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February 22, 2000

Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

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RECORDS AND REPORTING

Re: 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

Dear Ms. Bayo:

Enclosed for filing in the above docket is the original and fifteen (15) copies of Florida Power Corporation's Motion to Strike Portions of the Prefiled Testimony of Gerard J. Kordecki and Sean J. Finnerty.

We request you acknowledge receipt and filing of the above by stamping the additional copy of this letter and returning it to me in the self-addressed, stamped envelope provided.

If you or your Staff have any questions regarding this filing, please contact me at (727) 821-7000.

Very truly yours,

*Gary L. Sasso*  
Gary L. Sasso *je*

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APP \_\_\_\_\_  
CAF \_\_\_\_\_  
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CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.

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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 Submitted for filing: February 23, 2000

INTERVENOR FLORIDA POWER CORPORATION'S MOTION TO STRIKE PORTIONS OF THE PREFILED TESTIMONY OF GERARD J. KORDECKI AND SEAN J. FINNERTY

Florida Power Corporation ("FPC") hereby moves to strike portions of the prefiled direct testimony of Gerard J. Kordecki and Sean J. Finnerty. In support of its motion, FPC states as follows:

1. On October 25, 1999, Okeechobee Generating Company, L.L.C. ("OGC") filed with the Commission the testimony of Gerard J. Kordecki ("Kordecki") and Sean J. Finnerty ("Finnerty") in support of its petition for a determination of need for its proposed "merchant" power plant. Portions of the testimony of both Kordecki and Finnerty constitute legal conclusions as to the Commission's jurisdiction, and the meaning of various statutory provisions, and as such should be stricken. Legal arguments are not the proper subject for prefiled testimony.

2. OGC's attempt to bootstrap legal arguments into the evidentiary portion of this proceeding as direct testimony is inappropriate. In In re: Investigation Into the Appropriate Rate Structure for Southern State Utilities, Inc., for all Regulated Systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, and Washington Counties, 94 FPSC: 3:724, (hereinafter "Southern States"),

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Commissioner Julia L. Johnson, serving as prehearing officer, addressed a similar attempt to offer legal opinion as expert testimony, and Commissioner Johnson stated in pertinent part:

It has not been Commission practice to allow expert testimony on legal issues. I concur. The most appropriate place for legal discussion is in a post-hearing filing, such as a brief, where all of the parties have equal opportunity to present case law and argument in support of their position on the issue. Cross-examination of a witness on legal opinion is not contemplated by Section 120.57, Florida Statutes, which provides for a fact finding proceeding. Legal argument is more appropriately reserved for argument of counsel in a party's brief.

Id. at 3:726. In Southern States, Commissioner Johnson granted a motion to strike the legal analysis from the prefiled testimony. The same reasoning applies to certain statements of Kordecki and Finnerty here. OGC will have an opportunity to raise legal arguments in its post-hearing filings and has made a number of them in response to both FPC's and Florida Power and Light's Motions to Dismiss. It would be inappropriate to require FPC to cross-examine either Kordecki or Finnerty on legal issues addressed in their respective prefiled testimony, specifically identified below.

3. Accordingly, the following portions of Kordecki's and Finnerty's testimony should be stricken as an inappropriate legal opinion.

**Kordecki:**

- a. Page 9, Lines 5 through 15, including the entire Q&A beginning "What agency, if any, regulates these wholesale sales;"
- b. Page 9, Lines 18 through 21, including "I believe that, in general, they will have exempt wholesale generator ("EWG") status and will also be subject to FERC's regulatory authority as "public utilities" under the Federal Power Act;"
- c. Page 10, Lines 1 through 14, including the entire Q&A beginning "What role does the Florida Public Service Commission have in wholesale transactions;"

- d. Page 15, Lines 16 through 17, including “since this capacity can be required under a statewide emergency to be sold into the grid;”
- e. Page 16, Lines 17 through 19, including “Also, it is my understanding that under a statewide emergency, the Governor could require any utility with generation to supply into the grid;”

**Finnerty:**

- f. Page 10, Lines 6 through 7 including “The Okeechobee Generating Company is a “public utility” under the Federal Power Act;”
- g. Page 10, Lines 15 through 17 including “Okeechobee Generating Company, L.L.C. will be an “electric utility” under Florida law including the Grid Bill provisions;”

At Page 3, Lines 1-6 – Finnerty sponsors certain narrative text, figures and tables contained in the Exhibits filed with the Petition for Determination of Need (hereinafter “Pet. Exh”). The following legal opinions incorporated by Finnerty into his testimony should be stricken as well.

- h. Pet. Ex. Page 1, including “Okeechobee Generating Company L.L.C (“OGC”), a public utility subject to the jurisdiction of the Federal Energy Regulatory Commission under the Federal Power Act, and an electric utility under Section 366.02(2), Florida Statutes;”
- i. Pet. Ex. Pages 6, paragraph 2 through Page 7 including the paragraph ending “the Project satisfies all relevant criteria under Rule 25-22.081, Florida Administrative Code,” all of which is simply a legal discussion of the Siting Act, need statute and rule;
- j. Pet. Ex. Page 7, paragraph 3, including “Section II of these Exhibits provides a description of the applicant and primarily affected utility, OGC;”
- k. Pet. Ex. Page 9, paragraph 1, including “The applicant and primarily affected utility for the Commission’s determination of need is Okeechobee Generating Company, L.L.C.;”
- l. Pet. Ex. Page 9, paragraph 2, including “OGC is a FERC jurisdictional, FERC regulated wholesale public utility (as well as an electric utility under Section 366.02(2), Florida Statutes) . . .;”
- m. Pet. Ex. Page 10, paragraph 2, including the entire section titled

“B. Okeechobee Generating Company L.L.C.,”

- n. Pet. Ex. Table 1, including the entire section titled “Status with Federal Agencies.”

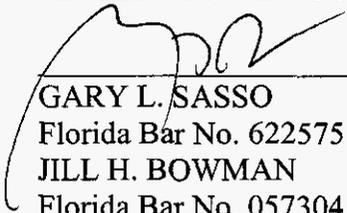
4. Counsel for FPC has consulted with Petitioner’s counsel and is authorized to state that they oppose this Motion. Neither FP&L, TECO, nor LEAF have any objection to this Motion.

WHEREFORE, FPC requests that the Commission strike as legal opinion the above-cited portions of the prefiled testimony of Gerard J. Kordecki and Sean J. Finnerty.

Respectfully submitted,

FLORIDA POWER CORPORATION

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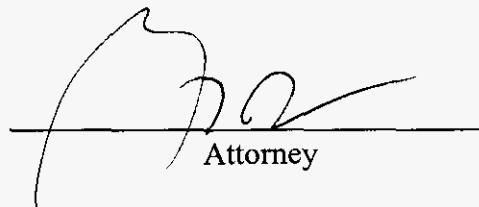


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FLORIDA POWER CORPORATION'S MOTION TO STRIKE PORTIONS OF THE PREFILED TESTIMONY OF GERARD J. KORDECKI AND SEAN J. FINNERTY has been furnished by U.S. Mail to the following counsel of record this 22~~nd~~ day of February, 2000.

  
\_\_\_\_\_  
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