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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 OCTOBER 14, 1999

OKEECHOBEE GENERATING COMPANY'S MOTION TO STRIKE PORTIONS OF FLORIDA POWER & LIGHT COMPANY'S PETITION FOR LEAVE TO INTERVENE

Okeechobee Generating Company, L.L.C., ("OGC") pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C.") and Rule 1.140(f), Florida Rules of Civil Procedure ("FRCP") hereby moves to strike portions of Florida Power & Light Company's ("FPL") Petition for Leave to Intervene ("Petition to Intervene") and as grounds therefore states:

1. On September 24, 1999, pursuant to Section 403.519, Florida Statutes, OGC filed a Petition for Determination of Need for an Electrical Power Plant ("OGC's Petition") and initiated this docket. OGC's Petition seeks the Commission's affirmative determination of need for the Okeechobee Generating Project, a 550 MW (nominal), natural gas-fired, combined cycle power plant to be located in Okeechobee County, Florida.

2. Uniform Rule of Procedure 28-106.205, F.A.C., sets forth the requirements for a petition to intervene in an administrative proceeding. Rule 28-106.205, F.A.C., provides that persons whose substantial interests may be determined in a proceeding may

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petition the presiding officer for leave to intervene. The petition must include allegations which demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to agency rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.[1] However, nothing in Rule 28-106.205, F.A.C., authorizes the use of a petition to intervene as a vehicle for arguing the merits of the case.

3. On October 7, 1999, FPL filed its Petition to Intervene in this docket. FPL's Petition to Intervene improperly contains numerous allegations and legal argument concerning the merits of OGC's Petition. FPL's merits arguments are wholly immaterial and irrelevant to its Petition to Intervene and should be stricken.

4. Rule 1.140(f), FRCP, provides:

> A party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time.

Under Rule 1.140(f), FRCP, a motion to strike should be granted if the matter to be stricken is "wholly irrelevant" to the proceeding. Pentecostal Holiness Church, Inc. v. Mauney, 270 So. 2d 762, 769

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[1]Commission Rule 25-22.039, F.A.C., contains similar pleading requirements for a petition to intervene.

(Fla. 4th DCA 1972). The allegations concerning the merits of OGC's Petition contained in FPL's Petition to Intervene are wholly irrelevant to FPL's intervention and should be stricken.

5. The second sentence of paragraph 7 should be stricken. The second sentence of Paragraph 7 states:

> The petitioner Okeechobee Generating Company, L.L.C. ("OGC") is not and will not be [subject to the Commission's jurisdiction].

This allegation, which is posed in opposition to the first sentence which states that FPL is subject to the Commission's jurisdiction, asserts a legal conclusion that OGC is not subject to the Commission's jurisdiction pursuant to section 366.04(5) and 366.05(8), Florida Statutes. This statement is clearly legal argument concerning the merits of OGC's Petition and, as such, is immaterial to a determination of whether FPL should be granted intervention. The statement is also wrong and completely ignores the Commission's order in In re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 99 FPSC 3:401, 416-18 ("Duke Order") in which the Commission specifically found that a similarly situated merchant plant developer was subject to the Commission's jurisdiction.

6. Paragraph 12 in its entirety, and the associated footnote number 1, should be stricken. Paragraph 12 in its entirety, and the associated footnote number 1, states:

> The statute under which the Commission must act to find that a power plant is needed, Section 403.519, Florida Statutes, requires specific findings regarding the need for the Project. Both the Commission and the Supreme Court of Florida have held that these findings are utility and unit specific.[1] Because OGC has no statutory obligation to serve and because OGC lacks a contractual obligation to serve, it cannot demonstrate that it has a need for its power plant.
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> [1] "The Siting Act", and Section 403.519 require that this body make specific findings as to system reliability and integrity, need for electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. Clearly these are utility and unit specific. In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 318 (Order No. 22341); The Commission's interpretation of section 403.519 also comports with this Court's decision in *Nassau Power Corp. v. Beard*. In that decision, we rejected Nassau's argument that the "Siting Act does not require the PSC to determine need on a utility-specific basis." 601 So.2d at 1178 n. 9. Rather, we agreed with the Commission that the need to be determined under section 403.519 is "the need of the entity ultimately consuming the power," in this case FPL. Nassau Power Corporation v. Deason, 641 So.2d 396, 399 (Fla. 1994).

Once again, these allegations are legal arguments representing FPL's view of the merits of this case and, as such, are immaterial to its Petition to Intervene. Moreover, it cannot seriously be disputed that these statements and this interpretation represents FPL's patently erroneous legal conclusion as to whether a merchant

power plant is entitled to be an applicant for a need determination under Florida law. However, conspicuous by its absence is any reference by FPL to the voluminous analysis of these same legal issues raised by FPL and decided by the Commission, in the Duke Order. 99 FPSC 3:421-23.

7. Paragraph 16 should be stricken in its entirety. Paragraph 16 states:

> This Commission's Rule 25-22.080 and 25-22.081, F.A.C., recognize this adverse impact on FPL's interests. For instance, Rule 25-22.081 requires the Petition to include **"A general description of the utility or utilities primarily affected."** Following the lead of Duke and the incorrect discussion in the Order in that proceeding, OGC seeks to keep the Commission ignorant of the impact of the facility by alleging that it "is the utility primarily affected by the Project", thus, failing to address the appropriate factors for evaluation from the proper perspective. Clearly, Rule 25-22.080 which requires notice of the commencement of the proceeding to the **"affected utility or utilities, if appropriate"** could not be reasonably construed to require that notice be given to the utility filing the application that the application was filed.

(Emphasis in the original.) That FPL has previously made, and not prevailed on, this same legal argument is evidenced by the clear language in the Duke Order. The Duke Order states:

> One of FPL's arguments for dismissal of the Joint Petition construes the provisions of Rule 25-22.081, Florida Administrative Code, as they relate to, and allegedly are not satisfied by, the Joint Petition. First, FPL alleges, there is no description of the specific utility or utilities primarily affected by the proposed plant. . . . FPL's arguments regarding rule requirements are disingenuous. First, the Joint Petition

does identify "primarily affected utilities". . . . 99 FPSC 3:420. Again, these are clearly substantive arguments on questions of law that have been definitively answered by the Commission. Whether OGC's Petition alleges the "appropriate factors" of the rule is wholly irrelevant and immaterial to FPL's status as an intervenor and should be stricken from FPL's Petition to Intervene.

8. The first three sentences of paragraph 24 should be stricken. The first three sentences of paragraph 24 state:

> In this case, in stark contrast to these (and other) prior Commission decisions, the approach taken by the petitioner is to offer to the Commission tautological arguments concerning "utilities only contracting to buy when it is reasonable to do so" as a surrogate for the process of evaluating the power plant proposal from the purchasing utilities' perspective. OGC makes no attempt to identify individual purchasing utilities. Instead, there is an effort to rely on the proposal being "consistent with" the need of a planning artifice called "Peninsular Florida."

This passage simply restates FPL's position on the legal issues in the Duke proceeding. In *Section III.B. Whether Duke New Smyrna/The City are Proper Applicants Pursuant To Decisional Law, Florida Power & Light Company*, the Duke Order states:

> The foundation of FPL's argument for dismissal of the Joint Petition is its assertion that Duke New Smyrna is not a proper applicant pursuant to decisional law .... Under FPL's interpretation of the decisions, no non-utility generator may seek a need determination without first obtaining a contract with a state-regulated utility with an obligation to serve. . . . According to FPL, a

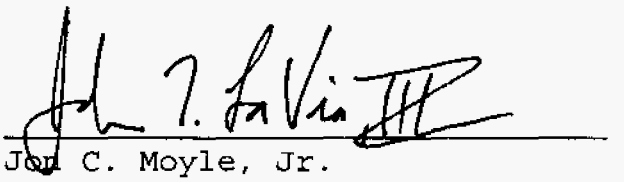
> non-utility generator without a contract with a state-regulated electric utility is not a proper applicant under the Siting Act.

99 FPSC 3:411 (citation omitted). FPL's statement that OGC makes "no attempt to identify individual purchasing utilities" is in lock step with its argument that a contract with a "state-regulated" utility is required before a wholesale power producer can seek a determination of need. This legal argument failed in the Duke proceeding and it is wholly inappropriate and immaterial to the issue of intervention.

9. In sum, FPL has a proper vehicle available to it to raise the substantive legal issues concerning the merits of OGC's Petition--a motion to dismiss. In fact, on October 8, 1999, FPL filed its motion to dismiss OGC's Petition; however, in its motion to dismiss, FPL raised none of the legal arguments that it has attempted to argue in its Petition to Intervene. These arguments are also inappropriate here. Accordingly, the above-cited portions of FPL's Petition to Intervene should be stricken.

WHEREFORE, Okeechobee Generating Company, L.L.C., respectfully requests that the Commission strike the above-cited portions of Florida Power & Light Company's Petition for Leave to Intervene.

Respectfully submitted this 14th day of October, 1999.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery (*) or U.S. Mail, on this 14th day of October, 1999, to the following:

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