

830
an

LAW OFFICES
BRYANT, MILLER AND OLIVE, P.A.
201 South Monroe Street
Suite 500
Tallahassee, Florida 32301
(904) 222-8811

ORIGINAL
FILE COPY

FAX: (904) 224-1544
(904) 224-0044

Barnett Plaza
Suite 1265
101 East Kennedy Boulevard
Tampa, Florida 33602
(813) 273-6677
FAX: (813) 223-2705

5825 Glenridge Drive
Building 3
Suite 101
Atlanta, Georgia 30328
(404) 705-8433
FAX: (404) 705-8437

December 18, 1995

VIA HAND DELIVERY

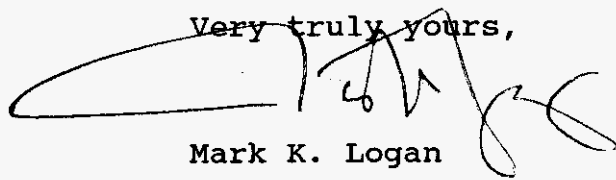
Ms. Blanco S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
Betty Easley Conference Center
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

RE: In Re: Petition of Jacksonville Electric Authority to
Resolve a Territorial Dispute with Florida Power & Light
Company in St. Johns County, Docket No.: 950307-EU

Dear Ms. Bayo:

Enclosed please find the original and fifteen copies of
Florida Power and Light's Memorandum in Opposition to Motion to
Intervene and Objection to Preliminary Agency Action for filing
with Florida Public Service Commission in the above referenced
matter.

Very truly yours,



Mark K. Logan

- ACK
- AFA
- APP MKL/skb
- CAF Enclosure
- CMU
- CTR cc: Bruce Page, Esquire
- EAG Kenneth A. Hoffman, Esquire
- LEG Edward Tancer, Esquire
- LIN Beth Culpepper, Esquire
- OPC The Honorable John Delaney
- RCH Roger Howe, Esquire
- SEC Richard Salem
- WAS
- OTH

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
12709 DEC 18 1995
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition of Jacksonville)
Electric Authority to Resolve a)
Territorial Dispute with Florida)
Power & Light Company in St. Johns)
County)

DOCKET NO. 950307-EU

Filed: December 18, 1995

**FLORIDA POWER AND LIGHT'S MEMORANDUM IN OPPOSITION TO
MOTION TO INTERVENE AND OBJECTION TO PRELIMINARY AGENCY ACTION**

Florida Power and Light Company ("FPL"), pursuant to Rule 25-22.037, Fla. Admin. Code, files this Memorandum in Opposition to Florida Steel Corporation's ("Florida Steel's") Motion to Intervene and Objection to Preliminary Agency Action and states:

1. This docket was initiated as a Petition to Resolve a Territorial Dispute in St. Johns County, filed by Jacksonville Electric Authority ("JEA"). The JEA is a subsidiary entity of the City of Jacksonville and is authorized to provide electricity and power to customers in Duval County and elsewhere.

2. FPL and JEA, via extensive settlement negotiations, resolved the dispute in St. Johns County. The parties further agreed upon a new territorial agreement re-affirming the territorial boundary shared by the parties for over 30 years. Accordingly, the parties, on October 6, 1995, filed a joint motion for approval of a territorial agreement.

3. Staff for the PSC reviewed the proposed agreement and issued a favorable recommendation on November 8, 1995. Pursuant to Rule 25-22.029, Fla. Admin. Code, the agreement was properly noticed and scheduled for Commission vote on November 21, 1995, as a proposed agency action.

DOCUMENT NUMBER-DATE

12709 DEC 18 95

FPSC-RECORDS/REPORTING360

4. The day before the agenda conference, representatives of Florida Steel requested a deferral of the item due to an alleged lack of notice that the Commission would consider a proposed comprehensive territorial agreement covering several counties. The Commission deferred consideration of the item until its next regularly scheduled agenda conference on December 5, 1995.

5. On December 4, 1995, the day before consideration of the now once-deferred agenda item, Florida Steel, at approximately 4:20 p.m., filed via facsimile its Motion to Intervene and Objection to Preliminary Agency Action.

6. On that same day, the Honorable John A. Delaney, Mayor of the City of Jacksonville, sent a request to Commission Chairwoman Susan F. Clark requesting a deferral of the agenda item to allow for analysis of a "local employer's" legal analysis of the City of Jacksonville's rights and obligations concerning the proposed agreement. The letter noted that the City had received a legal analysis that suggested the City has the legal authority and obligation to direct FPL to cease serving this unnamed customer, ultimately revealed as Florida Steel. Since the Mayor's letter constituted a potential ex parte communication under Section 350.042, Florida Statutes (1995), the letter was held from the Chairwoman and Commission until the actual agenda conference.

7. At the December 5, 1995, agenda conference, the Commission considered the Mayor's request and also heard an oral request for deferment of the proposed territorial agreement from Florida Steel's legal counsel. The Commission agreed to defer the

agenda item until a later date to be determined by the Chairwoman of the Commission and staff. Subsequent to the Agenda conference, staff have informed FPL that the agreement will now be considered as a proposed agency action on February 6, 1996. Staff have also scheduled a meeting of FPL, JEA, Florida Steel and any other interested party for January 10, 1996 to discuss any and all issues regarding the proposed territorial agreement.

8. Since the Commission has now afforded Florida Steel not one, but two deferments of the proposed consideration of the territorial agreement, Florida Steel's Objection to Proposed Agency Action is moot. The only relief requested by Florida Steel regarding its objection was that there should be a meeting of the parties prior to the Commission considering the proposed agreement. See Paragraph 14 of Florida Steels's Motion to Intervene and Objection to Proposed Agency Action. Since that meeting is now scheduled there is no reason for any further deferment of consideration of the proposed agreement.

9. Florida Steel also claims that it is substantially affected by the proposed territorial agreement, and therefore must be allowed to intervene in this proceeding with full rights as a party. This notwithstanding the fact that pursuant to Commission Rule 25-22.039, Fla. Admin. Code, all intervenors take the case as they find it. Here, of course, the case is at the proposed agency action stage where the only item left is for the Commission to consider is approval of the proposed agreement. Whatever Florida

Steel's desire to intervene in a Commission proceeding at this point, the motion to intervene must still fail as Florida Steel has not demonstrated the necessary standing to support intervention.

10. Rule 25-22.039, Fla. Admin. Code provides that persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene. The petition 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 putative intervenor are subject to determination or will be affected through the proceeding. Id. Florida Steel's Motion to Intervene contains no allegations suggesting that it may participate in this docket as a matter of constitutional or statutory right. Accordingly, Florida Steel may only be granted intervenor status if it can demonstrate that it has standing as a result of a substantial interest subject to determination or that will be affected through the proceeding.

11. A two prong test for standing was developed in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2nd DCA 1981), rev. denied, Freeport Sulphur Co., v. Agrico Chemical Co., 415 So.2d 1359 (Fla. 1982). That test has been expressly adopted by the Commission in determining whether to grant petitions to intervene in territorial matters. In re: Joint Petition for Approval of Territorial Agreement Between Florida

Power & Light Company and Peace River Electric Cooperative, Inc.,

12. Under Agrico, a party must show (1) that he will suffer an 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. The first requirement deals with the degree of the injury, the second with the nature of the injury. Agrico at 482.

13. Here, Florida Steel fails on both counts. Paragraph 12 of Florida Steel's Motion to Intervene states that "As a result of the closure of its Tampa mill this summer, as well as other considerations, Florida Steel must decide which of its production facilities must be modified or expanded. It must also decide if continued operation of the Jacksonville mill can be justified in the long term." There is no hint of any immediacy associated with this alleged injury. Furthermore the statements admit that there are numerous other considerations at issue for Florida Steel wholly unrelated to the proposed agency action of approving a territorial agreement. In addition there is no nexus between these alleged injuries and the proposed agency action of approving a territorial agreement. Such speculative and indirect allegations do not constitute an injury-in-fact that will support standing. In re: Joint Petition for Approval of Territorial Agreement between Florida Power & Light Company and Peace River Electric Cooperative, Inc. at 276.

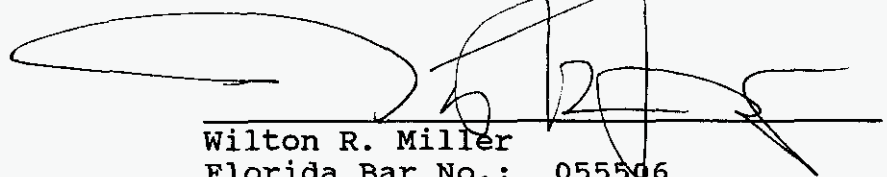
14. Florida Steel has not alleged anywhere within the four corners of its Motion that either approval or disapproval of the

territorial agreement will cause any change in circumstances, let alone an injury-in-fact. Florida Steel is an FPL customer within FPL's service territory. If this agreement is approved Florida Steel remains an FPL customer. If the agreement is not approved Florida Steel will still be an FPL customer subject to the current FPL-JEA territorial agreement and boundary. Florida Steel has simply alleged that it is unhappy with the Commission-approved rate FPL charges. Such allegations are insufficient to demonstrate an injury-in-fact that would support a finding that Florida Steel's substantial interests are at issue in this docket. In Re: Petition of Florida Power and Light Company for resolution of a territorial dispute with Fort Pierce Utilities Authority, PSC Order No, 94-0909-PCO-EU (July 25, 1994).

15. In addition to the fact that Florida Steel has not sufficiently pled an injury-in-fact that would satisfy the requirements of the first prong of the Agrico standing test, the Motion is further deficient in that it fails the second prong of Agrico as well. It is well established that in determining the appropriateness of territorial agreements, a customer has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. Storey v. Mayo, 217 So. 2d 304, 307-308 (Fla. 1968). Here Florida Steel alleges that it will be better served by the JEA. Since a territorial agreement is a proceeding where personal preference is not an issue, whatever alleged economic impact Florida Steel has suffered, even if real and direct, is not within the zone of

interests that this proceeding is designed to protect. In Re: Joint Petition for Approval of Territorial Agreement Between Florida Power & Light Company and Peace River Electric Cooperative at 277. Accordingly, Florida Steel's Motion to Intervene must be denied.

Respectfully submitted,



Wilton R. Miller
Florida Bar No.: 055506
Mark K. Logan
Florida Bar No.: 0494208
Bryant, Miller and Olive, P.A.
201 South Monroe Street
Suite 500
Tallahassee, Florida 32301
(904) 222-8611

and

Edward Tancer
Florida Power & Light Company
11770 U.S. Highway One
North Palm Beach, Florida 33408
(407) 625-7241
Florida Bar No.: 509159

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the parties listed below on this 18th day of December, 1995.

Kenneth Hoffman, Esq.
William Willingham, Esq.
Rutledge, Ecenia, Underwood
Purnell & Hoffman
215 South Monroe Street
Suite 420
Tallahassee, Florida 32301

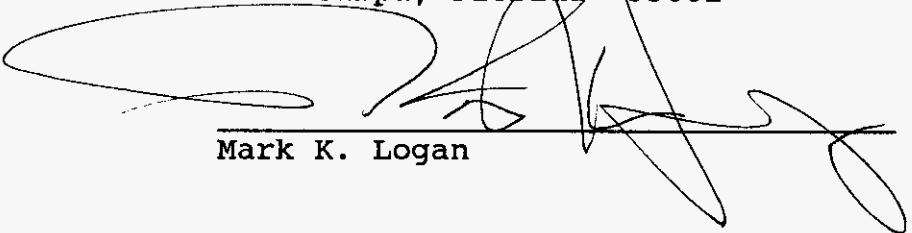
Mary Elizabeth Culpepper, Esq.
Staff Counsel
Public Service Commission
Gunter Building, Room 370
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399

The Honorable John Delaney
1400 City Hall
220 East Bay Street
Jacksonville, Florida 32202

Bruce Page
600 City Hall
220 East Bay Street
Jacksonville, Florida 32202

Roger Howe, Esq.
Office of Public Counsel
111 W. Madison Street
Suite 801
Tallahassee, Florida 32399-1400

Richard Salem
Patricia Haisten
Salem, Saxon & Nielsen
101 E. Kennedy Blvd., Ste. 3200
Post Office Box 3399
Tampa, Florida 33601



Mark K. Logan