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October 16, 1998

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RECORDS AND REPORTING

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' Response in Opposition and Motion to Deny System Council U-4, IBEW's Petition for Leave to Intervene and Accompanying Memorandum of Law.

Sincerely,

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

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

cc: Parties of Record (w/enclosures)

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FPSC-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: OCTOBER 16, 1998
City of New Smyrna Beach, Florida,)	
and Duke Energy New Smyrna Beach)	
Power Company Ltd., L.L.P.)	

PETITIONERS' RESPONSE IN OPPOSITION AND MOTION TO DENY
SYSTEM COUNCIL U-4, IBEW'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 herein as "the Petitioners," pursuant to Uniform Rule 28-106.204(1), 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 System Council U-4, IBEW ("IBEW") on October 4, 1998, ("IBEW's Petition"), together with the Petitioners' accompanying memorandum of law.

SUMMARY

IBEW has petitioned to intervene in this proceeding. IBEW's Petition fails to conform with the pleading requirements set forth in Commission Rule 25-22.039, F.A.C., and Uniform Rule 28-106.205, F.A.C. However, even if IBEW's Petition were properly pled, IBEW cannot demonstrate standing to participate in this proceeding. Though it is not clear from the face of IBEW's Petition, IBEW's grounds for intervening in this proceeding appear to be that granting the need determination creates uncertainty for IBEW's

members and would allegedly cause a "very unstable employment environment"; that the New Smyrna Beach Power Project ("Project") will limit the capacity of Florida's transmission lines; and that the Project could lead to brownouts and unsafe conditions for IBEW's members. As demonstrated below, none of IBEW'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). Accordingly, IBEW's Petition to Intervene should be denied.

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 System Council U-4, IBEW.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 Project, a state-of-the-art 514 MW combined cycle generating unit

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

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. The proceeding also serves to evaluate the need for the Project against which the Governor and the 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.

IBEW has petitioned to intervene in this proceeding as an association on behalf of its members. Thus, to establish standing to intervene, IBEW 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 v. Department of Labor, 412 So. 2d 351, 353 (Fla. 1982)). IBEW has failed to make such a showing and its petition for leave to intervene should be denied.

ARGUMENT

The interests of its members which IBEW claims would be affected by the determination of need sought by the Utilities Commission and Duke New Smyrna can be summarized as follows:

1. IBEW contends that granting the requested determination

of need "could give Duke [New Smyrna] an unfair competitive advantage in the power market, creating uncertainty for [IBEW's] members and their job security" and "cause a very unstable employment environment." See IBEW's Petition at ¶ 8 and ¶ 9.

2. IBEW next contends that power from the Project could "be 'exported' outside of the state" thus "limiting the capacity of our transmission lines that were built and designed for the use of Florida's electric users." See IBEW's Petition at ¶ 10.

3. Lastly, IBEW alleges that allowing a merchant plant to operate in Florida "could lead to brownouts causing unsafe conditions for our members and the general public." See IBEW's Petition at ¶ 11.

As demonstrated below, each of IBEW's allegations regarding adverse effects to its members' interests is speculative, remote and outside of the zone of interests to be protected by this proceeding to determine the need for the Project. Moreover, IBEW has failed to demonstrate that a substantial number of its members will be adversely affected. Accordingly, IBEW'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 482. To establish standing to intervene, IBEW 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, IBEW 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, IBEW 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, IBEW'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).

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

II. IBEW'S ALLEGATIONS CONCERNING THE POTENTIAL FOR THE PROJECT TO ADVERSELY AFFECT ITS MEMBERS' JOB SECURITY ARE INSUFFICIENT TO ESTABLISH STANDING UNDER AGRICO.

IBEW alleges that its members' interests will be adversely affected because this need determination proceeding "could give" Duke New Smyrna an unfair competitive advantage which in turn could create uncertainty for IBEW's members and otherwise adversely affect IBEW's members' job security. See IBEW's Petition at ¶ 8 and ¶ 9. This allegation fails both prongs of the Agrico test and is thus insufficient to establish IBEW's standing to participate in this proceeding.

Under the first prong of the Agrico test, to have standing, IBEW's members must suffer injury in fact which is of sufficient immediacy to entitle them to a hearing under Section 120.57, F.S. Ameristeel, 691 So. 2d at 477. In International Jai-Alai, the court addressed a similar attempt by employees to assert standing in an administrative proceeding. In International Jai-Alai, an association of jai-alai players attempted to challenge a decision by the Florida Pari-Mutuel Commission regarding an application by certain fronton owners to change the frontons' dates of operation. The jai-alai players' association asserted that the sought-after changes in the dates of operation would aid the owners in an

ongoing labor dispute with the players' association to the economic detriment of its members. 561 So. 2d at 1226. In denying the jai-alai players' association standing to participate in the proceeding, the court reasoned that the asserted injury to the association's members' economic interests (i.e., economic injury in the form of lost jobs) was "far too remote and speculative in nature to qualify under the first prong of the Agrico standing test." Id. For the same reasons, in this case, IBEW's allegations that granting the requested need determination could adversely affect its members' "job security" and cause an "unstable employment environment" is far too remote and speculative in nature to meet the first prong of the Agrico test.

Under the second prong of the Agrico test, to have standing, IBEW must demonstrate that the injury it asserts its members would suffer is the type of injury against which a need determination proceeding was designed to protect. See Ameristeel, 691 So. 2d 477-78; International Jai-Alai, 561 So. 2d 1226. A need determination proceeding under Section 403.519, F.S., is designed to consider the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed project is the most cost-effective available. Section 403.519, F.S., was not designed to protect the jobs or economic interests of IBEW's members; accordingly, such interests are not sufficient to meet the second prong of the Agrico test. International Jai-Alai, 561 So. 2d 1226 (jai-alai association's allegations of loss of jobs and economic detriment not sufficient

to establish standing under second prong of Agrico test).

III. IBEW'S ALLEGATION REGARDING THE EFFECTS OF THE OUTCOME OF THIS PROCEEDING ON FLORIDA'S TRANSMISSION SYSTEM IS INSUFFICIENT TO DEMONSTRATE STANDING TO PARTICIPATE IN THIS PROCEEDING.

IBEW has alleged that power from the Project could be transported out of state which would limit "the capacity of our transmission lines that were built and designed for the use of Florida's electric users." See IBEW's Petition at ¶ 10. For the following reasons, this allegation is not sufficient to establish standing under the Agrico test.

First, it is not clear what IBEW means when it states "our transmission lines." However, it is clear that neither IBEW nor its members own or transmit electricity over any transmission facilities within Florida. Thus, neither IBEW nor its members have a cognizable interest in such transmission facilities. IBEW's members' interests in the capacity of the State's transmission facilities are the same as the general public, and any impact on those interests is not sufficient to establish injury-in-fact under the first prong of the Agrico test. See Ameristeel, 691 So. 2d at 478 (electric customers' interests "remain completely unaffected and in no way injured" by territorial agreement). Moreover, any impact to Florida's transmission facilities caused by "exporting" power out-of-state is too remote and speculative in nature to qualify under the first prong of the Agrico test.

Second, the alleged impact to Florida's transmission system is outside the zone of interests to be protected in this need

determination proceeding. See Agrico, 406 So. 2d at 482. Assuming, arguendo, that IBEW were a proper party to raise issues related to impacts on Florida's transmission system, the proper venue to address such issues is through proceedings regarding transmission rates and service before the Federal Energy Regulatory Commission.

IV. IBEW'S ALLEGATIONS REGARDING THE POTENTIAL FOR THE PROJECT TO LEAD TO BROWNOUTS ARE INSUFFICIENT TO ESTABLISH STANDING UNDER AGRICO.

IBEW alleges that allowing an "unregulated plant" to operate in Florida could lead to brownouts causing unsafe conditions for its members and the general public. See IBEW's Petition at ¶ 11. This spurious allegation is inadequate to establish standing to participate in this proceeding.

First, IBEW has no legal basis to assert the interests of the "general public." The proper party for asserting such interests is the Public Counsel, not IBEW.

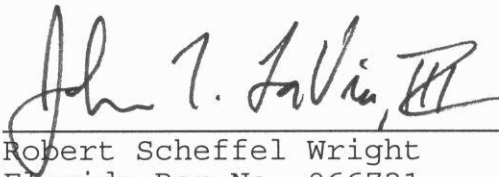
Second, IBEW's claim of potential "brownouts" caused by the addition of electric capacity is illogical. If anything, 514 MW of additional capacity in Florida will reduce the potential for brownouts.

Third, and most importantly, IBEW's claim that the Project could cause brownouts and unsafe conditions is too remote and speculative in nature to establish standing under the first prong of the Agrico test. See Ameristeel, 691 So. 2d at 478.

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 IBEW's legitimate, cognizable interests are being determined, nor subject to being adversely affected, by the Commission's action in this proceeding, and accordingly, IBEW's petition for leave to intervene must be denied.

Respectfully submitted this 16th day of October, 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 (*) or by United States Mail, postage prepaid, on the following individuals this 16th day of October, 1998:

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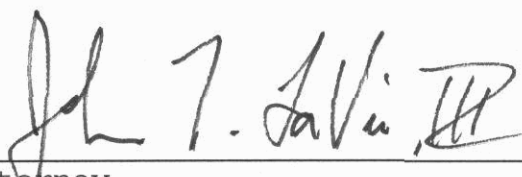
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