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 Subject: Electronic Filing for Docket No. 040029-EG / FPL's Motion to Dismiss Compliance Data Services, Inc. 's Protest

Attachments: M to Dismiss Calcs-Plus Protest.final.doc



M to Dismiss
cs-Plus Prote

Electronic Filing

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b. Docket No. 040029-EG

In re: Petition for approval of numeric conservation goals by Florida Power & Light Company.

c. Document being filed on behalf of Florida Power & Light Company.

d. There are a total of 16 pages.

e. The document attached for electronic filing is Florida Power & Light Company's Motion to Dismiss Compliance Data Services, Inc.'s Protest

(See attached file: M to Dismiss Calcs-Plus Protest.final.doc)

Thank you for your attention and cooperation to this request.

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of)
numeric conservation goals)
by Florida Power & Light Company)
_____)

Docket No. 040029-EG

Filed: March 22, 2005

**FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS
COMPLIANCE DATA SERVICES, INC.'S PROTEST**

Pursuant to Rule 28-106.204(2), Florida Administrative Code, Florida Power & Light Company ("FPL") hereby files this Motion to Dismiss the partial protest of the Florida Public Service Commission's ("PSC" or the "Commission") Approval of FPL's Demand-Side Management Plan filed by Compliance Data Services, Inc. ("Calcs-Plus"), Dennis J. Stroer and Jon F. Klongerbo ("DSM Plan Protest"), and in support states:

Background

1. By Order No. PSC-05-0162-PAA-EG, issued February 9, 2005 in the above-referenced docket, the Commission determined that the programs in FPL's DSM Plan met the Commission's three-prong test for evaluating conservation programs. Thus, the Commission issued notice of its proposed agency action approving FPL's DSM Plan "with one caveat." See Order No. PSC-05-0162-PAA-EG, pp. 2-3, issued February 9, 2005, Docket No. 041291-EI. The caveat was that Calcs-Plus and its principals had filed a protest in Docket No. 040660-EG to the Commission's PAA Order approving changes to FPL's BuildSmart Program ("BuildSmart Protest"), which program changes are included in FPL's DSM Plan. To avoid prejudging the issue of the modified BuildSmart Program, the Commission determined that, if a hearing was held in Docket No. 040660-EG, it would address the inclusion of the BuildSmart Program in FPL's DSM Plan as part of that proceeding. Conversely, if no hearing was held in Docket No. 040660-EG and Order No. PSC-05-0162-PAA-EG became final, the modified BuildSmart

Program would be part of FPL's DSM Plan.

2. Notwithstanding the Commission's express recognition of the BuildSmart Protest, on March 2, 2005, Calcs-Plus, a company in the business of providing energy ratings, and its principals Dennis J. Stroer and Jon F. Klongerbo (sometimes collectively referred to as "Petitioners"), filed a partial protest to the Commission's PAA Order approving FPL's DSM Plan. Petitioners protest Commission approval of FPL's BuildSmart Program and Residential Conservation Service Program. The DSM Plan Protest marks the Petitioners third pending protest to FPL's BuildSmart Plan. In an effort to serve its economic interests and perhaps concerned that FPL's Motions to Dismiss filed in Docket No. 040660-EG may succeed, the Petitioners have taken a proverbial third bite at the apple attempting to disrupt approval of BuildSmart Program amendments.¹ Just as FPL requested with the first two attempts, for the reasons set forth below, FPL respectfully requests that the Commission reject this third bite at the apple and dismiss the Petitioners' DSM Plan Protest.

3. In proposed agency action Order No. PSC-04-1046-PAA-EG, issued October 26, 2004 in Docket No. 040660-EG, the Commission found that "modifications to the BuildSmart program should accomplish the program's objective of encouraging the design and construction of energy efficient homes that cost effectively reduce FPL's coincident peak load and customer energy consumption and we approve them." See Order No. PSC-04-1046-PAA-EG, p. 4, Docket No. 040660-EG (issued October 26, 2004). Calcs-Plus filed its First BuildSmart Protest on November 15, 2004, and argued that the Commission Staff's September 23, 2004,

¹ Viewed conservatively, Calcs-Plus' DSM Plan Protest is its third bite at the apple given the two protests already filed by Calcs-Plus in Docket No. 040660-EG. In fact, this can be viewed as Calcs-Plus' fourth bite at the apple given the challenge to the BuildSmart Program filed in 2002 by the same principals acting as the "National Energy Raters Association." As discussed in greater detail in the body of this Motion, the Commission dismissed the National Energy Raters Association complaint for lack of administrative standing in Order No. PSC-02-0995-FOF-EI, Docket No. 020084-EI, issued July 23, 2002.

Recommendation to the Commission that led to the PAA Order was flawed. FPL timely moved to dismiss Calcs-Plus' Protest on December 3, 2004. FPL argued that Calcs-Plus' Protest of the Commission's Approval of Modifications to FPL's BuildSmart Program should be dismissed because the Commission does not have jurisdiction over Calcs-Plus' Protest since: 1) Calcs-Plus lacks standing to Protest the Commission's action because its economic interests are not within the zone of interests of the statutes and rules the Commission is applying to FPL's petition for approval of modifications to its BuildSmart program, and no immediate injury to Calcs-Plus will result from the Commission's decision; 2) Calcs-Plus' Protest is facially insufficient and the defect cannot be cured; and 3) the Commission does not have subject matter jurisdiction over the Protest. In any event, FPL argued that the allegations raised in Calcs-Plus' Protest were without merit.

4. On December 29, 2004, Calcs-Plus and its principals filed a motion to amend and clarify its November 15, 2004 Protest (the "Second Protest"). FPL filed a response and Motion to Dismiss the Second Protest on January 11, 2005. In addition to incorporating the arguments in FPL's First Motion to Dismiss, FPL argued that while Calcs-Plus' Motion to Amend attempted to remedy several of the defects in the November 15, 2004 Protest, it did not and could not remedy the fatal defect – lack of standing. As of the date this Motion to Dismiss the DSM Plan Protest is being filed, the Commission has not ruled on the Motion to Amend and Motions to Dismiss in the BuildSmart Docket.

5. On November 30, 2004, pursuant to Sections 366.82 and 366.06(1), Florida Statutes (2004), (the "Florida Energy Efficiency and Conservation Act" or "FEECA") Florida Administrative Code Rule 25-17.0021, and Order No. PSC-04-0850-CO-EG, issued September 1, 2004, in the above-referenced docket, FPL requested Commission approval of its DSM Plan and authority to recover through FPL's Energy Conservation Cost Recovery ("ECCR") clause

reasonable and prudent expenditures associated with implementation of such Plan. FPL's DSM Plan is designed to meet the conservation goals approved for FPL by the Commission in Order No. Order No. PSC-04-0850-CO-EG. The programs in FPL's DSM Plan fully implement all the currently known cost-effective Achievable Potential under the Rate Impact Measure ("RIM") and Participants tests through 2014. Further, the programs in FPL's DSM Plan should achieve the goals set forth in the FEECA and Florida Administrative Code Rule 25-17.001. The programs in FPL's DSM Plan will cost-effectively reduce the growth rate of weather-sensitive peak demand, reduce and control the growth rate of energy consumption, increase the conservation of expensive resources and increase the efficiency of the electrical system. Also, the programs in FPL's DSM Plan are cost-effective. Using the Commission's cost-effectiveness methodology, FPL has shown the cost-effectiveness of each of the proposed programs for which cost-effectiveness can be meaningfully calculated. Finally, the programs in FPL's DSM Plan are reasonably monitorable. FPL's monitoring efforts for each of its DSM programs and research projects were set forth in the detailed program and project summaries in FPL's Plan Document.

6. The Commission issued Notice of Proposed Agency Action Order Approving FPL's DSM Plan, Order No. PSC-05-0162-PAA-EG, on February 9, 2005. On March 2, 2005, Petitioners filed their protest to FPL's DSM Plan ("Third Protest"). This time, the relief requested by Petitioners is as follows:

The Petitioners urge the Commission to reject FPL's proposed residential DSM programs denominated "Residential Conservation Service" and "BuildSmart" and require FPL to submit a new program design that would enhance energy efficiency, the use of other state and federal programs and the use of building energy rating systems without unduly and unreasonable [sic] prejudicing its ratepayers and competing businesses within its territory. Petitioners also suggest that the existing programs to encourage energy efficient residences by both state and federal energy agencies should be recognized and their best products should be incorporated into the final program plan.

See Calcs-Plus' DSM Plan Protest (or "Calcs-Plus' Third Protest"), ¶ G, filed March 2, 2005 in

the above-referenced docket.

7. FPL's arguments with respect to Petitioners' BuildSmart Protests also apply to their DSM Plan Protest. As addressed in greater detail below, Petitioners lack administrative standing to litigate their partial protest to FPL's DSM Plan. Petitioners' have not demonstrated an injury in fact of sufficient immediacy to entitle them to a section 120.57 hearing. Further, Petitioners have not alleged an injury that is of a type or nature which a 120.57 hearing on these two programs in FPL's DSM Plan would be designed to protect. Petitioners' DSM Plan Protest should be dismissed and this docket closed because the DSM Plan Protest is deficient as a matter of law as Petitioners have failed to provide any basis upon which the Commission can provide the relief sought.

Legal Standard

8. A motion to dismiss raises as a question of law whether, accepting all allegations in the complaint as true and not looking beyond the complaint, the complaint alleges sufficient facts to state a cause of action. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). A pleading should be dismissed unless all of the elements of a cause of action are properly alleged. See Kislak v. Kredian, 95 So. 2d 510 (Fla. 1957).

Argument

9. Accepting all allegations in Petitioners' Protest as true, and drawing all reasonable inferences in favor of Petitioners, Petitioners' Protest must be dismissed with prejudice as a matter of law because Petitioners have not alleged an injury in fact of sufficient immediacy to grant them standing to protest the BuildSmart and Residential Conservation Service Programs, Petitioners interests are not within the zone of interests this proceeding is designed to protect and Petitioners have provided no basis upon which the Commission can grant the relief sought. Only substantially interested persons may participate as a party in a Commission action. **See Rules**

25-22.036(2), 25-22.039, 28-106.205, Florida Administrative Code (2003); Order No. PSC-02-0995-FOF-EI, Docket No. 020084-EI (issued July 23, 2002). To determine whether Calcs-Plus and its principals have standing to initiate this proceeding, the Commission should first evaluate whether Petitioners have any legitimate substantial interest that is entitled to protection by the Commission. It is well-established in administrative law that:

... before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

See Agrico Chemical Co. v. Dep't of Env'tl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981) ("Agrico").

Any injury to petitioners is speculative

10. The DSM Plan Protest does not allege an injury in fact that satisfies the Agrico standard. In order to satisfy the first prong of the Agrico test, a petitioner must allege with specificity either: 1) an actual injury in fact at the time the petition is filed; or 2) that the petitioner is immediately in danger of sustaining some direct injury as a result of an agency's action. See Village Park Mobile Home Assoc. Inc. v. Dept. of Business Regulation, 506 So. 2d 426, 433 (Fla. 1st DCA 1987). The injury or threat of injury must be both real and immediate, not conjectural, hypothetical or abstract. Village Park, 506 So. 2d at 433. A petition for formal hearing should be dismissed if it does not contain allegations that petitioner has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged conduct. Village Park, 506 So. 2d at 433-34.

11. The DSM Plan Protest does not include allegations of actual injury as a result of Commission approval of the BuildSmart and Residential Conservation Service Programs.

Instead, Petitioners argue that the agency action “will potentially increase their rates and costs of residing and doing business in the state; ... will also grant undue and/or unreasonable preferences and/or advantages to certain persons ... and ... will subject the Petitioners to undue and/or unreasonable prejudice or disadvantage in their chosen business and profession.” See DSM Plan Protest at ¶ B.4 (emphasis added). Petitioners’ allegations of injury are vague and uncertain. There is no allegation of tangible or immediate injury by Petitioners.

12. FPL’s BuildSmart Program, which targets energy efficiency measures in new residential construction, is cost-effective pursuant to the Commission’s approved cost-effectiveness methodology, Rule 25-17.008, Florida Administrative Code. Such cost-effectiveness methodology is designed to ensure that the DSM measure would not result in increased rates and cause customers who do not participate in a utility DSM measure to subsidize customers who do participate. See Legal Envt’l Assistance Foundation, Inc. v. Clark, 688 So. 2d 982 (Fla. 1996). Further, pursuant to Rule 25-17.003, Florida Administrative Code, FPL is required to offer residential energy audits which FPL delivers through its Residential Conservation Service Program. The Residential Conservation Service Program targets existing residential construction, and such program is not subject to a cost-effectiveness test. Based on conversations with Petitioners, FPL understands that Petitioners would ask FPL to pay rebates to its company and raters as a part of the BuildSmart Program. Though paying such rebates may benefit Petitioners, it would cause the Program to fail the Commission’s test for cost-effectiveness because of the detriment to the general body of customers. The Commission is called to act in the general public interest, rather than in the interest of a particular group of energy raters. The Third Protest fails to articulate an injury in fact of sufficient immediacy to be entitled to protection by the Commission in this proceeding. See Village Park, 506 So. 2d at 434 (speculations on the possible occurrence of injurious events are too remote to warrant inclusion

in the administrative review process); see also International Jai-Alai Players Assoc. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-1226 (Fla. 3d DCA 1990) (central injury asserted by the Association - namely, that the sought-after changes in the jai-alai playing dates would aid the fronton owners in their labor dispute with the Association and thus would either break or prolong the ongoing strike of the Association to the economic detriment of its members - is far too remote and speculative in nature to qualify under the first prong of the Agrico standing test); Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988) (speculative loss due to economic competition is not of sufficient “immediacy” to establish standing); In Re: Petition for generic proceedings to establish expedited process for reviewing North American Plan Administration (NANPA) future denials of applications for use of additional NXX Codes by BellSouth Telecommunications, Inc., Order No. PSC-01-1629-PCO-TL, Docket No. 010782-TL (issued Aug. 9, 2001) (Rule 25-22.039 did not authorize consumer to intervene where the petitioner did not demonstrate he would suffer an injury in fact of sufficient immediacy to entitle him to a formal hearing); In Re: Request for approval of transfer of control of MCI Communications Corporation to TC Investments Corp., Order No. PSC-98-0702-FOF-TP, Docket No. 971604-TP (issued May 20, 1998) (speculation as to the effect of a merger on competitive markets was too remote to confer standing); In Re: Peoples Gas System, Inc. Petition for Approval of Load Profile Enhancement Rider to Rate Schedule RS, SGS, GS, GSLV-1, GSLV-2 and GTSLV-2, Order No. PSC-95-0348-FOF-GU, Docket No. 941324-GU (issued March 13, 1995) (speculation as to what might happen if a rider is implemented was not of sufficient immediacy to confer standing).

Petitioners’ interests are not the type this proceeding is designed to protect

13. Petitioners’ DSM Plan Protest should also be dismissed under the second prong of the Agrico test because the claimed interest of the Petitioners is not the kind designed to be

protected by this proceeding. See Ameristeel Corporation v. Clark, 691 So. 2d 473, 476-478 (Fla. 1997); see also In Re: Petition for generic proceedings to establish expedited process for reviewing North American Plan Administration (NANPA) future denials of applications for use of additional NXX Codes by BellSouth Telecommunications, Inc., Order No. PSC-01-1629-PCO-TL, Docket No. 010782-TL (issued Aug. 9, 2001) (alleged injuries were beyond the scope of the proceeding and not of a type or nature the proceeding was designed to protect); In Re: Request for approval of transfer of control of MCI Communications Corporation to TC Investments Corp., Order No. PSC-98-0702-FOF-TP, Docket No. 971604-TP (issued May 20, 1998) (alleged injuries were not of a type or nature the proceeding was designed to protect); In Re: Peoples Gas System, Inc. Petition for Approval of Load Profile Enhancement Rider to Rate Schedule RS, SGS, GS, GSLV-1, GSLV-2 and GTSLV-2, Order No. PSC-95-0348-FOF-GU, Docket No. 941324-GU (issued March 13, 1995) (economic and service oriented interests were not of a type or nature the proceeding was designed to protect). Though the arguments in the DSM Plan Protest are vague and difficult to discern, it is clear that the arguments raised by the Petitioners relate to their economic interests. For example, Petitioners argue that FPL's BuildSmart and Residential Conservation Service Programs constitute a "subsidization of FPL's ventures into an unregulated area of service provision in competition with other competitive providers." See DSM Plan Protest at ¶ B.4. Further, Petitioners assert that "FPL's proposed program unnecessarily provides advantage to certain persons and greatly damages non-monopolistic public and private sector efforts to provide competitive services" See DSM Plan Protest at ¶ E. The Commission lacks jurisdiction to protect Petitioners' economic interests. See, e.g., In Re: Peoples Gas System, Inc. Petition for Approval of Load Profile Enhancement Rider to Rate Schedule RS, SGS, GS, GSLV-1, GSLV-2 and GTSLV-2, Order No. PSC-95-0348-FOF-GU, Docket No. 941324-GU (issued March 13, 1995).

14. The Commission has decided this issue before. In 2002, Mr. Dennis J. Stoer, who is listed in the Calcs-Plus' Protest as the president of the company and a person on whom all pleadings and documents should be served, filed a complaint against FPL on behalf of the National Energy Raters Association ("NERA") that included many of the same allegations as asserted in the current Calcs-Plus Protest. See In Re: Complaint by National Energy Raters Association against Florida Power & Light Company, Florida Power Corporation, and any other utility engaged in the practice, for alleged violation of Rule 25-17.003(4)(a), F.A.C., which requires every public utility to charge for a Building Energy Efficiency Rating System (BERS) Audit, Docket No. 020084-EI. By Order No. PSC-02-0995-FOF-EI, issued July 23, 2002, in Docket No. 020084-EI, on motion by FPL, the Commission dismissed NERA's complaint with prejudice because it found NERA could not remedy the fact that it failed the test for standing. See Order No. PSC-02-0995-FOF-EI at 3, Docket No. 020084-EI (issued July 23, 2002).

According to the Commission:

The 'economic injury to energy raters does not fall within the 'zones of interest' protected by any of the statutes implemented by Rule 25-17.003(4), Florida Administrative Code.' Moreover, we find that NERA has failed to demonstrate that it will suffer injury in fact that is of sufficient immediacy to entitle it to any relief.

See id.

15. Also, Petitioners dispute "the method of calculating the cost-benefit of the residential program denominated as 'Build Smart.'" See DSM Plan Protest at ¶ E. The cost-effectiveness methodology used by FPL is Commission-approved, and this proceeding is not the appropriate forum for any such dispute. See Rule 25-17.008, Florida Administrative Code.

Petitioners have alleged no basis upon which the Commission can grant the requested relief

16. Petitioners have asserted no basis upon which the Commission can grant the requested relief. Indeed, the Commission's authority over utilities under FEECA is limited. As

the Commission has recognized, FEECA only grants it authority to approve or disapprove conservation programs. See In Re: Implementation of Section 366.80-.85 Florida Statutes, Conservation Activities of Electric and Gas Utilities, Order No. 22586, Docket No. 890737-PU (issued Feb. 21, 1990) (finding Section 366.82, Florida Statutes, only grants the Commission authority to approve or disapprove conservation plans and programs submitted by the electric utilities, not to mandate a specific type of program). By Order No. PSC-05-0162-PAA-EG, the Commission determined that the programs in FPL's DSM Plan satisfied the three-pronged test used to evaluate conservation programs:

1. Does each component program advance the policy objectives set forth in **Rule 25-17.001 and the FEECA statute?**
2. **Is each component program directly monitorable and does it yield measurable results?**
3. Is each component program cost-effective?

See Order No. PSC-05-0162-PAA-EG, issued February 9, 2005 in Docket No. 040029-EG; citing In re: Implementation of Sections 366.80 through 366.85, Florida Statutes, Conservation Activities of Electric and Natural Gas Utilities, Order No. 22176, issued November 14, 1989, in Docket No. 890737-PU. According to the Commission:

We have reviewed FPL's proposed DSM Plan and determined it meets the three-pronged test. The resulting demand and energy savings also appear to meet FPL's newly set goals, as approved in Order No. PSC-04-0763-PAA-EG, issued August 9, 2004, in the instant docket. The resulting demand and energy savings also appear to meet FPL's newly set goals, as approved in Order No. PSC-04-0763-PAA-EG, issued August 9, 2004, in the instant docket. The DSM Programs which FPL counts toward its goals appear to be directly monitorable. FPL's Plan also includes four research and development programs and a cogeneration program which, while not directly measurable, are specifically identified in FEECA. Several of the programs in FPL's Plan are marginally cost-effective; however, FPL excludes measures which would have a payback of less than two years without an incentive for consumers. This reduces the potential for free-riders in FPL's programs, and increases the probability that the programs will be cost-effective.

See Order No. PSC-05-0162-PAA-EG, page 2, issued February 9, 2005 in Docket No. 040029-

EG.

17. Contrary to the relief sought by Petitioners, FEECA does not grant the Commission jurisdiction to dictate the specific terms of a conservation plan unless a utility has not implemented its programs or is not substantially in compliance with its approved plan. See § 366.82(3), Fla. Stat. (2004); Rule 25-17.0021(4)(j), Florida Administrative Code (2004); In Re: Implementation of Section 366.80-.85, Florida Statutes, Conservation Activities of Electric and Gas Utilities, Order No. 22586 in Docket No. 890737-PU issued February 21, 1990. In fact, none of the statutes, rules or tariff provisions cited by the Petitioners in support of their requested relief grant the Commission jurisdiction to award the relief requested. For example, nothing in Section 366.03, Florida Statutes, related to public utility duties, authorizes the Commission to redraft a DSM Plan that meets the Commission's three-prong conservation evaluation. In addition, FEECA specifically states as follows:

If the commission disapproves a plan, it shall specify the reasons for disapproval, and the utility whose plan is disapproved shall resubmit its modified plan within 30 days. ... If any utility has not implemented its programs and is not substantially in compliance with the provisions of its approved plan at any time, the commission shall adopt programs required for that utility to achieve the overall goals.

See § 366.82(3), Fla. Stat. (2004). Further, Rule 25-17.0021, Florida Administrative Code states:

If the Commission finds that a utility's conservation plan has not met or will not meet its goals, the Commission may require the utility to modify its proposed programs, or adopt additional programs and submit its plan for approval.

See Rule 25-17.0021(4)(j), Florida Administrative Code (2004). Under the circumstances, neither of these provisions afford a basis for the relief requested by Petitioners. There is no allegation that the utility has not implemented its programs, is not in compliance with its approved plan, or has not or will not meet its approved goals.

18. Rule 25-17.003, Florida Administrative Code, cited by Petitioners, also does not afford Petitioners a basis for the requested relief. Rule 25-17.003, related to energy audits, specifies the minimum requirements for performing energy audits by every utility. There is no allegation that FPL's BuildSmart and Residential Conservation Service Programs do not comply with Rule 25-17.003, and such programs do comply. In accordance with Rule 25-17.003, when a Building Energy-Efficiency Rating System ("BERS") Audit is requested, FPL refers the customer to a qualified energy rater or charges the customer on a cost basis for such audit. Further, Rule 25-17.003 requires FPL to offer walk-through energy audits, computer-generated Class A audits and customer-assisted energy audits which FPL elects to do in its Residential Conservation Service Program. Rule 25-17.003 does not afford Petitioners the requested relief.

19. Sections 553.990–553.998, Florida Statutes, the "Florida Building Energy-Efficiency Rating Act," and Rule 9B-60.005, Florida Administrative Code, relating to energy ratings and costs, also do not afford Petitioners a basis for the requested relief. In fact, such statutes and rules apply to the Department of Community Affairs and not the Commission. In any event, FPL's practices comply with the Florida Building Energy-Efficiency Rating Act to the extent applicable. Rule 25-17.003, Florida Administrative Code, discussed above, references Section 553.995, Florida Statutes, and the Department of Community Affairs Rule 9B-60.005, and requires FPL to "charge an eligible customer for a BERS Audit [based on] actual cost." See Rule 25-17.003(4)(a), Florida Administrative Code (2004). FPL charges for BERS Audits and there is no allegation to the contrary.

20. Finally, FPL Tariff Schedule for BERS Audits, Fifth Revised Sheet No. 4.040, cited by Petitioners, does not grant the Commission jurisdiction to award the requested relief. Again, FPL charges for BERS Audits and there is no allegation to the contrary.

21. In sum, while the Commission can refuse to approve a conservation program that

is not cost-effective or otherwise fails to comply with the Commission-approved DSM goals, the Commission's authority does not extend to requiring a utility to re-submit a new program design incorporating certain specified features of various federal and state programs, as requested by Petitioners. There is no allegation that FPL has not implemented its approved DSM programs or is not substantially in compliance with its approved plan. Therefore, under the circumstances, Petitioners' request that the Commission require FPL to submit a new program design with certain features is not a remedy available to the Petitioners.

Conclusion

22. The DSM Plan Protest should be dismissed with prejudice because Petitioners lack administrative standing and because there is no basis for the Commission to grant the relief requested. Petitioners do not have standing to protest FPL's DSM Plan because Petitioners have not shown that they will suffer any imminent cognizable injury as a result of the Commission's decision on FPL's DSM Plan. Further, Petitioners interests are not within the zone of interests this proceeding is designed to protect. Finally, Petitioners have alleged no basis for the Commission to grant the requested relief. As a matter of law, Petitioners have failed to state a claim upon which the Commission can grant relief. Therefore, the Commission should dismiss the DSM Plan Protest with prejudice and close this docket.

WHEREFORE, for the above and foregoing reasons, FPL respectfully requests that the Commission dismiss Petitioners' DSM Plan Protest with prejudice.

Respectfully submitted,

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NATALIE F. SMITH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of FPL's Motion to Dismiss was served by electronic mail (*) and U.S. Mail this 22nd day of March, 2005, to the following:

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