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June 24, 2002

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-VIA HAND DELIVERY-

Ms. Blanca S. Bayo, Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 020397-EQ

Dear Ms. Bayo:

Enclosed for filing and distribution on behalf of Florida Power & Light Company are the original and seven (7) copies of Florida Power & Light Company's Response to Petition to Intervene of New Hope Power Partnership and Palm Beach Power Corporation, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows 2000, and the word processing software in which the document appears is Word 2000.

If there are any questions regarding this transmittal, please contact me at 222-2300.

Very truly yours,

E. C. Daley

Elizabeth C. Daley

Enclosure
cc: William B. Graham, Esq.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement by Florida Power & Light Company	**Docket No. 020397-EQ**
	Filed: June 24, 2002

FLORIDA POWER & LIGHT COMPANY'S RESPONSE TO PETITION TO INTERVENE OF NEW HOPE POWER PARTNERSHIP AND PALM BEACH POWER CORPORATION

Florida Power & Light Company ("FPL") files this response to the Petition to Intervene in this docket filed by New Hope Power Partnership and Palm Beach Power Corporation ("Petitioners") and states in support thereof:

1. In this docket, FPL presented to the Public Service Commission ("Commission") in its Petition for Declaratory Statement a narrowly stated request for clarification as to whether "FPL may pay a Qualified Facility (QF), for purchase of renewable energy, an amount representing FPL's full avoided cost plus a premium borne by customers voluntarily participating in FPL's Green Energy Project."

2. Petitioners have not demonstrated that intervention is appropriate for this declaratory statement proceeding. Further, even if intervention were appropriate, Petitioners have not shown that they would have standing to intervene. Moreover, the Petition to Intervene presents allegations that are irrelevant and extend far beyond the scope of FPL's narrow request for declaratory statement.

Intervention Is Inappropriate In This Declaratory Statement Proceeding

3. Although, in certain circumstances, intervention may be permissible in a declaratory statement proceeding, such intervention is limited to a case in which the question presented in the petition for declaratory statement is "not narrowly drawn" and thus "the

substantial interests of other parties may be implicated." Florida Optometric Ass'n v. Dept. of Professional Regulation, Board of Opticianry, 567 So. 2d 928, 936 (Fla. 1st DCA 1990). See also Florida Dept of Business & Professional Regulation, Division of Pari-Mutuel Wagers v. Investment Corp. of Palm Beach, 747 So. 2d 374 (Fla. 1999).

4. In the present case, Petitioners allege only that they "will be harmed by any order rendered herein where such an order unduly narrows the scope of the Commission's authority or limits its options in effectuating public policy with respect to the use of renewable resources in Florida and the increased use of such renewables." Petition at 6.

5. However, FPL clearly has not asked the Commission for a declaratory statement or order narrowing the scope of the Commission's authority or limiting its options in effectuating public policy with respect to the use of renewable resources in Florida. To the contrary, FPL's purpose in seeking a declaratory statement is simply to obtain the Commission's answer "to a narrow question as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to [FPL] in [its] particular set of circumstances," as required under Section 120.565(1), Florida Statutes, which describes the requirements for a petition for declaratory statement. Thus, FPL's request for declaratory statement is the "normal" type of request envisioned by the First District Court of Appeal in Florida Optometric Ass'n, in which the Court concluded that "there will normally be no person, other than the petitioner, who will be affected by the declaratory statement." 567 So. 2d at 936.

Petitioners Have Not Demonstrated Standing To Intervene

6. Even if intervention were appropriate, Petitioners have failed to present allegations sufficient to demonstrate that they are entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to agency rule or that their substantial

interests are subject to determination or will be affected through the proceeding. This is an essential requirement for standing under Rule 28-106.205 (and Rule 25-22.039), Florida Administrative Code.

7. The Petitioners plead no constitutional, statutory or rule-based right to participate. Instead, Petitioners have made a deficient attempt to allege that they have substantial interests that will be affected by a declaratory statement. To have standing to participate in a declaratory statement proceeding on the basis that the person's substantial interests will be affected, the person must show: "1) that he will suffer an injury in fact of sufficient immediacy to entitle him to a Section 120.57 hearing; and 2) that his injury must be of the type or nature the proceeding is designed to protect." Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), *rev. den.*, 415 So. 2d 1359, 1361 (Fla. 1982). "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Id. Both requirements must be satisfied for a person to successfully demonstrate a substantial interest that will be affected by the determination in the proceeding. Id. Case law in Florida is well-developed regarding satisfaction of each of these requirements. Petitioners' allegations do not meet the requirements of case law as to standing.

a. Petitioners Failed To Allege Injury In Fact

Petitioners have alleged no injury in fact "of sufficient immediacy" as a result of the Commission's potential determination in this case. Rather, they seek to intervene based on a vague prediction of harm to their interests if the Commission decided to exceed its authority by venturing outside the parameters of FPL's petition and issuing a declaratory statement that narrowed the scope of the Commission's authority or limited its public policy options concerning the use of renewable resources. However, it is crucial to recognize that FPL's Petition for

Declaratory Statement seeks nothing even remotely resembling an order or statement narrowing the Commission's authority or limiting its options. Petitioners further assert that they "strongly support FPL's Green Energy Project and the development of power generated from technologies that afford enhanced protection to the environment," but that their participation as Intervenors "is necessary to prevent the entry of an order that would limit renewable energy programs to the narrow instance where all the costs of the renewable energy would be borne solely by customers voluntarily participating in the program." Because FPL seeks no such limiting order, the "harm" alleged by Petitioners is purely speculative and has absolutely no bearing on the question that FPL has raised in its request for a declaratory statement. Further, because FPL is not seeking approval for a Green Energy Project in this docket, the statement that Petitioners "strongly support" FPL's Green Energy Project is completely irrelevant.

Indirect, speculative, conjectural, hypothetical or remote injuries are not sufficient to meet the "injury in fact" prong of the Agrico standing test. Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So. 2d 426, 433 (Fla. 1st DCA 1987), *rev. den.*, 513 So. 2d 1063 (Fla. 1987); Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988), *rev. den.*, 542 So. 2d 1333 (Fla. 1989); International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Commission, 561 So. 2d 1224 (Fla. 3d DCA 1990). There must be either an actual injury or an immediate danger of a direct injury arising from challenged official conduct to meet this test.

In Village Park Mobile Home Ass'n, the First District Court of Appeals elaborated on the immediate injury-in-fact requirement. It stated that, "Agrico requires that a party show that he will suffer an immediate injury as a result of the agency action." 506 So. 2d at 432. The court further stated:

> [A]bstract 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. See O'Shea v. Littleton, 414 U.S. 488, (1974) and [Fla. Dep't of Offender Rehab. v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978)]. The court in Jerry therefore concluded that a petitioner's allegations must be of "sufficient immediacy and reality" to confer standing.
>
> Accordingly, our construction of Agrico, Firefighters, and Jerry leads us to the conclusion that a petitioner can satisfy the injury-in-fact standard set forth in Agrico by demonstrating in his petition either: (1) that he has sustained actual injury in fact at the time of filing his petition; or (2) that he is immediately in danger of sustaining some direct injury as a result of the challenged agency*s action.

506 So. 2d at 433 (emphasis added).

Applying the standard articulated in Village Park, it is clear that Petitioners fail to allege either (1) that they have already sustained injury in fact or (2) that they are in immediate danger of sustaining some direct injury as a result of the challenged agency action. Of course, Petitioners cannot allege that they have already sustained an injury, given the fact that the Commission has not yet acted upon FPL's request for a declaratory statement. Petitioners' allegations that their interests are in danger of injury are not only remote and speculative -- they actually have nothing to do with FPL's requested declaratory statement. According to Petitioners, (1) their interests, "which are to offer and provide cost-effective renewable electric power," "will be harmed" in some unspecified manner; and (2) "the promotion of renewable energy . . . could be harmed" in some unspecified manner.

The Petitioners offer no demonstration as to how a Commission action in this proceeding, if any, would affect Petitioner's interests. Petitioners state, and FPL agrees, that "a Florida utility's acquisition of renewable energy is not exclusively governed by PURPA." FPL cannot and does not dispute this statement. However, the Petitioners' two and a half pages of verbiage as to the role of the Commission and the Florida Legislature in fostering renewable energy is

irrelevant to the narrow issue that FPL seeks to address in this docket. This proceeding is not a broad forum for the discussion of renewable energy in Florida.

Petitioners allege a remote, speculative interest as a provider of renewable energy that a declaratory statement may adversely affect its interests by limiting the Commission's authority as to renewable energy policy. First, this proceeding is not a proceeding to determine policy. That must be undertaken through rulemaking. Any suggestion that this case may establish policy is inaccurate and not a basis to establish a substantial interest. Second, Petitioners have made no allegations that even suggest how a declaratory statement in this case might limit Petitioners' opportunity to enter into contracts for renewable energy. This proceeding does not address the ability of the Commission to foster renewable energy. That is not an issue that FPL has asked the Commission to address in its petition for declaratory statement. This proceeding is strictly limited to the Commission's interpretation of payments that FPL, a regulated retail utility, is allowed to make to a QF under federal and state law.

Remote, speculative and conjectural interests that cannot be shown to be injuries do not pass the "injury in fact" requirement of Agrico. Village Park, 506 So. 2d at 430, 433; International Jai-Alai Players, 561 So.2d at 1226. Petitioners have pled a speculative interest rather than demonstrating that they have suffered an injury in fact or that they are in immediate danger of suffering an injury in fact.

b. Petitioners' Interests Fall Outside the Zone of Interest

The second prong of the Agrico standing test requires that, "the injury must be of the type or nature the proceeding is designed to protect." 406 So. 2d at 482. This requirement is sometimes called the "zone of interest" test. *See*, Society of Ophthalmology, 532 So. 2d at 1285. In applying the "zone of interest" test, an agency or court typically examines the nature of

the injury alleged in the pleading and then determines whether the statute or rule governing the proceeding is intended to protect such an interest. If not, because the party is outside the zone of interest of the proceeding, the party lacks standing. Absent clear statutory authority, competitive economic interests do not satisfy the "zone of interest" requirement. Agrico, 406 So. 2d at 481; Shared Services, Inc. v. State Department of Health and Rehabilitative Services, 426 So. 2d 56, 59 (Fla. 1st DCA 1983); Society of Ophthalmology, 532 So. 2d at 1279-80; International Jai-Alai Players, 561 So.2d at 1226; City of Sunrise v. South Florida Water Management District, 615 So.2d 746, 747 (Fla. 4th DCA 1993).

Petitioners' statement of substantial interests focuses on Petitioners' competitive economic interests as potential providers of renewable energy in Florida. However, the statutory sections under which the Commission acts are designed solely to protect customers. These statutes are not intended to protect or otherwise address the competitive economic interests of renewable energy providers. Thus, Petitioners' alleged injury falls outside the zone of interest of the governing statutes.

Scope Of Proceeding

8. Even if Petitioners are found to have standing to intervene, FPL objects to the Petitioners' attempt to enlarge the scope of the proceeding. The Commission required in its own rule of procedure that "[i]ntervenors take the case as they find it." Rule 25-22.039, F.A.C.

9. Moreover, the First District Court of Appeal in Tampa Elec. Co. v. Florida Dep't of Community Affairs, 654 So. 2d 998 (Fla. 1st DCA 1995), explained the scope of a declaratory statement proceeding as follows:

Section 120.565, Florida Statutes, provides in pertinent part:

> A declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or

> order of the agency as it applies to the petitioner in his particular set of circumstances.

We have interpreted this language as limiting an agency's power to issue broad statements of policy in the guise of a declaratory statement: 'An administrative agency may not use a declaratory statement as a vehicle for the adoption of a broad agency policy or to provide statutory or rule interpretations that apply to an entire class of persons." Regal Kitchens, Inc. v. Florida Dept. of Revenue, 641 So. 2d 158, 162 (Fla. 1st DCA 1994). In Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928, 937 (Fla. 1st DCA 1990), we said:

> When an agency is called upon to issue a declaratory statement in response to a question which is not limited to specific facts and a specific petitioner, and which would require a response of such a general and consistent nature as to meet the definition of a rule, the agency should either decline to issue the statement or comply with the provisions of Section 120.54 governing rulemaking.

In the declaratory statement involved here, the department framed the inquiry broadly: "Although the amended petition seeks declaration on several questions, the main issue is whether or not local governments may control the up-sizing of electric power lines through comprehensive plans and land use regulations." And the department then responded with an equally broad answer: "Local governments have the power to regulate the use of land -- including the use of land for power lines -- under their constitutional home rule powers and various statutes which empower local governments, or confirm existing powers, including [the Growth Management Act.]" This language sets forth a general policy of far-reaching applicability. Clearly, the declaratory statement would apply to all local governments seeking to regulate any utility's construction of power lines. Thus, rather than being confined to the "petitioner in his particular set of circumstances," the declaratory statement in this case sets forth "broad agency policy . . . that applies to an entire class of persons." We therefore conclude that it is impermissibly broad.

654 So. 2d at 999.

Despite the admonition of the First District Court of Appeal that "declaratory statements are not to be used as a vehicle for the adoption of broad agency policies," Florida Optometric Ass'n at 937, Petitioners' request to intervene contains two and a half pages discussing the broad issue of renewable energy and available funding sources for renewable energy production. These issues concern "broad agency policies" rather than the narrow question as to avoided costs

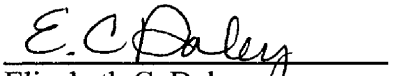
that FPL has presented to the Commission. Thus, the Petitioners apparently seek to intervene in order to change the scope of the proceeding and to ask the Commission to issue a broad policy statement. As stated, the Commission is statutorily prohibited from issuing such a statement. Insofar as the Petitioners have indicated that their purpose is to seek an impermissible statement from the Commission, the Petition to Intervene should be denied.

WHEREFORE, FPL hereby files this its response to the Petition to Intervene of New Hope Power Partnership and Palm Beach Power Corporation and respectfully requests that the Commission reject the intervention as presented by Petitioners.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP

Attorneys for Florida Power
& Light Company



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CERTIFICATE OF SERVICE
DOCKET NO. 020397-EQ

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to the Petition to Intervene of New Hope Power Partnership and Palm Beach Power Corporation was furnished by U. S. Mail or hand delivery this 24th day of June, 2002, to the following:

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