

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-EU FILED: November 3, 1999

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OKEECHOBEE GENERATING COMPANY'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO FLORIDA POWER CORPORATION'S PETITION THAT PROCEEDING BE HEARD AND DETERMINED BY 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 Corporation's ("FPC") Petition that Proceeding be Heard and Determined by the full Commission ("FPC's Petition"). 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 FPC's Petition. Lastly as FPC itself concedes, the relief requested by FPC--a hearing by the full Commission--is not available. Accordingly, the Commission should deny FPC's Petition.

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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 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

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 was the Duke New Smyrna case, which involved Florida's first merchant plant and thus raised a number of 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.

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).

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. FPC 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, Section 350.01(6), F.S. and its criteria does not support FPC's request that this proceeding 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, FPC's Petition should be denied.

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

Section 350.01(6), F.S., provides:

A majority of the commissioners may determine that the full commission shall sit in

any proceeding. The public counsel or a person regulated by the Public Service Commission and substantially affected by a proceeding may file a petition that the proceeding be assigned to the full commission. Within 15 days of receipt by the commission of any petition or application, the full commission shall dispose of such petition by majority vote and render a written decision thereon prior to assignment of less than the full commission to a proceeding. In disposing of such petition, the commission shall consider the overall general public interest and impact of the pending proceeding, including but not limited to the following criteria: the magnitude of a rate filing, including the number of customers affected and the total revenues requested; the services rendered to the affected public; the urgency of the requested action; the needs of the consuming public and the utility; value of service involved; the effect on consumer relations, regulatory policies, conservation, economy, competition, public health, and safety of the area involved. If the petition is denied, the commission shall set forth the grounds for denial.

FPC pays lip service to the statutory criteria specifically enumerated in Section 350.01(6), F.S., as grounds for assigning a matter to the full Commission by stating that "this proceeding should be heard and determined by the full Commission due to the public importance of the issues raised herein." FPC's Petition at 2. However, FPC never explains how the public will be affected by OGC's Petition for Determination of Need. Rather, FPC explains how it will supposedly be affected by OGC's Petition for Determination of Need. Apparently, recognizing the weakness of its argument under the statutory criteria enumerated in Section 350.01(6), F.S., FPC then creates from whole

cloth a new basis for full Commission involvement, i.e., that the Commission is considering related issues in In re: Generic Investigation into the Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida, (PSC Docket No. 981890-EU) (hereinafter the "Reserve Margin Docket"). FPC's Petition does not state a legally sufficient basis for assigning this proceeding to the full Commission and should be denied.

FPC argues that OGC's Petition for Determination of Need "raises difficult and important policy issues" and will potentially impact "long-standing regulatory policy." FPC's Petition at 2-3. 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 need determinations for 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 (emphasis supplied).² 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 Smyrna, 99 FPSC at 3:443 (emphasis supplied). The Commission could not have resolved FPC's "important policy issues" any more clearly in favor of merchant plants, and there is no compelling need for the full Commission--as opposed to the panel appointed by the Chairman--to revisit these issues here.

FPC attempts to distinguish Duke New Smyrna by arguing that OGC's Petition for Determination of Need represents an "extension" of the Duke New Smyrna decision to merchant plants that have no contracts with Florida retail utilities.³ In effect, FPC is once again arguing that OGC cannot be an applicant without first contracting with FPC or

²FPC's use of the term "longstanding" policy in its Petition is curious given the Commission's clear recognition that merchant plants are consistent with the Commission's "longstanding policy" of protecting ratepayers.

³FPC has an inconsistent view of the Duke New Smyrna case. In its Emergency Petition for Waiver of Rule 25-22.080 and Request for Stay, FPC argues that this proceeding should be stayed "pending the Florida Supreme Court's disposition of the Duke appeal" because of the similarity of the two cases. However, in its instant Petition, FPC strives to distinguish the Duke New Smyrna case. FPC cannot have it both ways.

another incumbent Florida retail utility.⁴ As OGC explained in its Memorandum of Law in Opposition to FPL's Motion to Dismiss, this attempt by FPC to 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. There is no new policy issue presented in this case that was not presented, and decided in the Duke New Smyrna case.

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

⁴This is the same argument that FPC made in its Motion to Dismiss OGC's Petition for Determination of Need and in its 1998 Motion to Dismiss the petition filed by Duke New Smyrna and the Utilities Commission, City of New Smyrna Beach. FPC was wrong in 1998, it was wrong in its Motion to Dismiss, and it remains wrong now.

regardless of whether it has entered into a contract with an incumbent Florida retail utility. FPC's attempts to limit the holding in Duke New Smyrna should therefore be rejected.

FPC next argues that this proceeding should be assigned to the full Commission because OGC's Petition for Determination of Need supposedly "calls upon the Commission to pre-judge issues currently before the Commission in the Reserve Margin docket" FPC's Petition at 4. There are several flaws in FPC's argument. First, and most importantly, nothing in Section 350.01(6), F.S., provides that a proceeding should be assigned to the full Commission because it raises issues being considered in other dockets--this is simply not one of the enumerated statutory criteria to be considered in determining whether a proceeding should be assigned to the full Commission. Second, nothing in OGC's Petition for Determination of Need requires the Commission to pre-judge issues raised in the Reserve Margin Docket. Rather, just as in any other need determination proceeding, the Commission should consider OGC's Petition for Determination of Need on its own merits based on the unique aspects of OGC's proposed electrical power plant. While one of the specific factors that indicate a need for OGC's proposed power plant is the constrained reserve margins currently existing in Florida, OGC's Petition for Determination of Need clearly alleges other factors that indicate a need for the project including economic need and

environmental benefits. The Commission did not pre-judge issues in the Reserve Margin Docket when it decided the various issues in the Duke New Smyrna case, and it would not so here. Just as in Duke New Smyrna, the Commission can consider Florida's constrained reserve margins in this proceeding without "pre-judging" any issues in the Reserve Margin Docket. For example, the Commission can readily decide that the Okeechobee Generating Project will enhance reliability and relieve constrained reserve margins without deciding that it must adopt and apply any particular reserve margin criterion to Peninsular Florida utilities. See Duke New Smyrna, 99FPSC at 3:433 (recognizing that the Commission was reviewing the level of reserve margins in Docket 981890-EU at the time of the Duke New Smyrna decision.) Similarly, as it did in Duke New Smyrna, the Commission can decide that the Okeechobee Generating Project will provide cost-effective power to the benefit of Florida electric customers without pre-judging any of the 19 issues in the Reserve Margin Docket.⁵

In sum, FPC's arguments that the full Commission should hear this proceeding because it raises issues that have been raised in the Reserve Margin Docket is not a valid statutory basis for full Commission consideration of this proceeding.

⁵Moreover, the Reserve Margin Docket may very well soon be resolved by stipulated settlement among the parties, thus rendering FPC's misplaced arguments entirely moot.

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

FPC questions the Chairman's discretion and asks that this case be assigned to the full Commission. However, as FPC concedes in its Petition, the relief requested, assignment of the case to the full Commission, is unavailable. FPC's Petition at 6 (stating that it is possible that a full complement of five commissioners may not be available to sit on this case). As FPC is well aware, 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 20 to 35 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 FPC, i.e., hearing by the full Commission, is not available.

FPC really wants to force four Commissioners to hear the case. Four Commissioners do not constitute the full Commission, and thus FPC'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.⁶ 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 FPC's Petition represents yet another attempt by an incumbent utility to erect a procedural roadblock to OGC's need determination proceeding. FPC 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

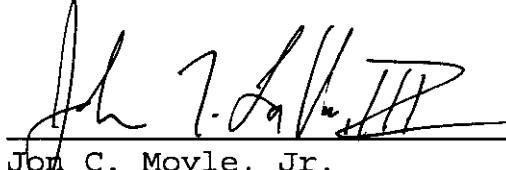
⁶FPC offers no sound public policy basis for having an even-numbered body decide this case. Instead, FPC cavalierly states that the Commissioner could work to break a tie by striving to reach a consensus or by "entertaining alternative motions." FPC's Petition at 6. FPC, however, fails to explain how alternative motions made by a four Commissioner panel would resolve a tie.

Determination of Need, the full Commission will consist of an even number of Commissioners. It appears that FPC 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 FPC. 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 reject FPC'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. FPC has presented no valid basis under the statutory criteria for assigning this proceeding to the full Commission. FPC's Petition should be summarily denied for the reasons stated herein.

Respectfully submitted this 3rd day of November, 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 facsimile transmission(**) or by United States Mail, postage prepaid, on the following individuals this 3rd day of November, 1999.

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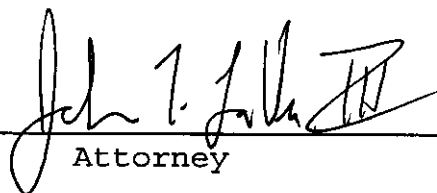
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