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September 24, 2002

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

RECEIVED 9:00
02 SEP 24 11:30:00
COMMISSION
CLERK

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

Dear Ms. Bayo:

On behalf of Florida Partnership for Affordable Competitive Energy, enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ Florida Partnership for Affordable Competitive Energy's Response to Florida Power & Light Company's Motion to Compel Answers to Interrogatories, Production of Documents and Motion for Protective Order. *10241-02*
- ▶ Florida Partnership for Affordable Competitive Energy's Request for Oral Argument *10242-02*

Please acknowledge receipt of the above on the extra copy and return the stamped copy to me. Thank you for your assistance.

Sincerely,

Joseph A. McGlothlin

AUS _____
 CAF _____
 CMP _____
 COM _____
 CTR JAM/mls
 ECR Enclosure
 GCL _____
 OPC _____
 MMS _____
 SEC L
 OTH _____

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Mms
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power and Light
Company for a Determination of Need
For a power plant proposed to be located
In Martin County

Docket No. 020262-EI

In re: Petition of Florida Power and Light
Company for a Determination of Need
For a power plant proposed to be located
In Manatee County

Docket No. 020263-EI

Filed: September 24, 2002

**FLORIDA PARTNERSHIP FOR AFFORDABLE COMPETITIVE ENERGY'S
RESPONSE TO FLORIDA POWER & LIGHT COMPANY'S
MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND
PRODUCTION OF DOCUMENTS AND
MOTION FOR PROTECTIVE ORDER**

Pursuant to Rule 28-106.204, Florida Administrative Code, the Florida Partnership for Affordable Competitive Energy ("PACE") responds to the Florida Power & Light Company's ("FPL") Motion to Compel Answers to Interrogatories and Production, and moves for a protective order ruling that it need not respond to the subject discovery requests. In support, PACE states:

Preliminary Statement

Based on conversations with counsel for FPL, PACE understands that, while FPL filed the motion to compel to which this pleading is directed, FPL does not request that the Commission take action on the motion pending its receipt of additional responses to discovery requests (to include a privilege log) from PACE. Therefore, PACE files this Response/Motion for Protective Order in order to state its position on the motion timely, and as a contingency, in the event FPL decides to pursue further the pending motion to compel.

Request for Production – Specific Objections

Request for Production No. 6

Request for Production Number 6 states:

Please provide all documents relevant to whether PACE is financially assisting any intervenor in these proceedings.

PACE maintains its objections to this request. Notwithstanding its objection, and without waiving it, PACE responded to FPL's request. Because PACE has responded to this request, this portion of FPL's motion is moot.

Request for Production Nos. 7 and 8

Request for Production numbers 7 and 8 relate to PACE's funding. Request for Production No. 7 states:

Please provide all documents related to the following sources of funding for PACE: (a) general funding and (b) funding for PACE's intervention in these proceedings.

Request for Production No. 8 states:

Please provide all documents showing the approximate percentage of PACE's budget that is contributed by each of PACE's funding sources.

PACE maintains its objections to this request. Requests 7 and 8 seek information related to PACE's funding sources. Information regarding PACE's funding is not relevant to PACE's associational standing in the present action, and not germane to any analysis of associational standing. In its motion FPL says, "[if] PACE's sole sources of funding derive from constituent organizations that otherwise lack standing to intervene, PACE would be unable to prove its associational standing." FPL's premise is faulty. FPL has cited no case law to support its proposition, and can find no support for its position in the test for associational standing.

The test for associational standing requires PACE to prove the following:

A substantial number of its members will be substantially affected by the Commission's decision in these dockets, the subject matter of this proceeding is within PACE's general scope of interest and activity, and the relief PACE seeks to receive, is of a type appropriate for its members.

Florida Home Builders v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982); *Farmworker's Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services*, 417 So.2d 753 (Fla. 1st DCA 1982). The test for associational standing is based on the basic standing principles established in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478(Fla. 2d DCA 1981), *rev.denied*, 415 So.2d 1359 (Fla. 1982). The standing test is based on the standing of the entity of the association to intervene. Conspicuously absent from the standing requirement is any requirement regarding the funding sources of the association.

FPL is simply trying to create a new and novel requirement out of whole cloth to suit its purpose - which is to preclude analysis of its RFP conduct by excluding potentially critical parties from the proceeding. The gloss that FPL is attempting to impose on the well-settled subject of standing is inappropriate - and would set a dangerous precedent. If an association has standing only if members who could separately intervene provide the funds for its participation, *what purpose would an association ever serve?* More importantly, if an association has standing, in the form of the traditional analysis - i.e., a substantial number of affected members, subject matter within the general scope of the association's interest, and relief that is appropriate for the association to pursue on behalf of its members¹ - *what difference does the source of funds make?* The answer is none. The information responsive to these requests does not relate to any of the issues in this proceeding. The sole purpose of these requests is to annoy, oppress and harass PACE. Therefore, PACE's objections should be sustained.

¹ Of PACE's six members, all are involved in the development of independent power generation projects in Florida; five submitted proposals during the supplemental RFP; and two are intervenors in the docket. PACE is attaching to this response/motion copies of PACE's articles of incorporation and mission statement - both of which have been provided to FPL in response to its discovery requests - which demonstrate that the subject of these dockets clearly falls within the area of the association's interest. At every possible level of examination, it is difficult to conceive an instance in which the showing of associational standing could be more compelling

In addition, notwithstanding objections to FPL's discovery, and without waiving those objections, PACE provided some relevant information in response to FPL's interrogatories and requests. The information PACE provided included a general description of PACE's membership requirements and structure, and basic information about PACE's general funding and funding of special projects. Copies of PACE's answers to FPL's Interrogatory Nos. 5 and 9 are attached. The answers show that PACE has already gone beyond the requirements of the discovery rules in its responses to FPL.

Request for Production No. 12

Request for Production Number 12 states:

Please provide all documents relating to a vote, discussion or approval, by PACE Members, of PACE's decision to petition to intervene in these proceedings.

PACE maintains its objections to this request. FPL's motion seeks to compel PACE to produce a privilege log for this request. Perhaps FPL's motion was prepared prior to conversations between counsel. PACE has already indicated to FPL that PACE will prepare and provide such a privilege log.

Request for Production No. 13

Request for Production No. 13 states:

Please provide all documents relating to all communications between (a) PACE and any other party or former party of these proceedings, (b) PACE and the PSC in connection with these proceedings and (c) PACE and any of its members regarding these proceedings.

PACE maintains its objections to this request. FPL's motion seeks to compel PACE to produce a privilege log for this request. As is the case with Production Request No. 12 above, notwithstanding its objections, and without waiving its objections, PACE will provide FPL with a privilege log of privileged documents responsive to this request. Because PACE will provide

FPL with a privilege log, this portion of FPL's motion is moot.

Request for Production No. 35

Request for Production No. 35 states:

Please provide all documents identified, referenced or relied upon in answering each interrogatory included in FPL's First Set of Interrogatories to PACE.

PACE maintains its objections to this request. FPL's motion seeks to compel PACE to produce a privilege log for this request. Notwithstanding its objections, and without waiving its objections, PACE will provide FPL with a privilege log of all privileged documents responsive to this request. Because PACE will provide FPL with a privilege log, this portion of FPL's motion is moot.

Requests for Production - Kenneth J. Slater's Testimony

Request for Production Nos. 15-18, 20-21 and 29

In Production Request Nos. 15-17, FPL requests all production cost models, all computer models, and all databases and inputs used in developing Kenneth J. Slater's testimony. In Request No. 18, FPL requests "all workpapers, input data and assumptions used to develop the 'expected energy not served' analysis discussed by Kenneth J. Slater. . . ." In Request Nos. 20-21 and 29, FPL requests all documents supporting Kenneth Slater's testimony, as well as "all documents used, consulted or developed in preparation of Kenneth Slater's exhibit," and "all documents used by or relied upon by Kenneth J. Slater in preparation of his testimony."

PACE maintains its objections to these requests. Notwithstanding its objections, and without waiving its objections, PACE provided FPL with all responsive information to these requests that PACE may provide without violating conditions imposed on proprietary material. This includes Mr. Slater's confidential and proprietary database, which PACE supplied to FPL under the terms of the parties' confidentiality agreement, and Mr. Slater's input assumptions and

output reports. However, in preparing his testimony, Mr. Slater utilized the PROMOD IV® Analytical Probabilistic Dispatch Model. This computer model is a proprietary product owned by NewEnergy Associates of Atlanta, Georgia. PACE cannot produce it to FPL; however, FPL may choose to license it from the owner.² Because PACE has fully responded to these requests, to the extent possible, this portion of FPL's motion is moot.

Interrogatories – Specific Objections

Interrogatory Nos. 8, 9 and 10

In its motion, FPL seeks to compel responses to Interrogatory Nos. 8, 9 and 10.

Interrogatory No. 8 states:

Has PACE financially assisted any intervenor, current or former, in these proceedings, at any time during these proceedings? If so, identify the intervenor, current or former, and describe the financial relationship, its history, its current status, and the type and total amount of financial assistance.

Interrogatory No. 9 states:

Please describe PACE's financial condition, including but not limited to, a detailed description of each source of funding for PACE, including (a) general funding and (b) funding for PACE's pending intervention in these proceedings.

Interrogatory No. 10 states:

Please list the approximate percentage of PACE's budget that is derived from each of the funding sources listed in Interrogatory 6.

PACE maintains its objections to Interrogatory No. 8. Notwithstanding its objections, and without waiving its objections, PACE provided an answer to this interrogatory. Because PACE has responded to Interrogatory No. 8, this portion of FPL's motion is moot.

PACE maintains its objections to Interrogatory Nos. 9 and 10, as well. Information regarding PACE's funding is not relevant to PACE's associational standing in the present action,

² In its motion FPL asserts that it produced a proprietary computer model to parties. FPL did so *only after licensing arrangements were in place with the owner.*

and not germane to any analysis of associational standing. As explained in greater detail above, FPL is incorrect in stating in its motion that “[if] PACE’s funding is derived wholly from organizations without a substantial interest in the present action, its associational standing must fail.” FPL has cited no case law to support its proposition, and likewise, can find no support for its proposition within the test of associational standing. PACE incorporates Paragraph – of this pleading by reference.

As stated above, at no point does the funding of an association come within the scope of inquiry under the associational standing test. Further, information responsive to these interrogatories would not be applicable to any of the prongs of the associational standing test. Moreover, information responsive to these interrogatories is not related to any of the issues in this proceeding.

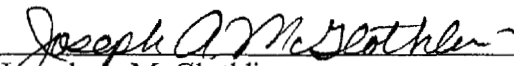
In addition, notwithstanding its objections to FPL’s Interrogatory No. 9, and without waiving those objections, PACE provided relevant information in response to this interrogatory, as well as other interrogatories and production requests. The information PACE provided to FPL included basic information about PACE’s general funding and funding of special projects. See PACE responses to Interrogatory Nos. 5 and 9. The additional requests for information regarding PACE’s “financial condition” and relative budgets are harassing in nature. To grant the request would be oppressive. As to “financial condition,” assume an association has six members, all of whom develop power generation projects in Florida; five of whom submitted proposals in the subject RFP; and two of whom are intervenors; and assume the association has \$25 in the bank. Now assume the same facts, except that the association has \$2 million in the bank. Does the size of the bank account affect the association’s standing? Clearly, the answer is no. This request, and the related inquiry regarding budgets, are out of bounds. If FPL renews its

effort to obtain the information, PACE is entitled to a protective order shielding it from such irrelevant, useless, harassing, and oppressive initiatives.

Conclusion

PACE's objections to FPL's discovery requests and interrogatories should be sustained. Should FPL supplement its motion following PACE's response, PACE reserves the right to raise any objection.

WHEREFORE the Florida Partnership for Affordable Competitive Energy requests that this Commission enter an order denying the Florida Power & Light Company's Motion to Compel Answers to Interrogatories and Production of Documents by Florida Partnership for Affordable Competitive Energy.



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Attorney for the Florida Partnership for Affordable
Competitive Energy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Partnership for Affordable Competitive Energy Response to the Florida Power & Light Company's Motion to Compel Answers to Interrogatories and Production of Documents by Florida Partnership for Affordable Competitive Energy was on this 24th day of September 2002, served via (*) Hand delivery, (**) electronically and U.S. Mail to the following:


(*)(**)Martha Brown
Lawrence Harris
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

(*)(**)Charles A. Guyton
Steel, Hector & Davis
215 S. Monroe Street
Tallahassee, Florida 32301

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118 North Gadsden Street
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Steel Hector & Davis LLP
200 S. Biscayne Blvd., Suite 4000
Miami, Florida 33131-2398

(**)D. Bruce May, Jr.
Karen D. Walker
Holland & Knight LLP
P.O. Drawer 810
Tallahassee, FL 32302


Joseph A. McGlothlin

ARTICLES OF INCORPORATION
OF
FLORIDA INDEPENDENT POWER PRODUCERS ASSOCIATION, INC.

The undersigned, acting as incorporator of Florida Independent Power Producers Association, Inc., under the Florida Not For Profit Corporation Act, adopts the following Articles of Incorporation:

ARTICLE I. NAME

The name of the corporation is: Florida Independent Power Producers Association, Inc.

ARTICLE II. ADDRESS

The street address of the initial principal office and the mailing address of the corporation are:

324 East Virginia Street
Tallahassee, Florida 32301

ARTICLE III. DURATION AND COMMENCEMENT

The corporation will exist perpetually, commencing on the date of filing these Articles of Incorporation.

ARTICLE IV. PURPOSE

The corporation is organized as a corporation not for profit, exclusively for the purpose of serving as a not for profit trade association or business league, to serve the common business and professional interests of, and to improve the business and professional conditions of independent power producers, including but not limited to Calpine Corporation; Competitive Power Ventures, Inc.; Constellation Power, Inc.; Duke Energy North America, LLC.; PG&E National Energy Group; and Reliant Resources, Inc. In furtherance of these purposes, the corporation may make or accept grants, carry on programs and activities, and sponsor projects in order to promote and support the business and professional reputation and development of independent power producers, and in order to promote, support and enhance the professional skills and proficiency of, and the business and professional opportunities available to, such independent power producers. Further, the corporation may engage in other activities designed or intended to accomplish such purposes. To these ends, the corporation may do and engage in any and all lawful activities that may be incidental or reasonably necessary to any of these purposes, and it shall have and may exercise all other powers and authority now or hereafter conferred upon corporations not for profit in the State of Florida.

ARTICLE V. LIMITATIONS ON CORPORATE POWER

The corporate powers of the corporation are as provided in Section 617.0302, Florida Statutes, except to the extent such powers are limited by the following provisions of this Article:

The corporation shall not have or issue shares of stock. No dividends shall be paid, and no part of the income of the corporation shall be distributed to its members, directors or officers. The corporation may pay compensation in a reasonable amount to its members, directors and officers for services rendered, may confer benefits upon its members in conformity with its purposes, and upon dissolution, partial liquidation, or final liquidation may make distributions to its members as hereinafter provided.

ARTICLE VI. INITIAL REGISTERED OFFICE AND AGENT

The corporation designates 324 East Virginia Street, Tallahassee, Florida 32301, as the street address of the initial registered office of the corporation and names Sally Adams the corporation's initial registered agent at that address to accept service of process within this state.

ARTICLE VII. MEMBERS

The corporation shall have one or more classes of members as provided in the bylaws of the corporation. The number of classes, the qualifications and rights of each class of members, and the manner of their admission shall be as provided in the bylaws.

ARTICLE VIII. INITIAL BOARD OF DIRECTORS

The corporation shall be governed by a board of directors. The board of directors has six (6) members initially. The number of directors may be either increased or diminished from time to time, as provided in the bylaws, but will never be less than six (6). The method of election or appointment of the directors shall be as provided in the bylaws. The names of the initial directors are:

Michael C. Green
Timothy R. Eves
Frank Stallwood
Sean J. Finnerty
Richard L. Wolfinger
John R. Orr, Jr.

ARTICLE IX. INCORPORATOR

The name and street address of the incorporator are:

<u>Name</u>	<u>Address</u>
Frank Stallwood	One Independent Drive, Suite 3232, Jacksonville, FL 32202

ARTICLE X. BYLAWS

The power to adopt, alter, amend or repeal corporate bylaws shall be vested in the board of directors.

ARTICLE XI. AMENDMENTS

Amendments to these Articles may be made by resolution passed by two-thirds of the board of directors.

ARTICLE XII. DISSOLUTION

In the event of any liquidation, partial liquidation, dissolution or winding up of the corporation, whether voluntary or involuntary, and whether total or partial, each member shall be entitled to receive cash or assets equivalent to the capital contribution paid to the corporation by such member. If the assets available for distribution upon any liquidation, partial liquidation, dissolution or winding up of the corporation are not sufficient to permit the refund of all such capital contributions, all the assets of the corporation shall be distributed ratably in proportion to the amount of capital paid to the corporation by the various members, but without interest. If any assets of the corporation remain after the refund or distribution to the members of all their capital contributions, such remaining assets shall be distributed to such organization or organizations exempt from tax under the provisions of Section 501 (c)(3) of the Internal Revenue Code as the board of directors of the corporation shall determine.

ARTICLE XIII. INDEMNIFICATION

(a)The corporation shall indemnify any person who is or was a party to any proceeding by reason of the fact that such person is or was a director or officer of the corporation or of any corporation not for profit of which the corporation is a member, to the fullest extent not prohibited by law, for actions taken in the capacity of such person as a director or officer of the corporation or of any corporation not for profit of which the corporation is a member. To the fullest extent not prohibited by law, the corporation shall advance indemnification expenses for actions taken in the capacity of such person as an officer or director, within twenty (20) days after receipt by the corporation of (1) a written statement requesting such advance, (2) evidence of the expenses incurred, and (3) a written statement by or on behalf of such person agreeing to repay the advanced expenses if it is ultimately determined that such person is not entitled to be indemnified against such expenses.

(b)The corporation by action of its board of directors, in its sole discretion, may indemnify any person who is or was a party to any proceeding, by reason of the fact that such person is or was an employee or agent of the corporation or of any corporation not for profit of which the corporation is a member, to the fullest extent not prohibited by law, for actions taken in the capacity of such person as an employee or agent of the corporation or of any corporation not for profit of which the corporation is a member. The corporation by action of its board of directors, in its sole discretion, may advance indemnification expenses for actions taken in the capacity of such person as an employee or agent, after receipt by the corporation of (1) a written statement requesting such advance, (2) evidence of the expenses incurred, and (3) a written statement by or on behalf of such person agreeing to repay the advanced expenses if it is

ultimately determined that such person is not entitled to be indemnified against such expenses. Absent specific action by the board of directors, the authority granted to the board of directors in this paragraph (b) shall create no rights in the persons eligible for indemnification or advancement of expenses and shall create no obligations of the corporation relating thereto.

The undersigned incorporator, for the purpose of forming a corporation not for profit under the laws of the State of Florida, has executed these Articles of Incorporation on _____, 2001.

Frank Stallwood, Incorporator

The undersigned agrees to act as registered agent for the corporation named above, to accept service of process at the place designated in these Articles of Incorporation, and to comply with the provisions of the Florida Not For Profit Corporation Act, and acknowledges that it is familiar with, and accepts, the obligations of such position.

Dated: _____

Sally Adams, Registered Agent

**FLORIDA PARTNERSHIP FOR AFFORDABLE COMPETITIVE ENERGY (FL PACE)
STATEMENT OF PRINCIPLES**

FL PACE represents the interests of competitive electric power generators, wholesale power marketers of electricity and other energy suppliers across the United States and in Florida, who support the development of a competitive wholesale market for electric power in Florida;

FL PACE believes that a competitive wholesale electricity market place will bring to Florida consumers greater supply reliability, reduction in investment risk to Florida consumers, and lower electricity prices than solely relying upon the traditional rate based methodology.

- FL PACE supports a competitive wholesale electric market structure through which:
 - Independent power producers can build, own and/or operate merchant generating facilities, at the expense of IPP shareholders as opposed to Florida consumers, to be a part of the solution to Florida's future energy needs;
 - Independent power producers and power marketers can offer competitively priced power to all wholesale buying utilities and marketers. All Floridians benefit as a result of having increased supply adequacy and reliability, with clean, efficient, low-cost generation.
- FL PACE's goal is to enact and preserve regulatory policies, legislation and practices that address:
 - **Merchant Generation Development** - In order for Florida to ensure adequate future supplies of clean generation at the lowest cost to consumers, independent power producers must be able to permit and build generation.
 - **Market Power Mitigation** - Abuse of market power harms competition. Florida should take measures to mitigate market power in order to foster robust competitive wholesale markets in Florida.
 - **Elimination of Advantages** – FL PACE supports methods to eliminate any advantages of any market participant. A fair and level playing field is needed to foster competitive, wholesale markets.
 - **Structural Separation** – A utility or its holding company shall only participate in competitive wholesale energy markets through structurally separate affiliates.
 - **Promote Competitive Solutions** -. After a satisfactory wholesale competitive framework has been implemented, Florida should rely upon market based solutions to maintain a robust, competitive wholesale market. State and Federal Government intervention should only occur in rare instances, such as in instances of market power abuses.
 - **Establishment of Affiliate Rules** - Affiliate rules should be adopted to accomplish two main functions: 1) preventing entities from subsidizing competitive functions with regulated funds, and 2) preventing preferential and discriminatory treatment by any regulated entity. The value of reliable electric energy should be reflected in the market price for competitive electric power products, and not subsidized through regulated functions.
 - **Transmission Open Access** – PSC and FERC rules must ensure non-discriminatory open access to the transmission grid, which is essential to a competitive wholesale marketplace.

FL PACE will work within the legislative arena, PSC administrative arena, the Florida Executive Branch, the Florida Dept of Environmental Protection and the burgeoning southeastern RTO to ensure that the implementation of competitive wholesale markets is consistent with this Statement of Principles.

PACE'S RESPONSE TO INTERROGATORY NOS. 5 and 9

INTERROGATORY NO. 5: Please describe PACE's membership process, identify who may become a member and how and any membership requirements, both financial and procedural.

RESPONSE: PACE has objected to this interrogatory. Notwithstanding that objection and without waiving it, PACE states that any entity having a interest in the purpose or objectives of PACE may apply for membership. The applicant must meet the requirements set by the Board of Directors and must pay the general dues. The Board of Directors acts on applications for membership. Once admitted, to remain in good standing, a member must pay its dues and abide by the corporation's by-laws.

INTERROGATORY NO. 9: Please describe PACE's financial condition, including but not limited to, a detailed description of each source of funding for PACE, including (a) general funding and (b) funding for PACE's pending intervention in these proceedings.

RESPONSE: PACE has objected to this interrogatory. Notwithstanding the objection, and without waiving it, PACE answers as follows:

Each member is required to pay annual dues, which are used to pay general administrative expenses and fund some basic activities. From time to time, PACE undertakes special projects. While the decision to engage in a special project must be made by PACE's Board, participation by members in the funding of special projects established by the Board is voluntary, and funding for a special project approved by the Board may come from as few as one or as many as all of PACE's members. PACE's participation in this proceeding is an example of a special project.