BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Approval of Demand-Side Management Plan by Florida Power & Light Company	**Docket No. 941170 - EG** **Filed: July 17, 1995**

MOTION IN OPPOSITION TO LEAF'S PETITION FOR HEARING

Florida Power & Light Company ("FPL"), pursuant to Florida Administrative Code Rule 25-22.037(2), moves that the Commission deny, or in the alternative, dismiss, the petition for hearing filed June 30, 1995 by the Legal Environmental Assistance Foundation, Inc. ("LEAF").

LEAF's petition does not comply with the requirement of Florida Administrative Code Rule 25-22.037(7)(a)4 to include "a concise statement of the ultimate facts alleged." LEAF's statement of the ultimate issues to be determined in the proceeding does not satisfy the requirements of the Commission's rules. What must be stated are ultimate facts, not ultimate issues. LEAF's petition fails to include an essential element; therefore LEAF's petition is facially deficient and should not be granted.

LEAF's petition does not comply with the requirement of Florida Administrative Code Rule 25-22.036(7)(a)2. to include "an explanation of how his or her substantial interests will be or are affected by the Commission determination." LEAF does not have standing. The Commission may deny a petition on proposed agency action "if it does not adequately state a substantial interest in the Commission determination...." Florida Administrative Code Rule 25-22.036(9)(b)1.

LEAF's petition also attempts to raise several issues that have previously been litigated before the Commission and decided by the Commission. LEAF's attempt to place these issues

before the Commission again is barred by the doctrines of collateral estoppel and administrative finality; consequently, these allegations fail to state a cause of action.

LEAF's petition also extends beyond the scope of the proceeding, which as to measurement of program results simply requires a determination of whether each program is directly monitorable and will yield measurable results. LEAF's request that the Commission develop a method to document key program assumptions, such as baseline usage, incentive levels, and free ridership rates is an inappropriate extension of the scope of the docket.

FPL's grounds are more fully developed in the attached supporting Memorandum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Florida Power & Light Company's Motion In Opposition To LEAF's Petition For Hearing and supporting Memorandum, were served by Hand Delivery (when indicated with an *) or mailed this 17th day of July, 1995 to the following:

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LEAF's Petition on proposed agency action should also be denied or dismissed because it (1) fails to allege facts sufficient to demonstrate standing as required by Commission rules, and (2) attempts to put in controversy factual policy matters previously decided by the Commission, such efforts being barred by the doctrines of collateral estoppel and administrative finality. Each of these latter two deficiencies is addressed in the following discussion.

I

LEAF'S 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.

A. Injury in Fact

Abstract, indirect, speculative, hypothetical, or remote injuries are not sufficient to meet the Agrico "injury in fact" standing requirement. There must be allegations that either (a) LEAF has

sustained actual injuries at the time of the filing of the petition, or (b) that LEAF is immediately in danger of sustaining some direct injury as a result of the Commission determination. Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987); Agrico Chem. Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981; Department of Offender Rehabilitation v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978). It is not enough to allege one's interests will be adversely affected; a petitioner must state with specificity how those interests will be injured. Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988); Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n, Inc., 418 So. 2d 1046 (Fla. 1st DCA 1982). Per these principles, it is clear that in this case, LEAF has failed to demonstrate any injury in fact that may result from this proceeding.

1. LEAF's "Natural Resource" Allegation

LEAF's Petition for Hearing ("Petition") alleges that "[a] 'substantial number' of LEAF's members 'use and enjoy' the 'natural resources' whose quality is 'placed at risk' by the construction and operation of electrical generation and transmission facilities that 'may' result from increased electricity sales or increased use of more polluting resource options than energy efficiency." LEAF Petition, p. 2, para. 4. This allegation is grossly deficient. Rather than alleging facts to allow the Commission to reach a conclusion, LEAF begins with a conclusion - "a substantial number."[1] It is impossible to determine from these allegations which specific natural resources LEAF alleges will

[1] To meet standing criteria, in this case the associational standing requirement in Florida Home Builders Ass'n v. Dept of Labor, 412 So.2d 352 (Fla. 1982), LEAF must allege facts, not conclusions. If that were not the case, it could simply allege "LEAF has standing." LEAF needs to allege its total membership and the subset of its membership with a purported injury to allow the Commission to determine if a substantial number of its members have an injury. It does not. It merely offers a conclusion.

be "placed at risk."[2] The Petition does not identify any kind of injury to these resources--whatever they may be--that will result from FPL's Demand-Side Management Plan.[3] The Petition does not provide any indication whatsoever of the nature of LEAF's members' "use and enjoyment" of these indeterminate resources.[4]

In essence, LEAF has failed to identify any specific "natural resources" its' members "use and enjoy," the nature of its' members' "use and enjoyment," and how and to what extent its members' indeterminate "use and enjoyment" of these unidentified resources will be affected in this proceeding. Thus, LEAF's Petition alleges only abstract, conjectural, and hypothetical "injuries" that are clearly insufficient under established case law to demonstrate injury in fact for purposes of obtaining standing under Section 120.57, F.S. Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987); Agrico Chem. Co. v. Department of

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[2] For example, does LEAF claim air quality or quantity will be affected by this proceeding? Surface water quality or quantity? Groundwater quality or quantity? Soils? Animal or plant habitat? Geologic resources? Marine resources? The Petition does not provide any clue, so one is left to guess as to which "natural resources" LEAF claims will be "placed at risk."

[3] For example, does LEAF claim surface or groundwater quality or quantity will be affected? If so, how, and in what manner? Will air quality be affected, and, if so, how and in what manner? Will animal or plant habitat be affected, and, if so, how and in what manner? Will soils or geologic resources be affected, and, if so, how and in what manner? Will marine resources be affected, and, if so, how and in what manner? Again, LEAF's Petition alleges such abstract, non-specific affects that one is left to conjecture as to the type and nature of any injury to indeterminate "natural resources" that may result from this proceeding.

[4] Do LEAF's members drink, swim, or boat in surface waters or consume groundwater that may be "placed at risk" by FPL's Plan? Do they engage in agricultural activities in soils that may be "placed at risk"? Do they explore geologic formations or swim, fish, or boat in marine resources that may be "placed at risk"? Do they merely engage in aesthetic appreciation of these resources? Again, it is impossible to determine from the Petition the nature of LEAF's members' interests, or how these interests--whatever they are--will be affected in this proceeding.

Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1982); Department of Offender Rehabilitation v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978).

LEAF's Petition suffers from the defects the court determined fatal to Section 120.57 standing in Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n, Inc., 418 So. 2d 1046 (Fla. 1st DCA 1982). In Grove Isle, a homeowners' association alleged their "substantial interests" would be "affected" by construction of a marina. In determining the homeowners' association lacked standing to challenge the Department of Natural Resources' decision allowing the use of certain submerged lands for construction of the marina, the court stated "[t]heir petitions for administrative hearing allege that they will be adversely affected by the adverse consequences to Biscayne Bay that will be caused by construction of the marina. These allegations do not show how petitioners are "substantially affected".... Id. at 1047 (emphasis added).

Moreover, LEAF's Petition does not even allege a direct, immediate injury to the unidentified natural resources or to its members' unspecified "use and enjoyment" of these resources; it merely alleges "risk" thereto. Webster's Ninth New Collegiate Dictionary (1987) defines "risk" as the "chance of loss or peril," or the "possibility of loss or injury." In other words, "risk" means that injury or loss may or may not occur--it is purely a matter of conjecture. In Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988), the court stated that standing "will be accorded only to those who will suffer an injury to their substantial interests in a manner sought to be prevented by the statutory scheme." Id. at 1284 (emphasis added). Likewise, in Department of Offender Rehabilitation v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978), the court stated that illusory speculation of possible injury is not of sufficient immediacy and reality necessary to confer standing. Id. at 1234. See also Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987) (threat of injury must be both real and immediate, not conjectural or hypothetical). In this case, LEAF's

allegations are illusory and speculative; thus, it has utterly failed to allege or demonstrate any sort of direct, real injury required to have standing under Section 120.57, F.S.

Moreover, in order for the "risk" about which LEAF complains to materialize, numerous intervening events must first occur: (1) FPL's Demand-Side Management Plan must result in increased electricity sales or increased use of more polluting resource options than energy efficiency; (2) the Public Service Commission must determine there is need for additional electric power generating and transmission facilities; (3) the Governor and Cabinet, sitting as the Electric Power Plant and Electric Transmission Line Siting Board, must approve the environmental, planning, and other impacts of the electric power generating and transmission facilities and site these facilities and issue regulatory certification; (4) the facilities must be sited in localities such that LEAF's members will be affected; (5) the facilities must be constructed and operated in such a manner that they somehow "place at risk" unidentified natural resources in which LEAF's members have an unspecified, indeterminate "use and enjoyment" interest; and (6) LEAF's members' unspecified, indeterminate "use and enjoyment" interests must somehow be injured by the construction and operation of these facilities. That even one--much less all--of these intervening events will occur so that the "risk" LEAF alleges is purely speculative, and conjectural.

The "risk" to natural resources and to LEAF's members' interests alleged in the Petition is similar to but even more remote and speculative than the alleged injuries determined insufficient in Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987), to establish an injury in fact. In Village Park Mobile Home Ass'n, residents of a mobile home park attempted to challenge in a Section 120.57 proceeding agency approval of a mobile home park prospectus which addressed, among other things, the circumstances and manner under which rents and other charges in the park may be raised. The residents alleged that if the prospectus were approved, rents and other charges would increase in the park. The court disagreed, finding the

prospectus only established the manner in which rents may be increased by the park owner at some point in the future. In order for the alleged injury (i.e., increased rents) to actually occur, future implementing actions of third parties must first occur. The court determined the mere possibility that injury may occur at some point in the future contingent on the intervening actions of third parties, insufficient to establish injury in fact under Section 120.57, F.S. The court concluded as the Commission should here: "[a]ttempting to anticipate whether and when these events will transpire takes us into the area of speculation and conjecture. The threat of injury alleged by appellants is not of sufficient immediacy to warrant invocation of the administrative review process." Id. at 434.

Another analogous case is Jerry v. Department of Offender Rehabilitation, 353 So. 2d 1230 (Fla. 1st DCA 1978), where a prisoner sought to challenge an agency rule imposing confinement and loss of gain-time for prisoners' behavioral infractions. The court found the likelihood that the prisoner would be injured in the future by confinement and loss of gain-time was contingent on his commission of future behavioral infractions and the enforcement of the confinement rule by corrections officials. Because the prisoner's injury may or may not occur at some point in the future, contingent on the occurrence of intervening events, any of which may or may not occur, the court determined the prisoner's alleged injury lacked sufficient immediacy and reality, and was too speculative, to constitute an injury in fact. The court noted that conjectural, speculative allegations of what "may" happen are insufficient to establish injury in fact. Department of Offender Rehabilitation v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978).

Also instructive in considering LEAF's remote and speculative allegations is International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Commission, 561 So. 2d 1224 (Fla. 3d DCA 1990), where the court found that an association of jai-alai players had not alleged that its members would suffer an injury in fact of sufficient immediacy to entitle it to a hearing under Section 120.57, F.S. In that case, the players association sought to challenge an application to change fronton opening

and closing dates, operating dates, and makeup performance dates. The players association argued its members' substantial interests would be injured because the date changes would "aid the fronton owners in their labor dispute with the Association and thus will either break or prolong the ongoing strike of the Association to the economic detriment of its members." The court found that this alleged interest "was far too remote and speculative in nature to qualify under the first prong of the Agrico standing test," and that other alleged injuries were "equally remote, speculative, or irrelevant." Id. at 1226.

LEAF's allegations in this case suffer from the same speculativeness, remoteness, and lack of immediacy as those in Village Park Mobile Home Ass'n, Jerry, and International Jai-Alai Players Ass'n. LEAF's Petition essentially alleges that at some indeterminate point in the future, a non-specific, indeterminate risk to unidentified natural resources and to indeterminate unspecified interests of LEAF's members may or may not occur, contingent on the occurrence of several intervening events, any or all of which may or may not occur. These allegations are utterly speculative and conjectural. Per the principles established in Village Park Mobile Home Ass'n, Jerry, and International Jai-Alai Players Ass'n, LEAF completely fails to establish an injury in fact of sufficient immediacy to afford standing in this proceeding.

2. LEAF's Remaining Allegations of Interest

LEAF's Petition also alleges that:

> A substantial number of LEAF's members are utility customers whose energy service bills will be affected by the Commission's action in this docket. The Commission's action will substantially influence how effectively FPL delivers demand side resources to its customers to meet their need for energy services, and, as a result, how much power plant generation can be avoided or postponed. The Commission's action also will influence the amount customers pay for energy services.

LEAF Petition, p. 2, para. 4.

These allegations ignore that the only energy customers who will be affected by this docket are FPL customers, not all "utility customers." Thus, the Petition's statement that LEAF members are "utility customers" fails to establish any link between this particular proceeding and any potential or real effects to LEAF members. Indeed, all LEAF members may well be customers of other electric power service providers, and thus not in any way affected by this proceeding. LEAF is unable to establish any injury its members will suffer in this proceeding merely by virtue of their being "utility customers" of some electric service provider somewhere within the state of Florida.

Setting aside that LEAF failed to allege facts sufficient to demonstrate that any of its members are FPL customers, much less that a substantial number of its members are FPL customers, conspicuously absent from these allegations are any demonstrations or even suggestion of injury. This is a fatal deficiency, for the Agrico test requires the allegation of **injury**. The fact that LEAF is interested in how the Commission acts in this proceeding is not a basis for standing. The following discussion from the Society of Ophthalmology case addresses the importance of a party such a LEAF 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, where the agency's application of that law in determining the rights and interests of members of the government or the public, it 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 find and 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.

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532 So.2d at 1284 (emphasis added).

By failing to allege any injury in its petition, LEAF has failed the Agrico standing test.

The most LEAF has alleged is that its members are "utility customers." As in the Society of Ophthalmology case, the petitioner has not alleged any facts linking its members to approval of FPL's Demand-Side Management Plan, nor has it alleged facts demonstrating that its members personally will suffer any injury as a result of FPL's DSM Plan proceeding. For instance, there is no allegation that there will be an increase on LEAF's members' bills which will be substantial, much less injurious. Similarly, there is no allegation that the amount paid by LEAF members who are FPL customers will be injurious. There is no allegation that as a result of the Commission determination FPL will not effectively deliver DSM and not avoid the power plants that it has projected to avoid through DSM. Thus, as to these allegations LEAF has failed to allege any injury in fact or any threat of potential injury of sufficient immediacy to obtaining standing under Section 120.57, Florida Statutes.

B. Zone of Interest

In addition to requiring an injury in fact of sufficient immediacy, the Agrico standing test also requires that "the injury must be of the type or nature the proceeding is designed to protect." Agrico Chem. Co. v. Department of Envtl. Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1982). This is the so-called "zone of interest" requirement. Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988). In determining whether a petitioner has met the zone of interest requirement, the agency or court examines the nature of the injury alleged in the pleading and then determines whether the statute or rule governing the proceeding is intended to protect such an interest.

Clearly, this proceeding is not designed to protect the "natural resource" interests alleged in LEAF's Petition. The Florida Energy Efficiency and Conservation Act ("FEECA"), Sections

366.80 - .85, 403.519 Florida Statutes, states legislative recognition of the importance of "utiliz[ing] the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens. Reduction in, and control of, the growth rates of electric consumption and of weather-sensitive peak demand are of particular importance." FEECA states further intent that "the use of solar energy, renewable energy sources, highly efficient systems, cogeneration, and load-control systems be encouraged." Section 366.81, F.S. Per these provisions, FEECA expresses intent to, among other things, protect the general health, prosperity, and welfare of the public and to encourage the use of certain innovative, cost-effective energy sources and energy conservation techniques. These legislative interests do not encompass or translate into proceedings to protect unidentified, indeterminate "natural resources" or LEAF's members indeterminate, non-specific interests therein.[5]

LEAF's allegations are akin to those asserted in Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n, 418 So. 2d 1046 (Fla. 1st DCA 1982). In Grove Isle, a homeowners association challenged the Department of Natural Resources' decision not to require a marina to obtain a lease for the use of certain submerged lands. The submerged lands proceeding dealt exclusively with the issue of whether to require proprietary use approval (a lease) for the marina; vague, indeterminate "adverse affects" to Biscayne Bay were not within the scope of the submerged lands lease proceeding. Thus, the association lacked standing. Similarly, in Suwannee River Area Council Boy Scouts of America v. Department of Community Affairs, the court determined the Boy Scouts lacked standing to challenge issuance of a binding letter determining a proposed project not a development of regional

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[5] FEECA does include a section, Section 403.519, Florida Statutes, that has been codified as part of the Power Plant Siting Act. The Siting Act might be construed as protecting natural resources interests, but that is done in the portion of the process performed by the Cabinet sitting as the Siting Board, not in the Commission's separate determination of need which Section 403.519, F.S., addresses.

impact (DRI), on the ground the Boy Scouts did not assert any issues properly within the scope of a DRI determination proceeding. In Friends of the Everglades v. Board of Trustees, 595 So. 2d 186 (Fla. 1st DCA 1992), the court stated that the statute which defines the scope or nature of the proceeding determines the nature of the injury required to demonstrate standing. The court noted that in both Grove Isle and Suwannee River, the proceedings involved determinations under statutes which were unrelated to the alleged interests of the persons seeking to assert standing. Id. at 189. Thus, the challengers lacked standing.

Likewise, in Boca Raton Mausoleum v. Department of Banking and Finance, 511 So. 2d 1060 (Fla. 1st DCA 1987), the court determined that the College of Boca Raton's alleged concerns over "traffic congestion" and an "atmosphere not conducive to higher education" were not within the zone of interest of a cemetery licensing proceeding. These injuries were determined "to be far outside the regulatory purpose of the [cemetery licensing] act...." Thus, the College lacked standing under Section 120.57, F.S. to challenge the cemetery's license.

Similarly, in this case, the vague, indeterminate "natural resource" interests LEAF alleges are not within the zone of interest of this proceeding. LEAF has not alleged any facts linking its "natural resource" interests, such as they can be determined from the Petition, to any of the energy conservation or innovative technology interests sought to be addressed in this proceeding. LEAF's "natural resource" interests are not within the zone of interest of this proceeding; thus, per Grove Isle, Suwannee River Area Council Boy Scouts, and Boca Raton Mausoleum, LEAF's Petition should be dismissed.

As to LEAF's other allegations regarding the effect on bills, the amount that will be paid , and whether FPL will be effective in delivering its DSM plan and avoiding power plants, there is no need to reach whether or not these interests are of the type protected by the zone of interest in this proceeding. As previously discussed, LEAF has not alleged a single injury to a single member in

regard to any of these suggested interests. Consequently, it cannot be determined whether there is an injury associated with these interests that falls within the protected zone of interest.

C. LEAF Does Not Yet Have Party Status

LEAF will undoubtedly argue in response to FPL's challenge of its standing that the Commission has already determined LEAF has standing and made it a party to this proceeding by virtue of entering Order No. PSC-95-0102-PCO-EG. Indeed, LEAF notes the entry of that order in its petition for hearing. There are two crucial problems with such an assertion. First, at the time LEAF 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 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 LEAF sought intervention (12/20/94) and was ostensibly granted (1/19/95) 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 LEAF's 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 LEAF could intervene; there was merely an administrative action

of assigning a docket number which had not been performed by Commission order or notice. LEAF 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. LEAF's position in this case is worse than Manasota-88's position in that case. Here LEAF 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. LEAF 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 LEAF's ostensible intervention order any weight and should discourage premature attempts to intervene in proposed agency action proceedings. For instance, when LEAF 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 LEAF, 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 LEAF should not relieve LEAF of its obligation to demonstrate standing in its petition on proposed agency action. It predated the proceeding and has no force and effect. LEAF 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. LEAF's intervention order should be treated as a nullity.

II

LEAF'S ATTEMPTS TO RELITIGATE ISSUES RESOLVED IN THE GOALS PROCEEDING ARE BARRED

In its Petition, LEAF makes allegations and raises issues of fact that have already been addressed by the Commission. LEAF 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 LEAF's cause of action. LEAF 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 LEAF makes in its petition on proposed agency action to relitigate issues already decided by the Commission.

A. LEAF's Attempt to Reintroduce the TRC verses RIM Argument Through the "Bills vs. Rates" Argument should be resisted.

In its petition LEAF alleges that certain of its members' bills will be affected by the Commission's action in this proceeding and that the amount that customers pay for energy services will also be influenced. Such arguments were a cornerstone of LEAF's attempt in the goals proceeding to have the Commission embrace the Total Resource Cost test. As the Commission is well aware, the Commission declined to embrace the Total Resource Cost test in the goals proceeding, instead opting for the use of the Rate Impact Measure and Participants tests together. See, Order No. PSC-94-1313-FOF-EG at 22. This issue of rates verses bills and the issue of TRC verses RIM has fully and fairly been litigated among the parties. FPL has relied on the Commission's determination of the use of the RIM and the Participant's tests in developing conservation goals, and has prepared a DSM plan which passes the RIM and Participants tests. Under these circumstances, the doctrines of collateral estoppel and administrative finality should bar relitigation of this issue.

B. LEAF's Attempt to Place At Issue Whether FPL's Programs Advance the Objectives Set Forth in FEECA and Rule 25-17.001 Should Not Be Heard

In its petition LEAF alleges that whether each component program of FPL's DSM plan advances the policy objectives set forth in Rule 25-17.001 and FEECA may be a disputed issue. In the recent Conservation Goals proceeding, it was fully and fairly litigated between FPL and LEAF

as to whether or not the conservation measures which comprise FPL's conservation programs in its DSM plan had the effect of reducing kW demand and kWh consumption. The Commission approved a DSM portfolio of conservation measures in setting FPL's goals. Those same conservation measures, which the Commission has found to be conservation, comprise FPL's programs. FPL relied on the Commission's determination in developing its DSM plan. Therefore, this issue should not be heard.

C. LEAF's Attempt to Relitigate Cost-Effectiveness Is Barred

In its petition LEAF alleges that a matter at issue is whether each component program is cost-effective. In the recent Conservation Goals proceeding, the Commission determined that all the measures comprising FPL's conservation plan, with the exception of water heating heat recovery units, were cost-effective. It approved conservation goals based upon its determination that these measures were cost-effective under the RIM and Participants tests. See, Order No. PSC-94-1313-FOF-EG at 22. FPL has relied upon the Commission's determination of cost-effectiveness in the goals proceeding in developing its DSM plan. Under the doctrines of collateral estoppel and administrative finality, this LEAF issue should be barred from relitigation.

CONCLUSION

LEAF's Petition for Hearing should be denied, or, in the alternative, dismissed for failure to state a cause of action. LEAF has failed to demonstrate standing by making the necessary showing that it has a substantial interest that will be affected by the Commission's proposed agency action of approving FPL's DSM plan. LEAF attempts to relitigate a host of issues resolved by the Commission in the recent goals proceeding; such efforts are barred by the doctrines of collateral estoppel and administrative finality, and those portions of LEAF 's Petition should be dismissed for

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Approval of Demand-Side Management Plan of Florida Power & Light Company	))	**Docket No. 941170 - EG Filed: July 17, 1995**

MEMORANDUM OF LAW SUPPORTING FLORIDA POWER & LIGHT COMPANY'S MOTION IN OPPOSITION TO LEAF'S PETITION FOR HEARING

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. LEAF has filed a request for hearing; however, it has failed to file the request for hearing in the form required under the Commission's procedural rules. Rule 25-22.029 Point Of Entry Into Proposed Agency Action Proceedings, provides in subsection (4) that, "[o]ne whose substantial interest 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**. Rule 25-22.036, in turn applies to all §120.57 proceedings before the Commission and requires the initial pleading where the Commission has issued notice of proposed agency action to be entitled "Petition on Proposed Agency Action." Subsection (7) of Rule 25-22.036 addresses the form and content of petitions on proposed agency action.

LEAF's petition for hearing fails to include, as required by subsection 4 of Rule 25-22.036, "a concise statement of the of ultimate facts alleged." This is an important omission. Without this allegation, FPL cannot even determine if LEAF's interest in this proceeding is adverse to FPL's interest. LEAF's statement of the ultimate issues to be determined in the proceeding does not satisfy the requirements of the Commission's rules. What must be stated are ultimate facts, not ultimate issues. LEAF's Petition fails to include an essential element; therefore LEAF's Petition is facially deficient and should not be granted.