

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In Re: Joint Petition for Determination)
of Need for an Electrical Power Plant in)
Volusia County by the Utilities)
Commission, City of New Smyrna Beach,)
Florida, and Duke Energy New Smyrna)
Beach Power Company Ltd., L.L.P.)

DOCKET NO. 981042-EM
RECORDS AND REPORTING

FILED: SEPT. 18, 1998

ORIGINAL

PETITIONERS' RESPONSE IN OPPOSITION AND MOTION TO DENY FLORIDA
ELECTRIC COOPERATIVES ASSOCIATION, INC.'S PETITION FOR LEAVE
TO INTERVENE AND ACCOMPANYING MEMORANDUM OF LAW

The Utilities Commission, City of New Smyrna Beach, Florida ("UCNSB" or "Utilities Commission") and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Duke New Smyrna"), collectively referred to as "the Petitioners," pursuant to Commission Rule 25-22.037(2)(b), Florida Administrative Code ("F.A.C."), hereby respectfully submit this response in opposition and motion to deny the petition for leave to intervene filed herein by the Florida Electric Cooperatives Association, Inc., on September 11, 1998, ("FECA's Petition"), together with the Petitioners' accompanying memorandum of law.

SUMMARY

FECA has petitioned to intervene in this proceeding. As

ACK ✓ grounds for its intervention, FECA claims that the Commission's
AFA 2 decision will set precedent and result in a change of policy that
APP _____ could affect FECA's members; that the Project may impact the
CAF _____ ability of FECA's members to plan for and provide capacity and
CMU _____ energy to their customers; and that the Project could have a
CTR _____
LED 2 potential economic impact on FECA's members by displacing their
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generation units. As demonstrated below, none of FECA's alleged injuries demonstrate that its members have substantial interests that will be affected by this proceeding. See Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). In addition, FECA has failed to demonstrate that a "substantial number" of its members have substantial interests that will be affected by this proceeding. See Florida Home Builders v. Department of Labor, 412 So. 2d 351, 352-53 (Fla. 1982). Accordingly, FECA's Petition to Intervene should be dismissed.

RELIEF REQUESTED

WHEREFORE, based on the foregoing, the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. respectfully request that the Commission DENY the petition for leave to intervene in this proceeding filed by the Florida Electric Cooperatives Associates, Inc.¹

MEMORANDUM OF LAW

On August 19, 1998, Duke New Smyrna and the Utilities Commission jointly filed an application for determination of need thus initiating this proceeding to determine the need for the New

¹In accord with In Re: Application for Amendment of Certificate No. 427-W to Add Territory in Marion County by Windstream Utilities Company, 97 FPSC 4:556, the Petitioners are responding to FECA's petition as a motion, and therefore are requesting denial thereof. Also, since FECA is not yet a party, but rather only a movant, the Petitioners are moving to deny the motion rather than to dismiss FECA. If FECA is granted intervention, the Petitioners reserve their rights to move to dismiss FECA at any time during these proceedings.

Smyrna Beach Power Project ("Project"), a state-of-the-art 514 MW combined cycle generating unit to be located near the city of New Smyrna Beach, Florida. The purpose of this proceeding is to determine whether the proposed Project is consistent with the needs of Florida electric customers for reliable electric power supplies at a reasonable cost and to assure that the Project is the most cost-effective alternative available to provide needed power. See Floridians for Responsible Utility Growth v. Beard, 621 So. 2d 410, 412 (Fla. 1993); In Re: Petition to Determine Need for Proposed Capital Expansion Project of the Dade County Resources Recovery Facility, an Existing Solid Waste Facility, by Metropolitan Dade County, FPSC Docket No. 930196-EQ, Order No. PSC-93-1715-FOF-EQ at 2 (Fla. Pub. Serv. Comm'n, Nov. 30, 1993). The proceeding also serves to evaluate the need for the Project against which the Governor and Cabinet, sitting as the Siting Board, must balance the environmental impact resulting from the Project's construction and operation in making the ultimate decision whether to grant or deny site certification for the Project.

FECA has petitioned to intervene in this proceeding as an association on behalf of its members. Thus, to establish associational standing to intervene, FECA must demonstrate that a substantial number of its members have substantial interests which would be adversely affected by this proceeding. See Friends of the Everglades v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186, 188 (Fla. 1st DCA 1992),

(citing Florida Home Builders, 412 So. 2d at 353)). FECA has failed to make such a showing and its petition for leave to intervene should be denied.

ARGUMENT

The "substantial interests" of its members which FECA claims would be adversely affected by the determination of need sought by the Utilities Commission and Duke New Smyrna fall into three general categories which can be summarized as follows:

1. FECA contends that because the proceeding "will likely involve policy making and will set precedent" and could result in a "policy change of substituting statewide need for utility-specific need", its members will be impacted. See FECA's Petition to Intervene at ¶ 7 and ¶ 8.

2. FECA also contends that the Project "would impact the ability of [its] members to plan for and provide capacity and energy" to their customers and is "most likely" a duplication of FECA's members' planning efforts. See FECA's Petition to Intervene at ¶ 8.

3. Lastly, FECA alleges that its members could suffer "potential economic impact" in the form of "stranded costs" due to the Project's displacement of FECA's members' generating units. See FECA's Petition to Intervene at ¶ 9.

As demonstrated below, each of FECA's allegations regarding adverse effects to its members' interests are speculative, remote and outside of the zone of interests to be protected by this proceeding to determine the need for the Project. Moreover, FECA

has failed to demonstrate that a substantial number of its members will be adversely affected. Accordingly, FECA's Petition to Intervene should be denied.

I. THE LEGAL STANDARD.

It is well established that under the Florida Administrative Procedures Act ("APA"), standing is conferred upon persons whose substantial interests will be affected by proposed agency action. See Fla. Stat. § 120.569 (1997); Agrico, 406 So. 2d at 488. To establish standing to intervene, FECA must demonstrate (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and (2) that its injury is of the type or nature against which this proceeding is designed to protect. Ameristeel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997) (citing Agrico, 406 So. 2d at 482). These requirements are commonly known as the two prongs of the "Agrico test" for standing. The first prong of the Agrico test focuses on the degree of injury, and the second prong focuses on the nature of the injury. Ameristeel, 691 So. 2d at 477 (citing Agrico, 406 So. 2d at 482).

To satisfy the first prong of the Agrico test, FECA must demonstrate that this proceeding will result in an injury to its members which is immediate, not remote. The alleged injury cannot be based merely on speculation or conjecture. See Ameristeel, 691 So. 2d at 478; Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); International Jai-Alai Players Ass'n v. Florida Pari-

Mutuel Commission, 561 So. 2d 1224, 1226 (Fla. 3rd DCA 1990);
Village Park Mobile Home Ass'n v. Department of Business
Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987).

To satisfy the second prong of the Agrico test, FECA must demonstrate that the alleged injuries to its members are of the type and nature against which this need determination proceeding is designed to protect. Stated differently, FECA's alleged injuries to its members must fall within the "zone of interest" to be protected by this need determination proceeding and the statute and rules that establish the purpose and framework for this proceeding. See North Ridge General Hospital, Inc. v. NME Hospitals, Inc., 478 So. 2d 1138, 1139 (Fla. 1st DCA 1985). Moreover, as a general rule, alleged economic injury alone is not sufficient to form the basis for standing unless the proceeding and underlying statutory framework are specifically designed to address competitive economic injury. Id.

In addition, to meet the requirements of standing under the APA an association such as FECA, "must demonstrate that a substantial number of its members would have standing." Friends of the Everglades, 595 So. 2d at 188 (emphasis supplied).

**II. FECA'S ALLEGATIONS REGARDING THE POTENTIAL
PRECEDENTIAL NATURE OF THIS PROCEEDING ARE
NOT SUFFICIENT TO ESTABLISH STANDING UNDER
AGRICO.**

FECA alleges that its members' substantial interests will be affected because this need determination proceeding "will likely involve policy making and will set precedent" and will result in a "policy change of substituting statewide need for utility-

specific need." FECA's Petition to Intervene at ¶ 7 and ¶ 8. For several reasons, FECA's allegations regarding the potential for this proceeding to set Commission precedent are simply not sufficient to establish standing under Agrico.

First, FECA's alleged interest in whether the Commission sets precedent or policy in this proceeding does not amount to "a real and immediate injury in fact" and thus fails the first prong of the Agrico test. See Ward, 651 So. 2d at 1237. FECA claims that the precedent set and the policy made will "likely"² impact its members. FECA does not clearly state how its members will be impacted or identify in what proceedings the Commission's decision will serve as precedent. Thus, this alleged effect on FECA is based on speculation and conjecture and is too remote to establish standing under Agrico. Id. At most, FECA has demonstrated that it is an interested bystander, and such an interest simply does not give rise to standing. If it did, any party that claimed it might be affected by the precedent being set in a given Commission proceeding could intervene in that proceeding. Such a result would turn the law of standing on its head.

Second, FECA's claimed injuries related to any precedent that may be set by the Commission in this proceeding are not within the "zone of interest" of this proceeding and thus cannot form a basis for standing. This is a need determination

²FECA's choice of the term "likely" to describe its alleged interests in this proceeding is further evidence of the speculative nature of these interests.

proceeding to determine whether the Project meets the standards enumerated in Section 403.519, F.S. Nothing in Section 403.519, F.S., or in the applicable Commission rules can be interpreted as protecting the interests alleged by FECA in preventing precedent being established or a change of policy occurring.

Third, FECA bases its allegation that it will be affected by the policy set in this proceeding on the premise that the Commission will change its policy and substitute "statewide need for utility-specific need." FECA's Petition to Intervene at ¶ 8. The Joint Petition clearly asserts a need for the Project based on utility-specific need -- the Utilities Commission's and Duke New Smyrna's. Moreover, consistent with the Commission's evaluation of need in several recent need determination cases, the Petitioners have included information relative to Peninsular Florida's capacity and energy needs in their Joint Petition. See, e.g., In Re: Petition of Florida Power & Light Company for Determination of Need for Proposed Electrical Power Plant and Related Facilities -- Martin Expansion Project, FPSC Docket No. 89097E-EI, Order No. 22691, Staff Prehearing Order at 24. (Fla. Pub. Serv. Comm'n March, 1990) (identifying issue as whether proposed facility is "consistent with the capacity needs of Peninsular Florida.") The Petitioners are seeking a determination of need as applicants within the existing statutory framework and consistent with the Commission's existing policy and FECA's allegations to the contrary are misplaced.

III. FECA'S ALLEGATIONS REGARDING THE EFFECTS OF THIS PROCEEDING ON THE ABILITY OF ITS MEMBERS TO PLAN ARE INSUFFICIENT TO DEMONSTRATE STANDING.

FECA alleges that if the Commission grants the requested determination of need for the New Smyrna Beach Power Project, the ability of its members to plan will be adversely affected. FECA's Petition to Intervene at ¶ 8. This alleged effect on FECA's planning is speculative, remote and based on conjecture. It is therefore insufficient to establish standing under Agrico.³ See Ameristeel, 691 So. 2d at 478; Ward, 651 So. 2d at 1237. In addition, this alleged interest is outside the zone of interests that this need determination proceeding is designed to protect. See Agrico, 406 So. 2d at 482. Moreover, FECA has not explained how any effects on its members' planning processes might be adverse.

Planning inherently deals with uncertainty. Basically, it is the process by which an entity makes decisions as to how to address future circumstances that cannot be known with precision. Power supply planning routinely addresses and incorporates considerations regarding the availability of electric capacity and energy from other power suppliers.

The availability of an additional resource that a utility

³FECA states that the Project is "most likely a duplication of FECA's members efforts to plan . . ." FECA's Petition to Intervene at ¶ 8 (emphasis supplied). Once again, FECA's choice of the term "most likely" is evidence of the speculative nature of this claim.

may choose to -- but does not have to -- buy from simply cannot create an adverse effect. Either the utility will choose to buy from the supplier on mutually agreeable, beneficial terms, in which case there can be no adverse effect, or the utility will decline to purchase from the supplier (assuming rational behavior, this would occur when no mutually beneficial deal was possible) and proceed with its independent plans accordingly. Either way, there can be no adverse effect on the utility's planning processes.

Finally, this is not a planning proceeding. FECA's members' generation plans are reviewed by the Commission in its review of utility ten year site plans pursuant to Section 186.801, Florida Statutes, and Commission Rule 25-22.071, F.A.C.

IV. FECA'S ALLEGATIONS REGARDING THE POTENTIAL DISPLACEMENT OF ITS MEMBERS' INEFFICIENT GENERATION ARE NOT COGNIZABLE INTERESTS IN THIS PROCEEDING AND ARE INSUFFICIENT TO ESTABLISH STANDING UNDER AGRICO.

FECA alleges that because its' "members own and operate generating units" of the type that may be displaced by the Project, its members could suffer "potential economic impact" in the form of standard costs. FECA's Petition to Intervene at ¶ 9. For the following reasons, FECA's allegations are inadequate to establish standing to participate in the proceeding.

First, FECA has not explained how any of its members might suffer the economic injury identified as "stranded costs" as a result of the Commission's determination of need for the

Project.⁴ Petitioners submit that FECA probably cannot show any adverse effects for the following reasons.

1. Because power from the Project cannot be sold at retail, FECA's members will continue to make all retail sales in their service areas, and presumably, they will structure their rates to recover all costs.
2. Because Duke New Smyrna cannot interfere with existing obligations between the distribution cooperatives and the generation and transmission ("G&T") companies, and because Duke New Smyrna has no legal ability to force either the distributing cooperatives or the G&T cooperatives to buy power from the Project, there can be no stranded costs associated with displaced wholesale sales.
3. If the Project merely displaces generation by a G&T cooperative, by virtue of such G&T cooperative purchasing power from the Project, there obviously can be no adverse effect because the purchase wouldn't be made unless it was a good deal for the cooperative.
4. At the most, the G&T cooperatives might not make some wholesale sales to non-cooperative customers that they might conceivably be able to make if the Project were not to be built. This is highly speculative, in that it depends on at least (a) the hypothesized ability of

⁴ As discussed below, this alleged economic injury, in addition to being highly speculative, is an economic injury not cognizable in this need determination proceeding.

the G&T cooperatives to make such sales and (b) on the revenues from such hypothetical sales being significantly greater than the cost of making them.

Second, FECA's alleged injury arising from the displacement of generation from its members' electrical generation units is clearly an economic injury not cognizable in this proceeding. See Agrico, 406 So. 2d at 482. Even FECA describes its injury as a "potential economic impact." FECA's Petition to Intervene at ¶ 9.

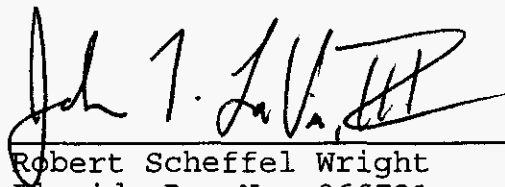
Third, FECA has not, and indeed, it cannot, allege that a "substantial number of its members" own or operate generating units that may be displaced by the Project. See Florida Home Builders, 412 So. 2d at 353 (stating that to establish standing, an association must demonstrate that a substantial number of its members are substantially affected by the proceeding); Friends of the Everglades, 595 So. 2d at 188. In fact, only two of FECA's members (Alabama Electric Cooperative, Inc., and Seminole Electric Cooperative, Inc.) own and operate generating units; two does not constitute a substantial number of FECA's members and thus FECA does not have standing as an association to assert its members' interests with regard to the alleged displacement of electrical generation units.

CONCLUSION

The Petitioners herein are asking the Commission to determine the need for the New Smyrna Beach Power Project, on the basis of the benefits that will accrue to the Utilities

Commission, City of New Smyrna Beach, and on the basis that the wholesale generating capacity and energy to be provided by the Project will contribute significantly to the reliability and integrity of the Peninsular Florida bulk power supply system and to the need of electric customers in Peninsular Florida for adequate electricity at a reasonable cost. None of FECA's legitimate, cognizable interests are being determined, nor subject to being adversely affected, by the Commission's action in this proceeding, and accordingly, FECA's petition to intervene must be denied.

Respectfully submitted this 18th day of September, 1998.



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CERTIFICATE OF SERVICE
DOCKET NO. 981042-EM

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 18th day of September, 1998:

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