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July 20, 1999

BY HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
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RECORDS AND REPORTING

Re: Docket No. 981890-EU, Generic Investigation of Peninsular Florida Reserve Margins

Dear Ms. Bayo:

Enclosed for filing are an original and fifteen copies of the consolidated response of Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. and Duke Energy North America, L.L.C. to the motions for reconsideration filed by FPL and FPC in the above-styled docket. I will appreciate your confirming receipt of this response by stamping the attached filing copy thereof and returning same to my attention.

As always, thanks to you and your Staff for your considerate and professional assistance.

If you have any questions, please give me a call.

Cordially yours,

Robert Scheffel Wright
Robert Scheffel Wright

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Generic investigation into the aggregate electric utility reserve margins planned for Peninsular Florida)
)
) DOCKET NO. 981890-EU
) FILED: July 20, 1999
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)
)

CONSOLIDATED RESPONSE TO MOTIONS FOR RECONSIDERATION

Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. ("Duke New Smyrna"), a party to the above-styled docket, and Intervenor Duke Energy North America, L.L.C. ("DENA," formerly known as Duke Energy Power Services, L.L.C., and collectively with Duke New Smyrna, "Duke"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C.") hereby file their consolidated response to the motions for reconsideration submitted by Florida Power Corporation ("FPC") and Florida Power & Light Company ("FPL").

Background

1. This proceeding was commenced in December 1998, pursuant to the Commission's instructions following a discussion of reserve margins, reliability, ten-year site plans, and related issues at the Commission's December 16, 1998 internal affairs conference. On March 1, 1999, the Staff issued their preliminary issues list for this proceeding. Included in these issues were (1) whether the Commission should establish a minimum Peninsular Florida planning reserve margin, (2) how that reserve margin should be calculated and allocated among individual utilities, and (3) whether various electric utilities, including FPL, FPC, and Tampa Electric Company ("TECO") appropriately account for

historical winter and summer temperatures when forecasting seasonal peak loads for planning purposes.

2. On March 18, 1999, the Commission held the first issue identification conference in this docket. On March 20, 1999, the Commission issued its Order Establishing Procedure (the "First OEP") for this docket. This First OEP stated that the purpose of this docket is "to investigate planned, aggregate electric utility reserve margins in peninsular Florida" and that the scope of the proceeding will be "based upon the issues raised by the parties and Commission staff up to and during the prehearing conference, unless modified by the Commission." On May 21, 1999, the Commission issued its Revised Order Establishing Procedure.

3. On May 24, FPL, TECO, LEAF, and Duke submitted their preliminary issues lists. FPL's preliminary issues list included the following as FPL's proposed Issue 3:

Should the Commission adopt a reserve margin standard for individual utilities in Florida? If so, what should be the appropriate reserve margin criteria for individual utilities in Florida? Should there be a transition period for utilities to meet that standard?

TECO's preliminary issues also included the following:

What is the appropriate reserve margin for Peninsular Florida? (Issue 2);

Should there be a minimum of supply-side resources when determining reserve margins? (Issue 3); and

How should individual utility's reserve margins be integrated into the aggregated reserve margin for Peninsular Florida? (Issue 5).

4. On May 26, 1999, the Commission held the second issue identification conference in the docket. FPL and FPC (and TECO)

were represented and otherwise fully participated at both issue identification conferences. On May 28, 1999, the Commission Staff published and distributed a revised list of issues pursuant to the discussion at the May 26 issue identification conference. FPL, FPC, and TECO subsequently moved for a status conference, which motions were granted.

5. The requested conference was convened as a preliminary prehearing conference on June 30, 1999. Following extensive argument, Commissioner Johnson issued, on July 1, her Order Clarifying Scope of Proceeding; Docket Procedures; and Establishing Issues (Order No. PSC-99-1274-PCO-EU, hereinafter "Order No. 99-1274"). In Order No. 99-1274, Commissioner Johnson established certain issues as the subject matter of the hearings scheduled in this docket and stated that the Commission's fundamental jurisdiction over the planning, development, and maintenance of a coordinated electric power grid provided the necessary statutory authority to conduct the investigation and to make decisions regarding the issues identified in Order No. 99-1274 based on a full evidentiary proceeding.

FPL's and FPC's Motions for Reconsideration

6. On July 9, FPC moved for reconsideration of Order No. 99-1274, and on July 12, FPL also moved for reconsideration of that Order. FPC's motion asserts that there has been no petition filed to commence a formal adjudicatory proceeding, and that the Commission has not taken any action to initiate a formal proceeding that "provides the essential elements of such a

petition." FPC's Motion at 2. FPC goes on to assert that "neither FPC nor any other utility was advised that either the Commission or any party was alleging and then proposed to prove facts that would affect or impair the substantial interests of FPC or any other utility." Id. FPC further asserts that the Commission has failed to give "legally sufficient notice" of the proceeding and of any charges against FPC. FPC's Motion at 6-7. FPC's position appears to be that the notice provided by the Commission's orders to date do not satisfy either the notice requirements or due process requirements under the Florida Administrative Procedure Act and the Florida and United States Constitutions. Id.

7. FPL asserts that this docket was conceived to be a generic investigation, not one in which decisions "determining or affecting the substantial interests of public utilities in Florida" would be made; that the docket and the procedures herein have implications for FPL's due process rights; and that the PSC did not initiate a proceeding in which the PSC might determine FPL's substantial interests. FPL's Motion at 3-4. FPL asks the Commission to reconsider the conclusion of Order No. 99-1274 that the scope of the docket will include the manner in which reserve margins are calculated, the level of reserve margins considered adequate, and the remedial action, if any, which must be taken to assure adequate reserve margins, apparently arguing that these subjects are not within the scope contemplated by the Commission's initial authorization of an investigation of

methodological issues relating to reserve margins. FPL's Motion at 7.

8. FPL's Motion also states that "FPL does not question in this docket the Commission's authority to investigate reserve margins either narrowly or broadly," but rather maintains that the docket was and is intended to be an investigation of reserve margin methodology. FPL also acknowledges that the Commission may choose to expand the scope of the docket, but contends that the PSC has not yet done so. FPL's Motion at 7.

9. Duke Energy New Smyrna and DENA respond as follows.

Notice

10. Legally sufficient notice must be reasonable, Varney v. Florida Real Estate Comm'n, 515 So. 2d 383 (Fla. 5th DCA 1987), and must inform the affected party of its rights to request a hearing and of the time limits for doing so. Henry v. State, Department of Administration, 431 So. 2d 677, 680 (Fla. 1st DCA 1983). Notice must also inform persons of the action the agency is contemplating or the charges it is making. See Wagman v. Florida Board of Medicine, 590 So. 2d 12, 13-14 (Fla. 1st DCA 1991); see also Inquiry Concerning Davey, 645 So. 2d 398, 406 n.3 (Fla. 1994). The Florida APA requires "reasonable notice of not less than 14 days." Fla. Stat. § 120.569(2)c (1997).

11. Here, Duke submits that the Commission has given legally sufficient notice of all actions that it is contemplating taking in this proceeding. The hearings in this docket have been scheduled and announced in procedural orders, and the principal

subjects of the hearing have been identified since, at the very latest, May 28. Duke submits that notice on May 28 for testimony to be filed on August 9 (now August 16) for a hearing to be held on September 28 and 29 (now November 2 and 3) is entirely reasonable. Moreover, as of the issuance of Order No. 99-1274 on July 1, the precise issues to be addressed in the docket have been identified. Furthermore, these are not new issues: the Commission Staff's first issues list included several key issues relating to determining whether reserve margins are being accurately calculated, and the First OEP, issued on March 20, clearly stated that the issues in this docket would be those raised by the parties and the Commission Staff. Moreover, both FPL's and TECO's preliminary issues lists submitted on May 24 included issues relating to whether there should be individual utility reserve margins. Clearly, at least FPL and TECO had notice that such issues were fair game to be addressed in this docket. Duke also understood the concerns being addressed in this docket to encompass specific issues relating to the adequacy of reserve margins, and believes that the issues raised are appropriate to the Commission's investigation as announced. Even if the earlier notice were somehow insufficient or defective, the scheduling of the hearing, the publication of the testimony filing and hearing dates, and the express identification of the issues to be addressed would have cured such defects.

12. Moreover, Duke believes that no "charges" have been levied against any public utility or electric utility. The

Commission has not "accused" or "charged" any utility with a violation of rule or statute. Rather, the Commission has identified substantive issues within its jurisdiction on which it plans to take evidence, make findings, and possibly adopt Peninsular Florida and utility-specific reserve margins as planning standards. This latter step may, at some point, require rulemaking, in which case the Commission may will presumably determine to proceed with such rulemaking pursuant to Issue 19, the "follow-up action" issue identified in Order No. 99-1274.

Due Process

13. Due process considerations, the Administrative Procedure Act, and Chapters 25-22 and 28-106, F.A.C., require adequate notice (see above) and the "opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative." Fla. Stat. § 120.57(1)(b) (1997). The Commission's procedural orders and rules governing this docket provide for all of these due process rights.

Conclusion

14. The Commission has the statutory authority to proceed with this docket as it sees fit. See Fla. Stat. §§ 366.04(5) & 366.05(8) (1997). The Commission may proceed as set forth in Order No. 99-1274 or revert to a less formal procedure.

Regardless of procedural form, the issues set forth in Order No. 99-1274 are important issues that relate directly to the reliability of Florida's electric power supply system.

15. The utilities' arguments that notice of the subject matter of this proceeding has been insufficient and that due process rights will be violated if the Commission proceeds as set forth in Order No. 99-1274 are misplaced. Much of FPL's and FPC's arguments are semantic, suggesting that because the Commission used the phrase "generic investigation" in initiating the docket, it cannot have subsequently expanded the proceeding to encompass decisions regarding the substantive issues set forth in Order No. 99-1274. These arguments are spurious; even FPL concedes that the Commission has the authority to investigate reserve margins narrowly or broadly, as well as the authority to expand the scope of the docket.

16. The fact is that the Commission, speaking through its designated prehearing officer and through Order No. 99-1274, has given sufficient notice of the issues being addressed, i.e., a minimum of ten weeks, from May 28 (the date on which the revised issues list was published following the second issue identification conference) to August 9 (the previously scheduled testimony filing date). The period of effective notice from the May 28 publication of the revised issues list to the hearings was, even on the previous schedule, three months (May 28 to September 28). By establishing the issues to be addressed in Order No. 99-1274, the Commission has fairly and adequately

apprised all parties of the actions that it is considering taking, including follow-up action in future proceedings as such may be identified in the instant case. Finally, all due process requirements -- notice, the opportunity to present direct and rebuttal evidence and argument, the opportunity to conduct cross-examination, and others -- have been or will be satisfied by the procedures established by the Commission's procedural orders and rules.

WHEREFORE, Duke New Smyrna and DENA believe that it would be inappropriate for the Commission to grant reconsideration of Order No. 99-1274.

Respectfully submitted this 20th day of July, 1999.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing, filed on behalf of Duke Energy Power Services, has been furnished by hand delivery (*) or U.S. Mail on this 20th day of July, 1999, to the following:

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