

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 28, 1999)

OKEECHOBEE GENERATING COMPANY'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S PETITION TO HAVE PROCEEDING ASSIGNED TO THE FULL COMMISSION

Okeechobee Generating Company, L.L.C. ("OGC"), the Petitioner in the above-styled docket, pursuant to Section 350.01(6), Florida Statutes ("F.S.") and Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby respectfully submits this response and memorandum of law in opposition to Florida Power & Light Company's ("FPL") Petition to Have Proceeding Assigned to Full Commission ("FPL's Petition"), which was filed with the Commission on October 21, 1999. As explained herein, the assignment of this proceeding to a panel consisting of three Commissioners was legally proper and fully consistent with precedent in prior need determination proceedings. Moreover, no grounds exist to support FPL's Petition. Accordingly, the Commission should deny FPL's Petition.

ARGUMENT

I. THE ASSIGNMENT OF THIS DOCKET TO A PANEL OF THREE COMMISSIONERS IS CONSISTENT WITH THE COMMISSION'S PRECEDENT IN PAST NEED DETERMINATION PROCEEDINGS.

The Chairman's decision to assign this need determination proceeding to a panel of Commissioners is consistent with the Commission's prior practice in numerous previous need determination

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REGULATORY REPORTING

proceedings.¹ See In re: Petition by City of Lakeland for Determination of Need for McIntosh Unit 5 and Proposed Conversion from Simple to Combined Cycle, 99 FPSC 5:103 (three commissioners assigned to need determination proceeding); In re: Petition to Determine Need for Cane Island Power Park Unit 3 and Related Facility in Osceola County by Kissimmee Utility Authority and Florida Municipal Power Agency, 98 FPSC 10:56 (three commissioners assigned to need determination proceeding); In re: Petition to Determine Need for Existing Tiger Bay Electrical Power Plant and Nominal Electrical Capacity Increase to That Plant by Florida Power Corporation, 97 FPSC 11:254 (three commissioners assigned to need determination proceeding); In re: Petition to Determine Need for Proposed Electrical Power Plant in St. Marks, Wakulla County, by City of Tallahassee, 97 FPSC 6:115 (three commissioners assigned to need determination proceeding).

¹In fact, only two of the last six need determination proceedings before the Commission have been assigned to the full Commission. One was Gulf Power's need determination, which appears as though it may have been assigned to the full Commission because it was filed following the Commission's denial of Gulf Power's petition, pursuant to Section 120.542, F.S., for a waiver of the bid rule. The other, of course, was the Duke New Smyrna case, which involved Florida's first merchant plant and thus raised policy issues. As described more fully herein, the Commission fully addressed those policy issues and articulated its policy in favor of the proposed Duke New Smyrna Beach Project, a merchant plant.

II. THE ASSIGNMENT OF THIS DOCKET TO A PANEL OF THREE COMMISSIONERS IS EXPRESSLY AUTHORIZED BY SECTION 350.01(5), F.S.

This need determination proceeding has been assigned by the Chairman to a panel of three Commissioners. Section 350.01(5), F.S. provides in pertinent part:

In order to distribute the workload and expedite the commission's calendar, the chair, in addition to other administrative duties, has authority to assign the various proceedings pending before the commission requiring hearings to two or more commissioners

(Emphasis supplied.) Clearly, the Chairman's assignment of this docket to a three-Commissioner panel falls squarely within the administrative authority specifically and expressly granted by the Legislature to the Chairman in Section 350.01(5), F.S. The Chairman, in his discretion, has distributed the workload of the Commission in full compliance with Section 350.01(5), F.S.

In this instance, there is no basis whatsoever for overturning--or even questioning--the Chairman's exercise of that discretion. Assignment of the case to a three-Commissioner panel is wholly within the Chairman's statutorily authorized discretionary functions. Accordingly, the only justification for overturning this lawful action would have to be either a demonstration that it was an abuse of the Chairman's discretionary authority or an express justification based on a weighing of the criteria set forth in Section 350.01(6), F.S. FPL does not even allege that it was an abuse of the Chairman's discretion, apparently because it knows that

the Chairman's action was lawful. Moreover, as discussed below, FPL's Petition is woefully lacking in any explanation as to why or how consideration of the statutory criteria indicates that the case should be referred to the full Commission.

In sum, the Chairman is both statutorily empowered and uniquely positioned to determine the proper allocation of the Commission's finite resources. The Chairman determined that in this docket, the Commission's resources would be best allocated by the assignment of a three-Commissioner panel. This determination is specifically authorized by Section 350.01(5), F.S., is consistent with Commission precedent established in prior need determination proceeding dockets, and is within the Chairman's discretionary powers. Accordingly, FPL's Petition should be denied.

III. FPL DOES NOT AND CANNOT ALLEGE LEGALLY SUFFICIENT GROUNDS FOR ASSIGNING THIS PROCEEDING TO THE FULL COMMISSION.

FPL's Petition does not state a legally sufficient basis for assigning this proceeding to the full Commission. FPL's sole allegation in support of its desire to have this proceeding assigned to the full Commission appears in paragraph 4 of FPL's Petition.

Paragraph 4 states in its entirety:

4. The overall public interest and impact of the pending proceeding, as well as the proceedings [sic] important issues regarding regulatory policy, demonstrate that the proceeding should be heard by the full Commission.

FPL does not identify with any detail how this proceeding will

impact the "overall general public interest" or "effect regulatory policies" and FPL's failure to do so is fatal. See Fla. Stat. § 350.01(6).

OGC submits that FPL has failed to specifically identify a legally sufficient basis for its Petition because no such basis exists. 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 Company, Ltd., L.L.P., 99 FPSC 3:401 (hereinafter "Duke New Smyrna") the Commission clearly articulated its "regulatory policy" regarding merchant plants and clearly determined that the proposed Duke New Smyrna Beach merchant plant was in the "public interest."

The Commission stated:

Our underlying policy in deciding need determination petitions is to protect electric utility ratepayers from unnecessary expenditures and ensure a safe reliable grid. In approving the proposed plant, we are effectuating our longstanding policy.

Duke New Smyrna, 99 FPSC at 3:431. The Commission concluded by stating:

Accordingly, granting the determination of need requested by the joint petitioners is consistent with the public interest and the best interest of electric customers in Florida.

Duke New Smryna, 99 FPSC at 3:443 (emphasis supplied). The Commission could not have spoken any more clearly.

**IV. THE RELIEF REQUESTED BY FPL IS NOT AVAILABLE AND
IS AGAINST PUBLIC POLICY.**

FPL questions the Chairman's discretion and asks that the case be assigned to the full Commission. The relief requested, assignment of the case to the full Commission, is unavailable. As FPL knows, one of the Commissioners, Julia Johnson, has announced her resignation from the Commission. At the October 5, 1999, Agenda Conference, it was announced that Commissioner Johnson would be leaving on or about October 31, 1999. The Florida Public Service Commission Nominating Council has 60 days in which to submit its recommendations to the Governor to fill such a vacancy. Fla. Stat. § 350.031(5). The Governor then has 60 days in which to appoint a new Commissioner from the nominees submitted by the Nominating Council. Fla. Stat. § 350.031(6).

The hearing in this case will start approximately 36 days after the vacancy on the Commission arises, at a time well within the Nominating Council's normal timeframe for interviewing and selecting nominees and most likely before the Governor's 60-day deliberation and appointment period even begins. Thus, the relief sought by FPL, i.e., hearing by the full Commission, is not available.

FPL really wants to force four Commissioners to hear the case. Four Commissioners do not constitute the full Commission, and thus FPL's request should, accordingly, be denied. Moreover, empowering a four-member deliberative body is against the public interest as it creates the possibility of a tie vote. The Legislature has made

clear its preference for collegial bodies to have an odd number of members, thus avoiding the possibility of tie votes. County Commissions, the governing boards of Water Management Districts, the Siting Board, the Board of Regents, and the Commission are all created with an odd number of members to avoid ties. See, e.g., Fla. Stat. § 240.207 (creating a 13-member Board of Regents); Fla. Stat. § 373.073 (creating 9-member and 11-member water management district governing boards).

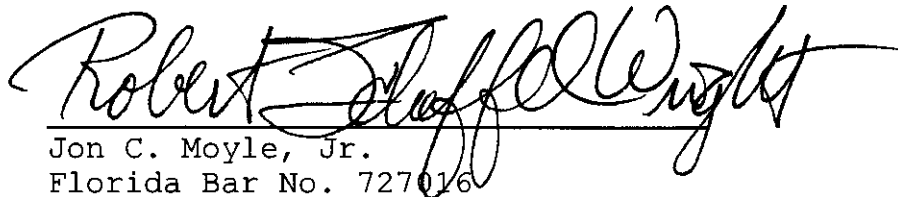
Lastly, the Commission should recognize that FPL's Petition represents yet another attempt by an incumbent utility to erect a procedural roadblock to OGC's need determination proceeding. FPL is well aware that due to the pending resignation of one of the Commissioners, at the time action will be taken on OGC's Petition for Determination of Need, the full Commission will consist of an even number of Commissioners. It appears that FPL is really attempting to gain an unfair, statutorily un contemplated, and potentially prejudicial advantage in this proceeding, i.e., a situation in which a tie vote by a four-member panel would result in a victory for FPL. Ties should not favor either side, which, it can be argued, is why the Legislature favors odd-numbered collegial bodies who exercise this type of power.

CONCLUSION

The Commission, cognizant of the Legislature's express preference for odd-numbered collegial bodies, should steer clear of

FPL's request which is directly at odds with the Legislature's preference. The Chairman acted properly under Florida Statutes and within his discretion in appointing a three-member panel to consider this case. Moreover, the Chairman's decision to assign this case to a three-member panel is wholly consistent with Commission precedent and recent practice. FPL's Petition should be summarily denied for the reasons stated herein.

Respectfully submitted this 28th day of October, 1999.



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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 28th day of October, 1999.

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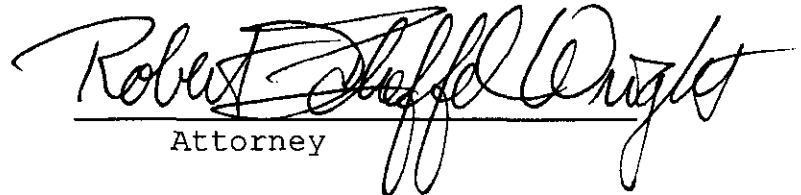
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