

STEEL ■
HECTOR
& DAVIS

REGISTERED LIMITED LIABILITY PARTNERSHIP

Steel Hector & Davis LLP
215 South Monroe, Suite 601
Tallahassee, Florida 32301-1804
850.222.2300
850.222.8410 Fax
www.steelhector.com

February 14, 2001

Matthew M. Childs, P.A.

-VIA HAND DELIVERY-

Ms. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 001148-EI

Dear Ms. Bayó:

It has been brought to my attention that there is a typographical error in Paragraph No. 2 of Florida Power & Light Company's Response in Opposition to Amended Petition to Intervene of Dynegy, Inc. and Dynegy Midstream Services, L.P. (the "FPL Response"), which was filed last Friday. The paragraph presently reads

FPL does not oppose Dynegy's Motion, for the reasons discussed below,
respectfully requests the Commission to deny the Amended Petition.

whereas it should read

FPL does not oppose Dynegy's Motion but, for the reasons discussed below,
respectfully requests the Commission to deny the Amended Petition.

While this is a minor omission, it might prove confusing. Therefore, I am enclosing for filing the original and seven (7) copies of a revised FPL Response, together with a diskette containing the electronic version of same. For convenient reference, I have dated the revised FPL Response "February 14, 2001 (revised)." The enclosed diskette is HD density, the operating system is Windows 98, and the word processing software in which the document appears is WordPerfect 9.

Sincerely,



Matthew M. Childs, P.A.

Enclosure

cc: Counsel of record

DOCUMENT NUMBER-DATE

02080 FEB 14 2001

Miami West Palm Beach Tallahassee Key West London Caracas São Paulo

Rio de Janeiro Santo Domingo
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Review of Florida Power & Light Company's proposed merger with Entergy Corporation, the formation of a Florida transmission company ("Florida transco"), and their effect on FPL's retail rates.)	DOCKET NO. 001148-EI
)	Dated: February 14, 2001 (revised)
)	
)	
)	
)	

**FLORIDA POWER & LIGHT COMPANY'S
RESPONSE IN OPPOSITION TO AMENDED PETITION TO INTERVENE
OF DYNEGY, INC. AND DYNEGY MIDSTREAM SERVICES, L.P**

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby respectfully opposes the amended petition to intervene that Dynegy, Inc. ("Dynegy") and Dynegy Midstream Services, L.P. ("Dynegy Midstream") have sought leave to file in this proceeding, and in support thereof states the following:

Background

1. On January 4, 2001, Dynegy filed a petition to intervene (the "Petition"). FPL filed a response in opposition to the Petition on January 12, 2001 (the "Response"). FPL opposed Dynegy's intervention on essentially two grounds: (a) Dynegy did not allege itself to be a retail customer of FPL and hence alleged no direct interest that this proceeding is designed to protect; and (b) the Petition clearly evidenced Dynegy's intent to misdirect this proceeding away from its stated scope toward issues related to FPL's position in the wholesale power market that are inappropriate and beyond the Commission's jurisdiction to consider.

2. On February 2, 2001, Dynegy and Dynegy Midstream filed a motion (the "Motion") for leave to file an amended petition to intervene (the "Amended Petition"). In the Amended

Petition, Dynegy attempts to address FPL's first ground for opposing Dynegy's intervention, by joining as a co-petitioner its subsidiary Dynegy Midstream, which is allegedly an FPL retail customer. The Amended Petition does nothing, however, to address FPL's second ground for opposition; in fact, the Amended Petition identifies the identical "disputed issues of material fact" and "ultimate fact" that FPL previously cited as evidence of Dynegy's intent to misdirect this proceeding. FPL does not oppose Dynegy's Motion but, for the reasons discussed below, respectfully requests the Commission to deny the Amended Petition.

Argument

3. The Amended Petition is a Trojan horse. Dynegy touts Dynegy Midstream's status as an FPL retail customer merely to gain entrance to this proceeding. Once inside, however, it is clear that Dynegy has little or no interest in debating the impact of the proposed merger of FPL's parent, FPL Group, Inc., on Dynegy Midstream's retail rates. Rather, it wants to address how the merger could affect Dynegy itself -- as a wholesale transmission customer and as a developer of industrial cogeneration facilities. Those are not proper subjects of this proceeding, and Dynegy should not be granted intervention to address them. Moreover, Dynegy Midstream's status as an FPL retail customer is an insubstantial basis for granting Dynegy Midstream -- much less Dynegy -- the right to intervene. The Commission should deny the Amended Petition as to both Dynegy and Dynegy Midstream. If it does not deny the Amended Petition outright, the Commission should not permit Dynegy to intervene and should not allow Dynegy Midstream to raise or address any issues that are not specifically related to the FPL retail rate on which it takes service.

A. Intervention standards.

4. Rule 28-106.205, F.A.C., requires that a petition to intervene in a Commission proceeding contain allegations sufficient to demonstrate that the person seeking intervention is entitled to participate in the proceeding, either as a matter of constitutional or statutory right or pursuant to Commission rule, or because the person's substantial interests are subject to determination or will be affected by the proceeding. The Amended Petition does not allege, nor could it, that Dynegy or Dynegy Midstream has a constitutional, statutory or regulatory right to intervene. Therefore, in order to demonstrate that either entity is entitled to intervene, the Amended Petition would have to contain allegations sufficient to demonstrate that the entity's substantial interests will be affected.

5. To demonstrate standing to intervene under the "substantial interest" test, a potential intervener must show that (a) it will suffer injury in fact as a result of the agency action contemplated in the proceeding that is of sufficient immediacy to entitle it to a hearing, and (b) the injury suffered is a type against which the proceeding is designed to protect. *Ameristeel Corp. v. Clark*, 691 So.2d 473, 477 (Fla. 1997) (quoting *Agrico Chemical Co. v. Dep't of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981)). Mere economic losses due to increased competition are not of sufficient immediacy to warrant intervention. *Florida Soc'y of Ophthalmology v. State Board of Optometry*, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988). Nor do general concerns shared by members of the community at large reflect the type of injury that proceedings are intended to protect. *Boca Raton Mausoleum v. Dep't of Banking and Finance*, 511 So.2d 1060, 1066 (Fla. 1st DCA 1987). And speculation on the potential occurrence of injurious events fails to meet the "injury in fact"

requirement. *Village Park Mobile Home Ass'n, Inc. v. State, Dep't of Bus. Regulation*, 506 So.2d 426, 434 (Fla. 1st DCA 1987).

6. This proceeding was initiated by the Commission to

consider the effect on FPL's retail rates of: 1) the planned formation of a regional transmission organization for peninsular Florida; and 2) FPL's planned merger with Entergy Corporation.

Order Establishing Procedure, No. PSC-00-2105-PCO-EI, issued November 6, 2000 (emphasis added). The stated scope of the proceeding is consistent with the Commission's regulatory authority over FPL's retail electric utility business. The Commission has not undertaken, nor could it properly undertake, an investigation into impacts on other aspects of FPL's and its affiliates' business that do not concern retail rates.

B. Dynegy Midstream has failed to allege an adequate basis for intervention.

7. Dynegy Midstream is alleged to be a retail customer of FPL in the GSD-1 rate class. See Amended Petition at ¶11; Motion at ¶2 and Ex. B. FPL has roughly 83,000 GSD-1 customers throughout its system. While the Amended Petition asserts that electric service is one of Dynegy Midstream's largest variable costs, that assertion must be tempered by the fact that the electric bill attached to the Motion as Exhibit B shows Dynegy Midstream was charged only \$1,458.68 in November 2000 and \$848.41 in the prior month. Dynegy Midstream's energy usage in 2000 averaged approximately 12,300 kWh per month, well short of the average for the GSD-1 class of about 20,300 kWh per month. In short, Dynegy Midstream is a modest-sized electric customer taking service on a quite common rate. The Amended Petition alleges nothing showing that Dynegy

Midstream has anything more than general concerns shared by the many other general-service ratepayers. This is an insufficient basis for standing. *See Boca Raton Mausoleum, supra.*

8. Moreover, *Agrico* requires that a party seeking to intervene allege that it will suffer “injury in fact” from contemplated agency action. This proceeding is an investigation, designed to inform the Commission about the proposed Florida Transco and the FPL Group - Entergy merger. The Commission has not proposed any agency action in this proceeding, and FPL has not sought agency action. FPL fails to see how anything in the conduct of this investigation to date possibly could result in “injury in fact” to Dynegy Midstream. Mere speculation as to the potential occurrence of an injury is insufficient. *Village Park Mobile Home Ass’n, Inc., supra.* Dynegy Midstream cannot possibly satisfy the “injury in fact” test at this time. If the Commission were ever to determine, based on the investigation, that it would take agency action affecting Dynegy Midstream’s substantial interests as a retail ratepayer, that would be the time for Dynegy Midstream to seek intervention.¹

¹ FPL recognizes that the Commission has permitted the Office of Public Counsel and the FIPUG to intervene. However, Public Counsel’s right to intervene is statutory, *see* Fla. Stat. §350.0611(1), and the Commission based its grant of intervention to FIPUG at least in part on the fact that there was no opposition to it, *see* Order Granting Intervention, No. PSC-00-1756-PCO-EI, issued September 26, 2000. Moreover, Public Counsel’s and FIPUG’s presence diminishes whatever legitimate interest Dynegy Midstream might otherwise have in participation. The Amended Petition vainly attempts to deflect this point. It draws a meaningless distinction between Public Counsel’s representation of “citizens” and Dynegy Midstream’s status as a “customer.” Clearly, Public Counsel’s principal role is to represent citizens as customers, a role that benefits Dynegy Midstream in the same way and to the same extent as every other customer of FPL. The Amended Petition then points out that Dynegy Midstream is not a member of FIPUG. This too is unavailing. FIPUG routinely participates to represent large industrial customers as a class, not the interests of individual member customers. That representation benefits FIPUG’s members and non-members alike.

C. There is no basis for Dynegy to intervene.

9. Even if the Commission were to allow Dynegy Midstream to intervene as a retail customer, there would be no valid reason to allow Dynegy to intervene as well merely because it is Dynegy Midstream's parent. As shown on Exhibit B to the Motion, Dynegy Midstream alone is the FPL customer; no reference appears on the bill to Dynegy. Dynegy Midstream is a separate legal entity, which is registered separately with the Florida Division of Corporations as a Foreign Limited Partnership and which has filed its own annual reports for at least the last three years. See Corporations Online, Public Inquiry for Dynegy Midstream Services, Limited Partnership, attached hereto as Ex. 1. According to paragraph 4 of the Amended Petition, Dynegy Midstream is "one of the country's leading manufacturers and marketers of natural gas liquids and related services." Surely such a substantial operation would have the resources to represent its own interests as a retail ratepayer in this proceeding. No useful purpose would be served by permitting Dynegy to intervene as well simply to protect those same interests.

10. The Amended Petition's allegations about Dynegy likewise provide no basis for it to intervene. In terms identical to the original Petition, (a) Dynegy is alleged to be a competitor of FPL in the wholesale power market, and (b) Dynegy's ability to compete with FPL in that market is alleged to be affected by the availability, reliability and cost of electric transmission services provided by FPL, as well as by the electricity rate that could be established if FPL's merger with Entergy is approved. Amended Petition at ¶¶6 and 10. These allegations fail to add substance to Dynegy's bid for intervention. Dynegy expresses concern over matters -- the health of the wholesale power market and the terms and conditions of transmission and wholesale power rates -- that are

well outside the Commission's jurisdiction, not to mention the stated scope of this proceeding. Dynegy attempts to address this fatal shortcoming by alleging, vaguely and insubstantially, that the Commission's determination of retail rates somehow could lead to changes in wholesale and/or transmission rates charged by FPL to Dynegy. *Id.* at ¶9. At best, this is mere speculation about the potential occurrence of injurious events, which *Village Park Mobile Home Ass'n* clearly holds is inadequate to meet *Agrico's* "injury in fact" requirement. Moreover, even if such a connection could be shown, impacts on wholesale power and transmission rates do not constitute an interest within the zone of interests that this proceeding, or the Commission's jurisdiction, is designed to protect. *See Ameristeel Corp., supra*, 691 So.2d at 478 (the mere fact that prospective intervenor identified an impact on it resulting from Commission's decision on territorial dispute did not warrant intervention, when that impact was not one that the Commission's jurisdiction over territorial disputes is intended to address).

11. Apparently sensing the futility of its earlier allegations, Dynegy has added one other, which is also unavailing. Dynegy alleges that it is a developer of industrial cogeneration facilities, and that retail rates constitute the "price point" against which it must compete in attempting to lure utility customers away to cogeneration. Amended Petition at ¶12. This is a curious twist indeed. By the logic of its "price point" argument, Dynegy's interest in FPL's retail rates is to ensure that they are as *high* as possible, for it would be the prospect of avoiding high rates that might tempt customers to install cogeneration. But the purpose of this proceeding -- and of the Commission's regulation of electric utilities generally -- is manifestly not to ensure that retail rates will be high.

Dynegy's alleged interest in high retail rates is not one that this proceeding is designed to protect and hence it fails to satisfy the second prong of the *Agrico* test for intervention.²

D. Dynegy proposes issues for consideration that would be clearly inappropriate for this proceeding.

12. As in the original Petition, the Amended Petition's identification of "disputed issues of material fact" betrays Dynegy's real interest in intervention: to steer this proceeding in directions that have nothing to do with the Commission's stated purpose for the proceeding. Paragraph 12 of the Amended Petition identifies, in identical terms to paragraph 11 of the original Petition, the following "disputed issues of material fact":

- "The effect of the proposed merger on FPL's earnings." ¶12 (a). This proceeding is not an earnings review.
- "The effect of the proposed merger on FPL's market power." ¶12 (b). The subject of FPL's "market power" is within the scope of neither this proceeding nor the Commission's jurisdiction.
- "The effect of the proposed merger on competition in Florida's wholesale power market." ¶12 (c). The Commission has no authority to consider the effect of the proposed merger on the wholesale power market and has not proposed to do so in this proceeding.

² Dynegy's purported interest in high retail rates is also in direct conflict with Dynegy Midstream's asserted interests as a retail ratepayer, which presumably are best served by ensuring that retail rates are *not* high. It is frankly difficult to regard Dynegy's "price point" argument as anything other than desperate and hackneyed makeweight.

- “The effect of the proposed merger on the adequacy, availability, reliability, and cost of electric transmission capacity in the Florida market.” ¶12 (d). To the extent that the Commission has jurisdiction over this subject, it does not relate to the issue of wholesale transmission service, which is clearly the focus of Dynegy’s interest.
- “The appropriate allocation of FPL revenues between retail and wholesale customers.” ¶12 (e). This proceeding is not about jurisdictional separation of revenues, nor should it be.
- “The appropriate acquisition adjustment to be made in setting retail rates for FPL retail customers after the merger.” ¶12 (f). This issue has been the subject of Staff inquiry; there is nothing to suggest that it is of unique interest to Dynegy or Dynegy Midstream, or that they would bring any useful expertise to bear on it.

13. The “ultimate fact” identified in Paragraph 13 of the Amended Petition is likewise taken verbatim from the original Petition and is likewise irrelevant to this proceeding’s proper purpose. It asks the Commission to consider “the merger’s impact in assessing FPL’s earnings and market dominance.” Again, Dynegy reveals that its true interests relate to FPL’s position in the wholesale power market, not to FPL’s provision of retail electric service. In short, Dynegy’s identification of issues constitutes an eloquent, if unintended, concession that it is looking for something very different than what this proceeding is intended to provide and that its intervention would serve no purpose other than to disrupt and misdirect.

WHEREFORE, FPL respectfully requests that the Commission deny the Amended Petition and not allow either Dynegy or Dynegy Midstream to intervene in this proceeding. In the alternative,

if the Commission does not deny the Amended Petition in its entirety, then FPL respectfully requests that the Commission not permit Dynegy to intervene and not allow Dynegy Midstream to raise or address any issues that are not specifically related to the FPL retail rate on which it takes service.

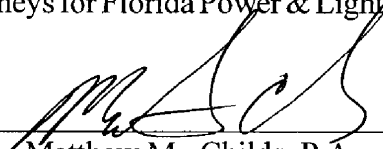
Respectfully submitted,

R. Wade Litchfield, Esq.
Senior Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408

Steel Hector & Davis LLP
215 South Monroe Street - Suite 601
Tallahassee, Florida 32301

Attorneys for Florida Power & Light Company

By:



Matthew M. Childs, P.A.
John T. Butler, P.A.

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of FPL's Response in Opposition to Amended Petition to Intervene of Dynegy, Inc. and Dynegy Midstream Services, L.P. was served by Hand Delivery (*) or mailed this 14th day of February 2001 to the following:

Robert V. Elias, Esquire. *
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850

Thomas A. Cloud, Esquire
Gray, Harris & Robinson, P.A.
201 East Pine Street, Suite 1200
Orlando, Florida 32802-3068

J. Roger Howe, Esq.
Office of Public Counsel
c/o Florida Legislature
111 W. Madison Street
Room No. 812
Tallahassee, Florida 32399-1400

Florida Industrial Power Users Group
c/o John McWhirter, Jr.
McWhirter Reeves
400 North Tampa St., Suite 2450
Tampa, Florida 33601-3350

By: 
Matthew M. Childs, P.A.