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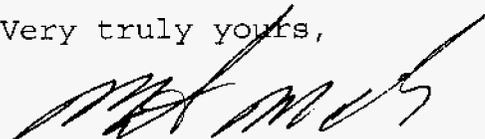
Blanca S. Bayó, Director  
Division of Records and Reporting  
Florida Public Service Commission  
4750 Esplanade Way, Room 110  
Tallahassee, FL 32399

RE: DOCKET NO. 991462-EU

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen (15) copies of Florida Power & Light Company's Memorandum in Reply to Okeechobee Generating Company's Memorandum of Law in Opposition to FPL's Motion to Dismiss Petition in the above-referenced docket.

Very truly yours,



Matthew M. Childs, P.A.

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FPSC-RECORDS & REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination )  
of Need for Electric Power Plant ) DOCKET NO. 991462-EU  
in Okeechobee County by Okeechobee ) FILED: OCTOBER 21, 1999  
Generating Company, L.L.C. )  
\_\_\_\_\_ )

Florida Power & Light Company's Memorandum in Reply  
to OGC's Memorandum of Law in Opposition to FPL's  
Motion to Dismiss Petition

Florida Power & Light Company ("FPL") hereby replies to Okeechobee Generating Company, L.L.C.'s ("OGC") Memorandum in Opposition to FPL's Motion to Dismiss.

1. **The Commission Cannot Entertain OGC's Request to Interpret Rule 25-22.082(2) to Mean the Opposite of What it Says Outside of a Petition for Variance or Waiver.**

OGC's Memorandum admits that Rule 25-22.082(2) applies by its plain language, admits that OGC did not comply with that Rule, but asks for a "construction" whereby the Rule would mean the opposite of what it says.

Rule 25-22.082(2), F.A.C. requires "each investor-owned electric utility" "**prior to filing a petition for a determination of need for an electrical power plant**" to "evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposal (RFP)." OGC alleges in its petition for

determination of need that it is an "electric utility" under Chapter 366 and that it is owned by a separate entity, but OGC never issued an RFP; it does not allege that it has. OGC presents no contention and makes no argument that the plain language of Rule 25-22.082(2) somehow does not apply to OGC. OGC does not argue that some exception can be found to the plain language of Rule 25-22.082(2) (the "Bidding Rule"). OGC does not contend or argue that FPL's statement of the terms of the Bidding Rule is inaccurate. Nor does OGC now contend or argue that it is not an "investor-owned electric utility" within the meaning of Rule 25-22.082(2). (FPL argues that the facts alleged by OGC do not establish this status but OGC continues to assert such status and it is that status which requires compliance with the Bidding Rule.) OGC does not contend or argue that it has been granted any waiver of the requirements of Rule 25-22.082(2). Instead, OGC asserts:

"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."

OGC's Response at 4-5. OGC further argues it should be spared the hardship of being required to "jump through the procedural hoops of the Rule". OGC's Response at 4-5 and 8.

OGC's argument is in effect a plea in mitigation of OGC's violation of the Bidding Rule. Thus, OGC's "memorandum" is a request for affirmative relief that cannot be raised in the form of

a response to a motion to dismiss. Uniform Rule 28-106.204(1) ("All requests for relief shall be by motion.").

OGC's request that the "rule should not be construed to apply to merchant utilities like OGC" is an acknowledgment and admission that Rule 25-22.082(2), by its terms, does apply to OGC and a further admission that OGC has not complied. As set forth previously, Rule 25-22.082(2) applies to "each investor-owned electric utility". OGC affirmatively alleges that it is an electric utility and that it is owned by a separate entity. Thus, OGC's transparent attempt to imply that what FPL argues for is a "construction" of the Rule is nothing more than an attempt to mask OGC's request for additional relief. (It is OGC that asks for a construction). The ploy is exposed when OGC argues its so-called "fundamental purpose" theory of Rule 25-22.082(2), not as a counter to some foray into construction proposed by FPL (because none was proposed by FPL) but, instead, to avoid the plain language of the Rule itself. OGC's request for a contrary "construction" is nothing more than a request for the Commission to violate its own rules or to not apply those rules as if a tacit waiver of the terms of Rule 25-22.082(2) had somehow been granted outside the applicable procedures for consideration of requests for waivers.

The types of assertions that OGC improperly makes are precisely the type of claims in its response to FPL's motion to dismiss that must be addressed through the waiver and variance

process and not through a response to a motion to dismiss. Section 120.542(1), Florida Statutes, states in material part:

"Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances."

Recognizing that, the Legislature passed provisions in the remainder of Section 120.542 permitting applications for rule waivers and variances. Instead of seeking a waiver or variance as intended by the Legislature, OGC asks that the Commission "construe" a rule as inapplicable, despite its plain language to the contrary.

OGC cannot, however, avoid the application of the Rule by an after-the-fact invitation to the Commission to ignore the plain language of the rule. If an entity could ignore the statutory process for considering variances and waivers and instead and only when challenged, ask for a "construction" contradicting the terms of an agency's rules in a response to a motion to dismiss, the Legislature's adoption of an orderly process to consider waiver requests would be useless. "In construing legislation, courts should never assume that the legislature acted uselessly." City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218, 219 (Fla. 1985).

OGC's "memorandum" is clearly insufficient to meet the standards for a waiver of Rule 25-22.082(2) under section 120.542 and Uniform Rule 28-104.002 and is untimely as well.

**2. The Commission has No Discretion to Accept OGC's Invitation to Ignore the Bidding Rule.**

If as OGC alleges it is an "electric utility," the Rule by its terms applies to OGC. There is no need for "construction." "It is a fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 454 (Fla. 1992). Accord Hawkins v. Ford Motor Co., \_\_\_ So.2d \_\_\_ 1999 WL 820573 (Oct. 14, 1999) (non-final pending time-limit for motions for reconsideration and submission to official reporter). "Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." Forsythe, 604 So.2d at 454 (quoting Van Pelt v. Hilliard 75 Fla. 792, 798-99, 78 So. 693, 694-95 (1918)). The Commission should reject the current invitation to have it agree to ignore the plain terms of Rule 25-22.082(2). The Commission cannot adopt a "construction" of a rule which contradicts the rule's plain terms. Contradiction is not construction.

The Administrative Procedure Act specifically provides that an exercise of agency discretion "inconsistent with agency rule" is reversible error. Fla. Stat. § 120.68(7)(e)(2) (1997). "[J]udicial deference to agency interpretation is not absolute.

When the agency's construction clearly contradicts the unambiguous language of the rule, the construction is clearly erroneous and cannot stand." Woodley v. Department of Health and Rehabilitative Services, 505 So.2d 676, 678 (Fla. 1st DCA 1987). Accord Kearse v. Dep't of Health and Rehabilitative Services, 474 So. 2d 819 (Fla. 1st DCA 1985). "**[J]udicial deference to agency interpretation does not extend to a construction which contradicts the unambiguous language of a rule.**" Arbor Health Care Co. v. Agency for Health Care Administration, 654 So.2d 1020, 1021 (Fla. 1st DCA 1995).

The Commission is being asked to ignore that it is bound by the law including its own duly promulgated rules. It is being asked to abuse its discretion and to refuse to apply its rules. Clearly, this is improper.

3. **The Commission Likewise has No Discretion to Consider, Outside of a Waiver Proceeding, OGC's Request that the Commission Ignore Rule 25-22.071 Requiring the Filing of a Ten-Year Site Plan.**

OGC similarly asserts that it would be a hardship for OGC to comply with the terms of the Commission's requirement for the filing of 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. . . ." Rule 25-22.071(1)(b) F.A.C. OGC asserts that it should be excused from failing to file a ten-year site plan because "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." OGC's Response Memorandum at 10. OGC also asks the Commission to treat its petition as its ten-year site plan. OGC's Response Memorandum at 12-14.

As an initial matter, "the rule-specified April 1 filing date" applies only to "electric utilities in the state of Florida with **existing** generating capacity of 250 megawatt (mW) or greater. . . ." Rule 25-22.071(1)(a) F.A.C. "Any electric utility, **other than those filing ten-year site plans pursuant to (1)(a)**" must file "in the year the decision to construct is made or at least three years prior to application for site certification. . . ." Rule 25-22.071(1)(b) F.A.C. OGC obviously cannot excuse its failure to comply with the Rule by reference to a provision of a Rule that, by its terms, applies only to "electric utilities in the state of Florida with **existing** generating capacity." Of course, Rule 25-22.071(1)(b) does not excuse the failure to file 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" merely because the putative applicant missed the April 1 deadline.

OGC, moreover, ventures outside the allegations of its Petition for Determination of Need to now assert that it only became an "electric utility" sometime after April 1, 1999 by virtue of "FERC approval of its wholesale tariff." Of course factual

assertions unalleged in the petition are not properly considered in response to a motion to dismiss. In any event, the standards or criteria for being an "electric utility" under Florida Law nowhere refer to FERC action on any matter.

Once again, OGC's response memorandum seeks the affirmative relief of a waiver of a binding, duly promulgated Commission Rule. The plain terms of the Rule require filing of the ten-year site plan "in the year the decision to construct is made or at least three years prior to application for site certification. . . ." Rule 25-22.071(1)(b) F.A.C. OGC admits that it has not filed a ten-year site plan and has not satisfied Rule 25-22.071(b)(1). All its plans and intentions notwithstanding, OGC asks the Commission again to ignore its Rule. For the reasons set forth above, the Commission cannot ignore Rule 25-22.071 and cannot consider a request for a waiver outside of a variance and waiver proceeding as proscribed by section 120.542 of the Florida Statutes and Uniform Rule 28-104.

#### **CONCLUSION**

Because OGC's "memorandum" admits that Rules 25-22.082(2) and 25-22.071(1)(b) apply by their plain terms as preconditions

to OGC's petition for determination of need and because OGC did not seek a rule waiver, the Commission should apply Rules 25-22.082(2) and 25-22.071(1)(b) and accordingly dismiss OGC's petition.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**  
**DOCKET NO. 991462-EU**

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Memorandum in Reply to OGC's Memorandum of Law in Opposition to FPL's Motion to Dismiss Petition has been furnished by Hand Delivery\* this 21st day of October, 1999 to the following:

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