

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of the retail  
rates of Florida Power & Light  
Company.

DOCKET NO. 001148-EI  
ORDER NO. PSC-02-0324-PCO-EI  
ISSUED: March 13, 2002

ORDER DENYING PETITION TO INTERVENE

By petition dated February 8, 2002, NUI Energy, Inc. (NUIE) has requested permission to intervene in this proceeding. NUIE is a corporation organized under the laws of the state of Delaware. NUIE sells natural gas to small and mid-sized retail commercial customers in Florida and competes with FPL Energy Services. In its petition, NUIE argues that it will be directly and substantially affected by any action the Commission takes in this docket. In addition, NUIE states it has a substantial interest in the outcome of Phase 2 of this proceeding.

NUIE states that this proceeding will address numerous issues concerning Florida Power & Light Company's (FPL) retail rates, including FPL's business relationships involving the sale and transportation of natural gas. Specifically, NUIE cites Issues 152-156 in Order No. PSC-02-0102-PCO-EI, dated January 16, 2002. These issues are:

- Issue 152: What is the appropriate regulatory treatment for sales of natural gas and transportation capacity made by FPL to an affiliated company?
- Issue 153: What is the appropriate regulatory treatment for sales of natural gas and transportation capacity made by FPL to an unaffiliated company?
- Issue 154: How should FPL allocate the costs associated with its sales of natural gas to FPL Energy Services (FPLES)?
- Issue 155: What is the appropriate regulatory treatment of FPL Energy Services' revenues and costs associated with sales by FPLES to customers within FPL's service area?

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Issue 156:           What is the appropriate regulatory treatment of FPL Energy Services' revenues and costs associated with sales by FPLES to customers outside of FPL's service area?

NUIE states it has a substantial interest in these issues because the affiliation between FPL and FPL Energy Services has created an unauthorized subsidization which enables FPL Energy Services to underprice its natural gas service rates in violation of Florida law, thereby unfairly and improperly undercutting its competitors' natural gas service rates.

On February 19, 2002, FPL filed a Response in Opposition to NUIE's Petition to Intervene stating that NUI fails to meet the test the courts have outlined to confer standing. FPL states that NUIE has no substantial interest in the subject matter of this proceeding, which is FPL's retail rates, since NUIE is not an FPL customer and seeks to intervene based solely upon "competitive economic injury" which may possibly affect its competition in the market.

#### APPLICABLE LEGAL STANDARD

To have standing in an administrative proceeding, a party must show that its substantial interests will be determined in the proceeding. See § 120.569(1), Florida Statutes. In Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), the First District Court of Appeal established the generally applicable test for standing to participate in administrative proceedings:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Agrico, 406 So. 2d at 482.

The first prong of the test, the "immediacy" requirement, has been held to preclude participation based on stated concerns that are speculative or conjectural. See International Jai-Alai Players Assoc. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, at 1225, 1226 (Fla. 3rd DCA 1990), and Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987) (speculations on the possible occurrence of injurious events is too remote to warrant inclusion in the administrative review process).

The second prong of the test, the "zone of interest" requirement, further limits standing to those persons that the Legislature intended to be protected by the administrative proceeding at issue. Agrico, 406 So. 2d at 478; Ameristeel Corp. v. Clark, 691 So. 2d 473, 478 (Fla. 1997).

#### ANALYSIS AND CONCLUSION

NUIE alleges that it is, or will suffer, direct and immediate injury as a result of FPL's unauthorized, improper subsidization of FPL Energy Services' natural gas business, through FPL's electric services business. NUIE states that it has a substantial interest in insuring the relationship between FPL's electric service business and FPL Energy Services' natural gas service business is properly regulated. NUIE argues that this proceeding will directly address the type of injury NUIE currently suffers because the Commission will address the relationship between FPL's electric service business and FPL Energy Services' natural gas service business under Issues 152-156.

To support its alleged substantial interest, NUIE states only that (a) FPL representatives may, while in the full employ of FPL, sell and otherwise market FPL Energy Services' natural gas service to FPL's electric customers and (b) FPL may be absorbing losses incurred by FPL Energy Services in its unregulated retail business through fuel adjustment costs, natural gas transportation costs, and other costs, recovered through the electric service revenues paid to FPL by its electric service customers.

This proceeding is intended to review FPL's retail rates. NUIE has made no concrete claim that it will be affected by the level of FPL's retail rates. Its argument for standing amounts to

speculation that the review of FPL's affiliate transactions in the course of this rate-review proceeding may somehow affect NUIE's competitive position with respect to FPL Energy Services in the sale of natural gas.

In Village Park Mobile Home Ass'n, Inc. v. State, Dep't of Bus. Regulation, 506 So. 2d 426, 433 (Fla. 1st DCA 1987), the court determined that an injury that is remote or speculative is insufficient to confer standing:

The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct.

Further, an indirect effect on economic competition does not meet the "immediacy" test. See Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988) ("While appellants may well suffer some degree of loss due to economic competition . . . , we fail to see how this potential injury satisfies the 'immediacy' requirement"); Village Park, 506 So. 2d at 434 (allegations regarding the effect of the outcome of an agency proceeding on the sales and profits of the intervener insufficient to confer standing); International Jai-Alai Players, 561 So. 2d at 1225-26 (claim that change in Jai-Alai schedule would indirectly affect economic interests of Jai-Alai Players "is far too remote and speculative in nature to qualify under the first prong of the Agrico standing test.").

Thus, I find that conjecture about an improved economic position in the natural gas market indirectly resulting from a retail electric rate proceeding is too speculative to meet the "immediacy" requirement of the injury-in-fact test of Agrico.

In addition to meeting the injury-in-fact prong of the Agrico test, NUIE must also meet the second prong zone-of-interest test. Both prongs of the Agrico test must be met. Ameristeel Corp. v. Clark, 691 So. 2d at 477. In fact, if an intervener fails the injury-in-fact test, there is no need to even consider the zone-of-interest prong. Id.

The zone-of-interest test looks at the nature of the alleged injury and compares it to the underlying purpose of the proceeding. Id. Therefore, standing based on allegations of competitive injury must be denied where the proceeding is "not meant to redress or prevent injuries to a competitor's profit and loss statement." Agrico, 406 So. 2d at 482.

This proceeding relates solely to the retail rates of FPL. Its purpose is not to protect the competitors of an unregulated affiliate in the natural gas market. The fact that the Commission is evaluating certain affiliate transactions to determine their impact on retail electric ratepayers does not confer standing upon the affiliate's natural gas competitors.

While NUIE cites two cases to show that competitive economic injury may provide a basis for standing to participate in an administrative proceeding, this is so only if the applicable statutory and regulatory schemes are designed to protect such interest. These cases can be distinguished because in both Boca Raton Mausoleum v. Department of Banking and Finance, 511 So. 2d 1060 (Fla. 1st DCA 1987) and Florida Med. Center v. Department of HRS, 484 So. 2d 1292 (Fla. 1st DCA 1986), the central purpose of the administrative proceeding was to limit competition in certain markets. In the cemetery licensing proceeding at issue in Boca Raton, the primary factor to be considered in licensing a new facility was whether it would "unreasonably affect the competitive market," and the underlying purpose was to limit the number of facilities based upon "the relationship between population growth, death rate, and ratio of burials to deaths." Boca Raton, 511 So. 2d at 1064 (quoting Section 497.002, Florida Statutes). Similarly, in the hospital certificate of need proceeding at issue in Florida Medical, the purpose was to protect competing facilities from "the probable impact of the proposed project on competition in [the same service] area." Florida Med., 484 So. 2d at 1294.

In this proceeding, market competition is not the purpose of the proceeding. Instead, the Legislature has defined the factors to be considered in evaluating a public utility's rates:

In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all

public utilities under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities; and energy conservation and the efficient use of alternative energy sources; provided that no public utility shall be denied a reasonable rate of return upon its rate base in any order entered pursuant to such proceedings.

Section 366.041(1), Florida Statutes. All of the factors listed are designed to protect a utility's retail customers. Nowhere has the Legislature indicated any intention to protect competitors. I find, therefore, that NUIE, has not demonstrated an injury of the type or nature which the proceeding is designed to protect.

Further, in Order No. PSC-01-0099-PCO-EI, denying intervention to Colonial Pipeline Company, intervention in this Docket was limited to entities that would be directly affected by FPL's rates and whose reason for intervention would relate to the underlying purpose of the case. That order states: that where the intervener is "not a retail customer of FPL . . . any actual or potential injury to [it] would not be addressed through this docket" and its "substantial interests are not affected." Order No. PSC-01-0099-PCO-EI, dated January 12, 2001, page 2. I find NUIE's position to be no different in terms of standing. For this reason, NUIE's petition is denied.

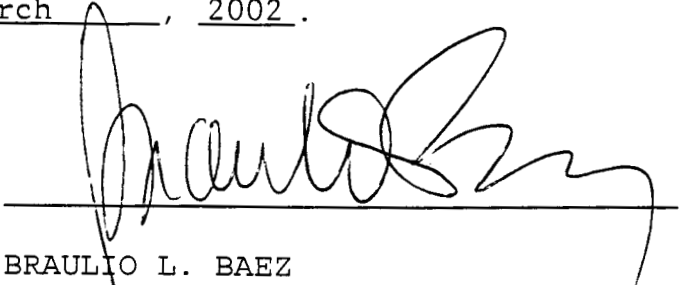
The denial of NUIE's Petition to Intervene is without prejudice. Should issues subsequently be identified that affect NUIE's substantial interests, then NUIE may petition for leave to intervene again.

Based on the foregoing, it is

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that the Petition to Intervene filed by NUI Energy, Inc. is denied.

ORDER NO. PSC-02-0324-PCO-EI  
DOCKET NO. 001148-EI  
PAGE 7

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 13th day of March, 2002.



BRAULIO L. BAEZ  
Commissioner and Prehearing Officer

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in

ORDER NO. PSC-02-0324-PCO-EI  
DOCKET NO. 001148-EI  
PAGE 8

the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.