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Attachments: FPL's response in opposition to SEC petition to intervene (2).doc; FPL's response in opposition to SEC petition to intervene (2).pdf

Electronic Filing

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b. Docket No. 080001 - EI
In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor

c. The Document is being filed on behalf of Florida Power & Light Company.

d. There are a total of 9 pages

e. The document attached for electronic filing is Florida Power & Light Company's Response in Opposition to Petition to Intervene of Saporito Energy Consultants

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Fuel and Purchased Power Cost)
Recovery Clause and Generating)
Performance Incentive Factor)

DOCKET NO. 080001-EI

FILED: November 3, 2008

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION
TO PETITION TO INTERVENE OF SAPORITO ENERGY CONSULTANTS**

Florida Power & Light Company ("FPL") respectfully responds in opposition to the petition for intervention of Thomas Saporito as an individual, and representing Saporito Energy Consultants ("SEC"), and states as follows.

Background and Summary

On November 3, 2008, the day before the hearing in this docket is scheduled to commence, Mr. Saporito filed the "SEC Petition to Intervene" (the "SEC Petition") as an individual and as a representative of SEC.¹ The stated purpose of the intervention with respect to FPL² is to address whether "the amounts sought by FPL in its instant petition [are] reasonably and prudently incurred in the upgrade projects of its Turkey Point and St. Lucie nuclear units?" SEC Petition at ¶ 10.

The reasonableness and prudence of the costs for FPL's nuclear uprate projects is not a subject to be addressed in this docket. The subject was addressed at length recently in Docket No. 080009-EI. Pursuant to Rule 25-6.0423, F.A.C., the Commission determined at its October 14, 2008 agenda conference the amount of reasonable and prudent nuclear uprate project costs that are to be recovered through FPL's 2009 capacity cost recovery ("CCR") factors. In this

¹ The SEC Petition was filed electronically on Saturday, November 1 and, consistent with the Commission's procedures on electronic filing is accordingly treated as being filed on the next business day, November 3.

² SEC also seeks to intervene with respect to Progress Energy Florida's nuclear uprate project, but this response specifically addresses only intervention with respect to FPL.

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docket, the only remaining issue with respect to those approved costs is essentially ministerial: has FPL properly calculated its 2009 CCR factors to recover the costs.

Intervention should be denied for several reasons. First, the SEC Petition does not allege any facts entitling Mr. Saporito or SEC to intervene in this proceeding. To the contrary, the SEC Petition makes it clear that the purpose of intervention is to address an issue that has already been resolved and is not properly before the Commission in this docket. Second, the intervention request does not even show that SEC is a legal entity with the capacity to maintain or intervene in a legal action. Third, even if SEC was a legal entity under Florida law, Mr. Saporito is not entitled to appear and represent SEC or SEC's clients because he is not an attorney or "qualified representative" as required by Commission rules.

Argument

A. Mr. Saporito Fails to Allege an Adequate Basis for Intervention

As noted above, the stated purpose of SEC's intervention is to address the reasonableness and prudence of the uprate project costs at FPL's St. Lucie and Turkey Point nuclear plants. Rule 25-6.0423, F.A.C., provides for the Commission to hold proceedings each year to determine the reasonable and prudent pre-construction costs and carrying charges on construction costs for an electric utility's qualifying nuclear power plant project, which the rule then authorizes the utility to recover through the CCR factors that apply for the following calendar year. The Commission opened Docket No. 080009-EI in early 2008 for this purpose, with FPL's nuclear uprate projects being among the projects for which cost recovery would be determined. Consistent with Rule 25-6.0423, FPL filed testimony in March and May 2008 supporting its request for cost recovery and a prudence determination with respect to *inter alia*,

the nuclear uprate projects. That subject was addressed in detail³ at a hearing held in September 2008, post-hearing briefs were filed, and the Commission determined at its October 14, 2008 agenda conference the amount of reasonable and prudent uprate project costs that FPL would be permitted to recover through the 2009 CCR factors.

Now, SEC wants to address that exact subject again, in this docket. This is inconsistent with the procedure envisioned in Rule 25-6.0423, and would constitute an improper collateral attack on a final decision by the Commission. In short, SEC seeks intervention to address a subject that is not – and cannot be – presently before the Commission.

The applicable standards for intervention are provided in Section 120.52(12)(b), Florida Statutes, and Rule 25-22.039, Florida Administrative Code. Rule 25-22.039 states in relevant part:

Persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene. Petitions for leave to intervene must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceedings 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 though the proceeding.

The SEC Petition contains (i) no allegation by Mr. Saporito of an entitlement to intervene based upon any constitutional or statutory right or Commission rule; and (ii) no mention of any “substantial interest” of Mr. Saporito entitled to protection in this proceeding. Absent such a showing, intervention should be denied.

Florida law provides a two-prong test for determining whether a party has a “substantial interest” entitling the party to intervene in a proceeding. Under it Mr. Saporito must show that: (1) he will suffer an injury in fact which is of sufficient immediacy to entitle him to a Section

³ The prehearing order in Docket No. 080009-EI identified more than a dozen issues for resolution that related specifically to FPL’s uprate projects. See Order No. PC-08-0581-PHO-EI, dated September 8, 2008.

120.57 hearing, and (2) his substantial injury is of a type or nature which the proceeding is designed to protect. *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981).

The SEC Petition reveals on its face that it seeks redress for an alleged injury (*i.e.*, customer responsibility to pay for allegedly unreasonable or imprudent uprate project costs) that this proceeding is not designed to protect, because a full, complete and final review and decision on the reasonableness and prudence of those costs has already taken place. Accordingly, the SEC petition should be denied.

B. SEC Lacks Legal Capacity to Intervene and Fails to Allege an Adequate Basis for Intervention

SEC is not a legal entity with the capacity to participate in this proceeding. SEC's request for intervention states that it is a "privately held entity." SEC Petition, at ¶ 6. Only certain groups of individuals or business entities are recognized by Florida law as legal entities distinct from their members, which are affirmatively granted the capacity to sue and be sued by statute. *See, e.g.*, § 607.0302, Florida Statutes. SEC does not allege it is a corporation, non-profit corporation, or any other entity with the legal capacity to sue under Florida law. Additionally, a review of the records of the Florida Department of State, Division of Corporations, indicates that SEC is not currently registered with the state as such an entity. Accordingly, SEC does not appear to be an entity recognized in Florida with the capacity to intervene. *See In re Petition to Determine Need for Polk Unit 6 Electrical Power Plant by Tampa Electric Power Company*, Docket No. 070467-EI, Order No. PSC-07-0695-PCI-EI, 2007 WL 2417278 (Fla. P.S.C. 2007) (conditioning intervention of organization upon the filing of proof that it has a valid certificate issued by the Department of State).

If SEC is somehow trying to establish associational standing to intervene on behalf of its clients, then the intervention request plainly fails to establish such standing. To begin with, there is no allegation that SEC and/or its clients represent any kind of association. Moreover, even if the intervention request contained such allegations, the test for associational standard has not been met. The test for associational standing, which was established in *Florida Home Builders v. Dept. of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982) and *Farmworker Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services*, 417 So. 2d 753 (Fla. 1st DCA 1982), is based on the standing principles established in *Agrico*. Associational standing may be found where: (1) the association demonstrates that a substantial number of an association's members may be substantially affected by the Commission's decision in a docket; (2) the subject matter of the proceeding is within the association's general scope of interest and activity; and (3) the relief requested is of a type appropriate for the association to receive on behalf of its members.

Applying this standard to the intervention request, it is clear that no facts are alleged that would entitle SEC to standing either individually, or on behalf of others, or as part of some association. First, the intervention request is silent as to how many SEC clients, if any, are customers of FPL. Second, there is no description of SEC's general scope of interest and activity. Finally, the petition fails to demonstrate that the relief requested is of a type appropriate for SEC to receive. As a result, SEC has failed to demonstrate associational standing.

In summary, SEC is not a legal entity entitled to appear or intervene in this or any legal proceeding. In addition, the intervention request fails to provide the Commission any factual basis upon which it can find that the two prong standing test in *Agrico*, and the three prong associational standing test established in *Florida Home Builders*, have been satisfied.

Accordingly, the request for intervention by SEC should be denied. *See In re Petition to Determine Need for West County Energy Center Unit 3 Electrical Power Plant by Florida Power & Light Company*, Docket No. 080203-EI, Order No. PSC-08-0398-PCO-EI, 2008 WL 2568584 (Fla. P.S.C. 2008) (denying intervention to individual and to unregistered organization that failed to demonstrate standing under *Agrico* or *Home Builders*).

C. Mr. Saporito is Not Entitled to Represent SEC or SEC's Clients

The Commission's rules require that a party be represented by an attorney or a "qualified representative." Rule 28-106.106(1), Fla. Admin. Code. Mr. Saporito is purporting to represent SEC and SEC's clients' interests, but Mr. Saporito is not an attorney, and has not made the required filing of qualifications for consideration to become a "qualified representative." Rule 28-106.106(2)(a), Fla. Admin. Code. Accordingly, Mr. Saporito is not entitled to represent SEC or SEC's clients before the Commission in this proceeding.

Conclusion

WHEREFORE, for all of the foregoing reasons, FPL respectfully requests that the Commission deny the petition for intervention filed by Thomas Saporito, as an individual, and representing Saporito Energy Consultants.

Respectfully submitted this 3rd day of November, 2008.

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CERTIFICATE OF SERVICE
Docket No. 080001-EI

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