improve materially to achieve a 4% EFOR, Cedar Bay calculates that FPL, over the same period, would pay Cedar Bay approximately \$8.9 million (NPV) (or \$23.2 million in nominal dollars) more under the First Amendment than under the Power Purchase Agreement.⁷ However, if Cedar Bay earns such greater payment, FPL's customers will have benefitted in the form of (1) the Facility's greater availability during periods when demand for power is high, and (2) enhanced ability to obtain more energy under the First Amendment when the price for energy from the Facility is beneath FPL's system lambda. FPL has reviewed Cedar Bay's calculations supporting the amounts specified in this paragraph, and FPL agrees that the calculations reasonably reflect the projected impact of the settlement relative to Cedar Bay's interpretation of the Power Purchase Agreement and the Declaratory Judgment and based upon Cedar Bay's assumptions about the Facility's operation.⁸

20. Other benefits of the First Amendment include:

⁵ Cedar Bay has every economic incentive to improve its EFORs relative to historical levels under the First Amendment. Hence, it is unlikely the availability factors would be significantly worse under the First Amendment than the current Power Purchase Agreement.

⁶ The net present values are expressed as of January 1, 2003.

⁷ In percentage terms, these amounts constitute 0.9 % and 0.8%, respectively, of the total capacity payments expected to be made to Cedar Bay over the same period based on the respective EFOR's.

⁸ Cedar Bay's calculations assume, under Cedar Bay's interpretation of the Power Purchase Agreement and Declaratory Judgment, that application of Factor B would be limited to five Off-peak Hours per day, *i.e.*, hours during which the contract price of the Facility's energy could reasonably be predicted to be higher than FPL's actual as-available avoided energy costs.

(a) Absent the First Amendment, FPL would be significantly limited in its right to dispatch the Facility during On-peak Hours. Moreover, should FPL not prevail in the remaining litigation,⁹ FPL would have to implement additional limitations on its dispatch of the Facility in Off-peak Hours. The First Amendment will allow FPL to dispatch the Facility, as well as use it for regulation, during all On-peak Hours and all Off-peak Hours.

(b) FPL may obtain additional megawatts from the Facility during both On-peak and Off-peak Hours without having to pay any additional capacity charge for megawatts in excess of 250 MW during Off-peak Hours and in excess of 258 MW during On-peak Hours. Cedar Bay is incentivized to deliver energy in excess of 250 MW during Off-peak Hours and 258 MW during On-peak Hours by the Energy Split, which also provides a cost savings benefit to FPL's customers.

21. For the foregoing reasons, the First Amendment will benefit FPL's general body of customers, as contemplated in Rules 25-17.0836(5) and (6), F.A.C.

WHEREFORE, FPL and Cedar Bay respectfully petition the Commission to approve the First Amendment and to authorize FPL to recover purchased power costs incurred pursuant to the terms of Power Purchase Agreement, as amended by the First Amendment.

⁹ The parties have filed cross motions with the Court concerning dispatch of the Facility during Off-peak Hours.
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Respectfully submitted,

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By: Joseph A. McGlothlin
Joseph A. McGlothlin, Esq.
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CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true and correct copy of the foregoing Joint Petition of Florida Power & Light Company and Cedar Bay Generating Company, Limited Partnership For Approval of First Amendment to Their Agreement for the Purchase of Firm Capacity and Energy was mailed this 18th day of September 2002, to the following:

Jack Shreve, Esquire
Office of Public Counsel
111 West Madison Street
Room 812
Tallahassee, Florida 32399-1400

for EC Daley, FBN 0104507
John T. Butler, P.A.