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Cc: Martha Brown  
Subject: Docket No. 040660-EG

ORIGINAL



Motion to  
miss Calcs-Plus

Enclosed for filing in Docket No. 040660-EG, In re: Petition for approval of modifications to BuildSmart Program by Florida Power & Light Company, is a Word file of Florida Power & Light Company's Motion to Dismiss Compliance Data Services, Inc.'s Protest, as well as the certificate of service (12 pages total). This filing is being electronically served contemporaneously on Staff and served by U.S. Mail on all parties of record in this docket.

Thank you for your assistance.

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(See attached file: Motion to Dismiss Calcs-Plus Protest.doc)

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of )  
modifications to BuildSmart Program )  
by Florida Power & Light Company )  
\_\_\_\_\_ )

Docket No. 040660-EG

Filed: December 3, 2004

**FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS  
COMPLIANCE DATA SERVICES, INC.'S PROTEST**

Pursuant to Rule 28-106.204(2), Florida Administrative Code, Florida Power & Light Company ("FPL") hereby files this Motion to Dismiss Compliance Data Services, Inc.'s ("Calcs-Plus") Protest of the Florida Public Service Commission's ("PSC" or the "Commission") Approval of Modifications to FPL's BuildSmart Program ("Protest"), and in support states:

**Summary**

1. FPL's BuildSmart program is designed to educate builders and customers about the benefits of energy-efficient building practices. Part of FPL's conservation offerings since the Commission initially approved BuildSmart as a pilot program in 1993, FPL has revised and modified the BuildSmart program over time in an effort to increase the program's effectiveness and market penetration. Under the program as currently designed and offered as part of FPL's Commission-approved DSM Plan, FPL inspects qualifying new single family detached homes during the construction process to verify installations of conservation measures and certify the new homes for energy-efficiency. FPL charges fees to home builders for plan inspection and certification depending on the level of efficiency achieved per home.

2. In June 2004, FPL filed a petition for modifications to the BuildSmart program. The BuildSmart program modifications are designed to allow FPL greater penetration in the production housing market, where participation in BuildSmart has lagged behind the penetration FPL has achieved in the custom housing market. Modifications to the program to increase

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participation among production homebuilders and other homebuilders and customers include the elimination of program participation fees that FPL believes have been a major impediment to builder participation. FPL believes that eliminating the basic service fee will not only increase the number of BuildSmart homes built by production builders, but will also have a positive effect on the number of custom build homes that participate in the program. Further, the modified BuildSmart program is available to all new, residential single-family homes, whether detached or attached, in FPL's service territory, whether built by a residential builder or an owner builder.

3. On October 26, 2004, the Commission issued as proposed agency action Order No. PSC-04-1046-PAA-EG in the above-referenced Docket (the "PAA Order"). The Commission found that "modifications to the BuildSmart program should accomplish the program's objective of encouraging the design and construction of energy efficient homes that cost effectively reduce FPL's coincident peak load and customer energy consumption and we approve them." See Order No. PSC-04-1046-PAA-EG, p. 4, Docket No. 040660-EG (issued October 26, 2004).

4. Calcs-Plus filed its Protest on November 15, 2004. Calcs-Plus, a company in the business of providing energy ratings, argues that the Commission Staff's September 23, 2004, Recommendation to the Commission that led to the PAA Order was flawed. Calcs-Plus' Protest of the Commission's Approval of Modifications to FPL's BuildSmart Program should be dismissed because the Commission does not have jurisdiction over Calcs-Plus' Protest since: 1) Calcs-Plus lacks standing to Protest the Commission's action because its economic interests are not within the zone of interests of the statutes and rules the Commission is applying to FPL's petition for approval of modifications to its BuildSmart program, and no immediate injury to Calcs-Plus will result from the Commission's decision; 2) Calcs-Plus' Protest is facially insufficient and the defect cannot be cured; and 3) the Commission does not have subject matter

jurisdiction over the Protest. In any event, the allegations raised in Calcs-Plus' Protest are without merit.

### **Legal Standard**

5. A motion to dismiss raises as a question of law whether, accepting all allegations in the complaint as true and not looking beyond the complaint, the complaint alleges sufficient facts to state a cause of action. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). A pleading should be dismissed unless all of the elements of a cause of action are properly alleged. See Kislak v. Kredian, 95 So. 2d 510 (Fla. 1957).

### **Argument**

6. Accepting all allegations in Calcs-Plus' Protest as true, and drawing all reasonable inferences in favor of Calcs-Plus, Calcs-Plus' Protest must be dismissed with prejudice as a matter of law because the Commission does not have jurisdiction to rule on Calcs-Plus' claims, and the defects in Calcs-Plus' Protest cannot be cured.

#### **I. Calcs-Plus lacks standing to file the Protest**

7. FPL respectfully requests that the Commission dismiss Calcs-Plus' Protest with prejudice because Calcs-Plus has not met and cannot meet the standing requirements to protest the Commission's PAA Order and, therefore, the Commission does not have jurisdiction to render a decision on the claims. Only substantially interested persons may participate as a party in a Commission action. See Rules 25-22.036(2), 25-22.039, 28-106.205, Florida Administrative Code (2003); Order No. PSC-02-0995-FOF-EI, Docket No. 020084-EI (issued July 23, 2002). In the context of administrative proceedings, including Commission proceedings, "substantial interest" requires a showing of degree and nature of injury such that the person seeking to participate (1) will suffer injury in fact that is of sufficient immediacy to entitle him or her to a formal hearing pursuant to Section 120.57(1), Florida Statutes (2003) (degree of injury); and (2)

that the injury is substantial and “of a type or nature which the proceeding is designed to protect” (nature of injury).” See Agrico Chemical Co. v. Dep’t of Env’tl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981) (“Agrico”) (emphasis added). A claim of substantial interest based solely upon economic interests is not sufficient unless the relevant statute itself contemplates consideration of economic interests. See Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997); Florida Medical Association, Inc. v. Dep’t of Professional Regulation, 426 So. 2d 1112, 1118 (Fla. 1st DCA 1983).

8. Calcs-Plus has not alleged that its interests are or will be substantially affected by the Commission action in this Docket. The alleged action of FPL that forms the basis of Calcs-Plus’ Protest is that FPL allegedly markets energy ratings and audits to its customers free of charge, while Calcs-Plus charges its customers for energy ratings and audits. Calcs-Plus alleges that FPL’s actions violate Rule 25-17.003(4), Florida Administrative Code. See Protest at ¶ 5. Leaving aside for the moment the lack of any merit in Calcs-Plus’ claims about FPL’s charges for audits, FPL submits that Calcs-Plus’ economic interests in this Docket are not of the kind the Commission has jurisdiction to protect. Rule 25-17.003(4), allegedly violated by FPL, implements Sections 366.05(1), 350.127(2), 350.115, 366.04(2)(f), and 366.82(5), (7), Florida Statutes (2003). These statutes provide the jurisdiction of the Public Service Commission to regulate public utilities “in the public interest” and “for the protection of the public welfare.” See § 366.01, Fla. Stat. (2003). There is no mention in these statutes of express or implied legislative intent for the Commission to protect the economic interests of third parties, such as Calcs-Plus.

9. Calcs-Plus’ economic interests in ensuring that FPL charges its customers for energy ratings or audits does not satisfy either prong of the Agrico test for standing. Calcs-Plus has alleged no immediate economic injury to its own interests by virtue of any agency action.

Moreover, economic injury to energy raters does not fall within the zones of interest protected by any of the statutes implemented by Rule 25-17.003(4), Florida Administrative Code, and is not the type of injury this proceeding is designed to protect. The Commission has jurisdiction to protect the interests of investor-owned utility customers in fair, just and reasonable rates, but not to protect the economic interests of energy raters in ensuring customers are charged for energy ratings.

10. The Commission has decided this issue before. In 2002, Mr. Dennis J. Stoer, who is listed in the Calcs-Plus' Protest as the president of the company and a person on whom all pleadings and documents should be served, filed a complaint against FPL on behalf of the National Energy Raters Association ("NERA") that contained many of the same allegations as asserted in the current Calcs-Plus Protest. See Docket No. 020084-EI. By Order No. PSC-02-0995-FOF-EI, issued July 23, 2002, in Docket No. 020084-EI, on motion by FPL, the Commission dismissed NERA's complaint with prejudice because it found NERA could not remedy the fact that it failed the test for standing. See Order No. PSC-02-0995-FOF-EI at 3, Docket No. 020084-EI (issued July 23, 2002). According to the Commission:

The 'economic injury to energy raters does not fall within the 'zones of interest' protected by any of the statutes implemented by Rule 25-17.003(4), Florida Administrative Code.' Moreover, we find that NERA has failed to demonstrate that it will suffer injury in fact that is of sufficient immediacy to entitle it to any relief.

See id.

11. Mr. Stoer and Calcs-Plus ignore the Commission's directives in Docket No. 020084-EI, and again seek to disrupt and delay modifications to FPL's BuildSmart conservation offerings in an effort to serve its own competitive economic interests; interests that are not cognizable in this Commission proceeding. Once again, Mr. Stoer and Calcs-Plus are unable to assert standing to file these claims.

## II. Calcs-Plus' Protest is facially invalid

12. Moreover, Calcs-Plus' Protest is facially invalid and should be dismissed for failure to comply with the rule requirements for a petition to initiate formal proceedings as a non-party to the action. First, Calcs-Plus' Protest completely disregards the requirement that, as a non-party, its Protest must "include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding." See Rule 25-22.039, Florida Administrative Code (2003). Further, nowhere in the Protest does Calcs-Plus allege a number of the items that Rule 28-106.201 of the Florida Administrative Code requires such a petition to include. For example, there is no statement of "each agency affected" by the Protest (required by Rule 28-106.201(2)(a)); no "statement of when and how the petitioner received notice of the agency decision" that lead to the Protest (required by Rule 28-106.201(2)(c)); no "statement of all disputed issues of material fact" or an indication that there are no such disputed issues (required by Rule 28-106.201(2)(d)). Though certain of these uniform rule requirements may seem trivial, they nonetheless have force and the Commission is directed to dismiss a petition that is not in substantial compliance with Rule 28-106.201(2)(d). See Rule 28-106.201(4), Florida Administrative Code (2003).

13. Further, where "it conclusively appears from the face of the petition that the defect cannot be cured," the petition should be dismissed with prejudice. See id. Here, the defect in the petition cannot be cured and should be dismissed with prejudice because the Commission lacks jurisdiction to act on Calcs-Plus' Protest.

### **III. The Commission lacks subject matter jurisdiction over Calcs-Plus' claims**

14. Apart from the jurisdictional defect in Calcs-Plus' Protest resulting from its lack of standing to bring this action and the facial invalidity of the petition, the Commission lacks subject matter jurisdiction to consider Calcs-Plus' claims.

15. The Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State. City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493, 496 (Fla. 1973). Rule 25-17.003(4)(a), Florida Administrative Code, which is quoted by Calcs-Plus in paragraph 5 of its Protest, provides:

Every public utility shall charge an eligible customer for a BERS audit. The amount of this charge, which shall reflect actual cost, shall first be filed with the Commission as part of the utility's tariff.

Also, paragraph 6 of the Calcs-Plus Protest cites Rule 25-17.008, Florida Administrative Code, regarding Commission-approved cost-effectiveness methodologies. The Commission has authority to adjudicate a claim of a violation of its rules only by a person who could show that his or her substantial interest is affected. See § 120.57(1), Fla. Stat. (2003); Rule 25-22.036(2), Florida Administrative Code (2003). As previously discussed, Calcs-Plus has failed to make such a showing and the economic interest it seeks to protect is not a substantial interest protected by the statutes granting the Commission jurisdiction to act.

### **IV. Calcs-Plus' claims lack merit**

16. Notwithstanding that there is no jurisdiction in the Commission to rule on the Protest, Calcs-Plus' allegations lack substantive merit. For example, Calcs-Plus argues that the Commission and FPL were incorrect in stating that the "Florida Energy Efficiency Code requires that newly constructed homes have an energy efficiency performance index (EPI) rating of 100 or less." Instead, Calcs-Plus argues that Florida Energy Efficiency Code is based upon "e-Ratio" and not "EPI rating." Calcs-Plus' argument amounts to semantics over substance. EPI is a

common, generally understood term synonymous with the current term known as “e-Ratio”<sup>1</sup> and is intended to provide a descriptive understanding of the energy efficiency level targets associated with BuildSmart participation.<sup>2</sup> EPI is the term that has been traditionally used to describe the BuildSmart program’s requirements and this reference provides continuity in expressing the proposed program changes relative to the existing program requirements. To eliminate any possible confusion, the existing BuildSmart Program Standards note the relationship between the terms “EPI Rating” and “e-Ratio.”<sup>3</sup> See Page 3, BuildSmart Program Standards, effective June 1, 2000 (“noting that EPI Rating is also referred to as e-Ratio”).

17. Another argument in the Calcs-Plus Protest that lacks merit is the argument that FPL and the Commission are misinterpreting the Department of Community Affairs (“DCA”) rules regarding ratings. Apart from the fact that the Commission did not interpret or misinterpret the DCA rules in the PAA Order, the Calcs-Plus argument has no weight because FPL’s petition for approval of modifications to its BuildSmart program uses the word “rating” as a generic term, describing the fact that the BuildSmart-referenced EPI rating, equivalent to “e-Ratio,” is a relative measure of performance. The generic word “rating,” as used in the context of the BuildSmart filing, is not defined as, or specifically intended to represent, a Building Energy

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<sup>1</sup> For example, in BuildSmart, an “e-Ratio” of .80 directly translates to a BuildSmart EPI rating of 80% or 80.

<sup>2</sup> Energy Performance Index (“EPI”) was previously defined in Section 553.902, Florida Statutes, but was removed effective July 1, 2001, as part of the State’s migration to the term “e-Ratio” for building code energy efficiency compliance. As a practical matter, the terms EPI and e-Ratio are used interchangeably in the trade and have been since the late 1990s, a fact of which Calcs-Plus cannot be ignorant. As builders and homebuyers acclimate to the term “e-Ratio,” BuildSmart representatives have found that it is helpful to use both the generally understood and symonymous term “EPI” along with the more current term “e-Ratio” to describe the program’s relative performance-based energy-efficiency requirements.

<sup>3</sup> While FPL is not unwilling to strike the term “EPI” from its BuildSmart program, and replace it with “e-Ratio,” FPL does not believe that doing so would aid the Commission or the market in understanding FPL’s filing.

Rating System (“BERS”) Audit. A BERS Audit is required to produce the specific “Rating” noted by Calcs-Plus and defined in Chapter 9B-60 of the Florida Administrative Code. New construction customers requesting a BERS Audit exclusive of the BuildSmart program participation requirements are informed of the BERS Audit charges specified in FPL’s tariff (Sheet Nos. 4.040 and 4.041) and must pay the applicable fee for this service.

18. Also, Calcs-Plus’ argument in paragraph 5 of its filing that FPL’s proposed modifications to its BuildSmart program violate the PSC rule requiring FPL to charge for BERS Audits is absolutely false. As mentioned above, FPL charges for BERS Audits and FPL’s filing for approval of modifications to its BuildSmart program in no way modifies or seeks to modify its existing tariff or the charges for BERS Audits. Rather, in FPL’s Petition for Plan Modification, FPL seeks only to eliminate the fees associated with BuildSmart program participation based on its analyses that increased program participation provides cost effective economies of scale. All program administration costs, including the cost of performing any audits, are included in the cost-effectiveness analysis of the program.

19. Further, Calcs-Plus’ argument in paragraph 6 of the Protest that the Commission’s Staff accepted FPL’s analysis of the cost-effectiveness of the BuildSmart program modifications without requiring an independent verification of the results seeks to expand application of the Commission’s rules. There is no requirement that the Commission Staff seek an independent verification of whether FPL’s application of the prescribed and Commission-approved cost-effectiveness methodologies was correct. Rule 25-17.008, Florida Administrative Code, is the Commission’s own rule and it can only be presumed that the Commission has indigenous resources to apply its rules and test whether its rules are being properly applied. Calcs-Plus cites no requirement that the Commission Staff seek independent verification and there is no such obligation.

20. Moreover, Calcs-Plus' assertion that municipal utilities subject to the Florida Energy Efficiency Conservation Act ("FEECA") have not found BuildSmart-type programs to be cost-effective, if true, would not surprise FPL. Every utility has different cost and benefit drivers which affect the cost-effectiveness analyses for an individual program and ultimately determine the portfolio of programs offered by a utility.

21. Further, Calcs-Plus' argument that the modifications to the BuildSmart program will not result in any benefits to FPL's customers, while substantial savings will result if the program is eliminated, directly contradicts the demonstrated cost-effectiveness of the program and the proposed modifications to the program. Based on the Commission-approved cost-effectiveness methodologies, the BuildSmart program has been shown to provide a benefit to all FPL's ratepayers, contrary to Calcs-Plus' claims. Moreover, Calcs-Plus' claim that FPL's BuildSmart program "has been responsible for labeling only 301 homes in their entire service area as Energy Star" is a red herring. The BuildSmart program is not designed to exclusively certify Energy Star homes, and Energy-Star-certified homes are only a small component of the overall BuildSmart program participation.

### **Conclusion**

22. Calcs-Plus' Protest of Modifications to FPL's BuildSmart program should be dismissed with prejudice because the Commission does not have jurisdiction to rule on the claims. Calcs-Plus does not have standing to protest FPL's BuildSmart program modifications because Calcs-Plus' economic interests are not within the zone of interests protected by the Commission in this proceeding. Further, Calcs-Plus has not shown that it will suffer any imminent cognizable injury as a result of the Commission's decision on FPL's proposed modifications. Calcs-Plus seeks to expand the Commission's jurisdiction beyond that conferred on it in the Florida Statutes. Further, Calcs-Plus' Protest is facially invalid in that it does not

comply with the rule requirements for a petition to initiate formal administrative proceedings as a non-party. The defects in Calcs-Plus' Protest cannot be remedied because Calcs-Plus could never remedy the defect in its standing to intervene. Even if Calcs-Plus did have standing to participate as a party, which it does not and cannot, the arguments presented by Calcs-Plus in its Protest are without merit. As a matter of law, Calcs-Plus has failed to state a claim upon which the Commission can grant relief. Therefore, the Commission should dismiss the Protest without the opportunity to refile and further delay implementation of modifications to FPL's BuildSmart Program that are in FPL's customers' best interests.

**WHEREFORE**, for the above and foregoing reasons, FPL respectfully requests that the Commission dismiss Calcs-Plus' Protest with prejudice.

Respectfully submitted,

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By: S/Natalie F. Smith  
NATALIE F. SMITH

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of FPL's Motion to Dismiss was served by electronic mail (\*) and U.S. Mail this 3rd day of December, 2004, to the following:

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