

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C.

DOCKET NO. 991462-EU

Submitted for filing: October 11, 1999

FLORIDA POWER CORPORATION'S PETITION TO INTERVENE

I. Introduction

1. Pursuant to Fla. Admin. Code Rule 25-22.039, Florida Power Corporation ("FPC") petitions the Commission for leave to intervene as a full party respondent in this proceeding. Petitioner Okeechobee Generating Company, L.L.C. ("OGC") seeks authority to build a wholly unsubscribed "merchant plant" to meet a need for generating capacity in Peninsular Florida arising from "constrained reserve margins." (Petition p. 17). OGC asserts in its petition that its proposed project will increase reserve margins in Peninsular Florida by 1.3% for Winter 2003-2004. Since OGC admittedly would not and could not sell energy to

retail customers, OGC must be proposing to sell its output at wholesale to utilities such as FPC, which have been awarded exclusive franchises to serve retail customers in Peninsular Florida. FPC currently serves approximately 25% of the

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load in Peninsular Florida. This means that OGC must be proposing to meet FPC's need for reserve capacity required to serve FPC's retail customers.

2. FPC takes issue with OGC's assertion, however, that OGC is in any position to meet FPC's need for capacity that may be counted toward FPC's reserves. That is because it is well established in Florida that utilities may rely only upon firm power resources in determining reserves. By the same token, FPC disputes that OGC is any position to contribute toward the aggregate reserve margins of the retail utilities in Peninsular Florida, of which FPC is one. If the Commission were to accept OGC's assertions and therefore grant OGC's petition, and FPC or the Florida Reliability Coordinating Council ("FRCC"), of which FPC is a member, were somehow expected to rely upon OGC's capacity or energy in determining reserves, FPC's long-term planning would be adversely affected and its ability to meet its obligation to serve its retail customers would be impaired. At a minimum, this would affect FPC's obligations under existing regulatory requirements, including Public Service Commission Rule 25.6035(2), Fla. Admin. Code, and would pre-determine issues set for hearing in the Reserve Margin docket, in which FPC has been made a mandatory party. For these reasons, and others detailed below, FPC must be accorded the right to intervene in this proceeding.

II. Intervenor Information

3. The name and address of the affected agency are:

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4. The name and address of the petitioner are:

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5. All pleadings, motions, orders, and other documents directed to the petitioner are to be served on:

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III. Substantial Interests

6. The question whether the Commission has statutory authority to grant a need determination for a “merchant plant” is currently pending before the Florida Supreme Court in the case involving Duke Energy New Smyrna Beach Power Company’s petition for a determination of need. In all likelihood, the Court will not render a decision on this important question prior to the final hearing date in this docket.

7. If FPC prevails in the pending appeal, OGC’s petition must be rejected, and OGC will not be permitted to obtain a determination of need for its proposed plant unless it is able to demonstrate at the outset that the plant will in fact be needed by a retail utility, such as FPC, as evidenced by a final power purchase agreement. In the current proceeding, however, OGC proposes to serve

need in “Peninsular Florida” without demonstrating any statutory or contractual commitment to do so. (Petition p. 13).

8. Under the law prior to the Duke case, an IPP like OGC would have to enter into a contract with a utility like FPC in order to prove what it alleges, namely, that some retail utility actually has a need for additional capacity. Granting OGC’s petition would fundamentally alter the role of public utilities under the pre-existing regulatory scheme and would thus impair FPC’s substantial legal interests as a regulated retail utility. To briefly summarize the law on this matter, this Commission does not have authority under existing law to approve OGC’s request for a determination of need. OGC is not a regulated retail load-serving utility, it has not recited a “utility and unit specific” need, and cannot identify any entity that will “ultimately consume the power” that it proposes to offer. Nassau Power Corp. v. Beard, 601 So. 2d 1175, 1178 n.9 (Fla. 1992); Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994). Absent these prerequisites a need determination would be both inappropriate and illegal.

9. OGC, however, presumes that the law has been changed and that the Commission may approve its petition based on the Duke precedent. FPC plainly has a stake in the regulatory regime that existed prior to this Commission’s decision in the Duke case, and the Florida Supreme Court may well sustain FPC’s position on appeal in that case. Because the Court’s decision will not likely be

issued prior to the hearing in this docket, FPC should be given leave to preserve its position in the event the Court rules in FPC's favor on appeal. Otherwise, the stakeholders in this controversy would be confronted with the absurd situation that the Commission might grant a determination of need that is contrary to law, and leave no one with standing to challenge that decision.

10. Further, regardless of the outcome of the Duke appeal, OGC seeks a determination of need based on its assertion that it will contribute to reserve margins in Peninsular Florida. This runs directly counter to long-standing Commission policy. The Commission has confirmed time and time again that retail utilities and the FRCC may count only firm power resources toward reserve margins. See e.g., Order No. PSC-93-1715-FOF-EQ; Order No. PSC-96-1076-FOF-EU; FPSC Rule 25-6.035(2). If the Commission were to accept OGC's position, therefore, FPC's obligations under long-standing Commission policy would change, and FPC's long-term planning will be detrimentally affected. This, too, necessitates that FPC be afforded leave to intervene.

11. In the same vein, OGC's calls upon this Commission to pre-determine questions presently pending before the Commission in the Reserve Margin docket, such as whether the Commission should adopt a 20% reserve margin planning criterion for Peninsular Florida. (Petition p. 18). The Commission has made FPC a mandatory "party" to that docket. (Request to Establish Docket; 12/17/98). It

follows, that FPC should plainly have a right to intervene in this proceeding as a party respondent, in order to protect its interests in the determination of issues that may affect the outcome of the Reserve Margin docket.

12. More specifically, the Commission initiated the Reserve Margin investigation to examine the appropriate methodology for measuring the adequacy of Peninsular Florida reserve margins. State-regulated utilities such as FPC (unlike OGC and Duke) that actually contribute to the State's firm reserves are mandatory participants in that investigation. The hearing in that docket is presently scheduled for November 2nd and 3rd. The parties' post-hearing statements are not due until December 2, 1999. Given the procedural posture of the Reserve Margin investigation, OGC's contention that some "Peninsular Florida" need has been identified is nothing more than an attempt to put the cart before the horse. The Commission has adopted no position and the Commission's *Advisory* Staff has made no recommendation concerning methodology, let alone concerning the adequacy of the reserves presently planned for Peninsular Florida.

13. Indeed, whether and how to reflect or incorporate uncommitted capacity (such as "merchant plants") in a methodology for testing the adequacy of reserves is one of the issues presently being investigated by the Commission. Issue 3 in the Reserve Margin docket states in pertinent part:

How should the individual components of an individual or peninsular Florida percent reserve margin planning criterion be defined:

A. Capacity available at time of peak (Ex. QF capacity, firm and non-firm purchases and non-committed capacity). . .(emphasis added).

Attachment to Prehearing Officer's Order Clarifying Scope of Proceeding; Docket Procedures and Establishing Issues, Docket No. 981890-EU, Generic Investigation Into Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida.

14. By filing its need petition now OGC is attempting to have the Commission pre-determine not only that (1) non-committed (here "merchant plant") capacity should be incorporated into a methodology for determining the adequacy of planned reserves in Peninsular Florida, but also that (2) Peninsular Florida reserves are inadequate, and OGC's proposed "merchant plant" can meet some portion of that need. Absent intervention, FPC and other state-regulated Peninsular Florida utilities will basically be tried and convicted of maintaining inadequate reserves in a "need determination" without ever being asked to participate in the discussion.

15. Moreover, in its need petition, OCG's contends that its "merchant plant" project will improve the Winter 2003-2004 reserve margin (of generation resources) from 9.23% to 10.52%. In addition to being grossly speculative, this contention is contradicted by this Commission's own findings in connection with

Duke's merchant plant need petition. In the Duke case, the Commission found that merchant plant "capacity should be considered for hourly and short term operating reserves, *but not for long term planning reserve margins, unless contracted for.*" (Order No. PSC-99-0535-FOF-EM) (emphasis added). Thus, OCG's plant cannot and should not be counted toward Winter 2003-2004 long-term planned reserve margins; thus, its basis for showing "need" must fail.

16. To be sure, Commission Staff appears to be promoting and supporting OCG's contention in this regard in the Reserve Margin investigation. In his pre-filed testimony, Commission Staff witness, Mr. Robert L. Trapp, simply announces that the potential contribution of uncommitted capacity should be considered in the calculation of individual utility and Peninsular Florida reserve margins, and scolds the FRCC and individual utilities for not figuring out how to incorporate this uncommitted capacity into their planning reserve margin calculations. Pre-filed testimony of Robert L. Trapp, pp. 6-7, 19, Docket No. 981890-EU, Generic Investigation Into Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida.

17. In this climate, FPC is uncertain of both how and if regulated retail load-serving utilities are supposed to co-exist with "merchant plants" in the existing regulatory environment. Over the past decade, the Commission has repeatedly confirmed FPC's fundamental belief that uncommitted capacity cannot

be considered in the calculation of an individual utility's or Peninsular Florida's planned reserve margins. Indeed, in the Commission's shared reserve margin rulemaking proceeding the Commission adopted a rule provision as follows:

(2) Treatment of Purchased Power. Only firm purchase power agreements may be included as a resource for purposes of calculating a planned or operating reserve. A utility may petition for a waiver of this requirement based on a very high availability of specific non-firm purchases.

Rule 25.6035(2).

18. FPC agrees with the Commission's rule. OCG offers no assurances (only projections) that it will be selling energy to Peninsular Florida retail load-serving utilities during peak periods, and therefore cannot be relied upon in any calculation of firm reserves. FPC has predicated its planning on this bedrock principle and plans to build generation in Florida that is committed to Florida retail customers to satisfy its legal obligation to make adequate investment in generating capacity and provide adequate and reliable electric service. OCG has called upon the Commission to address these issues in connection with OCG's need petition, and the outcome will profoundly affect the role that state-regulated utilities play in ensuring reliability.

IV. FPC's Standing

19. In order to establish standing to intervene in any proceeding, it is settled that a petitioner must show that (1) it will suffer injury in fact of sufficient

immediacy to warrant a hearing, and (2) that the injury is of the type or nature that the proceeding is designed to protect. E.g., Argico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), review denied, 415 So. 2d 1359 (Fla. 1982). In applying the Argico test, the Commission “must not lose sight of the reason for requiring a party to have standing in order to participate in a judicial or administrative proceeding”: “[T]o ensure that a party has a substantial interest in the outcome” so that “he will adequately represent the interest he asserts” in a proceeding in which that interest is not “totally unrelated to the issues which are to be resolved in the administrative proceeding.” Gregory v. Indian River County, 610 So. 2d 547, 554 (Fla. 1st DCA 1992).

20. As noted above, until the Florida Supreme Court resolves the question presently pending before it in the Duke appeal, this Commission’s authority under existing law to approve OGC’s request for a need determination remains subject to question. FPC should be permitted to participate in any proceeding that involves this open question and substantially impacts the future of generation resources in this State. Otherwise, the Commission might render a ruling that proves to be contrary to law, and no stakeholder in the current regulatory framework would have standing to challenge the illegal decision.

21. FPC must be given leave to intervene for other reasons as well. As we have explained, OCG’s petition purports to meet the needs of “Peninsular Florida.”

FPC serves 25% of the retail load of Peninsular Florida. Accordingly, OCG is seeking, in effect, to meet FPC's need. It follows, that FPC is an indispensable party.

22. What is more, OCG seeks to establish in this proceeding the extraordinary proposition that its “merchant” capacity should be counted toward the reserves of Peninsular Florida utilities, such as FPC, and that the current reserves planned by such utilities, including FPC, are inadequate. OCG thus calls upon the Commission necessarily to investigate, answer, and resolve important policy questions that it has only begun to explore in the Reserve Margin investigation. FPC, as a regulated utility, was directed by the Commission to participate in the Reserve Margin docket because the Commission recognized that an assessment of reserve margin methodology and any action relating thereto may affect FPC's substantial interests as a retail load-serving utility in the State. FPC and other retail utilities were thus made to participate in the Commission's consideration of these profoundly important questions, which may well impact the role of state-regulated utilities in ensuring the supply of reliable electric service in this State.

23. The Commission has routinely allowed entities to intervene in need determination proceedings precisely because the substantial interests of those entities will be affected by the proceedings. See, e.g., In re: Joint Petition to

Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power & Light Company and Cypress Energy Partners, Ltd. Partnership, 1992 Fla. PUC LEXIS 1631; 92 FPSC 11: 363; Dkt. No. 920520-EQ; Order No. PSC-92-1355-FOF-EQ (Nov. 23, 1992) (recognizing there is a limited need by utilities for additional capacity and energy and that "it is incumbent upon competing alternatives to come forward at a need determination" proceeding); In re: Petition to Determine Need for Proposed Electrical Power Plant in St. Marks, Wakulla County, by City of Tallahassee, 1997 Fla. PUC LEXIS 679; 97 FPSC 6: 115; Dkt. No. 961512-EM; Order No. PSC-97-0659-FOF-EM (June 9, 1997) (granting the Legal Environmental Assistance Foundation, Enpower, Inc., and LS Power LLC leave to intervene in need determination proceeding); In re: Petition of Ark Energy, Inc. and CSW Development-I, Inc. for Determination of Need for Electric Power Plant to be Located in Okeechobee County, FL, 1993 Fla. PUC LEXIS 124; Dkt. No. 920807-GP; Order No. PSC-93-0141-PCO-GP (Jan. 27, 1993) (granting FP&L's petition to intervene in need determination proceeding); In re: Joint Petition to Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power & Light Co. and Cypress Energy Partners, Ltd., 1992 Fla. PUC LEXIS 1146; 92 FPSC 8:376; Dkt. No. 920520-EQ; Order No. PSC-92-0830-PCO-EQ (Aug. 18, 1992) (granting Nassau Power Corporation's petition to intervene in need determination proceeding); In re: Petition for

Determination of Need for a Proposed Electrical Power Plant and Related Facilities in Polk County by Tampa Electric Company, 1992 Fla. PUC LEXIS 568; 92 FPSC 3: 19; Dkt. No. 910883-EI; Order No. PSC-92-0002-FOF-EI (March 2, 1992) (granting Floridians for Responsible Utility Growth leave to intervene in need determination proceeding); In re: Petition of Florida Power Corporation for Determination of Need for Proposed Electrical Power and Related Facilities, 1991 Fla. PUC LEXIS 1863; 91 FPSC 10:290 (Oct. 15, 1991) (granting Florida Industrial Cogeneration Association, Floridians for Responsible Utility Growth and Panda Energy Corporation leave to intervene in need determination proceeding).

24. Indeed, the Commission granted FPC and other retail utilities leave to intervene as parties in the Duke case. The result should be no different here.

V. Disputed Issues of Material Fact

25. FPC submits that OCG's petition is deficient as a matter of law and that it can and should be dismissed summarily. Assuming, however, that the Commission would have proper occasion to consider and determine factual issues, the petition presents numerous disputed issues of material fact. These include, but are not limited to:

- a. Whether and to what extent the power produced by OCG's proposed "merchant plant" would be sold in Florida or outside the State.

- b. Whether and to what extent retail utilities in the State would have any assurance of how, when, where, and on what terms OCG will market power in this State.
- c. Whether the terms of sale for power sold from the project would be advantageous to ultimate consumers in this State, in relation to regulated sales by utilities like FPC.
- d. Whether the detrimental impacts of the project would outweigh any benefits in view of OCG's projection that it would be selling the project's electric output inside the State for only the first 10 years of the plant's expected 20 year life.
- e. Whether the project has a sufficient contract in place for a firm supply of gas.
- f. Whether the project will absorb or divert natural gas from other power producers in the State, who are committed to serving customers in the State on a long-term basis.
- g. Whether the project would provide an impetus for the construction of a second, major trans-Florida gas pipeline, and whether that would be a benefit or a detriment to the State.
- h. Whether the project will be able to meet its projected in-service date given that the appropriate Federal agencies have not approved the construction of a second major trans-Florida gas pipeline.
- i. Whether presently planned reserve margins in Peninsular Florida are inadequate or constrained.
- j. Whether it is appropriate to consider only supply-side resources to the exclusion of demand-side resources when examining the adequacy of reserve margins planned for individual utilities and/or Peninsular Florida.
- k. Whether a 20% reserve margin is appropriate for either individual utilities or Peninsular Florida.

- l. Whether Peninsular Florida is in need of more than 10,000 MW of installed capacity through 2009 in order to maintain adequate reserves.
- m. Whether Peninsular Florida is in need of more installed capacity than is currently planned by Peninsular Florida retail utilities that are committed to serving retail customers within the State.
- n. Whether uncommitted capacity (such as the proposed capacity of this project) may properly be included in the calculation of reserve margins for individual utilities and/or Peninsular Florida. And if so, to what degree and how.
- o. Whether FPC and other Peninsular Florida utilities can rely to any extent on uncommitted capacity (such as the proposed capacity of this project) to satisfy their obligation to provide reliable electric service to retail customers in the State.
- p. Whether or not the project would be able to meet its projected in-service date of 2003 given that it has yet to receive its FERC, EWG certification for the nominal 550 MW unit identified in its need petition.
- q. Whether the project's in-service date coincides with any need in the State for generation in addition to that which is already planned by Peninsular Florida's retail-load-serving utilities.
- r. Whether FPC's transmission facilities or the transmission grid in Peninsular Florida would ultimately be adversely affected by the project.
- s. Whether OGC has properly estimated the availability of the project's uncommitted capacity to ultimate consumers in the State.
- t. Whether the petition complies with the Commission's rules.
- u. Whether the proposed project would satisfy the statutory criteria of need.

- v. Whether the proposed project would reliably meet the need of any particular retail utility in Peninsular Florida for firm capacity to meet its statutory obligation to serve.
- w. Whether the proposed project would constitute the most cost effective means for any particular retail utility reliably to meet its need for firm power resources.

VI. Ultimate Facts Alleged

26. This proceeding will affect FPC's substantial interests in the respects identified in paragraphs 1-25 above, which are incorporated by reference herein.

27. The proposed project would not satisfy the applicable statutory standards of need.

28. The proposed project would not meet any identified retail utility's need for firm resources to meet its obligation to serve.

29. The proposed project would not provide the most cost effective means for any retail utility to meet in a reliable manner its obligation to serve.

30. OCG has not satisfied and cannot satisfy the requirements of the Florida Energy Efficiency Conservation Act ("FEECA"), including those set forth in Section 403.519 of that law, that a petitioner for a determination of need first demonstrate that it has taken reasonable measures to avoid the construction of new generating facilities and has otherwise engaged in appropriate conservation measures.

31. OCG is incapable of having a “need” for generating capacity within the meaning of Section 403.519 since OCG has no obligation to serve. OCG’s only need is a need for profits.

32. The proposed project would not contribute to the reserve margins of any particular retail utility in Florida or of the retail utilities in Peninsular Florida.

33. The proposed project would necessarily create environmental impacts in Florida without a countervailing demonstration of true “need,” as that term is used in Section 403.519 and authoritatively construed by the Florida Supreme Court.

34. OCG has no contractual commitments whatsoever with any retail utility in Florida and thus utterly fails to satisfy the requirements established by the Florida Supreme Court as a precondition of standing for any IPP under Section 403.519 and the Florida Electric Power Plant Siting Act.

35. OCG has no plans to sell its output in Florida after the first ten years of the life of the project. Its plans prior to that time are speculative and unenforceable.

36. OCG is not an “electric utility” or “utility” as that term is used in the applicable Florida statutes.

37. The Commission would not have regulatory jurisdiction over OCG. If OCG should choose to resist the Commission's attempt to exercise jurisdiction over it, the Commission would be powerless to stop it.

WHEREFORE, FPC respectfully petitions for leave to intervene and participate as a full party respondent to this proceeding.

Dated this 11th day of October 1999.

Respectfully submitted,

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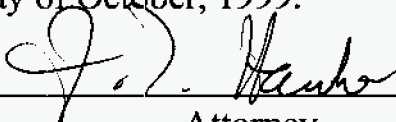
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FLORIDA POWER CORPORATION'S PETITION TO INTERVENE has been furnished by U.S. Mail to the following counsel of record this 11th day of October, 1999.



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