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Sent: Tuesday, March 29, 2005 4:44 PM
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Subject: Petitioner's Response to FPL's Motion to Dismiss in PSC Docket Nr. 040029
Attachments: FPSC 040029-EG-Petitioner's Answer to FPL motion to dismiss.doc

Attached is Petitioner's Response to FPL's Motion to Dismiss in PSC Docket Nr. 040029.

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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 29, 2005**

PETITIONER'S RESPONSE IN OPPOSITION TO FLORIDA POWER AND LIGHT'S MOTION TO DISMISS

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 March 22, 2005, and in support state:

A. Following adoption of the 1985 Florida Energy Efficiency Building Code, the Commission did not allow FEECA cost recovery to utility "new homes" demand side management programs such as those popular with the existing home market; i.e. rebates or other incentives for more efficient building practices and technologies. Under the newly adopted Florida Code, the Commission recognized that builders, under the performance code standards, could use more efficient measures to offset the use of less efficient building practices and technologies; such as, additional window area beyond code allowances. However, the Commission, supported by the Florida Energy Office and Department of Community Affairs Office of Codes and Standards, authorized FPL to conduct a New Home Construction Research Project in 1993 that ultimately led to the approval of the FPL BuildSmart program. Under the program as approved, FPL would inspect qualifying new single family detached homes to verify installations of conservation measures and rate the new homes for energy efficiency; thereby, creating an

award system to recognize achievement in energy efficiency at levels of 10%, 20% and 30% beyond the Florida Energy Code "standard" home.

B. In Order No. PSC-04-1045-PAA-EG, the Commission recognized FPL's desire to modify its BuildSmart program to offer two certification tracks: a "flexible measure approach" and a "prescriptive approach including measures relating to HVAC, ductwork and insulation." The Commission recognized that "[e]nergy star certification is not available under the prescriptive approach"; that is, the national standard for an energy efficient home would not be met. In recent discussions with FPL, the Petitioners discovered that FPL believes its revised "BuildSmart" program, if approved, will shift to the "prescriptive" approach. This shift will be further exacerbated by FPL insisting on what it now considers a "BERS" rating, paid by the builder or homeowner, for its flexible alternative and to qualify the home for EnergyStar® status.

C. In Order No. PSC-05-0162-PAA-EG, the Commission proposed approving FPL's 2005 Demand-Side Management Plan, including approval for cost-recovery and authorization for administrative approval of program participation standards.

D. FPL has consistently attempted to characterize Petitioner's protests as merely a protection of "economic interests" and not within the purview of the Commission's regulatory responsibility. Although clearly "economic interests" are at stake, as they are in virtually every other forum, the Petitioners, as ratepayers and interested citizens, are also vitally interested in gaining the maximum energy efficiency and fuel effectiveness available to Floridians. In fact, they have dedicated most of their productive lives to that pursuit.

E. Petitioner files the following answer to the specific paragraphs contained in FPL's Motion to Dismiss filed March 22, 2005:

1. FPL asserts obviously that its DSM program meets the Commission's "three-prong test for evaluating conservation programs." The Commission evaluates these conservation programs on the following criteria:

- whether the program advances the policy objectives of Rule 25-17.001, Florida Administrative Code, and Sections 366.80 through 366.85, Florida Statutes, also known as the "Florida Energy Efficiency and Conservation Act" (FEECA);
- whether the program is directly monitorable and yields measurable results; and
- whether the program is cost-effective.

The Petitioners have consistently held that FPL has failed to meet these three tests. In fact, if given the chance to prove its point, the Petitioners will show that at least two of its residential programs, BuildSmart and Residential Conservation Service, fail to meet any of the three criteria under the proposed program designs of FPL.

2. Although the Commission did recognize the protest of the BuildSmart program modification approval, it indicated that it would automatically include the program in FPL's DSM Plan and, without further hearing, approve cost recovery and delegate authority to set program performance (participation) standards. This would be true whether or not a hearing was held by the Commission upon the points raised in the initial protest. As far as FPL's insinuations that Petitioners have taken a "third (or even fourth) bite at the apple," Petitioners point out that it has yet to be given a

hearing on the merits of its contentions that not only do FPL's proposed programs fail the Commission's criteria but also they have never maximized the potential for energy efficiency in residential building practices, they have overcharged ratepayers, they have damaged private market efforts, and they have failed to meet the market penetration that many other programs have offered throughout the U.S. and even within the State of Florida.

3. In short, the Commission has not yet "found" any of the items referred to in the FPL allegations and, if given the chance, the Petitioners will prove the merits of its protests.

4. Again, FPL argues a point it has made repeatedly in an attempt to avoid discussing the issues on their merits.

5. As FPL so aptly points out in its motion to dismiss, the Commission has made a number of decisions over the 20-year life of FEECA. Some of these decisions have led to unintended consequences that, when not corrected by Commission action, violate the public purpose and spirit of FEECA. Petitioners urge the Commission to look at the interaction of two of FPL's twenty demand side management programs and evaluate the cost effectiveness of synergism between new and existing residential construction programs. FPL carefully points out that it "has shown 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." Petitioners will show that cost effectiveness and program performance for the two programs it has protested do not meet Commission standards, nor any meaningful public scrutiny.

6. The Petitioners, which include residential and commercial ratepayers of FPL, have filed only two protests. FPL fails to note that the Petitioners also state in their protest that:

> *persons within the utility's service areas will be unduly and/or unreasonably advantaged and/or subjected to undue and/or unreasonable prejudice or disadvantage and that residential ratepayers are being unduly charged for expenses of programs that fail, as proposed, to meet the purpose and intent of the relevant Florida statutes and agency rules.*

7. As the responses to FPL's points below show, along with Petitioner's Protest, Petitioners have standing to raise the issues they have presented, have demonstrated injuries of sufficient immediacy to entitle them not only to a section 120.57 hearing but also to remedies and relief that is within the power of the Commission to grant.

8. A pleading may also be amended pursuant to Rule 28-106.201 (4), F.A.C. if necessary to assure that all elements are properly alleged.

9. FPL has consistently alleged that Petitioners' Protest of its action is merely pursuing their "economic interests" as a competing service provider. Although it certainly is an aspect of this case, FPL is allowed to use a governmental-mandated cost recovery mechanism to shield it from any losses, it is allows to advertise and provide "free services," and also allowed to subsidize its ventures into what otherwise would be a competitive marketplace. FPL has consistently ignored the very real injury to its ratepayers, as well as the economic marketplace in its territory, and ignored the effects that its ill-conceived DSM program may cause when it uses the power of the state to collect from its ratepayers recovery for millions of dollars in costs. It would be very

different if FPL placed such programs in their own profit center and proved to its shareholders the values they claim the programs grant.

10. The injury to Petitioners is very real, direct and immediate.

11. The programs, if approved, will result in an immediate cost recovery for FPL from its ratepayers and certainly will 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 or profession. The tangible and immediate injury to the Petitioners is not vague and uncertain but is definitely real.

12. Although FPL's BuildSmart program passes the Commission's Rate Impact Measure (RIM) cost-effectiveness test that indicates, as FPL correctly points out, that the DSM measure would "not result in increased rates" and improves the position of FPL in its primary delivery of electricity services, it does impact current residential customers because they are forced to subsidize the costs of the program. The conversations with Petitioners were part of an attempted settlement negotiation initiated by FPL and did not in any way imply that Petitioners were proposing conditions that would cause the program to fail the RIM test, or any other cost effectiveness test approved by the Commission. The Petitioners merely pointed out to FPL representatives that different program constructs could result in more energy efficiency, greater demand savings, lower cost and better monitoring. In fact, the Petitioners have consistently pointed out that if FPL would only charge the participating customers for its rating service (which provides not only a service to the customer but also a verified performance monitor for the program) program costs would go down; performance go

up; and cost and program effectiveness would greatly gain. Gainesville Regional Utilities has adopted a similar approach and has gained the greatest penetration of new energy star homes in Florida. Again, FPL continues to attempt to incorrectly characterize the Petitioners as representing a particular economic interest and, by their actions, not having the interest and well-being of the general public in mind.

13. As part of its continuing effort to mischaracterize the Petitioner's positions as relating solely to "their economic interests," FPL goes to great length to cite various cases. FPL totally ignores the fact that they are being subsidized, through mandated cost recovery, for their ventures into markets for energy services heretofore unregulated. Their subsidy clearly allows them to price competitors out of the market while receiving support, through cost recovery, from those same competitors. The Commission has clear authority restrict or disapprove cost recovery for programs that "unnecessarily provides advantage to certain persons (including FPL) and greatly damages non-monopolistic public and private sector efforts to provide competitive services..." The Commission not only has clear authority but in fact has a duty to prevent such program designs.

14. The Commission has not decided this issue before. It indicated solely that a prior complaint initiated by the National Energy Raters Association failed for lack of standing. The Commission clearly reached no other conclusions in that case. [get some cites]

15. The Petitioners should be able to challenge the proposed cost-effectiveness test results provided by FPL as a disputed material fact.

16. The Commission has not yet determined that the FPL programs have satisfied its three-pronged test used to evaluate conservation programs. This protest is

about whether or not FPL has met the standards imposed by statute, rule and Commission policy.

17. FPL correctly points out that the Commission has the power to disapprove a plan and further points out the process to be followed in the event of such disapproval. The Petitioner's requested relief of denying the plan is consistent with the Commission's rules and the statutes under which it operates.

18. FPL incorrectly states that Petitioners have not alleged that Rule 25-17.003, F.A.C., is not being followed and is a material fact in dispute. These issues can certainly be clarified by amendment or through the issue identification phase of the hearing process. See Protest ¶E.2.

19. The "Florida Building Energy Efficiency Rating Act" provides for a statewide uniform building energy-efficiency rating system which applies to all public, commercial, and residential buildings in the state. The act further provides that "[a]ll ratings shall be determined using tools and procedures adopted by the department by rule in accordance with chapter 120 and shall be certified by the rater as accurate and correct and in compliance with procedures adopted by the department by rule in accordance with chapter 120." §553.998 It also defines a rating by the following criteria:

> **553.995 Energy-efficiency ratings for buildings.**— *(1) The energy-efficiency rating system shall at a minimum: (a) Provide a uniform rating scale of the efficiency of buildings based on annual energy usage; (b) Take into account local climate conditions, construction practices, and building use[; and] (c) Be compatible with standard federal rating systems and state building codes and standards, where applicable, and shall satisfy the requirements of s. 553.9085 with respect to residential buildings and s. 255.256 with respect to state buildings.*
>
> *(2) The energy-efficiency rating system adopted by the department shall provide a means of analyzing and comparing the relative energy efficiency of buildings upon the sale of new or existing residential, public, or commercial buildings.*

FPL incorrectly states that in meeting its monitoring requirements and qualifying its residences pursuant to its BuildSmart program that it does not perform the same functions as a rating system and that it complies with the Act to the extent applicable. This is clearly a disputed material fact and affects the application of Rule 25-17.003, F.A.C., as well. In fact, the FPL could dramatically improve not only its new construction program (BuildSmart) but also its existing home program, Residential Conservation Services, by adopting a mechanism to use the Florida Rating System extensively and requiring participants to pay the true cost which would improve both the cost and performance effectiveness of both programs.

20. FPL also incorrectly states that Petitioners have not alleged that Rule 25-17.003, F.A.C., is not being followed and is a material fact in dispute. In fact, the extent to which they are following and collecting their tariff fees is a material fact in dispute. See Protest ¶E.2.

21. In sum, FPL is getting ahead of the process when it states that "there is no allegation that FPL has not implemented its approved DSM program or is not substantially in compliance with its approved plan." Its flawed plan has not been approved and fails to meet the Commission's criteria. The Commission review is not limited solely to cost-effectiveness and meeting Commission-approved DSM goals. FPL even states earlier in its motion that the plan and programs included in the plan must meet the Commission's "three-prong test for evaluating conservation programs."

CONCLUSION

22. In summary, Petitioners have met all elements required for filing a Protest on FPL's proposed BuildSmart and Residential Conservation Services programs. 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 lack of cost effectiveness for the programs, the failure to develop synergism between the two programs involving consumer information and action, the lack of measurable performance monitoring where easily gained, the granting of undue or unreasonable preferences granted by the programs as proposed 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 two programs as proposed by FPL. Although the Commission does exercise 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 initially proposed by the utilities 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 29th day of March, 2005.

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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 29th day of March, 2005, to the following:

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