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September 30, 1998

Ms. Blanca Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
4750 Esplanade Way, Room 110
Tallahassee, Florida 32399

RE: Docket No. 981042-EM

Dear Ms. Bayo:

Enclosed for filing please find the original and fifteen (15) copies of Petitioners' Motion to Strike FPC's Memorandum in Opposition to Petitioners' Motion to Deny FPC's Petition to Intervene.

Sincerely,

John T. LaVia, III
John T. LaVia, III

RECEIVED & FILED

FPC-BUREAU OF RECORDS

cc: Parties of Record (w/enclosures)

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FPC-RECORDS/REPORTING

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition for)
Determination of Need for an) DOCKET NO. 981042-EM
Electrical Power Plant in Volusia)
County by the Utilities Commission,) FILED: SEPT. 30, 1998
City of New Smyrna Beach, Florida,)
and Duke Energy New Smyrna Beach)
Power Company Ltd., L.L.P.)
_____)

PETITIONERS' MOTION TO STRIKE FPC'S MEMORANDUM IN
OPPOSITION TO PETITIONERS' MOTION TO DENY
FPC'S PETITION TO INTERVENE

The Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P., collectively referred to herein as the "Petitioners", hereby respectfully submit this Motion to Strike FPC's Memorandum in Opposition to Petitioners' Motion to Deny FPC's Petition to Intervene ("FPC's Memorandum"). For the reasons stated herein, FPC's Memorandum is unauthorized by the Commission's rules and the Commission should strike it.

1. The issue posed in this instance is whether a party, such as FPC, which is seeking intervention in a Commission docket, is authorized to file a reply or response to a motion in opposition to its intervention. Uniform Rule of Procedure 28-106.204(1), Florida Administrative Code ("F.A.C."), and its predecessor, Commission Rule 25-22.037(2), F.A.C., are controlling as to this issue. By their plain meaning, Uniform Rule 28-106.204(1), F.A.C., and Rule 25-22.037(2), F.A.C., make it clear that a reply such as FPC's Memorandum is unauthorized.

2. In In Re: Application for Amendment of Certificate No. 427-W to Add Territory in Marion County by Windstream Utilities Company, 97 FPSC 4:556 (hereinafter "Windstream"), the Commission recently addressed the issue of whether a reply could be filed to a response in opposition to a petition to intervene. In Windstream, Marion County filed a petition for leave to intervene in a docket addressing Windstream Utilities Company's application to amend its certificate number 427-W by adding certain specified territory to its service area. Id. at 4:557. Windstream Utilities Company filed a response to Marion County's petition to intervene and Marion County, in turn, filed a reply to Windstream's response. J B Ranch, a party that previously filed a petition in opposition to Windstream's application also filed a reply. Windstream Utilities Company then moved to strike Marion County's reply as unauthorized by Rule 25-22.037(2), F.A.C.¹ In granting Windstream Utilities Company's motion to strike Marion County's reply, the Commission stated:

The replies filed by the County and J B Ranch are not appropriate. Petitions to intervene are motions, and pursuant to Rule 25-22.037(2), Florida Administrative Code, parties may file motions in opposition to a motion within seven days; this rule however, does not allow parties to file a reply to a response. The pleading cycle must stop at a reasonable point and our rules reflect that.

Id., at 4:563.

¹Windstream Utilities Company apparently did not separately move to strike J B Ranch's reply.

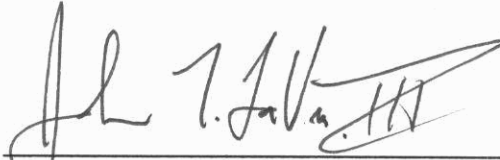
3. Though Rule 25-22.037(2), F.A.C., has been superseded by Uniform Rule 28-106.204, F.A.C.,² the rationale of Windstream is equally applicable to this case. FPC's petition to intervene is a motion, to which Petitioners timely filed a response in opposition. No other filings are authorized by either Uniform Rule 28-106.204, F.A.C., or Commission Rule 25-22.037(2), F.A.C. See accord Summary of FPSC Staff Recommendation, Dkt. No's 971004-EG, 971005-EG, 971006-EG, 971007-EG (on October 6, 1998 Agenda Conference) (recommending granting of FPL's motion to strike a reply filed by the Legal Environmental Assistance Foundation and stating that Rule 28-106.204, F.A.C., "like its predecessor, Commission Rule 25-22.037, [F.A.C.] does not provide for the filing of replies to responses to filed motions.")

4. The Commission should not be fooled by FPC's attempt to disguise its reply as a "memorandum in opposition"--as the Commission stated in Windstream, the pleading cycle must stop somewhere and FPC's Memorandum should be stricken.

WHEREFORE, 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 grant this motion to strike.

²See Florida Statutes § 120.54(5)(a)(1) (providing that unless the Administration Commission grants an exemption, the Uniform Rules of Procedure shall be the rules of procedure for each agency subject to Chapter 120, Florida Statutes.)

Respectfully submitted this 30th day of September, 1998.



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and

Duke Energy New Smyrna Beach Power
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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 (*), fax (**), or by United States Mail, postage prepaid, on the following individuals this 30th day of September, 1998:

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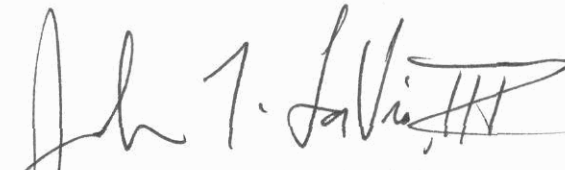
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