

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to determine need for an electrical power plant in Manatee County by Florida Power & Light Company.

Docket No.: 020262-EI

In re: Petition to determine need for an electrical power plant in Martin County by Florida Power & Light Company.

Docket No.: 020263-EI Filed: September 24, 2002

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RESPONSE IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION FOR OFFICIAL RECOGNITION

CPV Gulfcoast, Ltd. ("CPV") through its undersigned counsel and pursuant to Sections 120.569 and 120.57(1), Florida Statutes ("F.S."), and Rule 28-106.204, Florida Administrative Code, files this Response in Opposition to Florida Power & Light Company's ("FPL") Motion for Official Recognition, and in support, states the following:

- 1. FPL seeks to have the Commission take official recognition of documents that simply do not fall within the ambit of Sections 90.202(6) and 90.202(12), F.S.
2. First, Section 90.202(6), F.S., expressly provides that judicial notice may be taken only of "[r]ecords of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States." By its plain terms, this section does not authorize official recognition to be taken of the deliberations of an administrative agency, nor does case law interpreting this section authorize the action FPL requests of the Commission. The cases FPL cites in its Motion stand only for the general proposition that when the intent of a statute is at issue due to the statute's

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ambiguity, the legislative history of the statute may be judicially noticed to assist in interpreting the statute. These cases certainly do not stand for the sweeping proposition for which FPL offers them – i.e., that an agency should or must take official recognition of deliberations in a completely separate proceeding involving the adoption of a rule, particularly when the language of that rule does not appear to be at issue in this proceeding.

3. Section 90.202(12), F.S., authorizes judicial notice of “[f]acts that are not in dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.” The documents FPL seeks to have officially recognized do not fall within the scope of this provision. The transcript FPL seeks to have officially recognized contains statements and assertions of facts that CPV may very well dispute. Moreover, these statements and assertions of “fact” – which may be in dispute -- certainly are not “capable of accurate and ready determination” by resort to the transcript itself. Simply put, the transcript contains assertions, statements, and observations the accuracy of which CPV may well dispute, and about which CPV never had prior opportunity to provide input, since CPV was not a party to or participant in the Commission’s Bid Rule proceedings. See Maradie v. Maradie, 680 So. 2d 538 (Fla. 1st DCA 1996) (“...to fit within section 90.202(12), accurate records or other sources must exist which establish the judicially-noticed fact.”)

5. In Maradie v. Maradie, the court admonished that “in our justice system, the practice of taking judicial notice of adjudicative facts should be exercised with great caution” (citing Makos v. Prince, 64 So. 2d 670, 673 (Fla. 1953)). The court noted that such caution arises from “our belief that the taking of evidence, subject to established

safeguards, is the best way to resolve disputes concerning adjudicative facts.” The court further explained that “judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities” *Id.* at 541. This historic caution in the use of judicial notice was codified when Section 90.202, F.S., was legislatively enacted, as reflected in the fact that the statute only permits courts to take judicial notice of limited matters that are specifically recognized in the statute. *Id.* Accordingly, in that case, the court reversed the trial court’s official recognition of “facts” that were not established by indisputable sources. *Id.* at 542.

6. Here, FPL is asking the Commission, without any authority, to ignore the express limitations of Sections 90.202(6) and 90.202(12), F.S., and to take official recognition of documents that neither fall within the category of records appropriate for judicial notice under Section 90.202(6), nor are indisputable and not in dispute as required under Section 90.202(12). Heeding the courts’ counsel that judicial recognition should be permitted only with great caution under limited circumstances specifically recognized in Section 90.202, the Commission should deny FPL’s request.

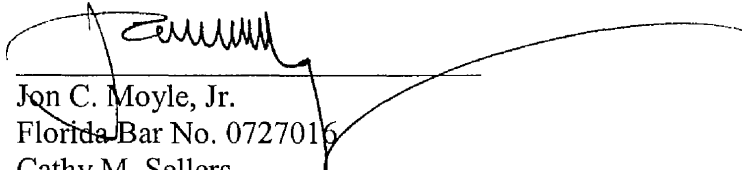
7. In addition to the fact that officially recognizing the transcripts would violate Section 90.202, F.S., it also would unduly prejudice CPV in this proceeding. CPV Gulfcoast was not a party to or a participant in the Bid Rule proceedings, which took place almost ten years ago. Thus, CPV did not have the opportunity to provide any testimony, input, or other information, or to present its position on the Bid Rule, and its views therefore were not subject to deliberation, debate, or consideration in the proceedings for which FPL seeks to have the transcripts officially recognized. In effect, FPL seeks to bind CPV by statements made in rule adoption deliberations in which CPV

had no part, nor could it have had a part. Under the case law cited above, clearly the mechanism of judicial notice does not contemplate such results.

8. If FPL wishes to have matters covered in the transcripts considered at hearing, it should be required to pursue the typical means for having such evidence introduced into the proceeding -- through testimony directly addressing those matters, which is then subject to cross-examination by the parties to this proceeding.

9. For the reasons set forth herein, CPV Gulfcoast respectfully requests the Prehearing Officer to deny FPL's Motion for Official Recognition.

Respectfully submitted this 24th day of September, 2002.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and U.S. Mail to those listed below without an asterisk, and by e-mail and hand delivery to those marked with an asterisk on this 24th day of September, 2002:

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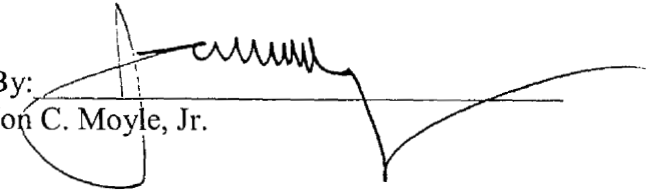
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By:
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A handwritten signature in black ink, appearing to read "Jon C. Moyle, Jr.", written over a horizontal line. The signature is stylized with a large initial "J" and a long, sweeping tail.