ORIGINAL

Timolyn Henry

From: jimtait@comcast.net
Sent: Tuesday, January 18, 2005 4:30 PM
To: Filings@psc.state.fl.us
Cc: Natalie_Smith@fpl.com
Subject: Petitioner's response to FPL motion to dismiss in 040660-EG

Attached is signed filing for case no. 04-0660-EG

PETITIONER'S RESPONSE IN OPPOSITION TO FLORIDA POWER AND LIGHT'S MOTION TO DISMISS AND REPLY TO FPL'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION TO AMEND AND CLARIFY PROTEST COMPLAINT

Jim Tait
1061 Windwood Way
Tallahassee, FL 32311
850.878.0500; fax 850.942.5890
jimtait@comcast.net

CMP _____
COM 5
CTR _____
ECR _____
GCL _____
OPC _____
MMS _____
RCA _____
SCR _____
SEC 1
OTH _____

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of Modifications to BuildSmart Program by Florida Power & Light Company	))))	Docket No. 040660-EG Filed: January 18, 2005

PETITIONER'S RESPONSE IN OPPOSITION TO FLORIDA POWER AND LIGHT'S MOTION TO DISMISS AND REPLY TO FPL'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION TO AMEND AND CLARIFY PROTEST COMPLAINT

Pursuant to Rule 28-106.204(2), Florida Administrative Code, Petitioners, Compliance Data Services, Inc. (d/b/a Calcs-Plus), Dennis J. Stroer and Jon F. Klongerbo, through their undersigned attorney, file this response to Respondent's, Florida Power & Light ("FPL"), Motion to Dismiss filed on December 3, 2004, and amended on January 11, 2005, and, in addition, replies to their Response in Opposition to Petitioner's Motion to Amend and Clarify their Protest Complaint filed on November 15, 2004, and in support states:

A. The undersigned attorney was only recently contacted; filed his notice of appearance on December 23, 2004; filed a motion to amend and clarify the original protest complaint on December 29, 2004; and initiated a review of FPL's Motion to Dismiss.

B. Subsequently, FPL filed its Response to Petitioner's Motion to Amend and Clarify its Protest and further amended their Motion to Dismiss on January 11, 2005.

C. The original protest was filed on November 15, 2004, by the Petitioner and its officers without the aid of counsel and, inadvertently and unknowingly, failed to clearly state their status as parties and also failed to clearly comply with Rule 28-106.201,

Florida Administrative Code ("F.A.C."), which has been corrected in their Motion to Amend and Clarify filed on December 29, 2004.

D. The Motion to Amend and Clarify and this Response to FPL's Motion to Dismiss, as amended, are both filed as soon as possible following the undersigned attorney's entrance into the case and does not prejudice the Respondent's ability to argue its cause. Petitioner's attorney has contacted Respondent's attorney and was advised that they would await receipt of any motions or responses before providing their response.

E. Petitioner files the following answer to FPL Motion to Dismiss filed December 3, 2004, as amended by its filing of January 11, 2005. Paragraphs numbering 1-9 refer to paragraph numbers in the amended Motion filed on January 11, 2005, which adopts or restates the points made under the same numbering in the original motion which was attached as Exhibit A to its amended motion; paragraphs numbering 10 & 11 refer to points made in the relevant original or amended motion; paragraphs 12-21 refer to points made in those paragraphs in the original motion; and, finally, conclusions are drawn in response to paragraph 22 in the original and paragraphs 12 & 13 in the amended motions:

--following paragraph numbers refer to paragraphs in amended motion (same or similar to original)--

1. The Petitioners, however, believe that FPL's program design has never maximized the potential for energy efficiency in residential building practices and has failed to meet the market penetration that many other programs have offered throughout the U.S. and even within the State of Florida. Their attempt to cure their past program failures and low rate of market penetration falls far short of the most cost beneficial program possible. The Commission should insist on better program design and not

continue to waste money raised from mandatory charges against ratepayers on a program designed to meet FPL's corporate objectives at the cost of a free and vibrant marketplace for energy efficient services in their territory. Their design deliberately extends their monopoly practices to services otherwise unregulated by F.S. Chapter 366 and places their proposed revised program not only into violation of F.S. Section 366.03 but also the intent and purposes of F.S. Sections 366.80-366.85, inclusive, the "Florida Energy Efficiency and Conservation Act." FPL's program design doesn't account for other market influences and does not try to incorporate positive private and public sector efforts. It further leads to a reduction of fuel choices offered participants and, potentially, leaves out technology choices that would gain greater efficiency.

2. The modifications proposed by FPL may be designed to allow FPL greater penetration in the production housing market and increase its penetration into the custom market; but, at the cost of continuing to destroy any possibility of the emerging free market for energy efficiency services, particularly in the delivery of assessment and inspection services, and runs counter to the state policy articulated by both F.S. Chapters 366 (particularly F.S. § 366.03 and § 366.81) and 553 (particularly F.S. § 553.991). These services are not regulated by the Commission; but, rather by the Department of Community Affairs. The Commission should not take action to approve a program design that avoids existing state standards and clearly uses the "monopoly" power granted by the state to fund a program to the detriment of an emerging "free and fair" competitive marketplace.

3. The Petitioners believe they should be granted the opportunity to show, by the greater weight of the evidence, that the program, as currently proposed by FPL, is

flawed and will result in less energy efficiency and conservation than alternative designs; will unduly and unreasonably grant preferences and/or advantages to certain persons; and, further, will subject the Petitioners to undue and/or unreasonable prejudice or disadvantage in their chosen residential lifestyle, business and profession.

4. Petitioners agree that their initial protest complaint concerned flaws in the FPL program design and the PSC staff analysis. Petitioners seek to rectify those errors by pointing out program design flaws and suggesting cost beneficial approaches that would meet PSC standards and result in dramatically increased energy efficiency in residential building practices and program market penetration. The initial protest, although inartfully drawn by Petitioners without the assistance of counsel, does demonstrate immediate injury to Petitioners, both commercially and residentially, and further provides a basis for standing under F.S. Chapter 366. The protest is not facially insufficient and any inadvertent or unknowing defect can be cured. The Commission clearly has subject matter jurisdiction pursuant to F.S. Sections 366.03; 366.80-366.85, inclusive; PSC Rule Section 25-17.003, F.A.C.; and authority to enforce FPL Tariff Schedule for BERS, Fourth Revised Sheet No. 4.040.

5. Petitioners are granted an opportunity to amend their complaint (protest) to meet failures pointed out in the Motion to Dismiss. See, Uniform Rules of Administrative Procedure 28-106.201 (4), Florida Administrative Code. Modern legal practices looking for substance over form and the legislative mandate to provide that Chapter 366 liberal construction further support the allowance of the motion to amend and clarify to allow all parties an opportunity to be heard.

6. As stated previously, the Commission clearly has jurisdiction to rule on Petitioner's Protest and any defects in the original protest complaint can be cured without prejudice to any party's ability to state their point and argue their case.

7. There is no disagreement that the order was protested timely. As stated previously, through inadvertence and unknowing errors due to the pro se initial filing, the Petitioners were not clear as to their status. They, at the first moment possible, clarified their status, without prejudice to the Respondent's time and ability to argue its case; therefore, the amendment and clarification should be allowed and be related back to the original complaint (protest) filed.

8. As stated previously, the Petitioners have shown their substantial interests in both the immediate degree of injury and the nature of their injuries. Respondent's reliance on the Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So.2d 478 (Fla. 2nd DCA 1981) decision is misplaced in that the interests of the Petitioners are not solely related to the impact on their business (economic) but also as commercial and residential ratepayers who will be forced to finance, in part, FPL's monopolistic attempt to destroy the competitive marketplace for energy efficient services. See, not only Respondent's cited case of Florida Medical Association, Inc. v. Dep't of Professional Regulation, 426 So.2d 1112 (Fla. 1st DCA 1983); but subsequent cases of Philbro Resources Corp. v. Dep't of Environmental Regulation, 579 So.2d 118 (Fla. 1st DCA 1991) and Maverick Media Group, Inc. v. Dep't of Transportation, 791 So.2d 491 (Fla. 1st DCA 2001).

9. Although FPL would limit to application of section 366.03, F.S., solely to its rates, the plain meaning of the statute, along with Rule 25-17.003(3), F.A.C., clearly

indicates otherwise. The Florida Public Service Commission has the clear authority to prevent a regulated utility from using its monopolistic power, and the authority of the FPSC to mandate ratepayers to fund FPL's proposed unregulated services, "to make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage **in any respect**." (emphasis supplied).

--following two paragraph numbers refer to both original and amended motions that contain dissimilar statements--

10. (original) The Commission did decide in a broad based challenge to a number of utility programs that it found a number of standing problems by the Complainant that were not resolved by amendment or response to FPL's Motion to Dismiss in that case. This case is substantially different in that it is FPL's blatant attempt to amend its program to provide "free" (but not to the ratepayer) ratings and inspections for selected residential properties.

(amended) See above response to paragraph 9.

11. (original) See above responses to paragraphs 7-10, inclusive.

(amended) The fact that the Dep't of Community Affairs is a statutory party to these proceedings demonstrates the relationship of Chapters 366 and 553, especially FPSC Rule 25-17.003(3) and DCA Rule 9B-60.005. Petitioners contend that, as put by FPL in its original motion, substance should control over semantics. FPSC should take cognizance of the DCA statutory mandate to develop a program to assure the development of a "statewide uniform system for rating the energy efficiency of

buildings." See, § 553.992, F.S. (2003). FPL raises a series of issues of material facts that the FPSC should allow to be heard.

--following paragraph numbers refer to original motion--

12. The cited Rule 28-106.201 provides also for a mechanism allowing any failure in the pleading to be rectified. Although the rule clearly provides for a one time amendment following the granting of a motion to dismiss (after the specific failures have been listed by the agency), the Petitioners have filed for leave to amend their complaint at the earliest stage in order to not unduly delay the Commission from reconsidering the program and to allow amendments to the program to be implemented as soon as possible. We believe that all elements of the requirements set out in Rule 28-106.201 have been met.

13. The protest petition, although inartfully drawn, provides adequate notice of the Petitioners' position on each of the elements required. Any failures of clarity or inadvertent omissions may be easily cured by appropriate amendments. The Petitioners deserve to be granted an opportunity to present their facts and to challenge FPL's statements.

14. The Commission has jurisdiction over the subject matter of the Protest.

15. The Commission clearly has subject matter jurisdiction pursuant to F.S. Chapter 366; more particularly, sections 366.03 and 366.80-366.85, inclusive. In fact, the Commission's Rule 25-17.003 (4)(a) cited by both the Petitioners and FPL clearly delineates the Commission's desire not to provide any person undue or unreasonable preferences or disadvantages. The Commission's grant of monopoly power to the public utility is limited to the provision of electric service in certain delineated territories and the

use of the power to mandate payments from customers to support the creation of a program designed to inhibit the development of a full and free marketplace for energy efficiency is not only not contemplated by the statute but actually prohibited. **The** Petitioners look forward to the opportunity to prove that their substantial interest is not only protected by relevant law but that society's overall general interest in a full, free and fair marketplace for energy efficient services is also met.

16. Petitioners agree that "semantics" should not prevail over "substance." If granted the opportunity, they will prove that the substance of the FPL program constitutes the creation of free ratings in violation of Commission rules, and FPL tariff schedules, and unduly and unreasonably destroys the creation of a free marketplace.

17. As previously stated in 16 above, Petitioners would like the opportunity to show that allowing FPL to continue with its proposed amended program would eviscerate the program designed to establish a full, free and fair marketplace for energy efficiency in Florida residences created by the Florida Legislature and assigned to the Florida Department of Community Affairs pursuant to F.S. Sections 553.990-553.998, inclusive, as implement by Rule Chapter 9B-60, F.A.C.

18. As previously indicted in 16 & 17 above, Petitioners look forward to the opportunity to conduct discovery on the FPL proposed program, as amended, and strongly believe that it can produce evidence that the "substance over semantics" will prove that FPL's proposal not only fails to promote a full, free and fair marketplace for residential energy efficiency services but also fails to provide a cost beneficial program meeting the Commission's rules. It certainly will fail to provide the most cost-beneficial alternative for which the ratepayers are due. As have their previous programs shown, it

will also fail to provide the market penetration they envision, although it will be enough to destroy any opportunity to establish a competitive service market that can be met by independent raters.

19. Petitioners have merely suggested that an independent analysis of FPL's program should be conducted. It will offer such an analysis.

20. The Petitioners seek to provide an independent assessment of FPL's analysis.

21. It is instructive that Gainesville Regional Utility enjoys significant market support for energy efficient construction in new residences in their territory with a different program designed to enhance private and other public sector efforts.

CONCLUSION

(FPL original ¶ 22 and amended ¶ 12 and 13).

In summary, Petitioners have met all elements required for filing a Protest on FPL's proposed amendments to its BuildSmart program. They and FPL have identified a number of material facts in dispute and seek to be able to offer their proof as to the material facts and the inferences that may be legally drawn. They firmly believe that, once the Commission is aware of those facts and considers the granting of undue or unreasonable preferences granted by the proposed amendments to the program and the undue or unreasonable prejudice or disadvantage directed towards the Petitioners and the unregulated marketplace of energy efficiency services, the Commission will reject the program as proposed by FPL. Although the Commission does not have the authority to design and establish programs consistent with the purpose and intent of the "Florida Energy Efficiency and Conservation Act," §366.80-366.85, F.S., inclusive, it has the duty

to assure that any programs proposed for cost recovery do not violate the provisions and intent of state law.

WHEREFORE, for the above and foregoing reasons, and to provide Petitioners their day in court to prove their claims and to establish better program designs for new construction programs that will not disrupt the development of a free, fair, efficient and competitive marketplace for energy efficiency services, the Petitioners respectfully request FPL's Motion to Dismiss be rejected; allow discovery to proceed and final recommendations be heard.

Submitted this 18th day of January, 2005.

s/William J. Tait, Jr.
William J. Tait, Jr.
FL BAR No. 0125081
1061 Windwood Way
Tallahassee, Florida 32311
Telephone: (850) 878-0500
Facsimile: (850) 942-5890
e-mail: jimtait@comcast.net

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Motion to Respond to FPL's Motion to Dismiss was served by electronic mail (*) and U.S. Mail this 18th day of January, 2005, to the following:

Martha Carter Brown*
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

R. Wade Litchfield, Esquire*
Natalie F. Smith, Esquire*
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408

Executive Office of the Governor
Office of Planning and Budget
General Government Unit
The Capitol, Room 1502
Tallahassee, FL 32399-0001

Department of Community Affairs
Division of Housing & Comm.Development
Office of Building Codes and Standards
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

Harold McLean
Stephen C. Burgess
Office of Public Counsel
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400

Department of Environmental Protection
Florida Energy Office
3900 Commonwealth Blvd, M.S. 19
Tallahassee, FL 32399

s/William J. Tait, Jr.
William J. Tait, Jr.