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ORIGINAL

October 11, 2000  
VIA Hand Delivery

Blanca S. Bayo, Director  
Division of Records and Reporting  
Betty Easley Conference Center  
4075 Esplanade Way  
Tallahassee, Florida 32399-0870

Re: Docket No. 991779-EI

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and 15 copies of:

- The Florida Industrial Power Users Group's Motion for Clarification of Parts I & II and Protest to Part III of Order No. PSC-00-1744-PAA-EI

in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Yours truly,

*Vicki Gordon Kaufman*

Vicki Gordon Kaufman

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In Re: Review of the appropriate application  
of incentives to wholesale power sales by  
investor-owned electric utilities

Docket No. 991779-EI

Filed: October 11, 2000

**THE FLORIDA INDUSTRIAL POWER USERS GROUP'S MOTION FOR  
CLARIFICATION OF PARTS I & II AND PROTEST TO PART III  
OF ORDER NO. PSC-00-1744-PAA-EI**

The Florida Industrial Power Users Group (FIPUG), pursuant to rules 25-22. 036 and 28-106.204, Florida Administrative Code, files this Motion for Clarification, or in the Alternative for Reconsideration of Order No. PSC-00-1744-PAA-EI (Parts I and II) and Protest of Order No. PSC-00-1744-PAA-EI (Part III). As grounds therefor, FIPUG states:

**INTRODUCTION**

This docket had its genesis in the November 1999 fuel adjustment docket in which an issue was raised as to whether it was appropriate or necessary to continue the shareholder incentive mechanism for economy energy sales for investor-owned utilities. Subsequently, this issue was referred to the entire Commission for hearing on May 10, 2000.

That hearing resulted in Order No. PSC-00-1744-PAA-EI (Order). In that Order, the Commission concluded that it should not eliminate the incentive program which now applies to only a modest .2% of Florida Power and Light Company's (FPL) sales up to a maximum of 6.8% of Tampa Electric Company's (TECo) sales. The Commission determined that the incentive should be greatly enhanced to include 100% of all new firm and non-firm non-separated sales that exceed a moving "threshold." The Order is very clear that the Commission wants utilities to make even more wholesale sales from assets in the retail rate base, but it is unclear as to whether it wants utilities to

make these sales to the detriment of retail customers. FIPUG requests the Commission to make it equally clear that even though it encourages more wholesale sales, these sales are not to be made when they hurt retail consumers.

Non-separated wholesale sales are sales from generators and transmission lines that are included in a utility's retail rate base. Retail customers pay substantially all of the carrying costs related to these assets including, but not limited to, the full depreciation cost, basic operating costs and an after tax profit on the investment in the assets.

The Commission modified the incentive mechanism as follows:

- The original incentive<sup>1</sup> applied only to **non-firm** Schedule C and X sales. After the "threshold" is met, the incentive approved in the Order applies to "all non-separated wholesale sales, **firm and non-firm**, excluding emergency sales, made under current and future FERC-approved schedules."<sup>2</sup>
- The original incentive mechanism permitted the utilities to retain 20% of the gain on all C and X sales; the incentive approved in the Order uses a three-year moving average of gains and credits gains above this threshold on an 80/20 basis, with the utilities retaining 20% of the gain.

#### **STANDARD FOR CLARIFICATION/RECONSIDERATION**

Reconsideration is appropriate when the Commission has overlooked or misapplied the law or the facts. *Diamond Cab. Co. of Miami v. King*, 146 So.2d 889 (Fla. 1962). In this instance, as discussed below, the Commission has overlooked serious unintended ramifications which may flow

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<sup>1</sup> The original incentive was approved in Order No. 12923.

<sup>2</sup>Order at 8-9, emphasis added.

from its decision and therefore clarification/reconsideration is appropriate.

Part III of the Order establishes a methodology for calculating gains and directs a regulatory treatment for the costs attributable to the sales and the revenue received from the sales. FIPUG will deal with it separately.

### **ISSUES FOR WHICH CLARIFICATION IS SOUGHT**

FIPUG requests the Commission to clarify Order No. PSC-00-1744-PAA-EI as to the following issues which were not expressly dealt with in the Order and which may result in unintended adverse consequences for retail customers.

1. Does the Commission intend for utilities to earn an incentive for making wholesale sales while it is interrupting its retail customers?

2. Does the Commission's regulatory policy promote wholesale transactions that increase rather than reduce retail prices?

3. If the buy-through provisions of interruptible tariffs are exercised while the utility is making non-separated wholesale sales, should the utility or the interruptible customer be responsible for the cost of replacement power that exceeds the average fuel charge?

### **ARGUMENT**

While the Order states that the new incentive program is applicable to all additional non-separated sales, both firm and non-firm, it is not clear that the Commission intended to permit the incentive to be applicable in periods of capacity shortfall. FIPUG requests that the Commission clarify its Order to ensure that the enhanced incentive does not encourage utilities to interrupt retail customers or purchase more expensive power to serve them. It would be folly for government to provide the utilities an incentive to make wholesale sales when these sales will result in retail load

management or require retail customers to pay more than the benefit they receive from the sale of power from assets the customers fully fund.

The Commission should ensure that retail customers are charged no more than they would have been charged if the firm or non-firm wholesale sales had not been made. The Commission determined that utilities should not be penalized for making injudicious wholesale sales. To complete the logic, it should also determine that customers should not be required to bear all the risk of open market transactions. Therefore, FIPUG asks this Commission to clarify its Order to state that utilities may **not** engage in wholesale sales when to do so would require them to interrupt their interruptible customers<sup>3</sup> (or buy through for those customers). Nor should wholesale sales be permitted when such power is replaced with more expensive wholesale purchases. With this approach, both parties will benefit from judicious sales, but neither party is penalized. The incentive will be for the utility to avoid risky sales or understand that it will bear the cost of capacity shortfall when its capacity is tenuous. Retail customers obligated to buy from a utility should receive priority over wholesale customers when the power comes from assets in the retail rate base.

Contemporaneously with the rendition of Order No. PSC-00-1744-PAA-EI, the utilities filed their 2001 fuel and purchased power projections. The Commission should take administrative notice of these submissions when it clarifies the Order in this docket. The projections provide newly discovered evidence and highlight the current magnitude of the wholesale power market in Florida. The attached abstract taken from the utilities' fuel and purchased power projections in Docket No.

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<sup>3</sup> Interruptible and load management customers can be instantaneously disconnected. This is not the case with non-separated wholesale sales. The economic mechanism for dealing with injudicious non-separated firm and nonfirm sales is addressed in the protest of Part III of the Order.

000001-EI and reported peak summer demand shows:

1. Florida's major utilities cannot meet their peak summer demand from their own capacity. They must rely on wholesale purchases.

2. When the projected 2001 retail consumption is compared to wholesale purchases, the utility filings show that up to 28.42% of the retail customers' power consumption will come from the wholesale market.

3. For two utilities, the annual projected cost of purchased power for the year 2001 is less than the cost of internal production. For two utilities, it is not. The filings do not show whether non-separated sales are being made contemporaneously with replacement power purchases, but the Order in this docket does not prohibit this from happening.

When the Commission expanded the incentive to make firm sales, it may have inadvertently sent the wrong signal to the utilities, indicating to them that it is permissible to interrupt retail customers in order to pursue such wholesale sales or that utilities may replace their wholesale sales with more costly third party purchases to serve retail load. FIPUG believes that the Commission did not intend to encourage such policies as they are contrary to the utilities' obligation to look first to serve its native load with plant capacity supported by the retail jurisdiction and because such policies would visit increased costs on all retail customers.

The situation of interruptible customers is further exacerbated by the fact that during times of interruption, the utility may "buy through" for the interruptible customer. FIPUG has observed that these buy-through costs are usually in excess of average cost and more than the utility receives from its non-separated wholesale customers. FIPUG prays that the Commission will clarify its Order to make it clear that such transactions are impermissible.

At hearing, the utilities were questioned about how interruptible customers would be treated if native power was needed to serve wholesale sales. The questioning indicates that the utilities may well interrupt native retail customers to serve wholesale load; FIPUG suggests that this is **not** the type of behavior the Commission is seeking to incent through its revised incentive program.

For example, the following exchange occurred with Florida Power Corporation's (FPC) Mr. Weiland:

Q If you were in a situation where you had to make a choice between your retail interruptible customer and your wholesale commitment, who would have priority in that situation?

A **I don't really know.** Because if there were some other system emergency that came up that required interruptions, I think our first goal would be to try to recall or pull back wholesale sales. And I think that is what we have done in the past. I don't know exactly, you know, in any particular circumstance what the legal requirements of the tariff are, quite honestly. All I know is that so far we have had these situations before, and we have not interrupted interruptible customers.

Q And would it be correct that you have not interrupted interruptible customers because you have been able to recall the wholesale or the power you committed to your wholesale customer?

A Either recall it or get it -- purchase it and get it to them some other way.

(Tr. 140-141, emphasis added).

TECo's witness Brown admitted that interruptible customers would be interrupted to facilitate wholesale sales:

Q There is just a few of the interrogatories I want to ask you about, and the first is Number 22.

A Yes.

Q Was this interrogatory prepared by you or under your supervision and direction?

A Yes.

...

Q . . . 20 times during this two-year time period **you were making economy sales at the same time that there was an interruption, or curtailment, or buy-through, is that correct?**

A **That's correct.**

CHAIRMAN GARCIA: Let me make sure I've got this right. **You were having your customers buy-through at the same time that you were selling outside of the system?**

THE WITNESS: **That's correct.**

BY MS. KAUFMAN:

Q And the other interrogatory I want to look at, Mr. Brown, is Number 35. . . .

A In this particular interrogatory we have entered into nonseparated [wholesale] sales whereby we would curtail our interruptible customers before we would curtail the [wholesale] sale. Is that what you are asking?

Q. Yes, that is exactly what I'm asking. . . . **[Y]ou have curtailed or interpreted your interruptible customers in order to make wholesale sales?**

A **Yes.**

(Tr. 221-224, emphasis supplied).

FPC has no clear policy; TECo enters into non-separated wholesale contracts that expressly give priority to the wholesale customer. This type of contract would be more competitive in the wholesale market. FIPUG doesn't believe that the utilities purposely disadvantaged the retail customer, but it has frequently happened in the last two years. In its focus on the fact that utilities have not profited from some types of wholesale sales, the Commission may have overlooked the fact that unforeseen events have caused retail customers to pay more. Incentives to increase these sales while capacity is short from generators in the last cycle of their life span may have disastrous results for non-firm customers. Interruptible customers and load management customers, who take service

from a shrinking reserve margin, are uniquely vulnerable when the reserve margin is further diminished by competitive wholesale sales.

The issue is whether the customers or the utility should bear the risk when a utility's competitive activities in the wholesale market are unprofitable. FIPUG urges the Commission to place the risk of loss on the party that controls the transaction-- the utility.

The Order imposes no proscription against replacing relatively inexpensive wholesale sales with more expensive wholesale purchases. The Order currently allows utilities to make these deals at retail customers' expense. The Order not only gives wholesale sales priority over the other customers served from the utility's reserve margin, when it is applied to firm non-separated sales, it elevates the wholesale customer over the firm retail customer. This should be prohibited by the Commission. In today's changing power market, the Commission needs to clearly state that it has its priorities right. Retail customers who pay most of the freight are entitled to protection against elusive wholesale profits.

Based on the above, FIPUG requests that the Commission clarify that:

1. Utilities are prohibited from making non-separated wholesale sales any time it will be necessary to interrupt retail customers.
2. Utilities are prohibited from making non-separated wholesale sales any time it will be necessary to purchase wholesale power to serve the retail customer **unless** the price for replacement wholesale power is less than the price of wholesale power sold.

The argument against such a regulatory policy may be that the Florida Commission has no authority to govern interstate wholesale sales in this manner. The logical extension of this reasoning is that the Commission may require retail customers to pay for utility plant they can't use. This proposition, of

course, would ignore the requirement of Florida law contained in §366.06, *Florida Statutes* (emphasis added):

The Commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually **used and useful** in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property **used and useful** in serving the public, . . .

The Commission addresses this requirement when it deals with wholesale contracts that have a duration of longer than a year. It doesn't interfere with the wholesale contract; it separates the plant and cost attributable to such sales from the retail rate base.

The current Order deals with non-separated sales, but the same Florida law governs the Commission. A Federal Court has allowed a state commission to give priority to retail sales over wholesale sales over the objection of the Federal Energy Regulatory Commission.<sup>4</sup> Such a position is clearly justified in times of capacity shortages when the utilities must determine whether to disadvantage their retail customers or forego a wholesale profit. The Commission may elect to take a less proactive course and use its rate making tool for the welfare of the customers it is obligated to protect. That tool is discussed in the section below.

### **PROTEST OF ORDER NO. PSC-00-1744-PAA-EI, PART III**

Part III of the Order deals with the calculation of "gains." The gains calculation looks only at the price of power sold. It determines that there is a gain when the price for power sold is greater than the incremental cost of generation that is sold. The calculation ignores what happens if a wholesale sale is made at a time when the utility doesn't have sufficient generating capacity to meet

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<sup>4</sup>*Northern States Power Co., et al v. Federal Energy Regulatory Commission, et al*, 176 F.3d 1090 (8<sup>th</sup> Cir. 1999).

the combined demands of its retail customers and wholesale customers and must buy high cost replacement power to serve them both.

FIPUG protests a calculation of gains that ignores replacement power purchases. Item 1 of Part III Order No. PSC-00-1744-PAA-EI should be revised to incorporate this real possibility. Item 3 should be broadened to cover any operating and maintenance costs that are charged to the fuel and purchased power clause.

Item 1 should be revised to read:

Each IOU shall credit its fuel and purchased power cost recovery clause for an amount equal to the incremental fuel cost of generating the energy for each such sale or in the event wholesale power is purchased to replace the power sold, when the incremental cost of replacement purchased power is more than the applicable fuel cost factor, the clause or the buy through customer for whom the replacement power is purchased shall be credited with the price difference.

Item 3 should be revised to credit the fuel and purchased power clause with any O & M costs charged to the clause and operating revenues with any costs charged to base rate expenses.

If the Commission and parties accept these proposed changes, FIPUG waives its right to further discovery and hearing on the subject.

**WHEREFORE**, FIPUG seeks reconsideration/clarification as set forth above and protests

Part III of the Order.

*Willis Gordon Kaufman*

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of The Florida Industrial Power Users Group's Motion for Clarification of Parts I & II and Protest to Part III of Order No. PSC-00-1744-PAA-EI has been furnished by (\*) hand delivery or U.S. Mail this 11<sup>th</sup> day of October, 2000, to the following:

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Florida Public Service Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

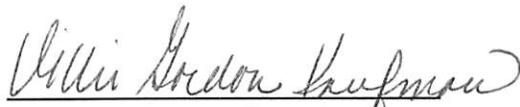
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## PROJECTED UTILITY SALES for the year 2001

### INSTALLED SUMMER CAPACITY / PEAK CUSTOMER DEMAND

### 2001 Projections

	GEN, BOT & SOLD	COST-PRICE	RETAIL MWH
<b>FPL 15509 / 17897 (1)</b>	MWH	COST-PRICE	MWH
GENERATED	79,316,817	\$25.93/MWH	89,259,919
WHOLESALE PURCHASES	18,492,595	\$18.51/MWH	
WHOLESALE SALES	2,211,997	\$44.70/MWH	
Whlse Purchases as a % of retail sales	20.72%		
Capacity Margin w/o Load Management or wholesale purchases	-13.34%		
<b>FPC 7062 / 8318</b>	MWH	COST-PRICE	RETAIL MWH
GENERATED	33,887,979	\$ 26.05/MWH	36,501,685
WHOLESALE PURCHASES	10,372,635	\$20.99/MWH	
WHOLESALE SALES	4,368,375	\$43.79/MWH	
Whlse Purchases as a % of retail sales	28.42%		
Capacity Margin w/o Load Management or wholesale purchases	-15.11%		
<b>TECO 3463 / 3579</b>	MWH	COST-PRICE	RETAIL MWH
GENERATED	17,482,424	\$19.43/MWH	17,114,071
WHOLESALE PURCHASES	1,797,196	\$41.10/MWH	
WHOLESALE SALES	752,614	\$26.81/MWH	
Whlse Purchases as a % of retail sales	10.50%		
Capacity Margin w/o Load Management or wholesale purchases	-3.24%		
<b>GULF 2106 / 2289</b>	MWH	COST-PRICE	RETAIL MWH
GENERATED	12,669,590	\$15.72/MWH	10,156,677
WHOLESALE PURCHASES	1,618,627	\$33.31/MWH	
WHOLESALE SALES	3,102,125	\$22.13/MWH	
Whlse Purchases as a % of retail sales	24.48%		
Capacity Margin w/o Load Management or wholesale purchases	-7.99%		

- (1) Summer available capacity from schedule 7-1 of utilities' ten Year site plan filed 4/1/2000  
Peak demand on system from all customers per most recent utility annual report or s  
Peak demand is understated if utilities were managing their load or interrupting industrial customers