ORIGINAL

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

SQUIRE, SANDERS & DEMPSEY L.L.P.
Including
STEEL HECTOR & DAVIS LLP

215 South Monroe Street, Suite 601
Tallahassee, Florida 32301-1804

Office: +1.850.222.2300
Fax: +1.850.222.8410

cguyton@ssd.com

June 6, 2006

VIA HAND DELIVERY

Blanca S. Bayó, Director
Division of the Commission Clerk &
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No.: 060220-EC

Dear Ms. Bayó:

Enclosed for filing are the original and seven (7) copies of Seminole Electric Cooperative, Inc.'s ~~Resp~~onse In Opposition to Petition to Intervene of Sierra Club, Inc.

If you or your Staff have any questions regarding this transmittal, please contact me at 222-2300.

Very truly yours,

SQUIRE, SANDERS & DEMPSEY L.L.P.

Charles A. Guyton
Partner

CMP
COM 5
CTR
ECR
GCL
OPC
RCA
SCR
SGA
SEC 1
OTH

CAG:gcm
Enclosure
Copy to: Martha Carter Brown, Esq.
Timothy Keyser, Esq.

Kim P.

TALLAHASSEE/55496.1

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for determination of Need for Seminole Generating Station Unit 3 electrical power plant in Putnam County, by Seminole Electric Cooperative, Inc.	)	Docket No. 060220-EC Date: June 6, 2006

SEMINOLE ELECTRIC COOPERATIVE, INC.'S
RESPONSE IN OPPOSITION TO PETITION TO
INTERVENE OF SIERRA CLUB, INC.

Seminole Electric Cooperative, Inc. ("Seminole) hereby responds to the untimely and legally deficient Petition to Intervene of Sierra Club, Inc. ("Petition") filed with the Commission on June 5, 2006. Seminole respectfully submits that the Petition should be denied for the following reasons which are more fully developed in the following paragraphs: (1) the Petition is untimely; (2) the Petition fails to meet minimum content requirements; (3) the Petition fails to aver standing; (4) the Petition was not served upon Seminole's counsel; and (5) the Petition attempts to raise issues not properly before the Commission.

A. The Petition is Untimely.

1. The Petition was submitted electronically, via email, to the Commission at 5:11 p.m. on the evening of June 2, 2006. The Petition was not filed by U.S. Mail, hand delivery, or by courier as required by the Commission's rule regarding filings. See Rule 25-22.028, Florida Administrative Code.

2. According to the Commission's "Electronic Filing Requirements," the party submitting a document for filing by electronic transmission acknowledges and agrees "[t]hat the filing date for an electronically transmitted document shall be the date the Division receives the

complete document." (This is consistent with the requirements of Uniform Rule 28.106.104(9).) "If the document is received on a non-business day, or after 5:00 p.m. on a business day, it will be considered filed as of 8:00 a.m. on the following business day." (This is consistent with Uniform Rule 28-106.104(3).) Therefore, the Petition was filed, if it has been filed at all, as of 8:00 a.m. on June 5, 2006. (The Petition is still not filed; it is incomplete because it does not contain a certificate of service (see Section D. below), and the Commission's e-filing requirements and the applicable Uniform Rule speak of receipt of a "complete document.")

3. The Commission's rule regarding intervention requires petitions to intervene to be filed at least five (5) days before the final hearing. Rule 25-22.039, Florida Administrative Code. If the Petition was in fact filed, it was filed, at the earliest, on June 5, 2006, two days before the final hearing scheduled for June 7, 2006. Therefore, the petition is untimely and should be denied.

B. The Petition Fails to Conform with Uniform Rule 28-106.201(2).

4. The Commission's intervention rule requires that a petition to intervene, "must conform with Uniform Rule 28-106.201(2)." Rule 25-22.039, F.A.C. Uniform Rule 28-106.201(2) contains a number of requirements that the Petition fails to meet, ranging from the mundane/technical to more substantive omissions. The Petition is not double spaced as required by Rule 28-106.201(1). The Petition does not contain "[t]he name, address and telephone number of the petitioner," as required by Rule 28.106.201(2)(b). The Petition does not contain "a statement of when and how the petitioner received notice of the agency decision,' as required by Rule 28-106.201(2)(c). The Petition does not contain "the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action" as required by Rule 28-106.201(2)(e). The Petition does not contain a "statement of the specific rules or statutes the

petitioner contends require reversal or modification of the agency's proposed action," as required by Rule 28-106.201(2)(f). Most significantly, the Petition does not contain "[a] statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the agency to take with respect to the agency proposed action," as required by Rule 28-106.201(2)(g).

5. Uniform Rule 28-106.201(4) specifically addresses the appropriate action in the event a petition is not in substantial compliance with subsection (2) of the rule or if it has been untimely filed. Such a petition "shall be dismissed."

C. The Petition Fails to Establish Standing.

6. Based upon the allegations in its Petition, the Sierra Club, Inc. ("Sierra") lacks standing to intervene in this proceeding. The Commission's intervention rule requires that a petition to intervene "include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding." Rule 25-22.039, F.A.C. Similarly, the Uniform Rule invoked by the Commission's intervention rule requires "an explanation of how the petitioner's substantial interests will be affected by the agency determination." Both of these pleading requirements are designed to give the Commission sufficient information to determine whether a petitioner or an intervenor has standing.

7. Under Chapter 120, Florida Statutes standing is conferred on one whose substantial interest will be affected by proposed agency action. Section 120.57, Fla.Stat.; *Friends of the Everglades v. Board of Trustees*, 595 So. 2d 186 (Fla. 1st DCA 1992). Before one can be considered to have a substantial interest in the outcome of a proceeding, he or she must show: (1) that he or she will suffer an injury in fact of sufficient immediacy, and (2) that his or her

substantial injury is of a type or nature which the proceeding is designed to protect. *Agrico Chem. Co. v. Department of Envtl. Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." *Id.*

8. Injury in Fact. Abstract, indirect, speculative, hypothetical, or remote injuries are not sufficient to meet the "injury in fact" standing requirement. There must either be actual injury, or immediate danger of direct injury, to meet this test. *Village Park Mobile Home Ass'n v. Department of Business Regulation,* 506 So. 2d 426 (Fla. 1st DCA 1987); *Agrico Chem. Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981; *Department of Offender Rehabilitation v. Jerry,* 353 So. 2d 1230 (Fla. 1st DCA 1978). It is not enough to allege one's interests will be adversely affected; a petitioner must state with specificity how those interests will be affected. *Florida Society of Ophthalmology v. State Board of Optometry*, 532 So. 2d 1279 (Fla. 1st DCA 1988); *Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n, Inc.*, 418 So. 2d 1046 (Fla. 1st DCA 1982).

9. The Petition completely fails to allege any injury, immediate or remote, that it or its members would suffer as a result of an affirmative determination of need. Sierra does state its purposes – "wise use of natural resources" and "protection of the environment." However, it makes no attempt to address how either purpose would be injured by an affirmative determination of need for SGS Unit 3. Sierra's Petition completely fails to meet this prong of the *Agrico* test. Therefore, even if Sierra's petition were timely and met minimum pleading requirements, Sierra lacks standing and should not be allowed to intervene.

10. Seminole commends to the Commission the discussion in *Florida Society of Ophthalmology v. State Board of Optometry,* 532 So. 2d 1279 (Fla. 1st DCA 1988) in which the

First District Court of Appeal addressed the difference between having a general interest in a matter and actually suffering an injury that warrants intervention:

> [N]ot everyone having an interest in the outcome of a particular dispute over an agency's interpretation of law submitted to its charge, or the agency's application of that law in determining the rights and interests of the members of the government or the public, is entitled to participate as a party in an administrative proceeding to resolve the dispute. Were that so, each interested citizen could, merely by expressing an interest, participate in the agency's effort to govern, a result that unquestionably would impede the ability of the agency to function efficiently....[P]arty status will be accorded only to those who will suffer an injury to their substantial interests sought to be prevented by the statutory scheme.

Id. at 1284 (emphasis added).

11. Zone of Interest. In addition to requiring an injury in fact of sufficient immediacy, the *Agrico* standing test also requires that "the injury must be of the type or nature the proceeding is designed to protect." *Agrico Chem. Co. v. Department of Envtl. Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1982). This is the so-called "zone of interest" requirement. *Florida Society of Ophthalmology v. State Board of Optometry*, 532 So. 2d 1279 (Fla. 1st DCA 1988). In determining whether a petitioner has met the zone of interest requirement, the agency or court 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.

12. Sierra's petition is particularly infirm as to alleging an appropriate zone of interest. The only interests pled by Sierra are "wise use of natural resources" and "protection of the environment." The present proceeding is not intended to protect either such interest. Rather, this proceeding is for the purpose of determining whether SGS unit 3 is needed by Seminole and its members, whether SGS Unit 3 is the most cost-effective alternative available to Seminole and its Members and whether there are conservation measures available to mitigate the need for SGS Unit 3. Section 403.519, Florida Statutes. Of course, if the Commission grants an affirmative determination of need, then Seminole will proceed under the Florida Electrical Power Plant

Siting Act ("Siting Act") where there will be a hearing that addresses the protection of the environment.

13. The Commission has long recognized that the scope of a need determination proceeding does not include environmental issues. In the Cypress Energy need determination case, the Commission stated the following:

> Only issues relating to the need for the proposed power plant as proscribed by section 403.519, Florida Statutes, will be heard in this proceeding. Separate public hearings will be held by the Department of Environmental Regulation before the Division of Administrative Hearings to consider environmental and other impacts of the proposed plant and associated facilities.

In re: Joint Petition to determine the need for electric power plant to be located in Okeechobee County by Florida Power & Light Company and Cypress Energy Partners, Limited Partnership, Docket No. 920520-EQ, Order No. 92-0827-PHO-EQ, Aug. 18, 1992. That language is very similar to the language the Commission set forth in its Notice of Hearing in this case:

> Only issues relating to the need for the proposed power plant will be heard at this hearing. Separate public hearings will be held before the Division of Administrative hearings at a later date to consider environmental and other impacts of the proposed plant and associated facilities.

Notice of Commission Hearing and Prehearing, March 29, 2006.

14. Earlier need cases contain lengthy discussions of the Siting Act and clear statements that the Commission will not expand need determination cases to cover environmental issues:

> The Siting Act sets forth a comprehensive licensing scheme for new and expanded steam-fired generating capacity.. . . . The Commission does not have statutory jurisdiction over the environment or natural resources in the State of Florida. The responsibility for those areas is divided among numerous state and local agencies: DER, the Department of Natural Resources, local Water Management Districts, the Game and Fresh Water Fish Commission, local zoning boards to name but a few. These are the agencies which are charged with the evaluation of environmental impacts of this or any future proposed plants. These matters are simply not within the jurisdiction of this body and therefore, are not properly considered in the need determination at issue here.

> The environmental impacts of these proposed units are properly litigated before the hearing officer in the final certification hearing. And under Section 403.507(2), Florida Statutes, DER is charged with the responsibility and authority to conduct or contract for studies in the following areas:
>
> (e) Impact on suitable present and projected water supplies for this and other competing land uses;
>
> (f) Impact on surrounding land uses;
>
> (h) Environmental impacts.
>
> . . .
>
> The forum in which the Legislature intended the record to be developed on the environmental impacts of proposed power plants is the forum in which the agencies charged with environmental matters have the greatest input: the final certification hearing. Given the existence of this forum and the lack of jurisdiction over the subject matter, the Commission should not seek to expand its need determination proceedings to cover environmental and natural resource issues."

In re: Petition of Florida Power & Light Co. to determine need for electrical power plant – Lauderdale repowering, Docket No. 8990973-EI, Order No. 23079 at 18-20, June 15, 1990, 90 FPSC 6:240, 257-59; *In re: Petition of Florida Power & Light Co. to determine need for electrical power plant – Martin County*, Docket No. 890974, Order No. 23080, June 15, 1990, 90 FPSC 6:268, 287-89.

15. The allegations of Sierra's Petition fail to meet both of the standing requirements in the *Agrico* test. Sierra has failed to plead any injury, immediate or even remote, to its alleged interests. Similarly, Sierra raises only environmental interests that are not within the zone of interest protected by need determination proceedings. Therefore, the Sierra Club lacks standing to intervene.

D. Sierra Failed to Serve Its Petition Upon Seminole.

16. Rule 28-106.104, Florida Administrative Code, requires that all pleadings filed with an agency contain a certificate of service. Rule 28-106.104(2)(f),(4) F.A.C. Subsection (4) of the same rule requires a party to "serve copies of the pleading or other document upon all other parties to the proceeding."

17. The Petition electronically "filed" in an email untimely sent to the Commission did not contain the required certificate of service. Therefore, it is not only untimely, but also incomplete. Moreover, counsel for Seminole has not received Sierra's petition from Sierra's counsel. It was not sent electronically by Sierra's counsel, and it has not been received from Sierra's counsel by mail, courier or hand delivery.

18. Sierra has attempted to ambush Seminole. It has filed an untimely petition to intervene and blatantly neglected to copy Seminole with its deficient petition. This forms yet another basis for denial of the untimely and deficient Sierra Petition.

E. The Petition Attempts to Raise Issues Not Properly Before the Commission.

19. The Order Establishing Procedure in this case, Order No. PSC-06-0247-PCO-EC, provided notice that several actions would result in the waiver of issues. It stated that "[f]ailure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission." It also provided that, [a]ny issue not raised by a party either before or during the Prehearing Conference shall be waived by that party, except for good cause shown." It also identified the criteria a party must demonstrate to show good cause. Sierra did not file a Prehearing Statement, did not attend the Prehearing Conference and made no attempt to demonstrate in its untimely and legally deficient Petition good cause as to why it could not raise its issues in a timely fashion. Therefore, Sierra has waived its opportunity to raise the new issues set forth in its untimely and legally deficient Petition.

20. Moreover, in Sierra's "issues," which are actually positions rather than objective issues, Sierra attempts to advocate the consideration of environmental externalities, a matter that the Commission long ago set apart from need determination proceedings. In "Issue" 4.a. Sierra advocates consideration of environmental impacts in the determination of costs. Similarly, in "Issue" 4.b. Sierra advocates the consideration of environmental mining practices that may be curtailed in the future. Consideration of environmental factors not covered by current environmental regulations, but which may be addressed in the future, or consideration of general environmental impact costs to society are considerations of environmental externalities.

21. The Commission long ago declined to consider environmental externalities in its need determination decisions. In both the Ft. Lauderdale repowering and the Martin expansion need determination cases, the Commission stated the following regarding environmental externalities:

> [W]e are of the opinion that the Commission cannot and should not consider these types of environmental and natural resource costs in making need determinations pursuant to the Power Plant Siting Act.
> . . .
> Externalities which involve a balancing of public good versus the need for new generation are the matters which are properly excluded from consideration by this body and best left to the environmental agencies and ultimately the Governor and Cabinet. Therefore, we find that the Commission can not and should not consider the cost to the state and its citizens of the environmental and natural resource impacts of the proposed [units].

In re: Petition of Florida Power & Light Co. to determine need for electrical power plant – Lauderdale repowering 90 FPSC 6:240, 254, 259; *In re: Petition of Florida Power & Light Co. to determine need for electrical power plant – Martin County*, Docket No. 890974, Order No. 23080, June 15, 1990, 90 FPSC 6:268, 281 289-90. The Commission similarly stated in the Cypress need determination case:

> Generally, we believe that we should not consider the costs and benefits associated with environmental externalities when evaluation cost effectiveness in need determination proceedings. This is because the statutory scheme envisions the bifurcation of environmental issues (which are considered by the DER) and regulatory issues (which are considered by the Commission). The Florida Public Service Commission has neither the expertise, the personnel, nor a statutory directive to consider such environmental issues. These issues, traditionally and statutorily have been considered by the Florida Department of Environmental Regulation and not by the Florida Public Service Commission.

In re: Joint Petition to determine need for electric power plant to be located in Okeechobee County by Florida Power & Light Co. and Cypress Energy Partners, Limited Partnership, Docket No. 920520-EQ, Order No. 92-1355-FOF-EQ, Nov. 23, 1992.

22. Sierra has waived the opportunity to raise any issues at this late date. Moreover, at least two of the four "issues" it attempts to raise are inappropriate in a need determination case. Sierra should not be allowed to raise untimely new issues. Indeed, Sierra should not be permitted to intervene at all.

Conclusion

Sierra's Petition to intervene should be denied. It is untimely and incomplete. It does not meet minimum pleading requirements. It fails to establish standing. It did not contain a required certificate of service, and it was not served upon Seminole's counsel. It attempts to raise issues that are improper and which Sierra has waived due to its lack of diligence. Seminole respectfully requests that the Commission deny the Petition.

Respectfully Submitted,

Squire, Sanders & Dempsey LLP
215 S. Monroe St., Suite 601
Tallahassee, FL 32301-1804

Attorneys for Seminole Electric Cooperative, Inc.

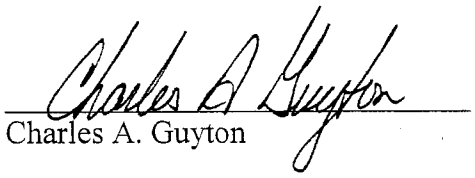
By: _____
Charles A. Guyton
Fla. Bar No. 0398039

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Seminole Electric Cooperative, Inc.'s Response In Opposition To Petition To Intervene Of Sierra Club, Inc. has been served by hand delivery (*) and by U.S. Mail on this 6th day of June, 2006, on the following:

Martha Carter Brown, Esq.*
Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Timothy Keyser
Keyser & Woodard, P.A.
Post Office Box 92
Interlachen, FL 32148



Charles A. Guyton