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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 ) DOCKET NO. 981042-EM  
 County by the Utilities Commission, )  
 City of New Smyrna Beach, Florida ) FILED: August 19, 1998  
 and Duke Energy New Smyrna Beach )  
 Power Company Ltd., L.L.P. )

**FLORIDA WILDLIFE FEDERATION'S PETITION FOR  
RECONSIDERATION OF HEARING OFFICER'S  
ORDER DENYING INTERVENTION**

Pursuant to Rule 25-22.0376, Florida Administrative Code, proposed intervenor Florida Wildlife Federation (FWF) respectfully submits this motion for reconsideration of Order No. PSC-98-1598-PCO-EM, denying FWF's petition for intervention.

In the Order denying FWF's petition for intervention ("Order"), the Hearing Officer cited a limited statement of FWF's assertion of substantial interests, and summarily dismissed the petition. Without any explanation or analysis, the Hearing Officer concluded that FWF's substantial interests were not subject to determination, and that FWF and its members would not

ACK 2 be affected by this proceeding. FWF respectfully disagrees, and requests reconsideration of its  
 AFA 2  
 APP     petition for intervention.  
 CAF      
 CMU      
 CTR    

**I. Requirements for Intervention**

**FWF's Petition for Intervention Was Timely Filed, Unopposed by Other Parties to the Proceeding, and Consistent With the Pleadings of Other Intervenors**

As a preliminary matter, FWF submits that, pursuant to Public Service Commission (PSC)

rules, the Petition to Intervene was timely filed. Rule 25-22.039 requires that petitions for leave

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to intervene must be filed at least five days before the final hearing. FWF's petition was filed on November 13, 1998, eighteen days prior to the December 2, 1998 final hearing.

As stated in the Order, neither Petitioners nor any other party filed an opposition to FWF's petition to intervene. Apparently, none of the parties objected to FWF's involvement in this proceeding, and therefore, none of the existing parties would be adversely affected by FWF's participation.

The Legal Environmental Assistance Foundation, Inc. (LEAF), petitioned for leave to intervene in this proceeding, and leave to intervene was granted by the Hearing Officer. See, Order Granting Petitions for Intervention, issued October 8, 1998. LEAF's statement of substantial interests was as follows:

LEAF has a substantial interest in the Commission's determination of need and in securing the environmental and health benefits of increased efficiency in the delivery of energy services and increased use of cleaner energy resources to meet energy service needs.

LEAF Petition to Intervene, at 1.

According to the transcript of oral arguments on the then-pending petitions for intervention, held on October 1, 1998, Counsel for LEAF made no appearance or oral argument in favor of their petition. Yet, LEAF's petition for leave to intervene was granted along with the other intervenors on October 8, 1998.

As discussed *infra*, FWF submits that its petition to intervene was consistent with LEAF's petition for intervention, in terms of specificity and statement of substantial interests affected. Because FWF's petition was summarily dismissed, it is difficult to determine the basis for the Hearing Officer's denial of FWF's intervention. FWF respectfully submits that it is arbitrary and capricious to approve LEAF's petition to intervene and deny FWF the same consideration based

on substantially similar pleadings and statements of substantial interests.

### **B. Requirements for Standing**

It appears to be well settled that to establish standing to intervene, a petitioner 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 (Fla. 1997) (citing Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981)). For reasons discussed *infra*, FWF submits that it satisfies both of these requirements.

## **II. FWF Has Substantial Interests in this Proceeding that Will Be Adversely Impacted By Approval of the Joint Petition**

### **A. Legislative Requirements for Determination of Need**

The Joint Petition for Determination of Need at issue in this case is governed by the mandatory requirements of F.S. Section 403.519, which is an integral part of the Florida Energy Efficiency and Conservation Act ("FEECA"), Florida Statute Sections 366.80-366.85 and 403.519. It can not be denied that a determination of need is an essential, threshold requirement for the siting of new power plant facilities, such as the proposed Duke New Smyrna Beach project, pursuant to the Florida Electrical Power Plant Siting Act ("FEPPSA"), F.S. Sections 403.501-403.518.

In adopting FEPPSA, the Florida Legislature recognized that the siting of new power plants "will have a significant impact on the welfare of the population, the location and growth of industry, and the use of natural resources of the state." F.S. Section 403.502. Moreover, in that section the Legislature expressly stated:

It is the policy of this state that, while recognizing the pressing need for increased power generation facilities, **the state shall ensure** through available and reasonable methods that the location and operation of electrical power plants **will produce minimal adverse effects** on human health, the environment, **the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life** and will not unduly conflict the goals established by the applicable local comprehensive plans.

*Id.* (emphasis added).

The Legislature went on to state three premises which form the basis for balancing the need for energy with the public interest. One of these basic premises is “to effect a reasonable balance between the **need for the facility and the environmental impact resulting from the construction and operation of the facility, including air and water quality, fish and wildlife, and the water resources and other natural resources of the state.**” *Id.* (emphasis added).

Obviously, the Section 403.519 needs determination process and mandatory requirements are an integral element of carrying out these important state policies and legislative mandates. It is equally obvious that the legislative intent was to minimize the potential impacts of new power plants on wildlife, wildlife habitats, and the ecological integrity of air and water resources.

Similarly, in adopting FEECA, the Legislature declared it to be “**critical** to use the most efficient and cost-effective energy conservation systems” in order to protect the health, prosperity and welfare of the citizens of the state. F.S. Section 366.81 (emphasis added). Reductions in the growth rates of electrical consumption was deemed by the Legislature to be of “particular importance.” *Id.* In Section 403.519, the Legislature sought to implement these directives by adopting the following provision:

The commission shall also **expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant** and other matters within its jurisdiction

which it deems relevant.

**Id.**

**B. FWF has a Substantial Interest in Enforcing these Legislative Policies and Mandates**

In support of its petition for leave to intervene, FWF avered that it had substantial interests in the determination of need because approval of the Joint Petition would result in harm or injury to Florida's wildlife populations and other natural resources. Specifically, FWF alleged that approval of the Joint Petition would:

- (1) allow the proliferation of merchant power plants in Florida that will add new sources of pollution, increase use of ground water, cause destruction of wetlands and other important wildlife habitats and cause other negative impacts on wildlife in the state, while the power was not necessarily produced to meet the needs of this state, and;
- (2) promote growth in the area it locates, causing greater growth than presently planned, resulting in negative impacts to wildlife and other natural resources of the state, and;
- (3) have cumulative impacts with other sources of pollution, causing higher and unnecessary rates of pollution that will result in injury to the states wildlife and other natural resources.

FWF further alleged that the proposed facility would not meet the need requirements of law and Commission rule, and adopted the issues of fact and ultimate facts supporting this position by the other intervenors in this matter who oppose the application for the Determination of Need. See, FWF Petition for Intervention, at 2-3. FWF alleged that it had over 13,000 members who used and otherwise enjoy and benefit from wildlife around the state, including the area potentially impacted by the proposed project. Clearly, FWF has a substantial interest in ensuring that the laws, regulations and state policies outlined above are give effect and are not ignored or

abrogated by action of the PSC in approving the needs determination sought by the Joint Petitioners.

**C. FWF's Substantial Interests Will be Adversely Impacted if the Joint Petition of Need is Approved**

The needs determination process set forth in Section 403.519 is designed to make a threshold determination -- and results in a legal presumption for purposes of the siting determination -- that the proposed plant will provide energy that is needed, cost-effective, and reliable. F.S. Section 403.519. As discussed *supra*, express consideration must be give to energy conservation measures which might mitigate the need for some or all of the energy to be supplied by the proposed project. Moreover, by statute this proceeding is the exclusive forum for making these determinations. Id.

In seeking intervention in this proceeding to protect its substantial interests, FWF is primarily focused on two issues already raised by the parties, specifically, issues 13 and 14 on the final docket.

Issue 13 states: "Are there any conservation measures taken by or reasonably available to the petitioners which might mitigate the need for the proposed power plant?" This issue goes to the heart of the mandatory conservation element of Section 403.519. The Joint Petitioners response to this critical issue is:

As a federally-regulated public utility selling electricity only at wholesale, Duke New Smyrna does not engage directly in the implementation of end-use energy conservation programs. Moreover, Duke New Smyrna is not required to have conservation goals pursuant to [FEECA] Section 366.82(2).

See, Joint Petition for Determination of Need, at 23. FWF submits that resolution of this issue in favor of Joint Petitioners would abrogate and render ineffectual the conservation requirements of

Section 403.519, and would establish a new policy that would have significant adverse impacts on the substantial interests of FWF and its members, for the reasons stated in subsection II. B., *supra*. Exempting merchant power plants from the mandatory conservation requirement would create a new policy that would allow a presumption of need for new power plants that may not actually be needed, or for additional capacity that might otherwise have been mitigated by conservation methods, resulting in additional and avoidable adverse impacts to wildlife, wildlife habitats, and the ecological integrity of air and water resources.

As a point in fact, Joint Petitioners have no incentive to promote energy conservation. On the contrary, they have every incentive to promote an increase in energy use in order to create new markets sell more of their power. Moreover, FWF respectfully submits that the utility intervenors in this proceeding do not share the same interests as FWF in protecting the conservation element of Section 403.519. Indeed, of the two remaining parties that might be expected to share FWF's public interest perspective in ensuring compliance with the conservation requirements of that section, namely staff and LEAF, neither have expressed a position on this critical issue. *See*, Staff's Prehearing Statement, filed November 2, 1998, at 5; LEAF Prehearing Statement, filed November 2, 1998, at 3-4.

Issue 14 on the docket is a legal issue addressing the PSC's statutory authority to render a needs determination under Section 403.519 for a merchant power plant. For reasons stated in (but not limited to) the various motions to dismiss the Joint Petition, FWF maintains that the PSC does not have that statutory authority. FWF submits that a determination in favor of the Joint Petitioners would establish new policy for the siting of merchant power plants in Florida, causing injuries to the substantial interests of FWF as described in subsection II. B., *supra*.

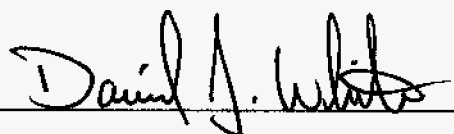
**D. This Proceeding is the Appropriate Forum to Protect FWF's Substantial Interests**

For reasons stated *supra*, FWF has a substantial interest in ensuring that wildlife habitat and the ecological integrity of Florida's air and water resources are not impacted by development of new power plants, including the proposed Duke New Smyrna project, that do not meet the requirements of FEPPSA and FEECA. These statutes are designed to prevent these impacts and, pursuant to Section 403.519, this proceeding is the exclusive forum for determining compliance with the need and conservation requirements. Therefore, this proceeding is the appropriate forum to protect FWF's substantial interests.

**III. Conclusion**

For the reasons stated herein, FWF respectfully requests reconsideration of its Petition for Leave to Intervene, and requests that the Petition be granted. Undersigned counsel avers that he was present during oral argument on the motions to dismiss, and if this Petition is granted, requests an opportunity to file a legal brief in support of the motion to dismiss.

Dated this 10th day of December, 1998.

A handwritten signature in cursive script, reading "David J. White", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above has been delivered by U.S. Mail, postage paid, to the following counsel of record: Robert Schefel Wright, Esq., Landers and Parsons, P.A., POB 271, Tallahassee, Florida 32302 for Duke Energy New Smyrna Beach Power Company; Gary L. Sasso, Esq., Carlton Fields Ward Emmanuel Smith & Cutler, P.A., POB 2861, St. Petersburg, Florida 33731 (on behalf of the Florida Electric Cooperatives Association, Inc.); James A. McGee, Esq., POB 14042, St. Petersburg, Florida 33731 (for Florida Power Corporation), Charles A. Guyton, Esq. and Matthew M. Childs, Esq., Steel Hector & Davis, LLPm 215 S. Monroe St., Suite 601, Tallahassee, Florida 32301 (for Florida Power and Light); Lee L. Willis, Esq., and James D. Beasley, Esq., Ausley & McMullen, POB 391, Tallahassee, Florida 32302 for Tampa Electric Company), Gail Kamaras, Esq. and Debra Swim, Esq., 1114 Thomasville Rd., Suite E, Tallahassee, Florida 32303 (for Legal Environmental Assistance Foundation, Inc.) and Leslie J. Paugh, Esq. and Grace A. Jaye, Esq., Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0850 on the date specified above.

By: \_\_\_\_\_

