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. 99-1462-EU) FILED: OCTOBER 22, 1999	

OKEECHOBEE GENERATING COMPANY'S MEMORANDUM OF LAW IN OPPOSITION TO FLORIDA POWER CORPORATION'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 Corporation's ("FPC") Motion to Dismiss the Petition ("FPC's Motion to Dismiss"), which was filed with the Commission on October 15, 1999. As explained herein, all of FPC's assertions are misguided or erroneous, or both, and the Commission should accordingly deny FPC's Motion to Dismiss. Alternatively, as further explained herein, FPC's Motion to Dismiss was untimely and should be denied on that basis.

SUMMARY

OGC is, on its own, a proper applicant for a determination of need under Section 403.519, Florida Statutes ("F.S."). Both the plain meaning of Section 403.519, F.S., and the Florida Electrical Power Plant Siting Act ("Siting Act"), and the Commission's Order in 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

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Company, Ltd., L.L.P., 99 FPSC 3:401 (hereinafter "Duke New Smyrna") confirm this conclusion. FPC's arguments that OGC is not an "electric utility" under Section 366.02(2), F.S., all ignore the Commission's holding in Duke New Smyrna. The Commission should reject FPC's misleading attempt to limit the holding of Duke New Smyrna. FPC's argument that OGC cannot be an "applicant" because it has not entered into a power sales agreement with a Florida retail utility also is directly contrary to the Commission's holding in Duke New Smyrna. Lastly, FPC's Motion to Dismiss should be denied because it was filed more than 20 days after OGC filed its Petition for Determination of Need ("OGC's Petition").

Accordingly, FPC's Motion to Dismiss must be denied.

ARGUMENT

I. CONTRARY TO FPC'S ASSERTIONS, OGC IS A PROPER "APPLICANT" UNDER SECTION 403.519, F.S.

In its Motion to Dismiss, FPC blithely asserts as grounds for dismissal that OGC is "not a proper 'applicant'" under Section 403.519, F.S., or the Siting Act (Sections 403.501-.518, F.S.). FPC's Motion to Dismiss at 1. In making this assertion, FPC ignores both the plain language of Section 403.519 and the Siting Act, as well as this Commission's holding in Duke New Smyrna. FPC is wrong and its Motion to Dismiss should be denied.

A. The Plain Language of the Applicable Statutes Confirms that OGC Is a Proper Applicant.

The issue of whether a merchant power developer such as OGC,

which is both federally regulated and state regulated, can be an "applicant" under Section 403.519, F.S., for the Commission's determination of need was recently fully briefed by the parties in Commission Docket Number 981042-EM and was specifically resolved by the Commission in Duke New Smyrna.

In summary, Section 403.519, F.S., provides in pertinent part:

> On request by an applicant or on its own motion, the Commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act.

(Emphasis supplied.) Section 403.503(4), F.S., defines an "applicant"[1] as:

> any electric utility which applies for certification pursuant to the provisions of this act.

(Emphasis supplied.) Section 403.503(13), F.S., in turn, defines an electric utility as:

> cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

(Emphasis supplied.) Thus, a "regulated electric company" is an "applicant" specifically authorized under the Siting Act to seek a determination of need from the Commission.

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[1]Section 403.522(4), F.S., part of the Transmission Line Siting Act, contains an identical definition of the term "applicant."

OGC is a proper applicant under the Siting Act because it is a "regulated electric company." First, as alleged in OGC's Petition, OGC is regulated by the Federal Energy Regulatory Commission ("FERC") as a "public utility" under the Federal Power Act, 16 U.S.C.S. § 824(b)(1)(1994). As a "public utility" selling power at wholesale in interstate commerce, OGC is subject to the regulatory jurisdiction of FERC, including, but not limited to, the FERC's jurisdiction over rates pursuant to the Federal Power Act. Indeed, the FERC has already approved OGC's Rate Schedule No. 1 for sale of the Okeechobee Generating Project's ("Project") capacity and associated energy to other utilities under negotiated arrangements. Okeechobee Generating Company, 88 FERC ¶ 61, 219 (September 15, 1999). Thus, as a company that sells wholesale electric power subject to the regulatory jurisdiction of the FERC, OGC fits squarely within the plain meaning of the term "regulated electric company" under any reasonable construction of the term, and therefore, OGC is a proper applicant under Sections 403.503(13) and 403.519, F.S.[2] See Carson v. Miller, 370 So. 2d 10 (Fla. 1979)

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[2]In arguing that OGC is not an applicant, FPC asserts that OGC is not state-regulated under Section 366.02(2), F.S. Even assuming, arguendo, that OGC is not an electric utility "under Section 366.02(2), F.S., and thus not state-regulated (both incorrect assumptions), FPC's Motion to Dismiss still fails because FPC does not and cannot challenge OGC's allegations in its Petition that it is a FERC regulated "public utility" under the Federal Power Act, and thus a "regulated electric company" under Section 403.503(13), F.S. It is well established that for purposes of deciding a motion to dismiss, all allegations and reasonable inferences therefrom must be viewed in the light most

(words of common usage should be construed in their plain and ordinary sense.)

Second, OGC is a "regulated electric company" because it is an "electric utility" subject to the Commission's regulatory authority and jurisdiction under the plain language of Chapter 366, F.S. Section 366.02(2), F.S., defines "electric utility" to mean

> any municipal electric utility, investor-owned electric company, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

OGC is investor-owned, in that it is wholly-owned by PG&E Generating, a publically traded Delaware Corporation. When the Project becomes operational, OGC will own, maintain, and operate an electric generation system within Florida. Thus, by a straightforward, "plain language" reading of the statutory language, OGC is an "electric utility."

As an electric utility under Chapter 366, OGC is subject to the Commission's Grid Bill authority, which is found at Sections 366.04(2)&(5) and 366.05(7)&(8), F.S. These provisions give the Commission "jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida . . . ." § 366.04(5), Fla. Stat.

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favorable to the non-moving party. See Abruzzo v. Haller, 603 So. 2d 1338, 1340 (Fla. 1st DCA 1992).

OGC is also subject to the Commission's jurisdiction under Section 366.055, F.S., which gives the Commission authority over the "[e]nergy reserves of all utilities in the Florida energy grid . . . to ensure that grid reliability and integrity are maintained."

FPC argues that to be an "electric utility" under Section 366.02(2), F.S., OGC must now own, maintain, or operate an electric generation, distribution or transmission system in Florida. FPC's Motion to Dismiss at 3. This same argument was made and rejected in Duke New Smyrna and is equally without merit in this case. It is clear that the Commission will have regulatory authority over OGC under Chapter 366, F.S. As the Commission unequivocally concluded in Duke New Smyrna:

> Duke is an "electric utility" pursuant to, Chapter 366, and is, therefore, subject to our Grid Bill authority.

99 FPSC at 3:417. In reaching this conclusion, the Commission correctly and summarily rejected FPC's "verb tense" argument by stating:

> The Project will be generating electricity thus meeting the functional requirements [of Section 366.02(2), F.S.].

Duke New Smyrna, 99 FPSC 3:417.

FPC's flawed construction of Section 366.02(2), F.S., is in essence an attempt to create an improper barrier to the entry of merchant plant developers into the Florida market. Under FPC's construction of 366.02(2), F.S., only entities that currently own

facilities in Florida can build new generation facilities in Florida. This is an illogical result that would ultimately benefit only incumbent utilities such as FPC and harms Florida's ratepayers.

FPC also asserts that OGC cannot be a regulated electric utility because the Commission will not prescribe a rate structure for OGC pursuant to Section 366.04(2)(b), F.S. FPC's Motion to Dismiss at 3. FPC's argument is contrived and faulty. As a federally-regulated wholesale public utility under the Federal Power Act with FERC approved market-based rate authority, OGC's rates and rate structure are subject to FERC's regulatory authority under the Federal Power Act. Thus, just like other entities that make wholesale sales of power in Florida (including FPC), FERC will regulate OGC's wholesale power sales. In other words, the Commission will not prescribe OGC's wholesale rates because it is unnecessary to do so--OGC is already subject to the FERC's regulatory authority. That the Commission does not prescribe wholesale rates for utilities in Florida but prescribes only retail rates and rate structure for such utilities is not a novel concept. The Commission does not prescribe rates or a rate schedule for FPC's own FERC-regulated wholesale power sales in Florida. Under FPC's tortured argument, the Commission's failure to prescribe rates for FPC's own wholesale power sales would mean that FPC is not an "electric utility" pursuant to Section 366.02(2), F.S., an obviously absurd and incorrect result.

B. **The Commission's Duke New Smyrna Order clearly provides that a merchant power plant developer is, individually, a proper applicant for the Commission's affirmative determination of need.**

In arguing that OGC is not an "applicant" under Section 403.519, F.S., FPC attempts to limit the Commission's holding in Duke New Smyrna to the proposition that Duke Energy New Smyrna Beach Power Company, Ltd., L.L.P. ("Duke New Smyrna"), the merchant plant developer in that case, was determined to be an applicant only as a "joint power agency," in conjunction with its co-applicant, the Utilities Commission, City of New Smyrna Beach. FPC's Motion to Dismiss at 2. FPC's attempt to so limit the holding of the Duke New Smyrna represents a blatant mischaracterization of the Commission's holding in Duke New Smyrna and must be rejected.[3]

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[3]FPC also mischaracterizes Commissioner Jacobs' separate opinion in Duke New Smyrna. In its Motion to Dismiss, FPC creatively uses ellipses to omit key language from Commissioner Jacobs' separate opinion. FPC's Motion to Dismiss at 2. FPC attempts to cite Commissioner Jacobs' separate opinion for the exclusive proposition that Duke New Smyrna was a proper applicant only because of its partnership with the Utilities Commission, City of New Smyrna Beach, when in fact Commissioner Jacobs clearly limited his position, stating as follows:

> I would not render a decision relative to Duke's standing as an applicant individually, nor would I make a decision on standing by bifurcating the application into the electricity required for the City of New Smyrna and the additional capacity of the plant (which has been dubbed "merchant capacity").

Duke New Smyrna, 99 FPSC at 3:450 (Jacobs, dissenting in part and concurring in part).

In Duke New Smyrna, the Commission specifically and unequivocally held that Duke New Smyrna was, individually, a proper applicant for the Commission's determination of need. The Commission stated:

> Duke New Smyrna is also a proper applicant for a determination of need.

Duke New Smyrna, 99 FPSC at 3:414. To further emphasize this point, the Commission stated:

> Duke New Smyrna is "regulated" and an "electric company" and therefore clearly meets the statutory definition of applicant.

Id., at 3:415. The Commission majority could not have spoken more clearly--a "regulated" "electric company" such as OGC is, individually, a proper applicant for a determination of need. FPC's attempts to limit the holding in Duke New Smyrna should be rejected.

C. OGC is not required to enter into a power sales agreement with a retail serving utility as a condition precedent to filing a determination of need.

Citing Nassau Power Corp. v. Deason, 641 So. 2d 396, 399 (Fla. 1994) ("Nassau II"), FPC resurrects its failed argument made in Duke New Smyrna that a merchant plant developer cannot be an applicant for a determination of need without first entering into a power sales agreement with a Florida retail utility. FPC's Motion to Dismiss at 1. Once again, the Commission clearly rejected this argument in Duke New Smyrna and should reject it again today.

In holding that Duke New Smyrna was not required to have a contract with a Florida retail utility, the Commission stated:

> There are no captive ratepayers being required to pay for the merchant portion of the Project because Duke New Smyrna is not seeking to require retail utilities to purchase the proposed plant's merchant output. On the contrary, if retail utilities purchase the merchant output of the Project, those purchases will be strictly voluntary and they will only be made if it is economic to do so. This is a case of first impression arising on facts clearly distinguishable from the cogeneration precedent. As such, we are not overruling prior precedent with respect to need determinations involving a QF.

Duke New Smyrna, 99 FPSC 3:423. The same holds true in this case. OGC is not required to allege in its Petition that it has entered into a power sales agreement with a Florida retail utility because it is not required to have entered into such an agreement as a condition precedent to obtaining a determination of need. In turn, by the Commission's reasoning in Duke New Smyrna, this requirement does not apply because no captive ratepayers are being forced to pay for OGC's Project and no retail utilities are being forced to purchase power or capacity from OGC's Project. Accordingly, FPC's argument should be rejected.

II. FPC'S MOTION TO DISMISS IS UNTIMELY AND SHOULD BE DENIED.

OGC initiated this docket by filing its Petition for Determination of Need with the Commission on September 24, 1999. FPC filed its Motion to Dismiss on October 15, 1999. Uniform Rule 28-106.204(2), F.A.C, provides:

> Unless otherwise provided by law, motions to dismiss the petition shall be filed no later than 20 days after service of the petition.

(Emphasis supplied.) FPC filed its Motion to Dismiss more than 20 days after OGC filed its Petition. No law authorizes FPC to exceed the mandatory 20-day time limit for filing a motion to dismiss and, accordingly, FPC's Motion to Dismiss is untimely and should be denied.

In past orders, the Commission has consistently denied, as untimely, motions to dismiss filed outside of the 20-day period established by Uniform Rule 28-106.204(2), F.A.C. See In re: Application for Transfer of Certificate Nos. 592-W and 509-S from Cypress Lakes Associates, Ltd. to Cypress Lakes Utilities, Inc. in Polk County, Docket No. 971220-WS, Order No. PSC-99-1809-PCO-WS (September 20, 1999) (stating that the Commission's decision to deny a motion to dismiss as untimely is "consistent with prior Commission action"); In re: Application for Rate Increase and for Increase in Service Availability Charges in Lake County by Lake Utility Services, Inc., 99 FPSC 3:214, 219; In re: Petition by Tampa Electric Company for Approval of Cost Recovery for a New Environmental Program, the Big Bend Units 1 & 2 Flue Gas Desulfurization System, 98 FPSC 9:323, 327 (denying a motion to dismiss filed more than 20 days after the petition was "initially filed/served") (emphasis supplied); In re: Petition of Florida Cities Water Company for Limited Proceeding to Recover Environmental Litigation Costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County, 98 FPSC 8:445,

449 (stating that Rule 28-106.204(2), F.A.C., "requires that motions to dismiss a petition shall be filed no later than 20 days after service of the petition unless otherwise provided by law, and the law does not provide otherwise.").

FPC cannot argue that it was not aware of OGC's Petition for Determination of Need. FPC filed its Petition to Intervene in this docket on October 11, 1999--within the 20-day period for filing a motion to dismiss set forth in Rule 28-106.204(2), F.A.C. If FPC had filed its Motion to Dismiss on the same date, it would have been timely, however, FPC chose not to do so. Moreover, on Thursday, September 23, 1999, a day prior to the date OGC filed its Petition for Determination of Need, as a courtesy, OGC's counsel informed FPC's lead registered lobbyist that OGC intended to file its Petition for Determination of Need on September 24, 1999. Thus, FPC had ample notice of OGC's Petition.

In sum, by filing its Motion to Dismiss more than 20 days after OGC filed its Petition, FPC has ignored the mandatory requirements of Rule 28-106.204(2), F.A.C. The Commission should not countenance FPC's dilatory tactics and FPC's Motion to Dismiss should be denied as untimely.

III. FPC'S RELIANCE ON FLORIDA POWER & LIGHT'S MOTION TO DISMISS IS MISPLACED.

In its Motion to Dismiss, FPC incorporates by reference the grounds for dismissal contained in Florida Power & Light's ("FPL") Motion to Dismiss, filed on October 8, 1999. FPC's reliance on

FPL's Motion to Dismiss is misplaced. As set forth more fully in OGC's Memorandum of Law in Opposition to FPL's Motion to Dismiss, filed on October 15, 1999, which is attached hereto as Exhibit A and incorporated by reference herein, all of FPL's grounds for dismissal are incorrect. Accordingly, FPC's renewal of FPL's Motion to Dismiss should be denied.

CONCLUSION

Following applicable Commission precedent, Okeechobee Generating Company is a proper applicant under Section 403.519, F.S., for the Commission's determination of need. FPC's arguments in its Motion to Dismiss are unfounded, contrived and wrong, and are contrary to the Commission's Order in Duke New Smyrna. Moreover, FPC filed its Motion out of time in violation of Rule 28-106.204(2), F.A.C. Accordingly, FPC's Motion to dismiss must be denied.

Respectfully submitted this 22nd 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 hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 22nd day of October, 1999.

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