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ORIGINAL
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August 25, 1995

Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-0850

RE: Docket No. 941170-EG

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen (15) copies of Florida Power & Light Company's Motion in Opposition to Petition for Formal Proceeding of Peoples Gas System, Inc. and Memorandum of Law Supporting Florida Power & Light Company's Motion in Opposition to Peoples' Petition for Formal Proceeding in Docket No. 941170-EG.

Very truly yours,

Charles A. Guyton

Charles A. Guyton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Approval of Demand-Side Management Plan by Florida Power & Light Company	**Docket No. 941170 - EG** **Filed: August 25, 1995**

MEMORANDUM OF LAW SUPPORTING FLORIDA POWER & LIGHT COMPANY'S MOTION IN OPPOSITION TO PEOPLES' PETITION FOR FORMAL PROCEEDING

Under the Administrative Procedures Act, specifically Section 120.57(1)(b)1, Florida Statutes (1993), the Commission has discretion whether to grant or deny a request for a Section 120.57(1) request for hearing. Peoples has filed a request for hearing in the form required by the Commission's procedural rules; it has filed a petition on proposed agency action.[1] Peoples' petition on proposed agency action should be denied or dismissed because it (1) fails to allege facts sufficient to demonstrate standing, as required by Commission rules, (2) attempts to put in controversy factual and policy matters previously decided by the Commission, such efforts being barred by the doctrines of collateral estoppel and administrative finality, (3) is premised upon a legal theory that misreads and misconstrues the sentence in Section 366.81, Florida Statutes regarding rate discrimination, and (4) advances internally inconsistent interpretations of the Florida Energy Efficiency Conservation Act ("FEECA"). Each of these deficiencies is addressed in the following discussion.

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[1] Rule 25-22.029 Point of Entry Into Proposed Agency Action Proceedings, provides in subsection (4) that, "[o]ne whose substantial interests may or will br affected by the Commission's proposed action may file a petition for a § 120.57 hearing, in the form provided by Rule 25-22.036." Rule 25-22.036, in turn, applies to all § 120.57 proceedings before the Commission (subsection (1)), and requires the initial pleading where the Commission has issued notice of proposed agency action to be entitled "Petition on Proposed Agency Action" (subsection (2)). Subsection (7) of Rule 25-22.036 addresses the form and content of initial pleadings other than notices and orders, including petitions on proposed agency action.

I.

INTRODUCTION

The consideration of Peoples' protest of FPL's CILC program should be placed in context. FPL is seeking, as part of its proposed DSM Plan, modification of its CILC program. The modification affects terms and conditions other than the incentive provided customers. FPL has offered CILC as an approved conservation offering since 1987, when a trial CILC program was approved by the Commission. Order No. 18259 (10/7/87). Since the initial offering of CILC as a conservation offering in 1987, the Commission has considered on at least three separate occasions (a) whether CILC advanced the goals of FEECA, and (b) whether it was cost-effective. The Commission has repeatedly found CILC to be a cost-effective conservation program advancing the goals of FEECA and approved the program for ECCR cost recovery.[2]

The contribution of CILC as a conservation measure on FPL's system has been immense. CILC provided 343.1 MW of available load control through June 1995, more than enough to avoid an entire power plant on FPL's system.

In the face of this proven, well-established, cost-effective conservation offering, Peoples, a competitive energy provider who (a) has its acknowledged load building programs approved under FEECA, (b) has no interest in protecting FPL's customers, and (c) failed to convince the Commission in the goals docket either that gas measures were cost-effective for FPL or that CILC was not conservation, alleges that CILC is not conservation and the continued offering of CILC is discriminatory.

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[2] Order No. 22747 (3/28/90); Order No. 23560 (10/2/90); Order No. 23709 (10/31/90); Order No. PSC-92-0687-FOF-EI (7/21/92).

Peoples' totally transparent attempt to protect its economic interests in selling more gas should be strongly rejected. Peoples has not alleged an actual or immediate injury to Peoples, merely a speculative, potential competitive economic effect, and such a competitive economic effect is not protected under FEECA. In fact, promoting natural gas sales is inconsistent with FEECA. Peoples was given an opportunity in the goals docket to demonstrate (1) that gas measures are cost-effective DSM for FPL, and (2) that CILC is not conservation. It failed to make such a case, and these issues should not be retried. Peoples cannot demonstrate it has standing to represent its customers, much less FPL's, yet it attempts to rely on a statute prohibiting discrimination against customers. What Peoples seeks, plain and simple, is to restrict the choice of its customers and sell more gas by keeping CILC from continuing to be an alternative available to its customers. This misuse of FEECA should not be indulged.

II.

PEOPLES' PETITION MUST DEMONSTRATE STANDING

Under Rule 25-22.036(7)(a)2. all initial pleadings, including petitions on proposed agency action, must include "an explanation of how his or her substantial interests will be or are affected by the Commission determination." The Commission may deny a petition on proposed agency action "if it does not adequately state a substantial interest in the Commission determination...." Rule 25-22.036(9)(b)1.

To have standing to participate in a Section 120.57 proceeding on the basis that the person's substantial interests will be affected, the person must show: "1) that he will suffer an injury in fact of sufficient immediacy to entitle him to a Section 120.57 hearing; and 2) that his injury must be of

the type or nature the proceeding is designed to protect." Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), rev. den. 415 So.2d 1359, 1361 (Fla. 1982). "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Id. Both requirements must be satisfied for a person to successfully demonstrate a substantial interest that will be affected by the determination in the proceeding. Id. Case law in Florida is fairly well developed regarding what it takes to satisfy each of these requirements.[3] FPL has previously summarized this case law in an earlier memorandum supporting a motion opposing another Peoples request for hearing and will not restate it here.

III.

PEOPLES' ALLEGED INTERESTS DO NOT PASS THE AGRICO TESTS

Peoples' petition sets forth in paragraphs 7 through 10 its allegations of substantial interests that will be affected by the Commission's proposed agency action.[4] However, before examining each allegedly affected and allegedly substantial interest, it should be noted that there is a common deficiency among these alleged interests. Nowhere in the petition has Peoples alleged

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[3] Any suggestion that the action in this case is quasi-legislative and, therefore, need not follow the Commission's rules, the Administrative Procedures Act, and the case law regarding § 120.57 proceedings should be rejected out of hand. The Commission has followed its rules regarding adjudicatory hearings by making this a PAA docket and issuing a PAA order. A Section 120.57 hearing has been requested. The statutes, rules and cases addressing Section 120.57 hearings are clearly applicable and must be followed.

[4] Actually, paragraph 7 does not address a substantial interest of Peoples; it states Peoples has already been allowed to intervene. Why that ostensible intervention is of no force and effect is addressed at pages 15 through 18 of this memorandum. Thus, this discussion will be limited to the allegations of paragraphs 8 through 10.

any **injury** as a result of the Commission's potential **determination in this case**. This is a fatal deficiency, for the Agrico test requires the allegation of **injury**. **The fact that Peoples is interested** in how the Commission acts in this proceeding is not a **basis for standing**. **The following discussion** from Society of Ophthalmology v. State Board of Optometry, **532 So.2d 1279 (Fla. 1st DCA 1988)**, rev. den., 542 So.2d 1333 (Fla. 1989) **addresses the importance of a party such as Peoples alleging** an injury rather than a mere interest:

> **We initially observe that not everyone having an interest in the outcome of a particular dispute over an agency's interpretation of law submitted to its charge, or the agency's application of that law in determining the rights and interests of members of the government or the public, is entitled to participate as a party in an administrative proceeding to resolve the dispute. Were that not so, each interested citizen could, merely by expressing an interest, participate in the agency's effort to govern,** a result that would unquestionably impede the ability of the agency to function efficiently and inevitably cause an increase in the number of litigated disputes well above the number that administrative and appellate judges are capable of handling. Therefore, the legislature must define and the courts must enforce certain limits on the public's right to participate in administrative proceedings. The concept of standing is nothing more than a selective method for restricting access to the adjudicative process, whether it be administrative or purely judicial, by limiting the proceeding to **actual disputes between persons whose rights and interests subject to protection are immediately and substantially affected.**

532 So.2d at 1284 (emphasis added). By failing to allege any injury in its petition[5], Peoples has failed the Agrico standing test.

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[5] In determining standing, the Commission is limited to the allegations of the pleading. Village Park, 506 So.2d at 433. Peoples has to plead its injuries, not supplement them in a response to a motion in opposition. As noted in the Society of Ophthalmology case, the absence of specific allegations of necessary injuries in a petition is fatal. 532 So.2d at 1286.

A. Peoples' Provision of Conservation

Peoples' first allegedly affected substantial interest is stated in paragraphs 8 and 9:

> 8. Peoples presently provides energy conservation advice, support, and services through ten energy conservation programs that comprise Peoples' Commission-approved Energy Conservation Plan. These programs provide significant energy conservation benefits via the efficient use of natural gas to displace electric generating capacity and energy.
>
> 9. The instant docket involves the review and approval of a conservation plan and programs by which FPL will be expected to achieve its established goals. Many of these proposed programs, including the CILC program, would, if implemented, affect Peoples' conservation programs by providing incentive payments, bill credits, and other inducements to customers to select electric end-use measures, with the practical effect of favoring such electric measures over natural gas appliances that serve the same end use applications. For example, electric "conservation" measures that provide incentives to commercial and industrial customers to use only electric water heating and space conditioning technologies will reduce the cost to such customers of using electric technologies and will thereby induce some of those customers to select electric end use equipment over natural gas equipment, including those for which Peoples provides incentives, advice, and support via its Commission-approved conservation plan and programs. Such electric measures, including FPL's CILC program, will conflict with and undermine Peoples' approved energy conservation programs by inappropriately restricting and inhibiting customer choice of more efficient gas applications and technologies. Thus, the approval of a conservation plan and programs, and the CILC program in particular, for FPL will directly affect the substantial interests of Peoples and its general body of ratepayers.

Applying the Agrico test to this allegation, one must determine if Peoples has shown 1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and 2) that Peoples' substantial injury is of the type or nature which the proceeding is designed to protect. A common problem in applying both aspects of the Agrico test is that Peoples' allegation of facts is so summary and so conclusory that the Commission cannot discern from Peoples' petition

if FPL's CILC program even offers incentives or other inducements for electric measures that have a comparable gas measure covered by Peoples' programs.

Before applying the Agrico test to this allegation of interest, it is important to examine just what interest is being alleged. Peoples states that approval of many of FPL's proposed programs, including CILC, would affect Peoples' programs by providing "inducements to customers to select electric end-use measures, with the practical effect of favoring such electric measures over natural gas appliances that serve the same end-use applications." As an example, Peoples refers to electric programs that provide incentives for residential water and space heating and alleges that such programs "will reduce the cost to such customers of using electric appliances and will thereby induce some of those customers to select electric end-use equipment over natural gas equipment...." It then concludes that approval of the electric DSM plans "will directly affect the substantial interest of Peoples and its general body of ratepayers."

This is a thinly masqueraded allegation of competitive economic interest. Peoples' interest in implementing its acknowledged load building "conservation" plan is its economic interest in retaining or adding customers to its system. Through its approved "conservation" programs, Peoples sells more gas. Reduced to its basics, this allegation is that "if you approve electric utility DSM programs, customers who might otherwise choose gas might choose electricity, with the effect on Peoples being reduced growth of gas sales." Peoples has no other interest in implementing its "conservation" programs. It has no numeric goals it must achieve. It does not face a penalty for failure to achieve a conservation goal. It does not benefit from deferred electrical generating capacity. Its programs are not designed to reduce natural gas consumption; they are designed to increase gas sales. Peoples' seemingly lofty attempt to protect its implementation of its conservation

plan is not an attempt to continue natural gas conservation; it is a transparent attempt to preserve and increase its gas sales - a purely competitive economic interest.

1. No Immediate Injury In Fact

Regardless of whether FPL's CILC modification is approved in this proceeding, Peoples' conservation plan will continue to be approved, and Peoples will continue to offer conservation pursuant to it. This proceeding and the approval of FPL's CILC modification in no way restricts Peoples from continuing its "conservation" offerings or its alleged conservation benefits. Any impact of approving FPL's CILC modification on Peoples' success in administering its approved conservation plan is indirect and speculative. There is no direct impact on Peoples' programs, such as changing the terms and conditions of the programs, or on Peoples' administration of those programs; Peoples will have total discretion to continue to offer the programs as it has or change its administration within the scope of the existing program descriptions. Remote, speculative and conjectural injuries do not pass the "injury in fact" requirement of Agrico. Village Park Mobile Home Ass'n v. Dept. of Business Regulation, 506 So.2d 426, 430, 433 (Fla. 1st DCA 1987), rev. den., 513 So.2d 1063 (Fla. 1987); International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Commission, 561 So.2d 1224, 1226 (Fla. 3d DCA 1990). Here, as in Village Park, any potential impact on Peoples' programs is not from approval of FPL's CILC modification, it will be (if at all) from the implementation of the program modification, and even then it will be contingent upon the intervening future actions of third parties, customers, as they exercise their choice among alternative efficiency options. Speculative injuries contingent upon intervening actions of third parties do not satisfy the "injury in fact" test of Agrico. Boca Raton Mausoleum v. Department of Banking, 511 So.2d 1060 (Fla 1st DCA 1987), discussing Village Park.

The closest Peoples comes to an allegation of injury, although it is neither immediate nor actual and is dependent upon the actions of intervening third parties (customers), is its allegations that its programs might be undermined by restricting and inhibiting customer choice. This allegation needs to be carefully considered.

First, it is deficient because it does not identify any Peoples approved conservation program that would be affected; one cannot tell from Peoples' petition if there are any Peoples' programs that offer gas end uses that are comparable to the end uses subject to control under CILC. Failure to allege facts sufficient to develop an interest is fatal. Society of Ophthalmology, 532 So.2d at 1286.

Second, it is deficient because it fails to acknowledge that FPL's CILC program is a continuation of an existing program with the incentives staying the same. Keeping the CILC incentive the same will not "reduce the cost" to customers, making Peoples' alternative programs, if there are any, less attractive.

Third, the allegation defies logic on its face. If an FPL program offers an alternative to Peoples' plan, as suggested but not shown, this increases customer choice rather than restricting or inhibiting it.

Fourth, the allegation is remote, speculative, and conjectural, contingent upon the intervening exercise of judgement by customers. Unlike electric utilities, Peoples has no numeric goals to meet and does not face penalties if it fails to meet a goal. So, even if approval of CILC induced a customer not to employ a gas end use, the effect (not injury) on Peoples is that it would sell less gas than it would have as a result of the customer exercising a choice. There is no actual injury which Peoples has sustained to its approved conservation plan or any immediate danger of Peoples' plan suffering some direct injury; consequently, this alleged interest fails the "injury in fact" prong of

Agrico. Village Park, 506 So.2d at 433. At worst, approval of CILC merely maintains the status quo rather than injuring Peoples.

Finally, this allegation of interest is deficient to the extent it attempts to raise the interest of Peoples' general body of ratepayers. Peoples has no authority to act on behalf of its ratepayers; Peoples has not included allegations showing it has associational standing to represent its ratepayers (FPL does not concede that such allegations could be made to support standing).[6] Peoples' attempt to forestall electric DSM alternatives available to Peoples' ratepayers is actually inconsistent with the interests of those ratepayers, who would still have the Peoples' alternative but would lose the choice offered by FPL.

2. No Protected Interest

Turning to the second aspect of the Agrico standing test, whether the alleged interest falls within the zone of interest protected by the proceeding, this proceeding is not intended to protect Peoples' conservation plan and offerings; this proceeding is unrelated to Peoples' conservation offerings. This proceeding is pursuant to **Rule 25-17.0021 Goals for Electric Utilities**. That rule, as indicated by its title, is limited to electric utilities; it does not apply to gas utilities. The rule states, in pertinent part, that "[W]ithin 90 days of a final order establishing or modifying goals, or such longer period as approved by the Commission, each utility shall submit for Commission

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[6] The only cases recognizing that an entity may represent others in Florida administrative proceedings involve associations. See, Florida Home Builders Assoc. v. Dept. Of Labor and Employment Security, 412 So.2d 351 (Fla. 1982); Farmworker Rights Ass'n. v. Dept. Of Health and Rehabilitative Services, 417 So.2d 753 (Fla. 1st DCA 1982). To demonstrate associational standing, an organization must show (1) a substantial number of its members are affected by the agency action, (2) the subject matter of the agency action is within the association's general scope of interest, and (3) the relief requested is of the type appropriate for a trade association to receive on behalf of its members. Id. Peoples cannot meet these requirements.

approval a demand side management plan designed to meet the utility's approved goals." The purpose of this proceeding is solely to consider approval of FPL's DSM Plan submitted to achieve the goals established by the Commission in the recent goals proceeding. Peoples' interest in its continued conservation offerings is not an interest this proceeding is designed to protect. Peoples' alleged interest in its continued offering of conservation is irrelevant to FPL's DSM Plan approval proceeding, and an irrelevant allegation will not support standing. International Jai-Alai Players, 561 So.2d at 1226. Thus, this Peoples' allegation also fails the second prong of the Agrico standing test.[7]

Peoples' real interest is simply a competitive economic interest masquerading as implementation of a conservation plan. Adverse competitive economic interests do not pass the "zone of interest" test unless there is clear statutory authority indicating that such interests are to be protected by the proceeding. Agrico, 406 So.2d at 481; Shared Services, 426 So.2d at 59; Society of Ophthalmology, 532 So.2d at 1279-80; International Jai-Alai Players, 561 So.2d at 1226; City

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[7] Undoubtedly, Peoples will argue in rebuttal that this proceeding is also pursuant to FEECA and that under FEECA Peoples' offering of conservation is relevant and intended to be protected. There are two problems with such an argument. First, it ignores that Rule 25-17.0021 limits the scope of this proceeding to electric utility DSM plans designed to meet Commission established goals. Second, it ignores that the Commission has established different processes for developing gas and electric conservation programs. Electric utilities have been given a very structured approach set out by rule for establishing goals and filing complying plans. See, Rule 25-17.0021. On the other hand, gas utilities have no comparable rule, no numerical goals, and no cost-effectiveness test established by Commission rule. They have been allowed to submit programs piecemeal. It is through this distinct, clearly different, process that gas utilities have been allowed to protect their interests in offering conservation program. Given that the Commission has implemented FEECA using two different processes for approving gas and electric conservation programs, it is inconsistent with the Commission's prior application of FEECA to allow gas utilities to attempt to protect their interests in electric utility plan compliance proceedings. The proper place for gas utilities to protect their program offerings is in their conservation plan proceedings.

of Sunrise, 615 So.2d at 747. The purpose of this proceeding is not to protect Peoples' economic interest in selling more gas.

This is a proceeding under FEECA and a rule applicable only to electric utilities to approve a cost-effective electric DSM plan designed to implement specific goals. None of the measures that were used to develop the goals were gas measures, and no goal of increasing gas sales was approved. The purposes of FEECA are myriad, as set forth in detail in Section 366.81, Florida Statutes (1993). Conspicuously absent from FEECA's purposes is the promotion of sales by natural gas utilities. In fact, FEECA intends the conservation of natural gas by empowering the Commission to establish goals and approve plans related to the conservation of natural gas usage. Id. This proceeding is not the forum intended to protect Peoples' speculative economic injury.

3. FPL Will Demand Strict Proof And Contest This Allegation

If this Peoples' allegation were deemed sufficient to demonstrate standing, then Peoples would have the burden in the case of proving up its allegation. See, State Department of Health and Rehabilitative Services v. Alice, 367 So.2d 1045, 1052 (Fla. 1st DCA 1979) ("the burden is upon the challenger, when standing is resisted, to prove standing."); Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So.2d 186, 190 (Fla. 1st DCA 1992) (facts alleged, "if determined to be true," demonstrate standing.) Peoples would have to prove not only that it offers "conservation" programs, but also its other allegation that its, "programs provide significant energy conservation benefits via the efficient use of natural gas to displace electric generating capacity and energy." While FPL steadfastly maintains that this allegation is insufficient to constitute standing in this proceeding, if it is determined otherwise, FPL will contest Peoples' proof of this allegation at trial.

B. Peoples Load Building Claim

Peoples' second allegation of interest is:

> 10. The Commission Staff correctly noted in their May 4, 1995 recommendation and in subsequent correspondence that FPL's commercial-industrial load control program (as well as the comparable programs offered or proposed by Florida Power Corporation and Tampa Electric Company) may increase both peak electric demands and electric energy consumption and thus may be more correctly classified as load building or load retention programs. The Commission directed the Staff to conduct a workshop on these issues on September 5, 1995; this workshop was again noted in Order No. PSC-95-0865-FOF-EG. Peoples understands that this workshop has been cancelled since that Order was issued; even had it not been cancelled, such an undocketed workshop would not be sufficient to protect Peoples' interests: unless Peoples requests a formal proceeding on FPL's CILC program, by operation of law, Order No. PSC-95-0865-FOF-EG will become final on August 8, 1995, and Peoples will be left without a point of entry to challenge the approval of FPL's CILC program.

Once again, under the Agrico test one must determine if Peoples has shown through this allegation both (1) that Peoples will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and (2) that Peoples' substantial injury is of the type or nature which the proceeding is designed to protect.

1. No Immediate Injury in Fact

Peoples makes no attempt to outline the injury it has or would sustain if CILC were a load building or load retention program. Regardless of whether there is a September 5th workshop, Peoples has to plead either (1) actual injury at the time of its petition, or (2) immediate danger of direct injury. Village Park, 506 So.2d at 433. Paragraph 10 of Peoples' petition does neither. It is left to the Commission's imagination as to how a load building or load retention program would injure Peoples. This is wholly and totally deficient.

2. No Zone of Interest

Given Peoples' failure in paragraph 10 of its petition to allege an injury if it were shown CILC was a load building or load retention program, it must also be concluded that Peoples has failed to allege an injury that falls within the protected zone of interest. Rather than acknowledge that it is seeking to protect its economic interest in selling more gas, an interest inconsistent with FEECA rather than protected by it, Peoples completely fails in paragraph 10 of its petition to allege an injury or that its injury is one protected by the underlying statute. Absent an immediate injury falling within the protected "zone of interest," Peoples is not entitled to "a point of entry to challenge the approval of FPL's CILC program."

C. The Commission Needs To Apply Standing Decisions Fairly

As the court noted in the Society of Ophthalmology case, standing is a selective method for restricting access to the adjudicative process. For a number of years the Commission has interpreted administrative standing broadly allowing almost universal intervention in utility proceedings. FPL has sought in a number of proceedings to limit interventions under the authorities cited earlier. The Commission has consistently declined.

Recently, however, the Commission has demonstrated renewed interest in the well developed body of case law on administrative standing. In the decision of In Re: Peoples Gas System, Inc. Petition for Approval of Load Profile Enhancement Rider, 95 FISC. 3: 352 (1995), the Commission denied intervention for lack of standing when an electric utility attempted to protect its competitive economic interests by seeking to intervene in a gas utility proceeding before the Commission. This was an important departure from prior Commission decisions on standing, and it should be seriously considered in this case.

FPL relies upon the same authority in seeking denial of Peoples' petition on proposed agency action in this case. Here, Peoples advances interests far more speculative than the interests alleged by TECO in that proceeding. Here, Peoples, like TECO in that proceeding, advances a competitive economic interest (no injury) that is not intended to be protected in this proceeding.

The Commission has the opportunity to adopt an evenhanded approach to standing when competing gas and electric companies attempt to participate in each other's proceedings. Alternatively, the Commission can adopt an approach to standing that makes the doctrine a sword and a shield to protect the gas utility industry at the expense of the electric utility industry. The proper choice is clear. Anything less than an evenhanded approach to standing would be a denial of due process and equal protection of law. Peoples' petition on proposed agency action should be denied for lack of standing.

D. Peoples Does Not Yet Have Party Status

Peoples will undoubtedly argue in response to FPL's challenge of their standing that the Commission has already determined they have standing and made them a party to this proceeding by virtue of entering Order No. PSC-94-1574-CO-EG. Indeed, Peoples notes the entry of that order in its petition. There are two crucial problems with such an assertion. First, at the time Peoples was ostensibly allowed to intervene, there was not yet a formal proceeding into which it could intervene, so the purported intervention is a nullity. Second, the Commission's rules regarding requests for hearings through petitions on proposed agency action still require "an explanation of how his or her substantial interests will be or are affected by the Commission determination" and permit the Commission to "[d]eny the petition if it does not adequately state a substantial interest in the Commission determination...." Rule 25-22.036 (7)(a) 2., (9)(b)1.

At the time Peoples sought (11/21/94) and was ostensibly granted (12/19/94) intervention, there was no formal proceeding before the Commission regarding the approval of FPL's DSM Plan. FPL did not file its petition seeking approval of its DSM Plan until January 31, 1995, after Peoples' ostensible intervention was granted. Under the Commission's procedural rules, a formal proceeding subject to a potential Section 120.57 hearing is not initiated until the filing of an "Initial Pleading." Rule 25-22.036(1),(2). An "Initial Pleading" is defined as:

> The initial pleading shall be entitled as either an application, petition, complaint, order, or notice, as set forth in subsections (3),(4),(5), and (6). Where the Commission has issued notice of proposed agency action, the initial pleading shall be entitled "Petition on Proposed Agency Action."

Rule 25-22.036(2). Prior to FPL filing its petition (initial pleading) in this proceeding, there was no formal proceeding into which Peoples could intervene; there was merely an administrative action of assigning a docket number which had not been performed by Commission order or notice. Peoples could not be made a party prior to the initiation of the formal proceeding.

A similar situation existed in Manasota-88, Inc. V. Agrico Chemical Co., 576 So.2d 781, 783 (Fla. 1st DCA 1991). There Manasota-88 attempted to intervene before the agency gave formal notice of its intended action. The reviewing court stated, "[a] party may not intervene in that type of proceeding until the DER gives formal notice of the action it intends to take regarding a pending permit application." 576 So.2d at 783. Peoples' position in this case is worse than Manasota-88's position in that case. Here Peoples attempted intervention before any request was made of the Commission to approve a Plan; it did not wait to intervene, like Manasota-88, until after a petition was filed and a proceeding was initiated.

The Commission's rules regarding the initiation of formal proceedings and point of entry for proposed agency action clearly intend for any entity protesting proposed agency action to demonstrate that its substantial interests will be affected by the proposed agency action. Rule 25-22.029 Point of Entry Into Proposed Agency Action Proceedings requires "[o]ne whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a § 120.57 hearing, in the form provided by Rule 25-22.036." Of course, Rule 25-22.036 requires such a petition to include, "an explanation of how his or her substantial interests will be or are affected by the Commission determination." Rule 25-22.036(7)(a)2. The Commission may then deny the petition on proposed agency action for failing to demonstrate a substantial interest in the Commission's determination. Rule 25-22.036(9)(b)1. Peoples was aware of the requirements of these rules when it filed its petition for proposed agency, and it attempted to comply with them; it should not now be heard to argue it does not have to demonstrate standing because of the prior intervention order.

As a policy matter, the Commission should not accord Peoples' ostensible intervention order any weight and should discourage premature attempts to intervene in proposed agency action proceedings. For instance, when Peoples sought intervention, it did not know the content of FPL's yet to be proposed plan. Therefore, each and every alleged interest regarding the potential impact of FPL's yet to be proposed plan was speculative and conjectural. There is no way that Peoples, or any entity filing before the initial pleading, could satisfy the Agrico requirement of showing an actual or immediate injury. Moreover, a party with the responsibility of filing an initial pleading, such as FPL in this case, (a) should not have to respond to intervention requests while it is preparing

its filing, (b) and cannot respond to speculative allegations of interest until it has determined just what action it will seek from the Commission.

The order ostensibly granting intervention to Peoples should not relieve Peoples of its obligation to demonstrate standing in its petition on proposed agency action. It predated the proceeding and has no force and effect. Peoples still had the obligation to plead its substantial interest, acknowledged this requirement, and then failed to meet it. Relying upon premature intervention would encourage similar conduct in the future when neither the parties nor the Commission may realistically assess whether substantial interests would be affected. Peoples' intervention order should be treated as a nullity.

IV.

MANY OF PEOPLES' ALLEGATIONS ARE BARRED BY THE DOCTRINES OF COLLATERAL ESTOPPEL AND ADMINISTRATIVE FINALITY

In its petition Peoples makes allegations and raises issues of fact that have already been addressed by the Commission. Peoples seeks to relitigate matters the Commission has resolved in the lengthy goals proceeding. These allegations should not be considered by the Commission, and cannot form the basis for a Peoples' cause of action. Peoples is barred from raising these issues by the doctrines of collateral estoppel and administrative finality.

Collateral estoppel limits litigation by determining an issue fairly and fully litigated between the parties. A decision in an earlier case estops the parties in the second case from relitigating issues common to both cases. Trucking Employees of North Jersey Welfare Fund, Inc. V. Romano, 450 So.2d 843 (Fla. 1984). The elements of collateral estoppel under Florida law are that: (1) the parties in both actions are identical; (2) the particular matter was fully and fairly litigated in the prior action;

(3) the prior decision was final; and (4) the decision was made by a court of competent jurisdiction. Mobil Oil Corp. V. Shevin, 354 So.2d 372 (Fla. 1977). Although collateral estoppel was originally developed as a judicial principle, it is applicable in administrative cases as well. See, Walley v. Florida Game & Fresh Water Fish Commission, 501 So.2d 671, 674 (Fla. 1st DCA 1987); 1 Fla Jur 2d Administrative Law 92 (1977); Brown v. Dept. Of Professional Regulation, Board of Psychological Examiners, 14 F.A.L.R. 3815 (Fla. 1st DCA 1992).

The doctrine of administrative finality has been developed in Florida largely through cases on appeal from this Commission. It was first recognized and applied in Peoples Gas System, Inc. v. Mason, 187 So.2d 325 (Fla. 1966), where the Supreme Court outlined the concept:

> [O]rders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision on such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

Peoples Gas, 187 So.2d at 339. Subsequent cases have noted exceptions for changed circumstance and extraordinary circumstances, but the doctrine has repeatedly been applied by Florida courts to the decisions of administrative agencies. See, Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979); Richter v. Florida Power Corp., 366 So.2d 798 (Fla. 2d DCA 1979); Russell v. Dept. Of Business and Professional Regulation, 645 So.2d 117 (Fla. 1st DCA 1994).

Both doctrines, collateral estoppel and administrative finality, have the effect of precluding the relitigation of issues before administrative agencies. Both doctrines should be applied to various attempts Peoples makes in its petition for formal proceedings to relitigate issues already decided by the Commission.

A. FPL's CILC Program Has Been Determined To Be Conservation That Reduces Peak Demand and Energy Consumption

Peoples attempts in paragraphs 10 and 13 of its petition to allege that FPL's CILC program is not a conservation program in that it may increase electric peak demand and electric energy consumption. This argument is inconsistent with the Commission's determination in the recent goals proceeding that FPL's load control measures constitute conservation.

In the recent goals proceeding FPL included in its proposed goals demand and energy reductions for CILC. The Commission approved goals for FPL that included peak demand and energy consumption reductions attributable to CILC.[8] In approving FPL's goals that included peak demand and energy savings attributable to CILC, the Commission determined that (1) this measure is conservation, and (2) that this measure results in reduced, not increased, peak demand and energy consumption. As intended under the doctrine of administrative finality, FPL has relied upon the Commission's determination that CILC offers a conservation measure that reduces peak demand and energy. That reliance is significant. FPL's Commercial/Industrial Load Control program constitutes 22% of FPL's conservation through the year 2003 intended to meet FPL's C/I summer demand goals set by the Commission.

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[8] In making its findings in that case, the Commission found that (a) "FPL's planning process and data are reasonable for purposes of evaluating DSM measures and establishing numeric goals," (b) "Input assumptions regarding the cost and performance of the measures were updated to reflect those specific to FPL's service territory," (c) "FPL evaluated a total of 217 measures, including the entire list of potential utility programs (UP) as directed by Order No. PSC-93-1679-PCO-EG and individual utility specific measures," (d) "in the preparation of its proposed goals, FPL adequately assessed the end-uses listed in the rule, except for natural gas substitution measures," (e) "we will set overall conservation goals for each utility based on measures that pass both the participant and RIM tests," and (f) "we accept FPL's RIM based goals for each year during the period 1994-2000." Order No. PSC-94-1313-FOF-EG at 11, 11, 20, 22 and 32, respectively.

Both FPL and Peoples actively participated in the goals docket. What constituted conservation and the appropriate amounts of conservation on FPL's system for the next ten years were fully and fairly litigated. The Commission made a final decision as to the conservation measures to be included in FPL's goals. FPL has relied upon that determination and seeks approval as a program the same CILC measure used to establish FPL's goals. All the necessary elements for the operation of collateral estoppel and administrative finality have been met. Peoples should not be allowed to relitigate whether FPL's CILC offering is conservation.

B. Peoples' Allegation That FPL's Programs Which Offer Incentives For Electric Technologies But Not Gas Technologies Are Discriminatory Is Merely An Attempt To Relitigate Whether Gas Technologies Should Be Offered

In paragraph 14 of its petition, Peoples argues that FPL's CILC program offers incentives to choose electric technologies but not to choose gas technologies. Peoples argues that this constitutes discrimination. FPL will separately address why Peoples' discrimination argument is without merit. Here FPL will address why consideration of whether gas measures should receive incentives as conservation alternatives is barred by collateral estoppel and administrative finality.

In the conservation goals proceeding, the Commission established conservation goals for FPL that included no conservation potential from any gas measure. In the goals proceeding FPL undertook, at the Commission's directive, an assessment of whether various gas measures constituted conservation measures that would cost-effectively reduce summer peak demand and energy consumption. FPL's analysis showed that none of the gas measures it analyzed passed both the Participants and RIM tests. Order No. PSC-94-1313-FOF-EG at 31. The Commission found FPL's analysis of gas measures not to be adequate. Id. at 20. To address the inadequacy of FPL's and other utilities' analyses, the Commission directed FPL and other electric utilities to engage in

research projects to develop Florida-specific data. Id. At 29, 30. The Commission's determination in the goals proceeding as to gas technologies was (1) they were not included in the conservation potential used to establish FPL's goals , and (2) Florida-specific data needs to be gathered through research projects before considering whether gas measures should be included as potential conservation measures available to FPL.

Peoples' vague allegation of discrimination purportedly arising from FPL's CILC program offering incentives for electric but not gas measures is simply an attempt to relitigate the gas issues resolved by the Commission in the goals proceeding. Apparently, Peoples is not satisfied with the Commission's determination that FPL's goals do not reflect any gas conservation potential and with the Commission's decision to have gas research conducted before the issue is addressed again. In reliance upon the goals decision, FPL has proposed programs, including CILC, that provide incentives for measures found by the Commission to be cost-effective; that does not include any gas measures. In reliance upon the goals decision, FPL has also filed a separate gas research and development plan to develop the Florida-specific data the Commission deemed necessary to further address this issue. Peoples' attempt to argue that FPL's CILC program discriminates because it does not offer incentives for gas measures is simply an attempt to relitigate issues fully and fairly litigated between FPL and Peoples. Peoples' attempt to relitigate this issue in this proceeding is barred by the doctrines of collateral estoppel and administrative finality.

V.

PEOPLES FAILS TO STATE A CAUSE OF ACTION IN ALLEGING DISCRIMINATION

The only legal authority cited by Peoples as providing a basis for relief for its allegations of discrimination is Section 366.81, Florida Statutes. The sum and substance of Peoples statement of authority are the following statements found in paragraphs 14 and 20 of Peoples' petition:

> 14. FPL's CILC program provides incentives to customers to choose electric technologies while denying comparable incentives to customers who would choose gas end use technologies that would similarly reduce electric peak demands and energy consumption. FPL's CILC program is discriminatory and therefore in violation of section 366.81, Florida Statutes.
>
> 20. Peoples is entitled to relief under the Florida Energy Efficiency and Conservation Act. Section 366.81, Florida Statutes, prohibits discrimination on the basis of customers' use of efficient technologies, such as many natural gas applications[.] Section 366.81 is to be liberally construed to promote reduction in the growth of electric energy consumption and weather-sensitive peak electric demand.

Peoples has seriously overstated and misstated the prohibition of discrimination in Section 366.81, Florida Statutes. The statute provides, in pertinent part:

> Since solutions to our energy problems are complex, the Legislature intends that the use of solar energy, renewable energy resources, highly efficient systems, cogeneration, and load-control systems be encouraged. Accordingly, in exercising its jurisdiction, the commission shall not approve any rate or rate structure which discriminates against any class of customers on account of the use of such facilities, systems, or devices. This expression of legislative intent shall not be construed to preclude experimental rates, rate structures, or programs.

As can be seen from the plain language of the statute, the prohibition of discrimination is limited to (1) approval of rates or rate structures that discriminate against (2) customers using (3) certain

specified measures, none of which are identified as gas measures. Through its brevity, Peoples glosses over the fact that this statute is not intended to provide relief for the type of conduct it alleges.

Peoples has failed to allege facts sufficient to demonstrate (a) which gas measures, if any, may fit within the term "highly efficient systems" used in Section 366.81, (b) if such gas measures are used by a class of FPL customers, (c) and that Peoples is entitled to represent such a class of FPL customers. Peoples merely makes the conclusory statement that many "gas applications" (unspecified) are "efficient technologies"(not "highly efficient"). Peoples' petition at 8. However, this allegation is deficient. Unless and until Peoples can demonstrate that (1) FPL seeks approval of a rate as part of its DSM Plan filing that (2) discriminates against a class of customers because of (3) the customers' use of gas measures that (4) qualify as a "highly efficient systems" under

Section 366.81 and (5) that Peoples is entitled to represent that class of FPL customers,[9] Peoples cannot rely upon Section 366.81 for relief.

VI.

PEOPLES' CLAIM FOR RELIEF ADVANCES INTERNALLY INCONSISTENT INTERPRETATIONS OF FEECA

In its petition Peoples alleges that FPL's CILC program may increase peak demand and energy consumption contrary to Section 366.81, Florida Statutes. Peoples' petition, ¶¶ 10 and 13. At the same time Peoples alleges its substantial interest is that its "conservation" programs, which clearly increase the use of natural gas, may be undermined by approval of FPL's CILC program. ¶ 9.

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[9] Peoples may not represent the interests of FPL's customers. In the Society of Ophthalmology case physicians attempted to demonstrate standing by arguing that their patients (customers) would suffer injury. 532 So.2d at 1282,1286. The Court denied standing on this ground for two reasons: (1) lack of allegations of facts personal to specific doctors or patients, and (2) a lack of allegation of facts that the doctors would be prevented from providing their services to patients but for the complained of agency action. 532 So.2d at 1286. Peoples' allegations suffer the same deficiencies. It has no allegation of fact that show that approval of FPL programs would discriminate against any particular customer. More importantly, Peoples has not alleged and cannot show that Peoples would be prevented from offering conservation services but for the approval of FPL's DSM Plan. Peoples has offered no authority to show it may represent its customers. There is already an entity established by statute with the responsibility to represent utility customers - the Office of Public Counsel. The only cases recognizing that an entity may represent others in Florida administrative proceedings involve associations. See, Florida Home Builders Assoc. v. Dept. Of Labor and Employment Security, 412 So.2d 351 (Fla. 1982); Farmworker Rights Ass'n. v. Dept. Of Health and Rehabilitative Services, 417 So.2d 753 (Fla. 1st DCA 1982). To demonstrate associational standing, an organization must show (1) a substantial number of its members are affected by the agency action, (2) the subject matter of the agency action is within the association's general scope of interest, and (3) the relief requested is of the type appropriate for a trade association to receive on behalf of its members. Id. Peoples cannot meet these requirements.

Both electric utility and natural gas utility conservation plans and programs are governed by the same provisions of FEECA. Section 366.81, Florida Statutes provides, in pertinent part:

> The Legislature further finds that the Florida Public Service Commission is the appropriate agency to adopt goals and approve plans related to the conservation of electric energy and natural gas usage. The Legislature directs the Commission to develop and adopt overall goals and authorizes the commission to require each utility to develop plans and implement programs for increasing energy efficiency and conservation within its service area, subject to the approval of the commission.

Peoples argues that under this statute it can have programs that increase natural gas usage but FPL cannot have programs that increase electrical usage. This inconsistency cannot be reconciled. If Peoples has a substantial interest in not having undermined its usage increasing programs approved under this statute, then it cannot maintain that any alleged usage increasing programs by FPL are contrary to the statute. Stated differently, if programs that allegedly increase electrical usage are contrary to FEECA, as Peoples maintains, then programs that increase gas usage are also contrary to FEECA, and Peoples cannot have a substantial interest protected by FEECA in having those programs preserved.

There are two ways to make Peoples' interpretation of FEECA consistent. One would be to acknowledge that programs that increase load are not per se "contrary to FEECA." Of course, this would remove Peoples' alleged cause of action regarding FPL's load control programs. The other approach would be to acknowledge that FEECA must be applied consistently to both the electric and gas industries and that no program may be approved that increases load. This, of course, would cause Peoples to no longer be able to plead it had a substantial interest in avoiding having its load building programs undermined. Either internally consistent interpretation of FEECA would defeat Peoples' request for hearing.

Respectfully submitted,

Steel Hector & Davis
215 S. Monroe St., Suite 601
Tallahassee, Florida 32301

Attorneys for Florida Power
& Light Company

By: Charles A. Guyton
Charles A. Guyton

TAL/12521

August 29, 1995

In Re: Motion in Opposition to "Petition on Proposed Agency Action" of Donnie Nolley) **Docket No. 941170 - EG**

I am writing in regards to Florida Power & Light Company's motion in opposition to the letter sent by Donnie Nolley dated June 28, 1995. I read all of the pages of the motion and would like to voice my opinion on this issue.

Mr. Nolley does not have the resources to hire a large law firm to do what you are asking, unlike the electric company. He understands solar and conserving energy. He has been selling solar for more than six years, now. He promotes all of the utility company's rebate programs: window tint, air conditioning, duct test and repair, on call box, and solar hot water. His livelihood depends on marketing and selling solar energy programs to homeowners.

As a consumer, I wonder why "Bob," the electric company's television advertisement, does not promote solar. Even though the solar industry won with the Public Service Commission a year ago, solar is not mentioned in public advertisement.

Donnie Nolley has been promoting energy conservation through Free Energy Survey. He has taken courses and training in energy auditing, even courses from the electric company. He did this so he could give fair and objective energy audits.

How can it be justifiable that solar doesn't work? How does it not fit into the energy conservation programs? Solar is a free source of energy; it is energy conservation at its cleanest and best. Once the equipment is paid for, homeowners will have hot water free of monthly electric expenses, or at least 85% free hot water.

When you talk to people at the Federal level, they will tell you that solar works. The people Mr. Nolley has talked to from the energy department recommend that you don't even use electric hot water heaters. They suggest that when it is time to replace the hot water tank, you change to solar.

All Mr. Nolley is asking is that the electric company treat the solar water heating program as equally as they treat heat recovery units. I find it hard to believe that the electric company cut the heat recovery program to $35.00 and now, with the new proposal, they want to raise the heat recovery program and cut out solar. Mr. Nolley has called the heating and air conditioning

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manufacturing companies; their engineering department revealed that once you change to a high efficient air conditioner and heat pump, the heat recovery unit does not work as efficiently.

Mr. Nolley is not as concerned that the electric company is removing solar from its rebate program; money is not the real issue. Promoting solar is the real issue. Having "Bob" talk about solar in the electric company's advertisement, having the energy auditors support solar the way they support other programs. The electric company's auditors do not mention solar as an alternative energy source. They even go so far as to discourage homeowners from using solar energy. Solar energy needs to be recognized as a viable source of energy.

To sell solar energy to a residential homeowner, you need financing, quality equipment and shipment, and you need the support and endorsement of the electric company. Solar has never gotten this endorsement.

The electric company has been adamant in trying to stop Donnie Nolley from promoting solar energy use. Mr. Nolley had to change the name of his company, originally Utilities Saver, because the electric company said that customers thought he was from the electric company. He had to change his company name to Free Energy Survey. He owns an independent company that provides free energy surveys to residential homeowners, recommending all energy conservation programs.

What the electric company has done in the northern district is sad. They have run off most of the solar hot water companies. Pool solar is the only thing sold, because they don't want to hassle with the electric company.

The Public Service Commission's decision to approve the Demand-Side Management Plan without a program promoting the use of solar energy, is telling a whole generation of individuals that solar energy does not work. We do not believe this. With the endorsement and promotion of solar energy by the electric company, solar energy use can be successful and cost-effective. The Public Service Commission is allowing the electric company's energy auditors to go out and tell the public that solar energy does not work, even after the Public Service Commission had recommended that the solar program stay.

Mr. Nolley has been a contractor on the electric company's solar hot water and window tint programs. He would receive between 60 and 100 calls per year on window tinting from homeowners who had received an energy audit by the electric company, but he never received a single phone call regarding solar hot water heating. Discussions with three other solar companies reveals that they have never received a call on solar energy use after the electric company has done an energy audit. The electric company has never recommended solar. When asked by homeowners

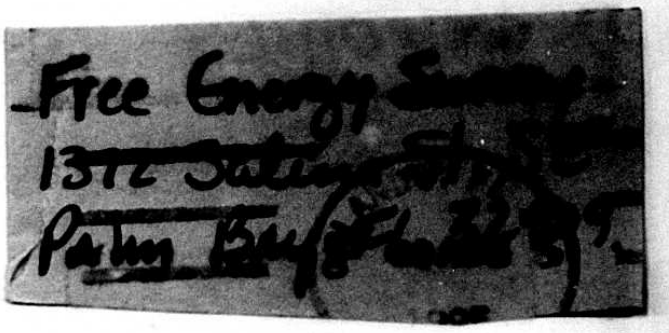
about solar hot water heating, the electric company representatives suggest that you don't use solar. The electric company has not been fair in promoting solar hot water heating and that can be proven. If a customer has an on call box, they have to call and disconnect the box before they can get solar. When customers call the electric company, they are told lies and discouraged from getting solar. Then the customers cancel their solar order.

How can we think that solar is not something we need in Florida, the Sunshine State? Other states like North Carolina and Wisconsin realize the importance of its use. They are introducing new programs to the public, promoting solar energy use. North Carolina is offering a state tax credit to convert from electric and gas to solar energy when heating one's house and hot water. We know solar works.

How can we justify increasing the rebates on other programs like heat recovery to make them look more appealing while totally negating the benefits of solar energy through non-promotion? The amount of rebate is not as important as the recommendation by the electric company. Energy auditors could leave stickers on the hot water tank suggesting that when the tank needs to be replaced the homeowner should consider solar. Promotion is as simple as the electric company saying, "Yes, solar is an energy resource that works," when homeowners inquire.

The public is very interested in energy conservation. Not everyone wants solar but a lot more people would if they were aware of it. Right now, the Florida Solar Energy Center goes around to schools trying to educate children about conserving energy and the use of solar energy. Awareness leads to Action. These children, when they grow up, will look for solar homes. Don't let the electric company teach our children that solar doesn't work. Every power company should be promoting solar energy use.

Respectfully
Rosellen Mack



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the response to FPL's Motion in Opposistion were mailed this 30th day of August, 1995 to the following:

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Gunter Building, Room 370
Tallahassee, Florida 32301

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Legal Environmental
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the response to FPL's Motion in Opposistion were mailed this 30th day of August, 1995 to the following:

Ms. Julia Johnson
PSC Commissioner
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Mr. Joe Garcia
PSC Commissioner
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Ms. Susan Clark.
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Ms. Diane Kiesling
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Ms. Colleen Kettels
Director
Florida Solar Energy Industries Assoc.
6208 W. Corporate Oaks Drive
Crystal River, Florida 34429

FREE ENERGY SURVEY

August 29,1995

I, Donnie Nolley, owner of Free Energy Survey, am interested in obtaining copies of the data presented to the Public Service Commission by Florida Power and Light in the proposal of the Demand Side Management Program. I'm concerned that all parties involved were not fully represented in the electric company data. Just last year the Public Service Commission believed that solar hot water was a valuable part of the load management program. What could have caused the Public Service Commission to reverse its decision on the effectiveness of solar hot water?

I do energy surveys in the northern district of the electric companies energy programs and I can prove that the electric company has not promoted the solar program. They have not treated this program like they treat all the other energy conservation programs. What bothers me is that if the public really knew that solar was part of the energy program there would be a demand for solar hot water. There was never a questionnaire given to all the electric companies customers asking them if their is an interest in solar. Most customers don't even know their is a program for solar hot water .

I have never hired an attorney but I feel very strong about this issue and I will continue to fight for this program to be treated fairly. I will look to the state and federal people to help and advise me on this matter if needed. I can't believe that the electric company convinced the Public Service Commission that solar is not an answer for the state of Florida.

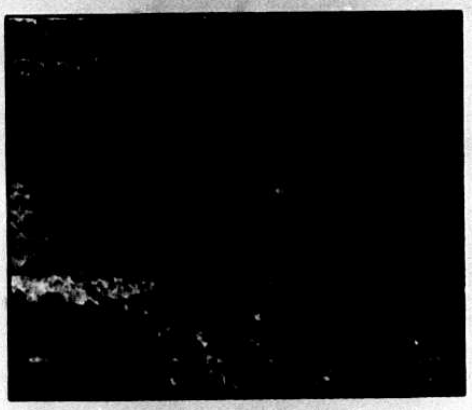
I, would like to have the opportunity to speak with the Public Service Commission about the continuation of solar hot water in the electric company's load management plan. I am concerned that the public has not been provided with enough information to express their opinion and to make an informed decision on the value of solar hot water. I look forward to receiving any information presented to the Public Service Commission that will help me understand the reason for the Public Service Commission's decision.

Thank You,

Donnie E. Nolley

Donnie Nolley
Free Energy Survey

1372 Salina St. SE - Palm Bay, Fl 32909 - 407-724-8701 - FAX - 407-725-5317



JOHN COLLINS, 8, of Cocoa Beach found a cool spot Tuesday: underwater at the Cocoa Beach Recreation Complex.

Increased demand, 5 broken generators may mean brownouts

By Kathy Reakes
FLORIDA TODAY

As 100-plus degree temperatures settled in across the state, a heat alert Tuesday only compounded problems for the state's largest power company as it asked customers to conserve power.

Highs in the upper 90s and low 100s hit 24 North Florida counties Tuesday afternoon, prompting the heat alert blanketing parts of the state, National Weather Service officials in Miami said.

The area covered by the warning stretches from the Georgia border to Flagler Beach, north of Daytona, across the state through Ocala to Suwannee on the Gulf Coast, northwest to Panacea in the Big Bend area.

Central and South Florida were expected to be hot, but not as oppressive as North Florida, thanks to sea breezes.

Melbourne's high reached 94 degrees by late Tuesday, but the heat index made it feel like it was 102, Weather Service officials said. Melbourne's average high temperature for August is 89 degrees.

Even though the state's humidity is a little bit lower than usual, the higher-than-normal heat, combined with the humidity, increases the risk of heat-related illnesses, said Joe Myers, director of the state Division of Emergency Management.

The warnings were aimed at the elderly, people with health problems, young children and people who are working or playing outdoors.

To help beat the heat locally, more than a few residents headed for Del's Freez Ice Cream shop in Melbourne.

See HEAT, Next Page

Heat wave helps fuel power crisis

HEAT, From 1A

Employee Lisa Pope, hot and a little harried from serving customers, said people had been waiting in line all day for a cool cone.

"We have been really busy," Pope said. "In fact, I can't really talk because we are so busy."

While residents licked ice cream cones and hid in air-conditioned buildings, Florida Power & Light Co. worked to keep them cool despite the loss of five of the company's 34 generating units.

To keep up with demand, FPL is asking customers to conserve energy throughout the week, spokeswoman Kathy Scott said.

Among the suggested conservation measures:

- Raise thermostat settings to 80 degrees.
- Close curtains and blinds to help insulate homes and offices from cooling loss.
- Avoid using room air conditioners; turn them off when you leave the room.
- Avoid using major appliances from noon to 7 p.m.

In addition to the appeal for conservation, the company also is implementing its load management program for participating residential and commercial customers, Scott added.

The program — On Call — allows FPL to turn off major appliances such as dishwashers, air conditioners and water heaters on a pre-arranged basis, saving customers money.

AP

LONE SURFER was among hordes who flocked to the beach in Jacksonville and other cities along Florida's coast Tuesday. They were taking advantage of enormous swells created by Hurricane Felix and escaping blistering heat that has gripped much of the state. The high temperature in Jacksonville was 100 degrees. Hurricane Felix, 1A.

If the utility still cannot meet customer demands, FPL may resort to rolling blackouts — periodic interruptions of service designed to keep up with demand, Scott said.

Repairs were being made to the five generating units out of service Tuesday. Without the units, Scott said the company was operating with one-third less power.

"We couldn't even buy power from another company because of the high temperatures across the Southeast," Scott said.

Melbourne's high of 94 seemed mild compared with parts of northern Florida, where temperatures reached 100-plus degrees.

It was the second consecutive day of record-breaking heat Tuesday in Apalachicola and Lakeland. Apalachicola set an all-time record of 103 degrees, breaking a 1932 record by 1 degree and shattering the daily record of 92 set in 1965. On Monday, a 96-degree reading in the Panhandle city broke a record set in 1943 by 3 degrees.

Lakeland's high of 100 degrees Tuesday broke a 1984 record by 3 degrees, one day after it hit 99 degrees Monday, which broke a 1933 record also by 3 degrees.

And more records were broken elsewhere in the Southeast, including 103 at Montgomery, Ala.; 101 at Birmingham, Ala.; 97 at Knoxville, Tenn., and 96 at Greenville, S.C.

Local residents hoping the heat will ease soon will be disappointed, officials with the Weather Service Office in Melbourne said.

The forecast through Saturday calls for partly cloudy skies with highs in the low to mid-90s.

The Associated Press contributed to this report.

Whom to call

For information on Florida Power & Light's On Call program, call 631-2000

Hot tips

Officials with the American Red Cross offer the following tips for dealing with excessive heat:

- Drink plenty of water regularly, even when you don't feel thirsty. Beverages with caffeine or alcohol don't cool the body as well as water.
- Eat small meals and eat more often, but avoid high protein foods, which increase metabolic heat.
- Avoid using salt tablets unless directed by a physician.
- Pay attention to the body's warning signals, such as heat cramps or muscular pains and spasms.
- Heat exhaustion occurs when work or heavy exercise is overdone in the hot weather, and heavy sweating causes a loss of body fluids. A mild shock can result and worsen, if not treated.
- Heat stroke, also called sun stroke, occurs when the body temperature continues rising and is life-threatening.

Some like it hot – but not *this* hot

By PHIL LONG
And JOHN LANTIGUA
Herald Staff Writers

The National Weather Service issued a heat alert for parts of Florida on Tuesday and said it expects scorching temperatures to continue for several days.

Florida Power & Light, which serves half the state's citizens, is expected to continue its plea for conservation of electricity today between the peak usage hours of noon and 7 p.m. The company, which has five of its 34 generators down around the state, had warned if demand didn't decline it might have to use rotating blackouts to cut usage.

FPL officials said they wouldn't know until Tuesday night if the voluntary plea had worked.

Bill Swank, FPL spokesperson, said Mother Nature is fortunately lending a hand to ease the strain that has led to near record demands. Rain showers in Dade and Duvall counties helped ease the strain on the state's fragile electric system.

"The rain has helped things here in Dade and we've been able to buy a little bit of power" from Georgia, Swank said.

Clouds and drizzle in Jacksonville helped drop the demand for electricity slightly, freeing some North Florida power for movement into South Florida.

"The hot weather over the whole South is really creating a heavy demand for electricity in every system," Swank said.

Tallahassee registered a high temperature of 102 degrees at 3 p.m. and, combined with humidity, that created a heat index or "feel-like temperature" of 114.

The National Weather Service

PLEASE SEE **POWER, 6A**

Some like it hot – but not *this* hot

Heat alert may last a few days in parts of state

POWER, *FROM* 1A

issued a warning that the heat index was likely to produce "feel-like temperatures" over 110 degrees in 24 North Florida counties.

That area stretched from the Georgia border, down to Flagler Beach on the east coast, west to Suwannee on the Gulf Coast and northwest to Panacea in the Big Bend area.

'Time to take precautions'

"When the index gets up there above 105 or 110 its time to take precautions," said Bob Ebaugh, National Weather Service specialist based in Miami. Miami saw a high temperature of 95 degree at 1 p.m. and high heat index of 104. Broward's high was 94 at 1 p.m. and had a heat index of 105 degrees.

Florida's 20 electric utilities, including FPL, can produce about 36,100 megawatts, enough power for nearly 11 million homes. As of Tuesday, the state had 3,754 megawatts of reserve, said Ken Wiley, spokesperson for the Florida Coordinating Group, an association of the state's 20 power producers.

"When the weather gets this hot, we worry," Wiley said.

FPL has about 395,000 residential customers — 10 percent of the total customers — who receive lower rates in exchange for letting FPL cut off their air conditioners, hot water heaters or pool pumps for short periods of time in conservation situations like today, Swank said. It is called the "on call" program. Beyond that, 380 of the company's biggest business customers can be called on to cut back and begin using their own generators for minimal power needs, Swank said.

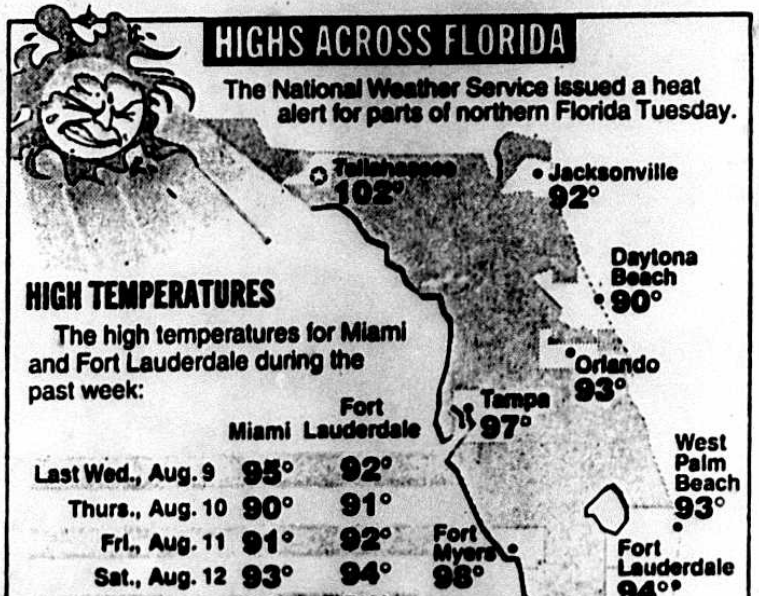
'On call' complaints

FPL received some complaints Monday and Tuesday from homeowners who have agreed to that "on call" program.

"The agreement I signed said they would cut our air conditioning at home for no more than 15 minutes per half hour," said attorney Lloyd Granet of Miami.

PHIL COALE / Tallahassee Democrat

COOL DOG: This puppy decided to take refuge in his water bowl at the Tallahassee-Leon animal shelter.



'When the weather gets this hot, we worry.'

KEN WILEY,
Florida Coordinating Group, an association of 20 power producers

'But our A/C was out for three hours yesterday. My wife and daughter had to leave the house. I've complained to the Public Service Commission."

Swank said the agreement also contained a provision for longer cutoffs in case of emergencies.

"And this was definitely an emergency today," he said.

With five units out Monday, FPL had lost 2,807 megawatts of its 18,160 megawatt generating capacity, Swank said. A megawatt is the amount of power required to operate 300 average size homes.

One of the affected generators, Manatee I on the west coast, was partially back on line Tuesday evening. The 798-megawatt turbine had been out since the weekend with a voltage regulation problem. By Tuesday it was back up to about 600 megawatts.

Caution urged

Doctors urged caution.

"People should spend no more than 10 minutes per hour outside in strenuous exercise," said Dr. Ron Fuerst, an emergency room physician in one of North Central Florida's busiest hospitals: Shands Teaching Hospital in Gainesville.

"The real key is to drink plenty of fluids," added Dr. Landis Crockett, assistant state health officer at the Florida Department of Health and Rehabilitative Services in Tallahassee.

"People should stay in the shade, find places where there is a little circulation of air, keep themselves in front of a fan if they don't have air conditioning," Crockett said, ". . . and wet themselves down a little if the air is really hot."

Sun shines on new solar center

By Chris Evans
FLORIDA TODAY

The strikingly bright, multicolored building rising at Brevard Community College's Cocoa campus constantly elicits curious glances and puzzled faces.

By the dozen, passersby say they want to know what the heck the thing is.

"To my understanding," said Chanel Gaines, a neighborhood resident and in-the-know former BCC student, "that is supposed to the solar energy center.

"It used to be at Cape Canaveral. That's what I heard. And the rumor is, it's supposed to be opening before Christmas."

The rumors are true but understated.

The Florida Solar Energy Center, now at Cape Canaveral, is scheduled to open its $7 million building with great ceremony in mid-September. When it does, it will make Cocoa the home of the nation's premier state-owned solar research center.

The internationally renowned facility, among the world's top research centers for energy efficiency, is an especially significant resource to energy-poor developing nations, officials said.

"There's basically no equal," center director David Block said.

Research includes testing of solar cells, which convert sunlight to electricity, and applying energy-saving technology — something center officials say they did in building their new facility.

Among the building's hyper-efficient traits:

■ "Superwindows" specially coated to allow 65 percent of visible light but only 2 percent of heat-producing infrared light to enter the building.

■ Bright, white roof panels that reflect the sun's rays.

■ A fan-powered air exchange system that moves air between the building core and perimeter, which will reduce the need to alter the air's temperature as much as in regular cooling systems.

■ Various light-related measures that will reduce energy use by more than 50 percent. Those include skylights angled to the north, allowing the least-direct sunlight to enter the building, and sensors that turn off a room's lights when it is empty and that change the lighting level depending on how much sunlight is present.

Center information

The new Florida Solar Energy Center will open to the public in mid-September. Hours: 10 a.m. to noon and 1 p.m. to 4 p.m. Monday through Friday except holidays. Admission: Free, but donations accepted.

These and other features will hold the annual electric bill to around $30,000, compared to $100,000 for a regular 72,000-square-foot building, solar energy center spokeswoman Ingrid Melody said.

"We want this building to be a living demonstration of energy efficiency," she said.

And, sure that they have an impressive building, center officials want to show it off.

The entrance of the new building will boast a mini-museum of energy efficiency. With that attraction, and the facility's more central location, officials hope to lure up to 10 times the 5,000 to 6,000 visitors they currently receive each year.

"We're probably better known nationally than we are here," Block said.

Block and his 150 staff members had hoped to begin moving into the new building last week. However, because of damage at the Cape Canaveral facility caused by Hurricane Erin, they won't begin the move before Aug. 21, Melody said.

Nonetheless, the moving process marks the end of more than five years of planning to move the center from its current home on U.S. Air Force land to BCC, which already shares space with the solar center's parent institution, the University of Central Florida.

The solar center has been on Air Force property since Florida legislators created the facility in 1975 with seven staff members and a $1 million annual budget. Vacant Air Force buildings in the post-Apollo era helped bring the center to Brevard, Melody said.

When legislators approved the idea of a solar energy center in 1974, Miami and Gainesville were strong contenders to serve as the center's home, Melody said. However, Cape Canaveral won, partly because of the existing buildings that were ready for use. Then, in the late 1980s, the military decided it wanted to take back its property, and solar center officials started looking for a new home.

The search ended at BCC, where Orlando-based UCF already had a major presence, and where BCC officials were excited to promote their Cocoa campus as a "Circle of Science," with the solar center, BCC's state-of-the-art planetarium and a new BCC/UCF library.

"This location allows us to tie into the educational network ... that we never had before, because we were kind of isolated," Block said.

The relocation is all the more significant because earlier this year, the center faced the possibility of losing all funding after the state Senate told universities to cut costs by 25 percent.

The center's annual budget stands at $7.69 million. About $3 million of that comes from the state university system, but the rest comes mostly from federal contracts tied directly to state matching money.

Brevard residents asked to continue

power conservation

By Kathy Reakes
FLORIDA TODAY

As the state's hot spell ebbed slightly Wednesday, Florda Power & Light officials asked residents to continue conserving energy.

Five broken generating units that supply more than one-third of the company's power along with the high temperatures prompted the company to ask customers Tuesday to cut back on power use.

"We still need customers to cut back," said FPL spokesman Bill Swank. "Ideally, people will conserve as long as the high temperatures exist."

A large response to the conservation appeal helped the company limp through Wednesday as employees worked to repair the broken generating units, Swank said.

Energy conservation suggestions include raising thermostats to 80 degrees, closing curtains and blinds and turning off or reducing use of all non-essential electric appliances.

Besides residents, local businesses also are helping to conserve.

Harris Corp. in Palm Bay and Melbourne cut their power usage by two-thirds both Tuesday and Wednesday by switching to generator power.

"We are part of FPL's load-sharing program," spokesman Jim Burke said. "As soon as we received the call to conserve, we cut back at several facilities and completely closed down one building Tuesday and Wednesday afternoon."

The company also works year-round to help reduce energy use by being a member of the state Green Light's Program that calls for reduced wattage in light bulbs."

All across the state, the heat index — the "feels-like" temperature — was even higher, but the state's top weather watcher said the hot spell should be starting to cool.

"I think the heat wave reached its peak yesterday," state meteorologist Mike Rucker said Wednesday.

"Tallahassee may come down from 103 degrees yesterday, to 100 today and maybe 97 tomorrow," Rucker forecast. "That's because a little more of a breeze is coming down from Hurricane Felix (bearing down on the Carolinas), and then the afternoon thunderstorms are coming back in the picture."

Officials with the National Weather Service Office in Melbourne said a westerly wind pattern over the state will continue to bring abnormally hot temperatures for the rest of the week.

A heat alert remained in effect Wednesday for nearly 30 counties across North Florida and much of the Panhandle.

Rucker said state officials knew of one death attributed to the heat: 27-year-old Alvin Carter of Lake City, who was working at a plant nursery in Suwannee County when he passed out and died.

North Florida hospitals and clinics reported treating dozens of people for heat-related ailments such as heat stroke and stomach cramps.

Florida Tech professor primes old energy source

Experiments try to glean more from sun's rays

By Billy Cox
FLORIDA TODAY

On the wall outside the office of Ryne Rafaelle, photovoltaics detective, a classic picture in the hallway illustrates the mystery's allure.

Without a shred of visible support, a black cube levitates above a flat surface.

Never mind that this event could never occur with room-temperature forces, that the cube is a specially fabricated superconductor, that it is suspended by the unnatural conjunction of liquid nitrogen boiling at minus 196 degrees Centigrade, over a rare earth magnet.

Image is everything: We can make objects hover in mid-air.

But if the image burns simplistic expectations into the terrain of the imagination, those expectations are not altogether outlandish, either.

When the subatomic highways are greased to eliminate traction and resistance, an entirely new universe of energy unfolds. The study of photovoltaics challenges scientists to harness that power for practical applications and make it affordable. The pioneers will be rich beyond their wildest dreams. If they can leach that power from the sun, and the entire world takes a new shape.

See PROFESSOR, 5E

Michael R. Brown, FLORIDA TODAY

RYNE RAFAELLE, a physics professor at Florida Institute of Technology, works to squeeze more energy from the sun.

FPL plant spills radioactive water

MIAMI — The state's largest utility ordered an internal investigation after an employee error caused a radioactive spill in a containment building at its St. Lucie nuclear power plant.

Officials with Florida Power & Light Co. and federal regulators stressed that the 10,000 gallons of water spilled Friday at the FPL plant was only "mildly radioactive" and posed no danger. No employees were in the area when the spill occurred.

Demand staggers FP&L

Central Florida's largest power provider, Florida Power & Light Co., wrestled with energy demands spurred by the heat. FP&L serves 3.2 million customers statewide, including 400,000 in Brevard, Volusia and Seminole counties.

Commercial, industrial and government customers who get discounts in exchange for an agreement to allow their power to be cut off in emergencies had to honor the agreement for about three hours in the afternoon.

In Seminole County, for example, the Sheriff's Office headquarters, county courthouse and administration buildings were in the dark. A backup generator at the Sheriff's Office sustained essential dispatch operations.

FP&L also asked all customers to cut back on electricity usage to avoid rolling blackouts throughout the system.

FPL reassigns nuclear plant manager

☐ A series of incidents at the St. Lucie nuclear power plant led to Chris Burton's demotion to plant services manager.

ASSOCIATED PRESS

HUTCHINSON ISLAND — Florida Power & Light has demoted a top manager of its St. Lucie nuclear power plant after a series of incidents kept one of the reactors closed for almost a month.

Chris Burton, the former general manager at the plant, has been reassigned to plant services manager, FPL officials said Thursday. He had been second-in-command at the plant.

The change comes a month after a Ford Explorer was sucked into one of the plant's discharge pipes, forcing three teen-age passengers inside to swim through lukewarm wastewater to safety. The three had trespassed July 9 on their way to the beach.

The demotion also comes a week after an employee error caused 10,000 gallons of low-level radioactive water to spill in a containment building of the problem reactor, prompting an internal investigation.

FPL spokesman Ray Golden said Burton's reassignment was unrelated to the investigation. He declined to comment further, saying he was prevented from discussing personnel issues.

The spill and four other incidents have occurred in the one reactor in the past month. The reactor had been shut down in preparation for Hurricane Erin last month but has been unable to restart because of equipment failures and personnel errors.

Three attempts to restart it — including the one in which the radioactive water spilled — have failed.

Golden said the company is concerned about the problems at the plant, deemed to have one of the safest records in the industry.

FPL officials have scheduled an Aug. 29 meeting with officials at the Nuclear Regulatory Commission in Atlanta to discuss the series of mishaps.

Interpreting the Rating

The Florida Building Energy Rating Guide provides a scale that allows you to compare a specific building with the most efficient and least efficient building energy technologies available today. The "most efficient" end of the scale represents both the lowest energy use (in Mbtu) and the lowest cost. The **lowest energy use** represents the most energy-efficient technologies currently available. The **lowest cost** represents the choice of fuel that will provide that energy at the least price.

Although the lowest rating is always technically achievable, it usually is not the most cost-effective. Generally speaking, the closer the rating is to the left end of the scale ("most efficient"), the more difficult and expensive it will be to achieve more efficiency. On the other hand, ratings toward the right end of the scale ("least efficient") can be easily and cost-effectively improved.

The breakdown of separate energy uses in the guide shows how costs are distributed. This information will be helpful in choosing where to invest money in energy-efficiency improvements.

Commercial Building Energy Use

Average annual energy consumption in commercial buildings varies substantially by building classification, occupancy and space use. For example, the same building is likely to have substantially different energy use depending on whether it is used to house office space or to house laboratory space. For large buildings ***energy use density*** is often used as a measure of the building's energy efficiency. This estimate gives the annual energy use of the building per square foot of conditioned floor area.

Within a given commercial building classification, the design and construction of the building itself and the efficiency of its energy service devices will control the most significant portion of the building's energy use. But even in the same building, actual energy use will vary depending on occupant density, thermostat setpoints, energy system control logic and many other factors.

Ways to Improve Energy Efficiency

Air conditioning is the largest energy end-use in the typical Florida building. On average more than 24.4% of annual energy costs go toward air conditioning in commercial buildings. The most effective ways to reduce air-conditioning cost are by improving lighting systems efficiencies, keeping heat out of the building and by improving the cooling system efficiency. Keeping the heat out means using light-colored exterior surfaces, installing good wall and ceiling insulation, and controlling air flow between indoors and outdoors (infiltration). The efficiency of the cooling system has a strong impact. Consult qualified service people if you have questions regarding system performance. Air conditioning duct systems should be free of leaks; otherwise large quantities of energy will be wasted. Consider installing energy

dehumidification technologies can provide this energy service at enhanced efficiencies.

Indoor Lighting averages about 27% of total commercial building energy use. The best fluorescent lighting systems (T-8 lamps with electronic ballasts) provide equal light at about four times the efficiency of incandescent lighting. Substitute compact fluorescent lamps for incandescents. Day lighting, a strategy that can be best employed only if considered in the early stages of building design, can reduce indoor lighting requirements by up to 60% if photo sensors and automatic dimming ballasts are employed. Of course, lights not in use should be turned off, so occupancy controls can save considerable lighting energy in commercial buildings.

Hot water is usually a small requirement in commercial buildings unless they include bathing, dish washing, or laundry facilities. Cost of use can be most effectively reduced by increasing the water heater Efficiency Factor (EF). For example new 40 gallon electric water heaters should have an EF of 0.88 or greater and new 40 gallon gas water heaters should have an EF of 0.54 or greater. Solar water heaters should be considered since they can have an EF greater than 10. Installation of low-flow showerheads can save upwards of 10% on hot water use. Additional tank and piping insulation should be considered.

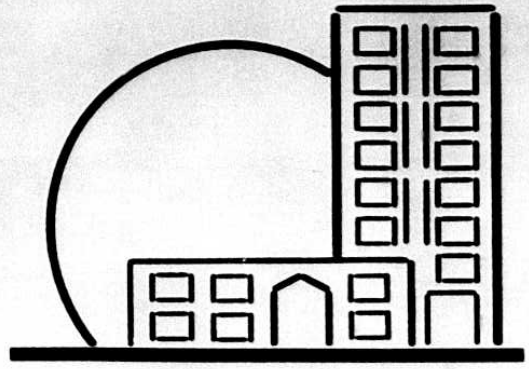
Equipment energy use can account for about 21.2% of total energy use--and more if the indirect impact on cooling loads are counted. Choosing computer equipment that qualifies for EPA's ***Energy Star*** program can produce savings of 25-50% over the equivalent conventional equipment. Fax and copy machines with energy saving operating modes can also save equipment energy. Consider implementing purchase policies that encourage energy-saving equipment.

Cooking energy use represents only 2.3% of average commercial buildings energy use but can reach 27% of total building use in cafeteria facilities. Since adequate ventilation is relatively large for spaces containing such equipment, the efficiency of the ventilation system can significantly impact the building energy use that ultimately results from cooking.

Refrigeration energy use averages 10.5% of commercial building energy use and reaches 24% in cafeteria facilities. Older model refrigerators and freezers are at best only marginally efficient. In selecting new refrigerators or freezers, select the most efficient unit available.

Outdoor lighting energy use represents 5% on average but may be much higher in facilities requiring extensive security or having large expanses of parking. Consider high efficiency systems such as high-pressure sodium lamps. Passive infrared controls can also provide large savings as well as enhanced security in many circumstances.

Florida Building Energy-Efficiency Rating System



New Commercial Buildings

The State of Florida
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Linda Loomis Shelley, Secretary