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September 30, 2002

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**VIA HAND DELIVERY**

Blanca S. Bayó, Director  
Division of the Commission Clerk &  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

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**Re: Docket Nos. 020262-EI and 020263-EI**

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") are the original and seven (7) copies of FPL's Motion to Quash Subpoena, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows 2000, and the word processing software in which the document appears is Word 2000.

If there are any questions regarding this transmittal, please contact me at 222-2300.

Very truly yours,

*EC Daley*  
Elizabeth C. Daley

ECD:gc  
Enclosure  
Copy to: Counsel for All Parties of Record

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition to Determine Need for  
an Electrical Power Plant in Martin County  
by Florida Power & Light Company

Docket No. 020262

In re: Petition to Determine Need for  
an Electrical Power Plant in Manatee County  
by Florida Power & Light Company

Docket No. 020263-EI

Dated: September 30, 2002

**FLORIDA POWER & LIGHT COMPANY'S  
MOTION TO QUASH SUBPOENA**

Florida Power & Light Company (“FPL”), pursuant to Rule 28-106.204, Florida Administrative Code, and Florida Rules of Civil Procedure 1.410 and 1.330(a)(3), moves to quash the subpoena (“Subpoena”) that CPV Gulfcoast (“CPV”), an intervenor in this proceeding, has served on FPL President Paul J. Evanson commanding him to appear as a witness at the Commission’s hearing concerning the present Petition for Determination of Need for Electrical Power Plants (“Hearing”). As grounds for its motion, FPL states:

1. The Subpoena, which was served on September 26, 2002, commands Mr. Evanson to appear as a witness to testify at the three-day Hearing which begins on October 2, 2002<sup>1</sup> at the Commission's headquarters in Tallahassee, Florida. As set forth more fully below, Mr. Evanson has many responsibilities as president of FPL and, but for the subpoena, would not be attending the hearing. Mr. Evanson should not be required to appear because other witnesses from FPL have testified and will testify to the same information that CPV now seeks from Mr. Evanson.

<sup>1</sup> Attached as Exhibit A. The subpoena requires Mr. Evanson's attendance at the very beginning of the hearing, although it is clear that CPV's case will not begin until the second or third day of the hearing. Counsel for FPL asked counsel for CPV to consider the timing if CPV sought a subpoena. However, the subpoena as served requires Mr. Evanson's attendance from the beginning of the hearing.

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2. The testimony CPV seeks from Mr. Evanson would be cumulative in that FPL, under the Prehearing Officer's Scheduling Order,<sup>2</sup> has previously filed with this Commission and served to the parties the prefiled testimony of ten witnesses in support of FPL's Petition for Determination of Need. During the discovery period for this proceeding, CPV has had the opportunity to depose all of these witnesses and will have the opportunity to cross examine all of them at the Hearing. In addition, CPV has taken Mr. Evanson's deposition in this proceeding.

3. FPL's witnesses, particularly Steven R. Sim, Rene Silva and Moray P. Dewhurst, have fully described in their prefiled testimony and in subsequent depositions FPL's decision-making process as to the Request for Proposals and the evaluation and decision-making that led FPL to file its present Petitions for Determination of Need. As FPL's witnesses, including Mr. Evanson, have already stated in prefiled testimony, Mr. Evanson's involvement in the matter was limited.

4. Mr. Evanson is responsible for the entire operation of FPL, which is the largest investor-owned utility in Florida and one of the largest in the United States. As such, he qualifies under Florida law as a high-ranking officer who may not be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser ranking officer. Dep't of Rehabilitative Services v. Brooke, 573 So. 2d 363, 371 (Fla. 1<sup>st</sup> DCA 1991) ("Brooke") ("We agree . . . that '[d]epartment heads and similar high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser ranking

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<sup>2</sup> Order Consolidating Need Determination Proceedings, Approving Proposal for Handling Confidential Bid Information and Establishing Procedure, Order No. PSC-02-0992-PCO-EI (July 23, 2002).

officer”)(reversing, due to executive privilege, orders directing that the Secretary of Health and Rehabilitative Services appear before the trial court to explain discretionary budget decisions). See also Halderman v. Pennhurst State School and Hospital, 559 F. Supp. 153 (E.D. Penn. 1982)(quashing a subpoena absent any showing that information sought from a department head was not equally available from a lesser-ranking official); Crown Cent. Petroleum Corp. v. Garcia, 904 S.W. 2d 125, 128 (Tex. 1995)(a corporate president or other high-level corporate official may not be compelled to give a deposition unless the party seeking the deposition shows that the official possess some unique or superior personal knowledge of relevant facts); and Baine v. General Motors Corp., 141 F.R.D. 332 (M.D. Ala. 1991)(accord). As Mr. Evanson stated during his deposition, the process was a “bottom-up,” rather than a “top-down” approach, in which analysis of options for the Need Determination was conducted by others within FPL, who relied in part upon analysis of an outside consultant. Mr. Evanson approved their recommendation. The individuals who evaluated the options, including the outside consultant, are witnesses who have prefiled testimony and will testify during the hearing in this proceeding.

5. Counsel for CPV had the opportunity to examine Mr. Evanson at his deposition on September 26, 2002. Moreover, Mr. Evanson resides in North Palm Beach, Florida, and works in Juno Beach, Florida, and both towns are more than 100 miles from the site of the hearing in Tallahassee. Florida law considers Mr. Evanson to be unavailable to testify and, thus, CPV is permitted to seek to introduce as evidence in the hearing the deposition transcript of Mr. Evanson. Fla. R.C.P. 1.330(a)(3) (“The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . (B) that the witness is at a greater distance than 100 miles from the place of the trial or hearing”). Thus, Mr. Evanson’s live testimony is unnecessary because a deposition transcript is available.

6. CPV's service of the unnecessary subpoena to Mr. Evanson can lead only to redundant and cumulative testimony and, thus, it is apparently is designed to harass FPL and Mr. Evanson rather than to seek admissible evidence in the Determination of Need proceeding. Mr. Evanson is a high-ranking official whose role in this Need Determination proceeding was limited to approving a recommendation of others within FPL. Thus, under the First District Court of Appeal's decision in Brooke, Mr. Evanson is not required to be present for live testimony in this proceeding and the subpoena should be quashed.

WHEREFORE, FPL requests that the Commission enter an order quashing the subpoena served by CPV which commands Mr. Evans to appear to testify at the hearing in this proceeding beginning on October 2, 2002.

Respectfully submitted,

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Attorneys for Florida Power & Light Company

**CERTIFICATE OF SERVICE**  
**Docket Nos. 020262-EI and 020263-EI**

I HEREBY CERTIFY that on this 30th day of September 2002, a copy of Florida Power & Light Company's Motion to Quash Subpoena was served by hand delivery (\*) or electronically (\*\*) and U.S. Mail to the following:

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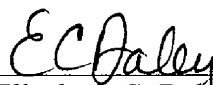
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By:   
Elizabeth C. Daley

# EXHIBIT A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Docket No. 020262-EI )  
Petition to determine need for an electrical )  
power plant in Martin County by Florida )  
Power & Light Company. )  
and )  
Docket No. 020263-EI )  
Petition to determine need for an electrical )  
power plant in Manatee County by Florida )  
Power & Light Company. )  
\_\_\_\_\_ )

SUBPOENA

THE STATE OF FLORIDA

TO: Paul Evanson, 700 Universe Blvd., Juno Beach, Florida 33408

**YOU ARE COMMANDED** to appear before the Florida Public Service Commission at 2540 Shumard Oak Blvd., Tallahassee, Florida 32399, on October 2, 2002, at 9:30 a.m., or at such time thereafter as designated by counsel for CPV Cana, Ltd. and CPV Gulfcoast, Ltd., to testify in this action. If you fail to appear, you may be held in contempt.

**YOU ARE SUBPOENAED** to appear by the following attorney(s) and, unless excused from this subpoena by these attorneys or the Commission, you shall respond to this subpoena as directed.

**DATED** on August 26, 2002.

Blanca S. Bayó, Director  
Division of the Commission Clerk and  
Administrative Services  
Florida Public Service Commission

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records and Hearing Services



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