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VIA E-MAIL/FEDERAL EXPRESS

Greg Shafer
Director, Division of Economics
State of Florida
Public Service Commission
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Office of the Attorney General
State of Florida
Antitrust Division
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**Re: Letter concerning Florida Power & Light Company and
Jupiter Tequesta A/C, Plumbing and Electric, LLC**

Dear Mr. Shafer:

We are in receipt of your correspondence dated July 30, 2018. Please consider this as Florida Refrigeration and Air Conditioning Contractor Association's ("FRACCA") request for clarification, and supplemental information for your consideration. Copies of our original correspondence dated April 18, 2018, and your reply dated July 30, 2018, have been enclosed for your convenience.

In addition, please take note that FRACCA has joined The MEP Coalition for Fair Competition, a growing statewide coalition of concerned citizens, small business owners and associates alarmed and concerned by the recent aggressive, predatory and improper activities of Florida Power & Light Company (<http://www.mepcoalition.org>). The MEP Coalition has

organized to stand up for small business owners who are being severely impacted by Florida Power & Light Company's illegal and prohibited actions.

FRACCA understands the position that Florida Power & Light Company ("FPL") is a subsidiary of NextEra Energy Inc. f/k/a FPL Group, Inc. ("NextEra Energy"), that FPL Energy Services, Inc. ("FPLES") is a subsidiary of NextEra Energy, and that Jupiter Tequesta A/C, Plumbing & Electric, LLC ("Jupiter-Tequesta A/C") is a subsidiary of NextEra Energy/FPLES. FRACCA also understands that the companies are affiliates as defined by Rule 25-6.1351, F.A.C. However, the interconnectivity between the corporate shells and the implications of this interconnectivity cannot be understated, given the impacts on fairness, competition, and justice.

By way of example, State of Florida Division of Corporation records indicate that six (6) of the seven (7) officers and directors of NextEra Energy are officers and directors of FPL. Furthermore, three (3) of the seven (7) officers and directors of FPLES are officers and directors of FPL, and FPLES constitutes the sole member of Jupiter-Tequesta A/C. Additionally, all four (4) corporations share the same principal place of business, and registered agent.

As it pertains to corporate shells, Florida law has long recognized the theory of mere continuation. Several primary factors that satisfy the mere continuation theory include: (1) the use of the same name, location, and employees; (2) a common identity of officers, and directors; and (3) the transfer of assets for less than adequate consideration. *See Considerations Involving Corporations*, CD FL-CLE 8-1. *See also, Bud Antle, Inc. v. E. Foods, Inc.*, 758 F.2d 1451 (11th Cir. 1985); *Chicago Title Ins. Co. v. Alday-Donalson Title Co. of Fla.*, 832 So. 2d 810, 814 (Fla. 2nd DCA 2002); *Amjad Munim, M.D., P.A. v. Azar*, 648 So. 2d 145 (Fla. 4th DCA 1994).

Florida has also disregarded corporate form and allowed for piercing of a corporate veil, upon a showing, in part, that a corporation's independence is nonexistent, or that the corporation was merely an alter ego of its shareholders. *See Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330 (11th Cir. 2011); *Seminole Boatyard, Inc. v. Christoph*, 715 So. 2d 987 (Fla. 4th DCA 1998).

While we are clearly not dealing with a matter involving an allegation of mere continuation or piercing of a corporate veil, it cannot be discounted that foundational elements of these legal theories, which exist to protect the public from acts Florida law considers reprehensible and contrary to the public's interest, are being overtly exhibited by FPL in the operations of its affiliates. Surely, the mere fact that the corporations are registered independently of the other is not, in and of itself, grounds for a finding that the companies are sufficiently operating independently. Accordingly, FRACCA requests clarification of how the determination was made that the companies are, in fact, independent given the entities share similar places of business, corporate structures, corporate officer/directors, and have transferred corporate assets, as discussed in detail below, for what appears to be no or inadequate consideration.

Furthermore, given FPL has admitted that it collects pricing and customer information from HVAC contractors seeking to participate in its HVAC Demand-Side Management preferred

independent contractor rebate program ("DSM"), FRACCA requests clarification on exactly how FPL controls and prohibits the release of contractor pricing and customer information concerning DSM related activities with affiliates, such as Jupiter-Tequesta A/C. Of particular concern is how the three (3) officers/directors of FPL, who are also officers/directors of Jupiter-Tequesta A/C via FPLES, are internally prohibited from accessing this information. FPL merely stating that it does not share data that it collects on HVAC contractors with Jupiter-Tequesta A/C is an unsatisfactory response, and, accordingly, FRACCA requests clarification of the practices protecting this information.

Lastly, FRACCA requests clarification regarding the determination that FPL is not improperly subsidizing Jupiter-Tequesta A/C. In particular, the State of Florida Public Service Commission ("PSC") stated in the July 30th correspondence as follows:

In regards to the use of an FPL facility by an affiliate, FPL has a Corporate Real Estate department that monitors and ensures usage of space by affiliates is properly recorded and billed to the regulated (sic) company. The job fair events in question were handled using FPL's corporate Real Estate process.

Based upon the foregoing, FRACCA's understanding is that FPL invoiced Jupiter-Tequesta A/C for its use of FPL's property for its numerous job fairs.

Prior to addressing Jupiter-Tequesta A/C's use of FPL's properties, FRACCA would like to supplement its original correspondence by notifying the PCS of the following practices which, upon information and belief, are ongoing between FPL and Jupiter-Tequesta A/C, and FRACCA believes constitute unfair competition and the illegal subsidization of non-regulated activities:

- FPL offers to transfer all incoming telephone calls to Jupiter-Tequesta A/C;
- FPL offers to schedule Jupiter-Tequesta A/C to perform a free inspection for the consumer at any residence upon which it is commencing or transferring power services;
- FPL places advertisements for Jupiter-Tequesta A/C in all invoices mailed to its consumers;
- FPL is recruiting HVAC technicians (employees) via the use of head-hunters;
- FPL ties payment of services from FPLES to its monthly invoicing to consumers;
- FPL allows Jupiter-Tequesta A/C the free use of its logo; and
- Jupiter-Tequesta A/C uses misleading advertisements in conjunction with the use of the FPL logo.

As to the above, in addition to FPL renting its premises to Jupiter-Tequesta A/C for job fairs, there can be no argument that there is substantial value to an HVAC company in potentially receiving, via transfer, all calls incoming to FPL, being scheduled to perform an inspection at all new or transferring FPL accounts, having the costs of your services invoiced monthly with FPL's

invoicing, and having an advertisement sent to all FPL's customers monthly.¹ Unless FPL is invoicing to Jupiter-Tequesta A/C, and Jupiter-Tequesta A/C is paying to FPL, tens, if not hundreds, of thousands of dollars monthly for the fair market value for these services, including the use of the properties, Jupiter-Tequesta A/C is enjoying an unfair competitive advantage, and FPL is wrongfully and illegally subsidizing an affiliate. No typical MEP/HVAC service company should have the means to enjoy the benefits Jupiter-Tequesta A/C is enjoying from FPL.

With regard to the recruiting practices of HVAC technicians by FPL, enclosed you will find a flash drive containing an audio file. On this audio file, you will hear a head-hunter soliciting an employee of a small business in Sarasota. The head-hunter clearly states who he is with, that he is working for FPL, and that they are recruiting in Sarasota. Jupiter-Tequesta A/C is an east-coast company. Given the geographically limiting name, it is more likely that FPL is pre-recruiting for another company it intends on operating in its territory on the west-coast of Florida. Regardless of whether FPL is recruiting for Jupiter-Tequesta A/C, or pre-recruiting for another soon-to-be MEP/HVAC affiliate, FPL acting as a recruiting tool is subsidizing the affiliate, which is an illegal act.

Furthermore, the compensation, benefits and recognition that comes with being an FPL employee cannot be matched by any small business competing in the HVAC home service industry. FPL actively recruiting for its affiliates is an anti-competitive act that must be stopped.

Regarding the use of the FPL logo by Jupiter-Tequesta A/C, so long as this is on-going, Jupiter-Tequesta A/C is being wrongfully subsidized by FPL. Jupiter-Tequesta A/C is advertising as an FPL company, and makes full use of the FPL trademark in all its advertisements. A trademark has intrinsic value, which is recognized and protected by Florida law. *See Rimmer v. Dickson*, 78 So. 2d 732 (Fla. 1955). If a company copies or duplicates a name in a calculated effort to obtain preferential treatment it "smacks strongly of unfairness." *May v. May*, 45 So. 2d 494 (Fla. 1950). Also, the Florida legislature has created written law protecting trade name. *See* Chapter 495, Fla. Stat. Among the protections offered by statute, the recovery of damages, punitive damages, injunctive relief and attorney's fees are afforded to victims of trade-name infringement.

There can be no question that FPL has spent millions of dollars building its tradename and logo in the state of Florida. No HVAC service company could match the spending FPL has done in creating its logo, and the associated goodwill attached thereto. No HVAC company in Florida can match the market saturation FPL has in its advertising. In past instances, FPL has used a quick and heavy hand to stop all use of its logo by HVAC contractors who mistakenly believed they could make use of the FPL logo when participating in and in conjunction with the DSM program. Now, Jupiter-Tequesta A/C is given free use of the logo. In accordance with Florida law, for Jupiter-Tequesta A/C to receive the benefits associated to the use of the FPL logo it must pay the

¹ To the extent FPL is assisting Jupiter-Tequesta A/C or FPLES collect payment for non-exempt services provided to consumers beyond ninety (90) days after the completion of the services, FPL is violating Chapter 520, Part V, Fla. Stat.

fair market value thereof for the use of the substantial goodwill and value FPL has invested in its tradename.

However, it is the opinion of FRACCA, and its 350 air conditioning and mechanical contractors, that there can be no "fair market value" associated to the use of the FPL logo. The benefits are unique and of such a substantial nature that no practical dollar value can be logically assigned. Simply put, the fair market value one would have to pay to be FPL's MEP/HVAC contractor is something no HVAC contractor could afford. FPL simply giving this logo to Jupiter-Tequesta A/C is, above all else, the most obvious evidence of a wrongful, tax-payer funded, subsidization of Jupiter-Tequesta A/C by FPL.

There can be no dispute that the FPL logo is legally protected and has intrinsic value. It is equally irrefutable that the fair market value of the logo is immensely substantial. Unless and until Jupiter-Tequesta A/C is completely prevented from using the FPL logo, Jupiter-Tequesta A/C will continue to enjoy an unfair competitive advantage against all other MEP/HVAC contractors, and FPL will continue to be in violation of Florida law. FRACCA implores the PSC to prevent this kind of activity.

By way of this correspondence, FRACCA also hereby requests that the State of Florida Office of the Attorney General Antitrust Division investigate this matter. FRACCA is aware and entirely understands that FPL, via the use of affiliates, may enter into and compete in a private market. However, FPL must compete on a level playing field, which it is not. Jupiter-Tequesta A/C advertises as an FPL company, holds job fairs on FPL property, FPL solicits competitor's employees on behalf of Jupiter-Tequesta A/C, and FPL provides extensive and free competitive advantages and market access to Jupiter-Tequesta A/C, all under the FPL logo and with the benefit of its goodwill. As if that were not enough, Jupiter-Tequesta A/C also utilizes false and misleading advertisements, by claiming to have been in business for over thirty-five (35) years despite being incorporated in Delaware in 2017. You will also find a video produced by The MEP Coalition for Fair Competition upon the enclosed flash drive which further elaborates and exposes upon the concerns of its members.

If FPL is permitted to wrongfully uplift and subsidize Jupiter-Tequesta A/C until it becomes a self-sustaining behemoth in the HVAC service market, an untold number of family owned small business will be destroyed. Indeed, the landscape of the construction industry in Florida may be irreversibly altered. We may even see behavior exhibited by FPL akin to that in the seminal antitrust case *Standard Oil Co. of New Jersey v. United States*. 31 S.Ct. 502 (1911). FPL's market saturation, consumer contact, and inevitable buying power will allow it to manipulate supply chains while it seeks to dominate and control the Florida MEP/HVAC service market. Accordingly, it is absolutely paramount that the State of Florida step in and ensure that all competition and FPL's operation of its affiliates is occurring within the confines of Florida law, for both the protection of free market enterprises and the consumers of the State of Florida.

State of Florida Public Service Commission
State of Florida Office of the Attorney General's Antitrust Division
September 12, 2018
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Thank you for your attention into this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Cotney Construction Law, LLP



Virgil Tray Batcher

VTB:va

Enclosures

cc: The Florida Refrigeration and Air Conditioning Contractor Association (via e-mail)