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Subject: Re: Electronic Filing - Docket # 070650-EI

Attachments: OUC Brief 1-2-08[3].doc



OUC Brief
-08[3].doc (70 K)

Re: Electronic Filing - Docket #070650-EI

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B. Docket No. 070650-EI

In re: Florida Power & Light Company's Petition to Determine Need for Turkey Point Nuclear Units 6 and 7 Electrical Power Plant

C. Document being filed on behalf of Orlando Utilities Commission.

D. There are a total of 7 pages; which includes the Certificate of Service.

E. The document attached for electronic filing is Orlando Utilities Commission's Brief In Support of Granting Its Petition to Intervene.

(See Attached File: OUC Brief 1-2-08(3).doc)

Thank you for your attention and assistance in this matter.

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FPSC-COMMISSION CLERK

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Florida Power & Light Company's)
Petition to Determine Need for)
Turkey Point Nuclear Units 6 and 7)
Electrical Power Plant)

Docket No. 070650-EI

Filed: January 3, 2008

ORLANDO UTILITIES COMMISSION'S BRIEF IN SUPPORT
OF GRANTING ITS PETITION TO INTERVENE

On October 16, 2007, Florida Power & Light Company ("FPL") filed a Petition to Determine Need for two nuclear-fueled generating units which add substantial capacity to the Florida Grid. On December 7, 2007, the Orlando Utilities Commission ("OUC") filed its Petition to Intervene in FPL's need determination. On December 12, 2007, FPL filed a Response in Opposition to OUC's Petition to Intervene ("FPL's Response"). On December 24, 2007, the Florida Public Service Commission's ("Commission") Prehearing Officer issued a Notice of Oral Argument ("Notice") in which the Prehearing Officer posed two questions to be heard in oral argument and authorized OUC to file a written brief in support of its position. Pursuant to the Notice, OUC hereby files this brief in support of its position that OUC is substantially affected by the underlying proceeding and must therefore be permitted to intervene.

Questions Presented

1. Whether OUC has a substantial interest in the adequate, reliable, or cost-effective supply of electricity in the State, such that it is therefore entitled to intervene in this proceeding?
2. Whether OUC has a substantial interest in ensuring that Florida Power & Light Company (FPL) holds discussions with potential co-owners as to the proposed nuclear units, and to include in its petition a summary of those discussions, such that it is therefore entitled to intervene in this proceeding? If so, what is the specific authority which requires FPL to conduct or the Commission to compel FPL to conduct, such discussions with potential co-owners, in the context of this proceeding.

Argument

- 1. The Orlando Utilities Commission (“OUC”) as part of the Florida electrical grid has a substantial interest in the adequate, reliable, or cost-effective supply of electricity in the State, such that it is entitled to intervene in this proceeding.**

To participate as a party in this proceeding, OUC must demonstrate that its substantial interests will be affected by the proceeding. Specifically, OUC must demonstrate that (1) it will suffer injury in fact which is of sufficient immediacy to entitle it to a hearing; and (2) that its injury is of the type or nature against which this proceeding is designed to protect. Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997) (citing Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982)).¹ OUC meets both prongs of the Agrico test.

OUC currently serves nearly 200,000 customers through its generation of electric power within Florida’s state-wide electrical grid and has a substantial interest in the adequate, reliable and cost effective supply of electricity throughout the state of Florida. The Commission’s need determination for FPL’s proposed nuclear facilities constituting between 2,200 and 3,040 MW of electrical generation capacity will drastically impact the future supply of electricity within the state-wide electrical grid of which OUC is a part. FPL’s proposed nuclear generating units will substantially affect OUC’s ability to adequately plan how to meet its future electrical generation needs; will substantially affect OUC’s long-term transmission planning; will substantially impact the economics of electrical power sales throughout the state of Florida; and will impact the long-term stability and reliability of the electric grid. Accordingly, OUC will suffer injury in fact of sufficient immediacy under the first prong of the Agrico test to entitle OUC to participate in this

¹ This two-pronged test for standing is referred to as the Agrico test.

proceeding.²

Under the second prong of the Agrico test, OUC must establish that its injury is of the type or nature against which this proceeding is designed to protect. This prong of the Agrico test is referred to as the “zone-of-interest” test. The substantial interests alleged by OUC clearly fall within the zone-of-interest of this proceeding.

This is a need determination proceeding in which the Commission will determine the need for FPL’s proposed nuclear generating units pursuant to Section 403.519, Florida Statutes. Section 403.519(4)(b) states that the Commission must consider state-wide objectives. Section 403.519(4)(b)(2) provides that the Commission shall take into account whether the nuclear power plant will “[e]nhance the reliability of electric power production within the state by improving the balance of power plant fuel diversity and reducing Florida’s dependence on fuel oil and natural gas.” § 403.519(4)(b)(2), Fla. Stat. (emphasis supplied). Section 403.519(b)(3) states that the Commission shall take into account whether the nuclear power plant will “[p]rovide the most cost-effective source of power, taking into account the need to improve the balance of fuel diversity, reduce Florida’s dependence on fuel oil and natural gas, reduce air emission compliance costs, and contribute to the long-term stability and reliability of the electric grid.” § 403.519(b)(3), Fla. Stat. (emphasis supplied). These are state-wide objectives that the Commission is statutorily required to consider. To eliminate the ability of electric utilities, like OUC, that are part of the state wide electrical grid to intervene in these proceedings to protect its substantial interests will render these important state-wide objectives meaningless.³

² In FPL’s Response, FPL does not challenge OUC’s standing under the first prong of the Agrico test.

³ In 1998, FPL filed a petition to intervene in the need determination case before this Commission initiated by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. FPL alleged that its substantive

2. **OUC has a substantial interest in ensuring that FPL holds discussions with potential co-owners as to the proposed nuclear units, and to include in its petition a summary of those discussions, such that it is therefore entitled to intervene in this proceeding? If so, what is the specific authority which requires FPL to conduct or the Commission to compel FPL to conduct, such discussions with potential co-owners, in the context of this proceeding?**

OUC is a generating utility within the state-wide electrical grid whose need for non-greenhouse gas emitting, base load nuclear generation in Florida has been recognized by the Florida Legislature in its most recent amendments to Section 403.519, Fla. Stat., which now require applicants such as FPL to address, in the need petition, participation opportunities discussed with other electric utilities. § 403.519(4)(a)5., Fla. Stat. By requiring applicants to include this information in their petitions, the Legislature has designed the need determination proceeding to, among other things, ensure that other electric utilities are afforded the opportunity to discuss ownership interest in a proposed nuclear power plant. Any other interpretation of this requirement would render the Legislature's recent addition to the statute meaningless. Pursuant to Section 403.519, Fla. Stat., the Commission must ensure that meaningful discussions with other electric utilities have in fact occurred before making an affirmative determination of need. Id. Because no meaningful discussions have taken place, OUC must be permitted to intervene and participate in this docket in order to protect its substantial interests in this regard. Electric utilities across the state of Florida have a significant need for non-greenhouse gas emitting base

interest would be affected by the Commission's action, including its planning, construction and operation of transmission and generating facilities, and its continuing ability to make capacity and energy sales to other utilities. The Commission granted FPL's petition over the objections of New Smyrna Beach and Duke Energy. (Order No. 98-1305). That need determination involved a 500-megawatt class gas-tiered combined cycle power plant, and which the Commission agreed affected the largest utility in Florida and its substantial interests. Certainly then, FPL's proposed nuclear plants similarly affect the substantial interests of OUC and the other utilities in Florida, in the exact same ways and under Section 120.52(12)(b), Fla. Stat., and Rule 25-22.039, F.A.C., OUC is entitled to intervene in this docket. See also In re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee by Okeechobee Generating Company, L.L.C., Docket No. 991462-EU (Order No. PSC-99-2153-PCO-EU).

load nuclear generation. Access to this type of generation should not be limited to citizen customers of only the biggest providers. Accordingly, the ability of the electric utilities to have meaningful discussions concerning their access to this type of electrical generation is vitally important to the state-wide objectives that the Commission must consider pursuant to Section 403.519(4)(b) during the need determination process.

FPL's Response misconstrues the plain language of Section 403.519(4)(a)(5), Fla. Stat. which provides that the applicant's petition shall include, "[i]nformation of whether there were any discussions with any electric utilities regarding ownership of a portion of the nuclear or integrated gasification combined cycle power plant by such electric utilities." §403.519(4)(a)(5), Fla. Stat. The plain language of the statute clearly indicates the legislature designed the need determination proceeding to ensure that the Commission considers whether the applicant has conducted meaningful discussions concerning minority ownership in the proposed nuclear power plant with other electric utilities.

FPL asserts that FPL has met this statutory condition precedent by informing the Commission that preliminary discussions related to joint ownership opportunities in Turkey Point 6 and 7 have occurred. FPL's Response at 2. FPL claims that the statutory requirements are only "informational" and that there is no statutory requirement to engage in joint ownership discussions. FPL's Response at 2. However, the plain language of the statute requires that FPL disclose any such joint ownership discussions as a part of FPL's complete petition. §403.519(4)(a), Fla. Stat. Therefore, any joint ownership discussions or the lack thereof, are deemed relevant in the analysis and approval of FPL's petition. As a result, OUC has standing to intervene in this matter. FPL cites to language within a version of Senate Bill 888 which was withdrawn for the premise that the Legislature did not implement a specific requirement that the

Siting Board consider whether an allowance had been made for minority ownership by other utilities in a proposed nuclear power plant. This unpersuasive and improper legislative history is inappropriate and must not be considered by the Commission. Legislative history cannot be used to give meaning to the plain language of statutes that are sufficiently clear. Ratzlaf v. U.S., 510 U.S. 135 (1994). Legislative history may only be resorted to for the purpose of solving doubt, not for the purpose of creating it. Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U.S. 563 (1922). Furthermore, legislative intent cannot be inferred from actions that were not taken by the Legislature. To construe the proposed amendment to Senate Bill 888 as indicating that the Legislature, by not acting in a specific manner in setting a “condition or criterion in determining whether a nuclear plant may be sited and built in Florida,” was not interested in providing an opportunity to meaningfully discuss minority ownership interest in a proposed power plant would render the provision meaningless. Section 403.519(4)(a)(5) was not implemented to be ignored, it was implemented to provide the Commission with an accurate representation of any discussions made by the applicant concerning co-ownership in order to facilitate the Commission’s need-determination process.

Respectfully submitted this 3d day of January 2008.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing OUC's Brief in support of granting its petition to intervene has been furnished by electronic mail and/or U.S.

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