

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. )  
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) DOCKET NO. 971446 EU  
) FILED: December 15, 1997  
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**DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY, L.L.P.'s  
MOTION TO DISMISS FLORIDA POWER & LIGHT COMPANY'S PETITION  
FOR LEAVE TO INTERVENE**

Duke Energy New Smyrna Beach Power Company, L.L.P. ("Duke"), by and through undersigned counsel and pursuant to Rule 22.037, Florida Administrative Code ("F.A.C.") hereby files this motion to dismiss Florida Power & Light's Company's ("FPL's") Petition for Leave to Intervene, and in support thereof states as follows.

**Introduction**

'ACK \_\_\_\_\_ 1. On November 4, 1997 Duke filed with the Florida Public  
AFA \_\_\_\_\_ Service Commission ("FPSC" or "Commission") a Petition for  
APP \_\_\_\_\_  
CAF \_\_\_\_\_ Declaratory Statement which initiated this proceeding. In the  
CMU \_\_\_\_\_  
CTR \_\_\_\_\_ Petition, Duke requested that the Commission confirm that Duke is  
EAG \_\_\_\_\_ entitled to apply to the Commission for a determination of need  
LEG \_\_\_\_\_  
LIN \_\_\_\_\_ pursuant to Section 403.519, Florida Statutes, and the Florida  
OPC \_\_\_\_\_  
RCH \_\_\_\_\_ Electrical Power Plant Siting Act ("Siting Act"). In the  
SEC \_\_\_\_\_  
WAS \_\_\_\_\_  
OTH \_\_\_\_\_

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alternative, Duke requested that the Commission find that no determination of need is required for the project described in the Petition.

2. On December 9, 1997, FPL filed its Petition for Leave to Intervene ("Petition") in which it attempted to intervene in this docket. As a matter of law, FPL does not and cannot demonstrate standing to participate in this proceeding and FPL's Petition should be dismissed.

#### FPL Lacks Standing to Intervene in this Proceeding

3. Though FPL's Petition contains allegations of numerous injuries that FPL will purportedly suffer as a result of Duke's proposed project and which FPL contends serve as the basis for standing in this proceeding, FPL's allegations fall into four general categories: (1) alleged impairment of FPL's ability to meet its statutory duties to plan, build and maintain a system adequate to provide reliable service to its customers; (2) alleged impairment of FPL's ability to provide transmission service to its customers due to alleged constraints created by the project described in Duke's Petition for Declaratory Statement; (3) alleged impairment of FPL's ability to purchase power to serve its customers due to alleged transmission

constraints created by the project described in Duke's Petition for Declaratory Statement; and (4) alleged impairment of FPL's ability to seek a subsequent need determination for an alternative plant or power purchase because of the existence of the power plant described in Duke's Petition for Declaratory Statement. None of these purported injuries are sufficient to provide FPL with standing to participate in this proceeding.

4. In Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 and 415 So. 2d 1361 (Fla. 1982), the court enunciated a two-prong test for establishing standing in a Chapter 120 proceeding. To have a substantial interest in the outcome of an administrative proceeding, the court held that a petitioner must demonstrate:

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 the type and nature which the proceeding is designed to protect.

Id. at 482. FPL's Petition fails to satisfy either prong of the Agrico test.

5. To satisfy the first prong, a petitioner must assert that the agency action will result in an injury which is immediate, not remote. The injury cannot be based on speculation

or conjecture. Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); International Jai-Alai Players Association v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1226 (Fla. 3rd DCA 1990) (finding alleged injuries to be "too remote and speculative" to qualify under the first prong of the Agrico test). FPL's Petition contains numerous allegations of injury, all of which are too speculative to meet the first prong of the Agrico standing test.

6. All of FPL's purported injuries to its substantial interests are linked to the construction of a potential future merchant power plant and FPL asserts that this proceeding somehow will authorize construction of such a plant. FPL's assertion is simply not accurate. The purpose of this proceeding is simply to answer the question posed by Duke. If the Commission determines that Duke is an "applicant" eligible to pursue a determination of need, it by no means follows that Duke will be authorized to immediately construct a merchant power plant, nor that the construction of such a power plant would then adversely affect FPL's ability to plan and operate its system or result in uneconomic duplication. Accordingly, FPL's alleged injuries are too speculative and remote to meet the "immediacy" prong of the

Agrico standing test.

7. The second prong of the Agrico test requires a showing that the injury is of the type and nature against which the proceeding is designed to protect. Stated alternatively, a petitioner's injury must fall within the "zone of interest" to be protected by the proceeding and the rules and statutes at issue.

8. As noted above, this proceeding is a declaratory statement proceeding. Section 120.565(1), Florida Statutes, provides that declaratory statements are intended to provide a petitioner with "an agency's opinion as to the applicability of a statutory provision, or of any rule or order of an agency, as it applies to the petitioner's particular set of circumstances." As such "there will normally be no person, other than the petitioner (in this case Duke) who will be affected by the declaratory statement." Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928, 936 (Fla. 1st DCA 1990).

9. None of the injuries that FPL has alleged will occur are of the "type and nature" against which a declaratory statement proceeding is designed to protect. By its very nature,

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<sup>1</sup>The Commission rule concerning declaratory statements, Rule 25-22.020, F.A.C., contains similar language.

this declaratory statement proceeding is designed solely to provide a response to specific questions posed by Duke. As a matter of law, FPL does not fall within the "zone of interest" of the proceeding and thus has no cognizable substantial interest that can be affected. Accordingly, FPL has failed to meet the second prong of the Agrico standing test.

10. As described above, FPL alleges that the proposed merchant power plant may impair FPL's ability to seek a need determination for some future unspecified power plant. Clearly, this alleged injury is highly speculative. In addition, under the second prong of the Agrico test, economic injury is not sufficient to form the basis for standing unless the proceeding and underlying statutory framework are specifically designed to address economic issues. See Agrico, 406 So. 2d at 482. This declaratory statement proceeding is in no way related to the issue of uneconomic duplication of generating facilities and any alleged economic consequences to FPL as a result of this proceeding do not constitute a cognizable substantial interest under the second prong of the Agrico test. See In Re: Peoples Gas System, Inc., 1995 WL 121390 (Fla. P.S.C., March 13, 1995), Order No. PSC-95-0348-POF-GU at 3 ("TECO is only speculating what might happen if the rider is implemented. Speculation as to

future economic detriment is too remote to establish standing.";

In Re: Petition of Monsanto Company for a Declaratory Statement  
Concerning the Lease Financing of a Cogeneration Facility, Docket  
No. 860725-EU. (Fla P.S.C.), FPSC Order No. 16581 at 2.

WHEREFORE, Duke Energy New Smyrna Beach Power Company,  
L.L.P., respectfully requests that the Florida Public Service  
Commission DISMISS Florida Power & Light Company's Petition for  
Leave to Intervene in this docket.

Respectfully submitted this 15<sup>th</sup> day of December, 1997.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail or hand-delivery(\*) on this 15th day of December, 1997 to the following:

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