

ORIGINAL

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-ED

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OKEECHOBEE GENERATING COMPANY'S COMMENTS
AND MEMORANDUM OF LAW IN OPPOSITION TO
FLORIDA POWER CORPORATION'S EMERGENCY PETITION
FOR WAIVER OF RULE 25-22.080 AND REQUEST FOR STAY

Okeechobee Generating Company, L.L.C., (OGC), the Petitioner in the above-styled matter, pursuant to Section 120.542, Florida Statutes (F.S.), and Rule 28-104.003, Florida Administrative Code (F.A.C.), hereby files its Comments and Memorandum of Law in Opposition to Florida Power Corporation's Emergency Petition for Waiver of Rule 25-22.080 and Request for Stay. For the reasons discussed herein, the Commission must deny Florida Power Corporation's (FPC) Petition for Waiver and Request for Stay.

SUMMARY

FPC has not shown it is entitled to a waiver of Rule 25-22.080, F.A.C. Under Section 120.542, F.S., FPC must demonstrate it meets the legal standard for being granted a waiver, and FPC has failed to meet this burden. FPC attempts to twist this issue by arguing that OGC must instead show that it will be prejudiced by a waiver of the rule. However, under the plain language of Section 120.542, F.S., and interpretive case law, it is incumbent on FPC to demonstrate it is entitled to a waiver and it has completely failed to sustain this burden.

Moreover, even if FPC were entitled to a waiver of Rule 25-22.080, F.A.C., in this proceeding, it is not entitled to an emergency waiver. Florida statutory and case law make clear

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that for a person to be entitled to emergency relief, he or she must demonstrate an immediate danger to the public health, safety, or welfare. Section 120.569(2)(n), F.S. (Supp. 1998) (emphasis added). FPC did not even allege, much less demonstrate, an immediate danger to the public health, safety, or welfare. Once again, FPC fails to make the necessary showing entitling it to the relief requested.

As a person seeking to intervene into OGC's need determination proceeding, FPC takes the posture of this case as it finds it. The Commission has set OGC's need determination hearing for December 6-8, 1999, based on timeframes established by Commission rule. If these timeframes are not convenient for FPC to participate in OGC's need determination, FPC has the choice of allocating its resources in a manner more convenient for it or not attempting to intervene in the proceeding. Moreover, FPC seems to be adequately preparing to proceed with the upcoming hearing on the established schedules, as it has already served OGC with numerous interrogatories, requests for production, and requests for admission.

Finally, contrary to FPC's assertions otherwise, there are no compelling public policy reasons why a waiver of the timeframes in Rule 25-22.080, F.A.C., and the related requested stay should be granted. Indeed, the converse is more true: the OGC project will provide Florida with immediate benefits once it is operational, and these benefits should not be unnecessarily stalled by FPC or others.

Accordingly, FPC's Emergency Petition for Waiver and Request for Stay should be denied.

ARGUMENT

I. Florida Power Corporation has failed to meet the statutory standard for a waiver of Rule 25-22.080, F.A.C.

FPC has not met its statutory burden to demonstrate its entitlement to a waiver of Rule 25-22.080, F.A.C.

Section 120.542, F.S., establishes the standard that must be satisfied for a person to obtain a waiver of, or variance from, agency rules. To obtain a waiver or variance from a rule, the person must demonstrate in his or her petition both that (1) application of the rule would create a substantial hardship or violate principles of fairness, and (2) that the underlying purpose of the statute will be achieved by other means by the person requesting the waiver or variance. Section 120.542(2), F.S. FPC has not satisfied either requirement in this case.

A. FPC has not demonstrated that application of Rule 25-22.080, F.A.C., to this proceeding would cause it to suffer substantial hardship or would violate principles of fairness.

1. FPC has not demonstrated that application of Rule 25-22.080, F.A.C., to this proceeding would cause it to suffer substantial hardship.

"Substantial hardship" is defined as "a demonstrated economic, technological, legal, or other type of hardship" to the person requesting the waiver. Section 120.542(2), F.S. (emphasis added). To demonstrate substantial hardship, the petitioner must allege "specific facts that would justify a waiver or variance for the petitioner." Section 120.542(5), F.S. (emphasis added).

FPC's Petition fails to allege any specific facts demonstrating it will suffer a "substantial hardship" if the timeframes under Rule 25-22.080, F.A.C., are applied in this proceeding. FPC's conclusory allegation that it will incur "expense and disruption associated with participating in this

proceeding at this time" simply does not state with specificity facts sufficient to show that FPC will suffer a "demonstrated economic, technological, legal or other hardship," as expressly required by Section 120.542, F.S. Indeed, FPC or any other party is likely to incur "expense" and "disruption" any time it actively participates in a need determination hearing, regardless of when the hearing is held. This plainly does not constitute a "substantial hardship."

Case law interpreting Section 120.542, F.S., provides that more than conclusory statements are necessary to justify the granting of a waiver or variance under Section 120.542, F.S. In Final Order Denying Petition For Variance from Rule 62-610.521, F.A.C., 20 Fla. Admin. L. Rep. 4258 (Dep't. of Env'tl Protection Order OGC File No. 98-1666, Aug. 4, 1998), the Florida Department of Environmental Protection (FDEP) found a petitioner's conclusory allegations of physical and technological impossibility to meet a rapid infiltration system setback rule insufficient to justify granting a variance from the rule. FDEP determined that "with no additional information or supporting documentation, [the petitioner] has not demonstrated an economic, technological, legal, or other type of hardship." *Id.* at 4261. FPC's allegations are similarly conclusory and unsupported by any information or documentation demonstrating any specific facts to show FPC will suffer any type of economic, technological, legal, or other type of hardship. See Final Order on Petition for Variance or Waiver, 21 Fla. Admin. L. Rep. 2153, 2155 (Dep't. of Health Order DOH-98-01300, Nov. 18, 1998) (denying request for waiver or variance due to lack of specific facts to establish substantial hardship); see also Order Denying Petition for Rule Waiver, Docket No. 980783-EI, Order No. PSC-98-1202-FOF-EI, Sept. 9, 1998) (electric utility did not allege facts sufficient to show that waiver of certain provisions of procurement rule would result in unfair advantage to its competitors in the procurement process and therefore did not demonstrate

a substantial hardship for purposes of obtaining a waiver from the rule).

The paucity and insufficiency of FPC's factual allegations are striking when compared to cases in which factual allegations have been found sufficient to justify a waiver or variance. For example, in Final Order Granting Petition for Waiver from Rule 62-555.310 and a Variance from Rule 62-555.312, 21 Fla. Admin. L. Rep. 2868 (Dep't. of Env'tl. Protection Order, OGC File 98-0424, June 9, 1998), the petitioner alleged facts sufficient to demonstrate it would suffer a substantial hardship due to strict adherence to a rule that would result in its inability to use its multimillion-dollar waste treatment and recovery system.¹ In this case, FPC's bare assertions of "expense" and "disruption" clearly do not rise to the level of factual specificity required by Section 120.542, F.S., Rule 28-104.002, F.A.C., or interpretive case law, to justify granting a waiver of Rule 25-22.080, F.A.C. FPC's petition should be denied on this ground alone.

Moreover, even if FPC had alleged specific facts demonstrating it would suffer hardship, it has not shown the alleged hardship will be any greater than that suffered by any other person who participates in any need determination proceeding. Case law interpreting the "substantial

¹ Other examples of cases in which factual allegations have been found sufficient to justify waiver or variance include situations in which petitioners have alleged specific estimated monetary losses or specific technological or other facts that demonstrate they will suffer substantial hardship. See, e.g., In re: Petition for Waiver Under Section 120.542, Florida Statutes, Filed by St. Lucie County, FL, 21 Fla. Admin. L. Rep. 2898 (Dep't. of Health Order DOH9-00420-FO-HSGM, Apr. 27, 1999) (alleging estimated monetary losses incurred if rule not waived); Order and Notice of Disposition of Petition for Waiver, 21 Fla. Admin. L. Rep 2900 (Dep't. of Health Order DOH99-00385-FO-HSE, Apr. 14, 1999) (alleging specific technical facts regarding existing sanitary sewage disposal practices sufficient to demonstrate that adherence to rule would create hardship and that statutory purpose would be still served if waiver granted); Final Order, In Re: Petition for Waiver of Rule 62B-33.007(3)(c), Florida Administrative Code, 21 Fla. Admin. L. Rep. 2820 (Dep't. of Env'tl. Protection Order DEP 99-0360, Apr. 27, 1999) (alleging specific facts concerning dwelling sufficient to demonstrate that adherence to coastal construction setback rule would result in substantial economic hardship to property owner).

hardship” standard provides that for the alleged hardship to be “substantial,” it must be greater in degree than that suffered by any person in the ordinary course of compliance with the rule. Final Order on Petition for Variance or Waiver, 21 Fla. Admin. L. Rep. 2153 (Dep’t. of Health Order DOH-98-1300, Feb. 10, 1998) (Department of Health denied podiatrist’s petition for variance or waiver of agency rule because he had not demonstrated he was subject to any more hardship than any other person applying for licensure under the rule). Similarly, in this case, FPC has not established that the timeframes established under Rule 25-22.080, F.A.C., will result in FPC being subject to any greater hardship than any other person complying with the rule’s timeframes in any need determination proceeding. FPC claims it will be “hard-pressed” to meet the timeframes contemplated by Rule 25-22.080, F.A.C., and the Commission’s scheduling order issued pursuant to the rule. However, as a regular participant in need determination proceedings, FPC is familiar with the timeframes in this rule and presumably has complied with them in the past without experiencing substantial hardship. Indeed, FPC complied with similar Commission-established procedural timeframes in the Duke New Smyrna need determination proceeding last year. 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., Docket No. 981042-EM, Order No. PSC-99-0535-FOF-EM, Mar. 22, 1999), 99 FPSC 3:401 (hereinafter Duke New Smyrna). FPC has alleged nothing specific in this case to demonstrate that the application of Rule 25-22.080, F.A.C., to this proceeding will impose any greater hardship on it than is typically and routinely encountered in any need determination proceeding conducted under the timeframes set forth in this rule. For this reason, FPC’s petition for waiver or variance is deficient and must be denied.

Finally, it must be remembered that the waiver and variance provisions in Section 120.542, F.S., were enacted by the Legislature to provide individuals relief from unreasonable, unfair, and unintended rule requirements in particular instances. These provisions were not intended to provide relief from mere inconvenience that typically may be encountered in the ordinary course of compliance with a rule. The inconvenience alleged by FPC -- to which anyone participating in this or any other need determination proceeding is routinely subject -- simply does not rise to the level of "substantial" hardship as that term is defined in statutory and case law. Accordingly, FPC has failed to demonstrate it will suffer a substantial hardship from application of Rule 25-22.080, F.A.C., and its attempt to secure a waiver of the rule must be rejected.

2. FPC has not demonstrated that application of Rule 25-22.080, F.A.C., to this proceeding would violate principles of fairness.

FPC's petition for waiver also is legally deficient because FPC fails to demonstrate that the application of Rule 25-22.080, F.A.C., in this proceeding would violate principles of fairness. "Principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. Section 120.542(2), F.S.

In this case, FPC has not alleged -- nor can it allege -- any specific facts that distinguish its particular circumstances from those of other persons participating in this proceeding, all of whom are similarly situated with FPC. FPC's allegations (which are disputed) concerning potential confusion of issues, difficulty meeting hearing timeframes, and other pressures apply to every person in this proceeding.

Case law bears out FPC's failure to meet the statutory standard for waiver. In Final Order on Petition for Variance or Waiver, 21 Fla. Admin L. Rep. 2153 (Dep't. of Health Order DOH-98-1300, Feb. 10, 1998), the Department of Health found that a podiatrist seeking a waiver or variance had not demonstrated that principles of fairness would be violated by a licensure exam rule, because the rule did not affect him in a manner significantly different from the way which it affected other similarly situated persons. Id. at 2156. Similarly, in this case, FPC cannot demonstrate it is affected by Rule 25-22.080, F.A.C., in a manner any different -- much less significantly different -- from all others participating in OGC's need determination proceeding. In fact, FPC's own petition admits that "interested parties like FPC" in this proceeding will be subject to Rule 25-22.080, F.A.C., and hearing schedule established under the rule. Petition, page 5, para. 7. The rule's "common effect" on all of the participants in this proceeding makes abundantly clear that the rule does not violate principles of fairness under Section 120.542, F.S.

FPC argues that conducting OGC's need determination hearing before the Commission makes a decision in the Reserve Margin investigation would "foster the appearance of unfairness," and, according to FPC, that would be detrimental to the interests of "all participants" in the proceedings. (FPC Petition, page 7, paragraph 14.) This is both utterly baseless and legally meaningless. First, FPC does not even pretend how to explain how the Commission's action on OGC's petition would "foster the appearance of unfairness." Moreover, the "appearance of unfairness" is not the legal standard for, or even relevant to, the granting of a waiver under Section 120.542, F.S. FPC's allegation that "all participants" in this proceeding will be affected by the timeframes established per Rule 25-22.080, F.A.C., is further indication that FPC is not being treated any differently than any other similarly situated person, i.e., than any other person in this

proceeding. Furthermore, FPC cannot credibly argue that it was unaware of OGC's need determination proceeding until "less than two weeks ago" and that it learned about the petition on its own. In fact, OGC's counsel informed FPC's lead registered lobbyist on September 23, 1999, that OGC was going to file its Petition for Determination of Need on September 24, 1999. Therefore, FPC actually was informed of the proceeding a day before it was filed, and more than eight days before FPC's petition for waiver alleges it was informed. FPC has had more time to prepare for the hearing than any of the other participants.

The law is clear that for principles of fairness to be violated, FPC would have to be subject to some sort of significantly different treatment than others similarly who are situated. FPC has not satisfied this standard and its petition for waiver should be denied.

3. FPC has not demonstrated that the purpose of the underlying statute would be achieved by other means.

FPC argues that since Section 403.519, F.S., which prescribes the need determination process that is part of the site certification process under the Florida Electrical Power Plant Siting Act, does not establish timeframes for the conduct of a need determination hearing for a proposed electrical power plant, the statute's purpose will be served by delaying OGC's need determination hearing pending the Florida Supreme Court's decision in the Duke New Smyrna matter and the conclusion of the Reserve Margin proceeding. This position completely fails to address the actual purpose of Section 403.519, F.S. — which is not to establish procedures for conducting need determination hearings, but instead is to establish the substantive factors for the Commission's consideration when conducting a need determination hearing for a proposed electrical power plant.

The need determination process is part of the overall process of assuring that adequate, cost-effective power supplies are developed, consistent with appropriate environmental balancing considerations, in the best interests of the State and her citizens. The factors to be considered in a need determination proceeding include "the need for electrical system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available." Section 403.519, F.S. Clearly, these statutory purposes are not served by delaying OGC's need determination nor can these purposes be achieved by other means.

OGC has filed its Petition for Determination of Need specifically so it can expeditiously obtain a need determination from the Commission prior to fully preparing its application for site certification, since an affirmative determination of need is a condition precedent to the site certification hearing. Section 403.508(3), F.S. As FPC is well aware, the preparation of a site certification application is a very time-consuming and costly endeavor, and OGC prudently wishes to know if its Petition for Need Determination has been granted before undertaking the entire site certification application preparation process. This is a prudent development practice in a non-rate basis setting. Indeed, OGC will be severely prejudiced if the requested waiver is granted. If OGC were required to abate its need determination proceeding as desired by FPC, it would be subject to having to risk substantial sums of money, contingent on the Commission's action on OGC's need determination petition, in order to prepare its full site certification application for filing in June 2000. These significant sums will not be put at risk if the Commission proceeds with OGC's need determination, as authorized by Commission Rule 25-22.080(1), F.A.C., in advance of OGC's filing its site certification application. Erecting yet another roadblock to the expeditious

provision of adequate, reliable electricity at a reasonable cost by delaying OGC's need determination hearing does not accomplish, and indeed thwarts, the purposes of Section 403.519, F.S.

Finally, FPC argues that OGC cannot claim prejudice by a delay in conducting the need determination hearing. As explained above, OGC will in fact suffer significant prejudice if its need determination hearing is delayed. Further, FPC ignores that it bears the burden to demonstrate entitlement to the requested waiver, and that OGC is not under any burden to demonstrate prejudice for it to be entitled to the certainty of Rule 25-22.080, F.A.C., timeframes in this case. FPC's attempt to shift the burden of proof to OGC is an ill-concealed ploy to deflect attention from its total failure to meet its statutory burden to demonstrate entitlement to the waiver.

II. FPC has not demonstrated the existence of an emergency, which is necessary for the grant of an emergency waiver of Rule 25-22.080, F.A.C.

Rule 28-104.004, F.A.C., sets forth the requirements for a petitioner to demonstrate entitlement to an emergency waiver or variance. Specifically, Rule 28-104.004(2) requires the statement of: (a) the specific facts that make the situation an emergency, and (b) the specific facts to show the petitioner will suffer an immediate adverse effect unless the waiver or variance is issued more expeditiously than the timeframes provided in Section 120.542, F.S.

FPC has not alleged any facts whatsoever to establish the existence of an emergency. Case law engrafting the emergency order standard in Section 120.569(2)(n), F.S. (1998 Supp.), to Section 120.542, F.S., requires that there be a "demonstrated immediate danger to the public

health, safety, or welfare" for an "emergency" to exist. In Final Order Denying Petition for Emergency Variance from Rule 62-522.300(2)(a), 20 Fla. Admin. L. Rep. 3902 (Dep't. of Env'tl. Protection Order, OGC File No.98-1668, June 6, 1998), DEP denied a request for an emergency variance from a rule that prohibited establishment of a zone of discharge for underground discharges through wells, on the ground that "the facts stated by [the petitioner] to justify the filing of a petition for an emergency variance in no way allege an immediate danger to the public health, safety, or welfare if the variance were not granted" Id. at 3903.² Similarly, in this case, FPC has completely failed to allege any facts that demonstrate existence of any danger -- immediate or otherwise -- to the public health, safety, or welfare if the emergency waiver is not granted. Accordingly, FPC has not alleged a sufficient factual basis to be granted an emergency waiver of Rule 25-22.080, F.A.C., and its request for an emergency waiver must be denied as a matter of law.³

III. FPC must take this case as it finds it, and therefore cannot challenge the hearing timeframes that have been established pursuant to Rule 25-22.080, F.A.C.

It is well-established in Florida law that persons who are granted intervenor status in a case take the case as they find it. National Wildlife Federation, Inc. v. Glisson, 531 So. 2d 996 (Fla.

² See also Order Granting Temporary Waiver of Rule 25-4.110(1), Florida Administrative Code, and Denying Emergency Treatment, Docket No. 990777-TL, Order No. PSC-99-1791-PAA-TL, Sept. 14, 1999)(petition for emergency waiver from timeframes for complying with telecommunications rule denied on ground facts alleged did not constitute an immediate danger to the public health, safety, or welfare).

³ Rule 28-104.005(2), F.A.C., provides that an agency may deny a petition based on its determination that the situation is not an emergency. The petition is then reviewed on a non-emergency basis pursuant to the process and timeframes established in Section 120.542, F.S.

1st DCA 1988); Rule 25-22.039, F.A.C. (Commission rule expressly providing that intervenors take the case as they find it). For persons permitted to intervene in pending litigation, the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding. *Id.*, citing Riviera Club v. Belle Mead Development Corp., 194 So. 2d 783 (Fla. 1940); Williams v. Nussbaum, 419 So. 2d 715 (Fla. 1st DCA 1982); Fla.R.Civ.P. 1.230.⁴

In this case, FPC is, in essence, attempting to “hijack” OGC’s need determination proceeding by seeking a waiver of the applicable timeframes and by also seeking a stay that would indefinitely postpone OGC’s need determination hearing.⁵ FPC’s effort in this regard blatantly contravenes established legal principles governing the subordinate position of intervenors, and FPC’s petition accordingly should be denied.

IV. There are compelling public policy reasons why FPC’s request for waiver and stay in this proceeding should be denied.

In addition to the host of reasons discussed above, FPC’s petition for waiver and request for stay should be denied because it does nothing to advance, and in fact impedes, numerous public policies favoring the provision of clean, reliable electric power service at a reasonable cost to consumers in Florida.

FPC’s pleading easily could have been entitled a “Motion for Indefinite Continuance,” since that is in effect what FPC is seeking. Plainly put, FPC does not wish to have entities like the

⁴ See also, Rudloe v. Florida Department of Environmental Protection, 517 So. 2d 731 (Fla. 1st DCA 1987) (denying petition to intervene in lawsuit after original petition initiating lawsuit was voluntarily dismissed).

⁵ FPC attempts to co-opt and control OGC’s need determination proceeding notwithstanding that it has not been granted party status as an intervenor in the proceeding.

Okeechobee Generating Company as a competitor in the Florida electric power wholesale marketplace, even though such competition will reduce the wholesale price of electricity and is consistent with federal and state energy policy. It simply is not in FPC's financial interest to have vigorous competition in the wholesale electric power market in Florida. From FPC's perspective, the longer electrical power plants like OGC's are prevented from entering the Florida wholesale power market, the better for incumbent monopolistic providers of power, like FPC.

Public policy considerations dictate that OGC's need determination should be considered as expeditiously as possible and should not be delayed, as FPC seeks through its request for waiver and stay.

First, Florida would be benefitted by having OGC's 550 megawatts of electricity available as soon as possible. In December of 1998, Commission staff determined that should a freeze of the magnitude of the Christmas 1989 freeze occur again, depending on unit availability, the blackouts experienced could be twice as severe as those experienced in 1989. Florida Public Service Commission, Review of Electric Utility Ten-Year Site Plans, Volume I: Review and Analysis, December 31, 1998, at 38. Projects like OGC's will help mitigate the electric power consumption impacts of weather events like the Christmas 1989 freeze. Obviously, the sooner this identified risk can be reduced, the better for electric power consumers in Florida.

Second, OGC's power plant will be one of the cleanest in the country. In fact, having OGC's plant available as an electric power source in Florida will result in a reduction in the emission of air pollutants from electric power generation into Florida's skies. Thus, each day that OGC's plant is delayed, a less-efficient, more environmentally-damaging power plant will be meeting consumers' power demands, at the cost of Florida's air quality.

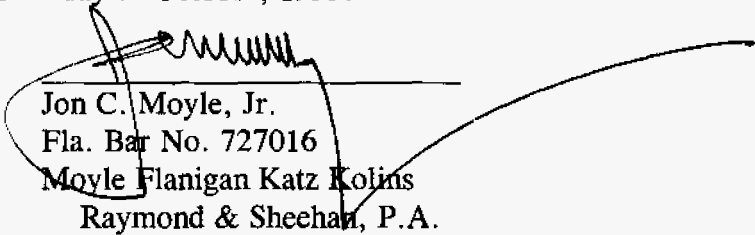
Moreover, OGC's competitive presence will exert market pressure to reduce the prices of capacity and energy in Florida's electric power wholesale market. The Commission reached a similar conclusion when it found that the Duke New Smyrna plant may exert a downward pressure on electricity pricing in the wholesale power market in Florida. This, in turn, will flow through to retail rates through the fuel adjustment cost. Duke New Smyrna, 99 PSC 3:438.

In sum, public policy supports this case going forward as scheduled. This case is about the efforts of a wholesale electric power generating company, OGC, which, as a "public utility" under the Federal Power Act and an "electric utility" under Chapter 366, F.S., is a type of legal entity that already has been found by this Commission to be permitted to file a need determination petition. Duke New Smyrna, 99 FPSC 3:414-15. OGC is seeking to build one of the cleanest electric power plants in the country — a plant that will help foster a competitive, robust wholesale Florida market. On the other hand, contrary to the public interest, FPC's dilatory tactics in this case are about the continuing attempts of long-standing electric power monopolies, like FPC, to thwart OGC's efforts notwithstanding the compelling public benefits that will be realized by the entry of OGC's plant into the Florida wholesale power market. FPC's Petition for Waiver and Request for Stay is just one more roadblock thrown into OGC's path and should be promptly removed by this Commission.

CONCLUSION

For the reasons addressed herein, FPC has completely failed to carry its legal burden to demonstrate it should be granted a waiver of Rule 25-22.020, F.A.C., and a stay of the need determination hearing that has been scheduled in this proceeding pursuant to Rule 25-22.080. Accordingly, FPC's petition should be denied.

Respectfully submitted this 22 day of October, 1999.



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CERTIFICATE OF SERVICE
DOCKET NO. 991462-EU

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States Mail, postage prepaid, on the following, this 22nd day of October, 1999.


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