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February 19, 2002

VIA FEDERAL EXPRESS

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, FL 32399-0850

Re: DOCKET NO. 001148-EI

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen (15) copies of Florida Power & Light Company's Response in Opposition to NUI Energy, Inc's Petition to Intervene in the above referenced docket. An electronic copy is provided on a diskette.

Very truly yours,

Gabriel E. Nieto

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of the retail rates of Florida Power & Light Company.	)	Docket No. 001148-EI Dated: February 19, 2002

FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO NUI ENERGY, INC's PETITION TO INTERVENE

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code ("FAC"), hereby responds in opposition to the petition to intervene filed by NUI Energy Inc. ("NUIE") and states:

1. NUIE's petition provides no legitimate basis to confer standing and must therefore be dismissed. NUIE has stated no substantial interest in the subject matter of this proceeding, FPL's retail rates. Indeed, NUIE does not even claim to be an FPL customer. Rather, as its Petition makes perfectly clear, NUIE's interest is in indirectly affecting its unregulated competition with an FPL affiliate that is not a party to this proceeding. NUIE alleges that it "competes with FPL Energy Services in selling natural gas service to retail customers in Florida." Petition ¶ 5. Indeed, NUIE expressly admits that it seeks to intervene based solely upon "competitive economic injury." Petition at ¶ 6. It then uses this fact to make several attenuated and speculative arguments as to how it believes this proceeding *might,* possibly, affect its competition in that market.

2. In *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981) the First District Court of Appeal established the generally applicable test for standing to participate in administrative proceedings:

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show (1) that he will

> suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Agrico, 406 So. 2d at 482. To pass muster under that test a putative intervener must meet two separate requirements. First, it must show that it will suffer "injury in fact" as a result of the agency action contemplated in the proceeding, which is of sufficient immediacy to entitle it to a hearing. And secondly, the intervener must show that its injury is within the "zone of interest" that the proceeding is designed to protect. *Id.; see also Ameristeel Corp. v. Clark*, 691 So.2d 473, 477 (Fla. 1997) ("The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.")

3. The "immediacy" requirement has been held to preclude participation based on stated concerns that are speculative or conjectural. *See Village Park Mobile Home Ass'n v. Department of Business Regulation,* 506 So. 2d 426 (Fla. 1st DCA 1987); *International Jai-Alai Players' Ass'n v. Florida Pari-mutuel Comm'n,* 561 So. 2d 1224 (Fla. 3d DCA 1990). Thus, it provides a "reality check" to the injury-in-fact requirement.

4. The "zone of interest" requirement further limits standing to those persons that the Legislature intended to be protected by the administrative proceeding at issue. *Ameristeel Corp. v. Clark*, 691 So. 2d 473 (Fla. 1997); *Agrico Chem. Co. v. Department of Envtl. Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981).

5. As discussed below, NUIE's petition falls far short of meeting either test.

A. Immediate Injury in Fact

6. As mentioned, an injury that is remote or speculative is insufficient to confer standing:

> abstract injury is not enough. **The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury** as a result of the challenged official conduct.

Village Park Mobile Home Ass'n, Inc. v. State, Dep't of Bus. Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987) (emphasis added). In other words, mere speculation about how a proceeding *might* affect the intervener is insufficient.

7. NUIE's Petition provides a prime example of why the courts have created and zealously applied this requirement. NUIE seeks to intervene in a proceeding that is intended to review FPL's retail rates. But it makes no claim that it will in any way be affected by the level of those rates. Its argument in support of standing amounts to nothing more than speculation that the review of FPL's affiliate transactions in the course of this rate-review proceeding may somehow place NUIE in a better competitive position with respect to FPL Energy Services in the sale of natural gas. FPL Energy Services is an unregulated affiliate of FPL whose rates are not -- and cannot be -- the subject of the Commission's rate review.

8. Putting aside the issue of whether this meets the zone of interest requirement, it is clear that conjecture about an improved economic position in the natural gas market indirectly resulting from a retail electric rate proceeding is far too remote and speculative to meet the "immediacy" requirement of the injury-in-fact test. *See Florida Society of Ophthalmology v. State Board of Optometry*, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988) ("While appellants may well suffer some degree of loss due to economic competition . . ., we fail to see how this potential injury satisfies the "immediacy" requirement"); *Village Park*, 506 So.2d at 434 (allegations regarding the

effect of the outcome of an agency proceeding on the sales and profits of the intervener insufficient); *International Jai-Alai Players,* 561 So. 2d at 1225-26 (claim that change in Jai-Alai schedule would indirectly affect economic interests of Jai-Alai players "is far too remote and speculative in nature to qualify under the first prong of the *Agrico* standing test.").

9. NUIE is in no way directly affected by the matters before the Commission. Because NUIE has failed to provide any basis for standing beyond attenuated and speculative arguments as to how it is affected by this proceeding, its petition must be denied.

B. Zone of Interest

10. Even if a putative intervener is shown to have an immediate injury in fact, the standing inquiry does not stop there.[1] The intervener must *also* show that this injury is within the zone of interest protected by the proceeding. *Ameristeel Corp. v. Clark*, 691 So.2d at 477. The zone-of-interest test looks at the nature of the alleged injury and compares it to the underlying purpose of the proceeding. *Id.* Thus, standing based on allegations of competitive injury must be denied where the proceeding is "not meant to redress or prevent injuries to a competitor's profit and loss statement." *Agrico*, 406 So. 2d at 482.

11. NUIE's claim that it is somehow within the zone of interest of this proceeding defies all logic. This proceeding relates solely to the retail electric rates of

[1] Turning the law of standing on its head, NUIE is apparently of the belief that if it meets the zone-of-interest test, injury-in-fact is irrelevant. See Petition ¶ 6. Unfortunately for NUIE, the law is quite the contrary. It is clear that these are independent requirements and *both* must be met. *Ameristeel Corp. v. Clark*, 691 So.2d at 477. Indeed, where an intervener fails the injury-in-fact test there is no need to even consider zone-of-interest. *See id.*

FPL. Its purpose is to protect FPL's retail electric customers, not the competitors of an unregulated affiliate in the natural gas market. The fact that the Commission is looking at certain affiliate transactions to determine their impact on retail electric ratepayers in no way confers standing upon the affiliate's natural gas competitors. To allow such intervention would, at the eleventh hour, expand what is already an incredibly complex review of the retail electric rates of Florida's largest utility, into a blanket (and statutorily unauthorized) review of the business activities of its unregulated affiliates. There is certainly no cause to do this, as NUIE has failed to provide even the barest basis for standing.

12. Indeed, NUIE's desperate invocation of cases where competitive economics were squarely at issue only serves to highlight the deficiencies of its claims. In both, *Boca Raton Mausoleum v. Department of Banking and Fin.*, 511 So. 2d 1060 (Fla. 1st DCA 1987) and *Florida Med. Center v. Department of HRS*, 484 So. 2d 1292 (Fla. 1st DCA 1986) the central purpose of the administrative proceeding was to limit competition in certain markets. In the cemetery licensing proceeding at issue in *Boca Raton*, the primary factor to be considered in licensing a new facility was whether it would "unreasonably affect the competitive market," and the underlying purpose was to limit the number of facilities based upon "the relationship between population growth, death rate, and ratio of burial to deaths." *Boca Raton*, 511 So. 2d at 1064 (quoting § 497.002, Fla. Stat. Similarly, in the hospital certificate of need proceeding at issue in *Florida Medical*, the purpose was to protect competing facilities from "the probable impact of the proposed project on competition in [the same service] area." *Florida Med.*, 484 So.2d at 1294.

13. Turning to the present proceeding, no one could seriously claim that a similar situation exists; *i.e.,* that the purpose of reviewing FPL's retail electric rates is to further the business interests of an unregulated affiliate's competitors in the natural gas market. To the contrary, the Legislature has been perfectly clear as to the limited set of factors that the Commission is to consider in this case:

> In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction, the commission is authorized to give consideration, among other things, to **the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities; and energy conservation and the efficient use of alternative energy resources**; provided that no public utility shall be denied a reasonable rate of return upon its rate base in any order entered pursuant to such proceedings.

§ 366.041(1), Fla. Stat. (emphasis added).

14. All of these factors are designed to protect a utility's retail electric customers, not its unregulated affiliate's competitors in the natural gas market. Nowhere does the Legislature express any intention to protect entities such as NUIE. Indeed, this is glaringly apparent from NUIE's own petition, which makes the bold claim (at ¶ 6) that "NUIE's substantial injury is within the zone of interest of this proceeding," but is then unable to cite any statutory language to back up that claim.[2]

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[2] Moreover, when the Legislature wants the Commission to consider competitive economic issues, it does so expressly, as in sections 364.01(3) and (4), Florida Statutes, which direct the commission to foster competition among telecommunications companies. No similar language exists in chapter 366, Florida Statutes, which governs electric utilities.

15. Applying the fundamental standing principles discussed above, the Commission has in this very case strictly limited intervention to entities that will be directly affected by FPL's rates (*i.e.*, those who are FPL customers) and whose reason for intervention relates to the underlying purposes of the case. *See* Order No. PSC-01-0099-PCU-EI (denying intervention to Colonial Pipeline Company). In dismissing that order, the Commission correctly recognized that where the intervener is "not a retail customer of FPL . . . any actual or potential injury to [it] would not be addressed through this docket" and its "substantial interests are not affected." Order No. PSC-01-0099-PCU-EI. NUIE's petition is no different in terms of standing, and should be dismissed accordingly.

WHEREFORE, FPL respectfully requests that the Commission deny NUIE's petition to intervene in this proceeding.

Respectfully submitted this 19th day of February 2002.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of the retail rates of)	Docket No. 001148-EI
Florida Power & Light Company.)	Dated: February 19, 2002

CERTIFICATE OF SERVICE OF FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO NUI ENERGY, INC's PETITION TO INTERVENE

I HEREBY CERTIFY that a true and correct copy of the following was served by United States mail on February 19, 2002 to the following persons:

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