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December 9, 1997

By Hand Delivery

Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard, Room 110
Tallahassee, Florida 32399-0850

**Re: Petition of Duke Energy New Smyrna Beach Power Company, L.L.P. for
Declaratory Statement Concerning Eligibility To Obtain Determination of
Need Pursuant to Section 403.519, Florida Statutes
Docket No. 971446-EU**

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and fifteen (15) copies of Petition for Leave to Intervene in Docket No. 971446-EU. Also enclosed is an additional copy of the Petition which we request that you stamp and return to our runner.

If you or your Staff have any questions regarding this filing, please contact me at 222-2300.

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WAS _____

OTH Deaton

Very truly yours,



Charles A. Guyton

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Duke Energy New Smyrna)
Beach Power Company, L.L.P. for)
Declaratory Statement Concerning)
Eligibility To Obtain Determination of Need)
Pursuant to Section 403.519, Florida Statutes)

Docket No. 971446-EU

Filed: December 9, 1997

**FLORIDA POWER & LIGHT COMPANY'S
PETITION FOR LEAVE TO INTERVENE**

Florida Power & Light Company ("FPL"), pursuant to Florida Administrative Code Rule 25-22.039, petitions the Florida Public Service Commission ("Commission") for leave to intervene in Docket No. 971446-EU, and in the alternative if intervention is not permitted, moves the Commission, pursuant to Florida Administrative Code Rule 25-22.036(2), for leave to participate amicus curiae. As grounds for this requested relief, FPL states:

Introduction

1. The name and address of the petitioner are:

Florida Power & Light Company
9250 West Flagler
Miami, Florida 33174

2. All pleadings, motions, orders and other documents directed to the petitioner are

to be served on:

Matthew M. Childs, P.A.
Charles A. Guyton
Steel Hector & Davis
Suite 601, 215 S. Monroe St.
Tallahassee, Florida 32301

William G. Walker III
Vice President, Regulatory Affairs
9250 West Flagler
Miami Florida 33174

**FPL's Substantial Interests Will Be Adversely Affected
By The Declaratory Statement Sought By Duke Energy New Smyrna**

3. FPL is a public utility within the meaning of Chapter 366, Florida Statutes and is subject to regulation by the Commission. As a public utility subject to regulation under Chapter 366, FPL is a state authorized provider of retail electric service with an obligation to serve the public, and it has the exclusive right to make retail sales within its territory. Consistent with its obligation to provide retail service, FPL has planned and built an integrated electric generation, transmission and distribution system, invested significant sums of money in assets necessary to serve its retail customers, has filed and had approved rates for the provision of its retail electric service, has had rules and regulations relating to the provision of retail electric service approved by the Commission, and has undertaken other conduct to comply with the regulatory requirements of Chapter 366 and the Commission's implementation of Chapter 366

4. In this proceeding an affiliate of an out-of-state electric utility seeks a declaratory statement that either (a) Duke Energy New Smyrna, a non-utility generator, may seek a determination of need under the Florida Electrical Power Plant Siting Act ("Siting Act"), or (b) Duke Energy New Smyrna may proceed with environmental permitting for construction of a power plant without securing a determination of need under the Siting Act.

5. In a number of prior decisions, the Commission has held that a non-utility generator is not a proper applicant for a determination of need under the Siting Act without first securing a contract with an electric utility, with which it must be a co-applicant.¹ The

¹ In Re: Petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 644 (Order No. PSC-02-1210-FOF-EQ) (It is the utility's need for power to serve its customers which must be evaluated

Commission's decisions have been premised upon its interpretation of the language of the Siting Act to the effect that the "need" to be assessed in a determination of need is the need of specific entities, all of which have an obligation to serve the public and a corresponding need for capacity. *Id.* Because non-utility generators such as the petitioner have no obligation to serve and a corresponding need, the Commission has required that they first have a contract with an entity that has such a need before proceeding under the Siting Act. *Id.* The Commission's interpretation of the Siting Act has been upheld not once, but twice by the Supreme Court of Florida.²

in a need determination proceeding. Nassau Power Corp. v. Beard, supra. A non-utility generator has no such need because it is not required to serve customers. The utility, not the cogenerator or independent power producer, is the proper applicant."); In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsula Florida's Electric Utilities, 89 FPSC 12:294, 318 (Order No. 22341) (The Siting Act, and Section 403.519 require that this body make specific findings as to system reliability and integrity, need for electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available **Clearly these criteria are utility and unit specific.** ... As such, that capacity must be evaluated from the purchasing utility's perspective in the need determination proceeding, i.e., a finding must be made that the proposed capacity is the most cost-effective means of meeting the purchasing utility X's capacity needs in lieu of other demand and supply side alternatives.) In Re: Joint Petition to determine need for electric power plant to be located in Okeechobee County by Florida Power & Light Company and Cypress Energy Partners, Limited Partnership, 92 FPSC 11, 363, 365 (Order No. PSC-92-1355-FOF-EQ). (The Commission stated: 'non-utilities are not included in the statutory definition of an "applicant" who may file for a need determination' and also held that "the statutory exclusion of non-utilities as applicants recognizes the utility's planning and evaluation process and envisions either approval or denial of the utility's selection of its generation alternatives."); In re: Petition of Florida Power and Light Company to determine need for electrical power plant - Martin expansion project, 90 FPSC 6: 268, 284-85 (Order No. 23080) (In order for the specific mandates of the statute to be meaningful, they must be answered from the utility's perspective. ... Unless the utility which awards the bid is an indispensable party, it is virtually impossible to develop the record in these areas.)

² Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992); Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994).

6. In its prior decisions holding that non-utility generators are not proper applicants under the Siting Act, the Commission has stated that its scheme of requiring a non-utility generator to first secure a contract with an entity that has a need, "simply recognizes the utility's planning and evaluation process. It is the utility's need for power to serve its customers which must be evaluated in a need determination proceeding. Nassau Power Corp. v. Beard, supra. A non-utility generator has no such need because it is not required to serve customers. The utility, not the cogenerator or independent power producer, is the proper applicant."¹

7. A declaratory statement finding that Duke Energy New Smyrna, a non-utility generator, could seek a determination of need without a contract with an entity that has a need for power would fail to recognize FPL's obligations to serve customers, FPL's corresponding need for power, FPL's planning and evaluation processes, and FPL's duty to avoid unnecessary duplication of facilities. The issuance of the declaratory statement sought would immediately and seriously injure FPL's ability (1) to meet its statutory duties to plan, build and maintain an system adequate to provide reliable service to its customers, (2) to provide transmission service necessary to serve its customers due to transmission constraints created by the Duke project, (3) to purchase power to serve its customers due to transmission constraints created by the Duke project, and (4) to seek a subsequent determination of need for an alternative plant or power purchase because of the existence of the Duke project

8. Because the petitioner seeks in this proceeding to have the Commission reverse a long-standing and well reasoned interpretation of the Siting Act that the need to be considered in

¹ In Re: Petition of Nassau Power Corporation to determine need for electrical power plant, 92 FPSC 10:643, 645, affirmed, Nassau Power Corp. v. Deason.

need determinations is the need of utilities with an obligation to serve, this proceeding is precisely the type of proceeding meant to protect FPL's interests. FPL seeks to protect its ability to plan and build its system to meet its service obligations. FPL seeks to protect its ability to seek determinations of needs under the Siting Act. FPL seeks to protect against uneconomic duplication of service. FPL seeks to protect its current ability under the Commission's and the Supreme Court's interpretation of the Siting Act to have resources available to meet its needs analyzed first in its planning and evaluation process. FPL seeks to avoid an entity building a power plant which could be used to serve FPL's need without regard as to whether it will improve or harm FPL's reliability, without regard to FPL ability to provide adequate electricity at reasonable cost, without regard as to whether the plant is the most cost-effective alternative, and without regard as to whether there is conservation available that would mitigate the need for the plant. All these interests have been put at risk by the relief sought in this proceeding

9. This is the only proceeding in which FPL can protect its interests. If the declaratory statement sought is issued, it is either controlling under the rule of stare decisis⁴ or entitled to great weight⁵ in future proceedings involving FPL customers seeking to use the same disguised retail sale arrangement. If not allowed to intervene and participate in this proceeding, FPL will be foreclosed from addressing the legal issue being addressed. Once the legal issue is addressed without FPL, FPL is faced with the decision, without an opportunity to help formulate

⁴ See, Department of HRS v. Barr cited previously.

⁵ See, Krivanek v. Take Back Tampa Political Committee, 625 So.2d 840 (Fla. 1993).

the law. This is not only the type of proceeding in which FPL's interest is meant to be protected, it is the only proceeding in which its interest may be protected.

Disputed Issues of Material Fact

10. FPL believes there are a number of disputed issues of material fact which should be resolved:

- a. Whether the proposed plant, without a contract for the purchase of its power, would reduce the use of imported oil in Florida by economically displacing oil-fired generation, at no risk to electric customers.
- b. Whether the proposed plant, without a contract to sell its power in Florida to an entity with an obligation to serve and a corresponding need, would provide general reliability benefits.
- c. Whether the proposed plant, without a contract to sell its power within Florida to a utility with need, would provide environmental benefits..
- d. Whether the proposed plant poses no economic risk to utility customers.
- e. Whether the proposed plant, without a contract to sell it output to a Florida utility provides any energy efficiency and conservation benefits.
- f. Whether the proposed plant, without a contract to sell its output to a Florida utility, provides any socio-economic benefits.
- g. What the proposed power plant, without a contract to sell its output to a Florida utility, would create downward competitive pressure on retail prices paid by consumers.

There may be other disputed issues of material fact not readily apparent on the face of the petition.

Ultimate Facts Alleged

11. Florida Power & Light Company's substantial interests will be affected by the disposition of the Duke Energy New Smyrna petition. Florida Power & Light Company should be granted leave to intervene.

Alternative Motion To Participate As Amicus Curiae

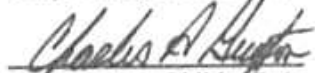
12. Pursuant to Rule 25-22.037(2), F.A.C., Florida Power & Light Company ("FPL"), alternatively to its petition to intervene, has moved the Commission for leave to file an amicus curiae memorandum of law addressing the petition in this proceeding. While FPL believes that it has substantial interests which will be affected by the Commission determination in this proceeding, should the Commission determine that FPL's interests are not sufficient to satisfy the standing test in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), the Commission would nevertheless be aided in its consideration of this petition by an FPL amicus curiae memorandum of law.

Prayer For Relief

WHEREFORE, Florida Power & Light Company petitions the Commission for leave to intervene and participate as a party in this proceeding. If its petition to intervene is granted, FPL's previously filed amicus curiae memorandum of law in Docket No. 971337-EU which FPL has previously asked be considered as a filing in this proceeding should be treated as an answer to the petition for a declaratory statement; if intervention is not granted, FPL's motion for leave to file an amicus curiae legal memorandum addressing why the Commission should dismiss or

summarily deny Duke Energy New Smyrna's petition should be granted.

Respectfully submitted,



Matthew M. Childs P.A.

Charles A. Guyton

Steel Hector & Davis LLP

Suite 601, 215 South Monroe St.

Tallahassee, Florida 32301

Attorneys for Florida Power & Light Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Petition for Leave to Intervene was served by Hand Delivery (when indicated with an *) or mailed this 9th day of December, 1997 to the following:

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