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 FILED: OCTOBER 15, 1999

OKEECHOBEE GENERATING COMPANY'S MEMORANDUM OF LAW IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS PETITION

Okeechobee Generating Company, L.L.C. ("OGC"), the petitioner in the above-styled docket, pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby respectfully submits this memorandum of law in opposition to Florida Power & Light Company's Motion to Dismiss Petition ("FPL's Motion to Dismiss"). As explained herein, all of FPL's assertions are misplaced or incorrect, or both, and the Commission should accordingly deny FPL's motion.

SUMMARY

Okeechobee Generating Company has properly followed and substantially complied with all rules applicable to OGC's Petition for Determination of Need ("OGC's Petition"). OGC has alleged sufficient facts to establish that it is an "electric utility" under both Section 366.02(2) and Section 403.503(13), Florida Statutes ("F.S."). OGC submits in good faith that Commission Rule 25-22.082, F.A.C. Selection of Generating Capacity, should not reasonably be construed as applying to merchant utilities, like OGC, whose proposed power plants are not going to be included in a retail-serving utility's rate base and thereby subject to mandatory

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recovery from captive retail customers. OGC is not required to have filed a ten-year site plan at this time, but will do so next April 1 in accordance with Commission Rule 25-22.071, F.A.C. FPL's assertion that OGC's status as an Exempt Wholesale Generator ("EWG") with respect to a 500 MW plant as opposed to the 550 MW plant proposed in OGC's Petition is somehow a defect in OGC's pleadings is not only irrelevant, it is also absurd. OGC's authority to generate and sell electricity in the Peninsular Florida wholesale market comes from OGC's Rate Schedule No. 1 approved by the Federal Energy Regulatory Commission ("FERC"). Finally, OGC has complied specifically with Commission Rule 25-22.081, F.A.C., Contents of Petition, which sets forth the requirements for need determination petitions, and in so doing, OGC has also complied substantially with the requirements of Rule 28-106.201, F.A.C., the provision of the Uniform Rules of Procedure regarding initiation of proceedings by petitions.

Accordingly, FPL's motion to dismiss must be denied.

ARGUMENT

I. OGC HAS ALLEGED SUFFICIENT FACTS TO ESTABLISH THAT IT IS AN "ELECTRIC UTILITY" UNDER BOTH SECTION 366.02(2) AND SECTION 403.503(13), F.S.

FPL first asserts that Okeechobee Generating Company has not alleged sufficient facts to establish that it is an "electric utility," and then attempts to bootstrap that misplaced assertion into an argument that OGC has not properly invoked the Commission's jurisdiction over the requested need determination for the Okeechobee Generating Project. In the first place, to be a proper applicant under the Florida Electrical Power Plant Siting Act (Sections 403.501-.518, F.S.)("Siting Act") and Section 403.519, F.S., the petitioner must be an "electric utility" within the meaning of Section 403.503(13), F.S. Being an electric utility subject to Commission regulation under Section 366.02(2), F.S. is one way of being a "regulated electric company," which is one of the identified species of "electric utility" under the Siting Act; another way is to be a "public utility" subject to regulation by FERC under the Federal Power Act. OGC is both an electric utility and public utility, and has alleged facts sufficient to establish both.

Specifically, OGC has alleged that it "will own the Project and will market the Project's capacity and associated energy to other utilities and power marketers under negotiated arrangements" at wholesale pursuant to OGC's FERC-approved tariff. OGC's Petition at 6. Thus, OGC has alleged that it will own a generation

system -- i.e., the Okeechobee Generating Project -- within Florida. No more than this is required as a matter of pleading. See Abruzzo v. Haller, 603 So. 2d 1338, 1240 (Fla. 1st DCA 1992) (when considering a motion to dismiss, the reviewing court must assume that all allegations in the complaint are true and all reasonable inferences must be drawn in favor of the pleader).

OGC has also alleged that it will sell electric capacity and energy at wholesale, and has included in its exhibits the FERC's order approving OGC's tariff authorizing such sales. This demonstrates OGC's authority to engage in the business of generating and selling electricity. No more than this is required to establish its status as a federally regulated electric company. Indeed, the FERC's order granting this authority is irrefutable prima facie evidence of OGC's status as a FERC-regulated electric company as well as of OGC's authorization to engage in that business.

OGC has sufficiently plead facts that will establish that it is an electric utility under Chapter 366, F.S., as well as a public utility under the Federal Power Act. (16 U.S.C.S. § 824(b)(1) & (e) (1994)). Accordingly, FPL's motion to dismiss based on its "inadequate allegations" argument fails and its motion to dismiss must be denied.

II. BECAUSE THE FUNDAMENTAL PURPOSE OF COMMISSION RULE 25-22.082, F.A.C., SELECTION OF GENERATING CAPACITY, IS TO PROTECT CAPTIVE RATEPAYERS OF RETAIL-SERVING INVESTOR-OWNED

UTILITIES, THAT RULE SHOULD NOT BE CONSTRUED TO APPLY TO MERCHANT UTILITIES LIKE OGC.

FPL asserts that OGC's petition is defective because it does not allege that OGC has conducted a request for proposals in accordance with Commission Rule 25-22.082, F.A.C., Selection of Generating Capacity. This argument too is misplaced because it fails to comprehend the fundamental purpose of the subject Rule. The purpose of the Rule is to protect captive ratepayers from uneconomic decisions by their monopoly retail-serving utilities, which have the ability to bind those ratepayers to pay the costs of the utilities' power plants.[1] Viewed in this light, this Rule should not be construed to apply to merchant utilities like OGC and should not be interpreted in a manner inconsistent with the underlying purpose of the Rule.

The fundamental purpose of the Rule is to protect captive electric ratepayers from paying too much for power supply resources from their monopoly retail-serving utilities. This purpose is clearly borne out by the history of the Rule and by Commission orders interpreting and applying it. The Rule was adopted by Commission Order No. PSC-93-1846-FOF-EU, issued on December 29, 1993. In re: Amendment of Rule 25-22.081, F.A.C., Contents of Petition; and Adoption of Rule 25-22.082, F.A.C., Selection of

[1] It should be noted that FPL is presently in the process of "repowering" two of its power plants (Ft. Myers and Sanford) by adding a total of more than 1,500 MW of generating capacity for which FPL has never conducted an RFP process and does not intend to do so. FPL's decision not to bid out the capacity represented by these "repowering" projects would not appear to be consistent with the Rule's goal of protecting captive ratepayers.

Generating Capacity, 93 FPSC 12:556. Though the Order consists of little more than the boiler-plate notice of adoption language, the Staff's recommendation makes clear that the purpose of the Rule is to promote competitive selection of generation capacity in order "to assist electric utilities in fulfilling their statutory obligation to serve at the lowest cost" and to facilitate the Commission's role in reviewing the utility's power supply procurement decisions to ensure that service is provided at the lowest cost to ratepayers. In re: Amendment of Rule 25-22.081, F.A.C., Contents of Petition; and Adoption of Rule 25-22.082, F.A.C., Selection of Generating Capacity, Docket No. 921288-EU, Staff Recommendation at 3 (November 22, 1993); see also id. at 9, 10. This focus on utilities with a statutory obligation to serve retail ratepayers, and on protecting those captive retail ratepayers, makes clear that the Rule was not intended to include merchant wholesale utilities, like OGC, which have no statutory obligation to serve retail customers and no captive retail ratepayers from whom they may demand cost recovery.

Moreover, Commission orders applying and interpreting this Rule support the proposition that the Rule's intent is to protect captive ratepayers from being saddled with the costs of power supply resources that are not the most cost-effective alternatives available to their retail-serving utilities. For example, earlier this year, the Commission denied a request for waiver of the Rule by a retail-serving investor-owned utility because the utility had not demonstrated that the lowest cost generation alternative would

be selected by the utility, and that the requested waiver would thus be "contrary to the intent of the bidding rule . . . ." In Re: Petition by Florida Power Corporation for Waiver of Rule 25-22.-082, F.A.C., Selection of Generating Capacity, 99 FPSC 2:92, 96. The Commission went on to note that denying the waiver would assure that the utility's ratepayers benefit from the most economical resource addition. Id. at 98.

In this light, it is clear that the Rule was not intended to apply to a merchant utility like OGC, and that it makes no sense to apply the Rule to OGC. OGC has no statutory obligation to serve retail customers (indeed, it cannot do so without forfeiting its EWG status), and no corresponding legal ability to bind such captive customers to pay for any of the costs of the Project. Moreover, OGC has no legal ability to bind any retail-serving utility to pay for any of the costs of the Project. Retail-serving utilities will only pay for the capacity and energy that they choose to purchase from OGC, and they will, reasonably assuming rational economic behavior, only choose to buy power from OGC when that purchase represents the most cost-effective alternative available to serve an identified need. In Re: Joint Petition for Determination of Need for an Electric 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, 434-35 (hereinafter Duke New Smyrna). In other words, if a retail-serving utility has a lower-cost option available than a potential purchase from OGC, then it should, consistent with its

general duty to serve at the lowest cost, select the alternative.

This is exactly how the Commission envisions merchant plants operating in the context of the bidding rule. As the Commission noted in Duke New Smyrna:

> The "bidding rule," Rule 25-22.082, Florida Administrative Code, requires that an investor-owned utility evaluate supply-side alternatives in order to determine that a proposed unit, subject to the PPSA, is the most cost-effective alternative available. If Duke New Smyrna were to construct the Project, it could propose to meet a utility's need pursuant to the bidding rule, but the IOU would have the final decision on how it would meet its needs. An IOU, or any other utility in Florida should prudently seek out the most cost-effective means of meeting its needs. The Duke New Smyrna project simply presents another generation supply alternative for existing retail utilities. Florida ratepayers will not be at risk for the costs of the facility, unless it is proven to be the lowest cost alternative at the time a contract is entered.

99 FPSC 3:434-35. It further makes no sense to require OGC to jump through the procedural hoops of the Rule because OGC can only contribute to promoting the fundamental purpose of the Rule. In effect, OGC and other merchants are building their power plants for the purpose of participating in various procurement processes (RFPs, Florida Energy Broker transactions, or other short-term or long-term power supply solicitations and negotiations) conducted by retail-serving utilities. OGC can only contribute to the fundamental purpose of the Rule by making an additional, necessarily cost-effective power supply option available to retail-serving utilities. As the Commission stated in Duke New Smyrna:

> The Duke New Smyrna project presents another alternative for existing utilities, without putting Florida ratepayers at risk for the costs of the facility as is done for the costs of rate based power plants.
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> * * *
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> The evidence in the record shows this plant, because of its efficiencies, will be dispatched a great deal of the time. However, because of its merchant nature, it will only be dispatched when it is economical to do so. As a result, we believe that it will exert a downward pressure on electricity pricing in the wholesale power market in Florida. This, in turn, will flow through to retail IOU customers in retail rates through the fuel adjustment clause.

99 FPSC 3:437-38. The Commission should not reasonably apply the Rule in such a way as to impede OGC's ability to further the goals of the Rule.

Accordingly, FPL's motion to dismiss based on its "bidding rule" argument fails and its motion to dismiss must be denied.

III. OGC IS NOT REQUIRED TO ALLEGE THAT IT HAS FILED A TEN-YEAR SITE PLAN IN ORDER TO FILE ITS PETITION FOR DETERMINATION OF NEED, NOR IS OGC REQUIRED TO HAVE FILED A TEN-YEAR SITE PLAN AT THIS TIME. NONETHELESS, OGC FULLY INTENDS TO FILE A PLAN AT THE APPROPRIATE TIME.

FPL asserts that OGC's petition is deficient because it fails to allege that OGC has filed a ten-year site plan in accordance with Commission Rule 25-22.071, F.A.C. FPL is again mistaken. OGC is not required either to have alleged compliance with this Rule, nor is OGC required by the Rule to have filed a ten-year site plan at this time. Commission Rule 25-22.081, F.A.C., which governs the

contents of petitions for determinations of need, does not contain any requirement that the applicant have either filed a ten-year site plan or that it allege that it has done so, or that it explain why it has not done so.

Moreover, FPL has selectively omitted key language from the Rule in its Motion to Dismiss. The Rule provides that an electric utility, such as OGC, that elects to construct an additional generating facility exceeding 75 MW gross generating capacity "shall prepare a ten-year site plan . . . in the year the decision to construct is made or at least three years prior to application for site certification, and every year thereafter until the facility becomes fully operational." Rule 25-22.071(1)(b), F.A.C. OGC had not made a decision to construct the Project as of the normal, rule-specified April 1 filing date in 1999, nor was OGC an electric utility at that time, because it had not yet received FERC approval of its wholesale tariff. Accordingly, OGC was not obliged to file a ten-year site plan on April 1 of this year, i.e., 1999. OGC does intend to file a ten-year site plan on or before April 1, 2000, in full compliance with the Rule. This plan will then be timely, since, obviously, an affirmative order granting OGC's need determination must be issued before OGC can make a final decision to construct the plant.

Alternatively, OGC respectfully submits to the Commission that it is in substantial compliance with the Commission's Rule and statutory requirements because the information contained in the

need determination filing includes substantially all of the information that would be included in the ten-year site plan.

Accordingly, FPL's motion to dismiss based on its ten-year site plan rule argument fails and its motion to dismiss must be denied.

IV. FPL'S ASSERTION REGARDING OGC'S EWG STATUS IS IRRELEVANT TO OGC'S AUTHORITY TO GENERATE AND SELL POWER INTO THE PENINSULAR FLORIDA WHOLESALE POWER MARKET AT MARKET-BASED RATES. OGC IS FULLY AUTHORIZED BY ITS FERC-APPROVED TARIFF TO ENGAGE IN THE BUSINESS OF GENERATING AND SELLING ELECTRICITY.

FPL's assertion that OGC cannot be a proper applicant because its EWG certification applies to a power plant having slightly different capacity than the unit proposed in its need determination petition and exhibits is spurious and irrelevant, and accordingly FPL's motion to dismiss fails on this ground as well.

The plain legal truth is that OGC's status as an EWG has nothing to do with its status as a public utility under the Federal Power Act, nor with its status as an electric utility under Chapter 366, F.S., nor, accordingly, with its status as a regulated electric company and an applicant under the Siting Act. It is OGC's status as a Commission-regulated wholesale electric utility under Chapter 366, F.S., and its status as a FERC-regulated public utility under the Federal Power Act that makes OGC a "regulated electric company," an "electric utility," and an "applicant" under the Siting Act and Section 403.519. See Duke New Smyrna, 99 FPSC 3:415-17. OGC's EWG status only exempts OGC from regulation by the

Securities Exchange Commission pursuant to the Public Utility Holding Company Act of 1935. See 15 U.S.C.S. §792-5A (1994 & Supp. 1997). Indeed, OGC is a public utility under the Federal Power Act and an electric utility under Chapter 366, F.S., regardless whether it obtains EWG status. (Without EWG status, OGC would still be the same in the eyes of the FERC and the Commission, but it would be different in the eyes of the Securities Exchange Commission.)

Moreover, by virtue of the FERC's having approved OGC's tariff for wholesale power sales at negotiated rates, OGC is fully authorized to engage in the business of generating and selling electricity in Florida.

Accordingly, FPL's motion to dismiss fails on this ground as well, and the Commission should deny it.

V. OGC'S PETITION FULLY COMPLIES WITH THE COMMISSION'S RULES GOVERNING PETITIONS FOR DETERMINATION OF NEED AND SUBSTANTIALLY COMPLIES WITH ALL APPLICABLE PLEADING REQUIREMENTS OF RULE 28-106.201, F.A.C.

FPL finally asserts that OGC's Petition is inadequate because it does not contain a statement of disputed issues of material fact as required by Uniform Rule of Procedure 28-106.201. This argument is specious and hyper-technical, elevates form over substance, and fails to recognize that OGC's Petition fully complies with all applicable pleading requirements set forth in Rule 25-22.081, F.A.C., and that it complies substantially with the requirements of the Uniform Rules.

OGC's Petition and exhibits are more than sufficient to allow:

> the Commission to take into account the need for electric system reliability and integrity, the need for adequate reasonable cost electricity, and the need to determine whether the proposed plant is the most cost effective alternative available....

See Rule 25-22.081, F.A.C. (repeating the necessary factors to be considered in a need determination proceeding set forth in Section 403.519, F.S.). In other words, OGC's Petition has addressed all of the issues -- the need for system reliability and integrity, the need for adequate electricity at a reasonable cost, cost-effectiveness, and conservation issues -- that are the normal disputed issues of material fact in need determination proceedings. See Duke New Smyrna, 99 FPSC 3:401 at 443 (stating that the petitioners in the Duke New Smyrna need determination proceeding "provided all the information required by Section 403.519, Florida Statutes, and Rule 25-22.081, Florida Administrative Code"). Moreover, OGC's Petition has identified and addressed the four specific statutory criteria -- i.e., the normal disputed issues of fact in need determination cases -- clearly, specifically, and concisely. Paragraphs 43 and 44 summarize the basic need and cost-effectiveness issues, which are also discussed in more detail in Paragraphs 20-21 (reliability need), 22-24 (need for adequate electricity at a reasonable cost), and 27-33 (cost-effectiveness). Paragraphs 35 and 36 directly address energy conservation issues, including an explanation of how the Project will serve the specific goals of the Florida Energy Efficiency and Conservation Act (Sections 366.80-.85 and 403.519, F.S.). Accordingly, OGC has

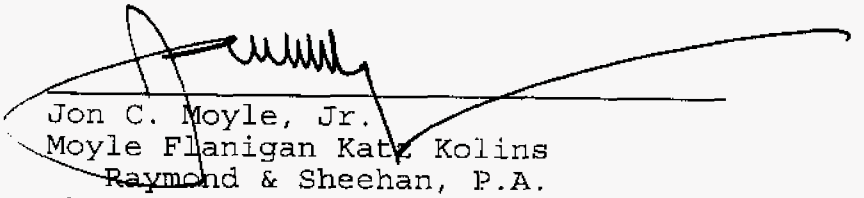
complied substantially with the Uniform Rule requirement to include statements of disputed issues of material fact.

FPL's argument is apparently that OGC's Petition should be dismissed because the Petition does not include a separate listing of these issues with more specific "name tags" identifying them as disputed issues. FPL is grasping at straws, and its trivial argument should be summarily rejected and its Motion to Dismiss denied.

CONCLUSION

Okeechobee Generating Company, L.L.C. has substantially complied with all applicable pleading and other requirements necessary to bring its Petition for Determination of Need for the Okeechobee Generating Project before the Commission. FPL's arguments in its Motion to Dismiss are misplaced and unfounded. Accordingly, FPL's motion must be denied.

Respectfully submitted this 15th day of October, 1999.



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CERTIFICATE OF SERVICE
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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 15th day of October, 1999:

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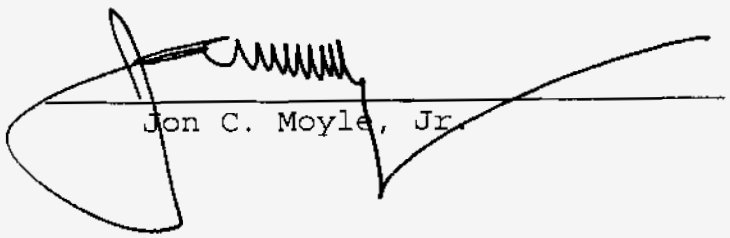

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