STEEL
HECTOR
DAVIS

Steel Hector & Davis
215 South Monroe, Suite 601
Tallahassee, Florida
904-222-2300
904-222-8410 Fax

ORIGINAL
FILE COPY

Matthew M. Childs, P.A.

June 10, 1997

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

RE: DOCKET NO. 970410-EI

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen (15) copies of Florida Power & Light Company's Motion to Deny and Dismiss in the above referenced docket.

Very truly yours,

Matthew M. Childs, P.A.

ACK
AFA
APP
CAF
CMU
CTR
EAG
LEG
LIN
OPC
RCH
SEC
WAS
OTH

MMC:ml

Enclosure

cc: All Parties of Record

Miami
305-577-7000
305-577-7001 Fax

West Palm Beach
561-650-7200
561-655-1509 Fax

DOCUMENT NUMBER-DATE
05760 JUN 10 97
FPSC-RECORDS/REPORTING

ORIGINAL
FILE COPY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Proposal to Extend Plan for the Recording of Certain Expenses for the Years 1998 and 1999 for Florida Power & Light Company	DOCKET NO. 970410-EI FILED: JUNE 10, 1997

MOTION TO DENY AND DISMISS

Florida Power & Light Company ("FPL"), pursuant to Rule 25-22.037, Fla. Admin. Code, hereby files this Motion to Deny and Dismiss the Petition and Protest of AmeriSteel Corporation ("Protest"). The Protest should be denied because, contrary to the requirements of Rule 25-22.036, Fla. Admin. Code, it fails to adequately state a substantial interest in the Commission action in this Docket. The Protest should also be dismissed because it seeks to expand the scope of any Commission proceeding beyond that permitted by Section 120.80(13)(b), Fla. Stats. and seeks to have the Commission hold "Section 120.57(1)" type hearings despite the failure of AmeriSteel to identify any "disputed issue of material fact" as required by Rule 25-22.036, Fla. Admin. Code.

In support of this Motion to Dismiss, FPL states:

1. Summary of "Proposed Agency Action" Procedure

Subsequent to the taking of Proposed Agency Action (and reflected in either an order or notice), one whose "substantial interests may or will be affected" by the proposed action may file

a petition for a §120.57 hearing. Rule 25-22.29.[1]

Commission Rule (25-22.029) requires that a Petition on Proposed Agency Action be in the form prescribed by Rule 25-22.036, Fla. Admin. Code, which form, among other matters, requires that this Petition contain:

> 2. ...an explanation of how his or her substantial interests will be or are affected by the Commission determination;
>
> 3. A statement of all known disputed issues of material fact. If there are none, the petition must so indicate;
>
> 4. A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief.

Rule 25-22.036(7)(a)(2)(3)and (4), Fla. Admin. Code.

Section (9)(b) sets forth alternatives the Commission has in disposing of a Protest such as AmeriSteel's. First, the Protest may be denied if it does not adequately state a substantial interest. Second, the Protest may be granted and the Commission is to determine whether a Section 120.57(1) hearing or a Section 120.57(2) hearing is required.[2]

Florida Statutes Section 120.80(13)(b) has significant impact on the procedure to be followed after a Protest to a Proposed

---

[1]Of course, it is the "affecting" of a person's substantial interests that gives rise to the opportunity to request a hearing under Sections 120.569 and 120.57, Fla. Stats. See, U.S. Sprint Communications Co. v. Nichols, 534 So.2d 698,699 (Fla. 1988).

[2]Under Section 120.509, Fla. Stats., "unless waived by all parties, Section 120.57(1) applied whenever the proceeding involves a disputed issue of material fact.

Agency Action. This section provides:

> (b) Notwithstanding §§120.569 and 120.57, a hearing on an objection to proposed agency action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

Section 120.80(13)(b) prevents a de novo hearing or a de novo proceeding addressing the action now protested by AmeriSteel. Indeed, this clear result was intended by this revision to the Administrative Procedures Act which was originally enacted in 1995 as Section 120.57(5)(b). Mr. Vandiver, General Counsel to the Commission explained this to the Senate Committee on Commerce and Economic Opportunities on April 24, 1995.[1]

> My understanding is there's a case J.W.C. Transportation versus DOT [sic]-and that basically says when an individual protests a proposed agency action all bets are off and you go back to square zero. And we have been following that case law. Now we would like to have only those issues that are in dispute go to hearing rather than going back to square one. We think it makes more sense from a policy standpoint only to fight about those things that are in dispute. This makes more sense from an efficiency standpoint to only fight about those rather than putting all issues back on the table and having a de novo hearing on all issues. And it just makes a lot more sense to us and that's why we proposed it.

Ms. Masterson, Staff Director of the Senate Committee on Commerce and Economic Opportunities in explaining the bill that

---

[1]Transcribed from audio tape prepared by and for the Senate Committee on Commerce and Economic Opportunities.

contained the subject revision to Chapter 120, Fla. Stats. stated:[4]

> The provisions restrict the issues that may be considered in a challenge of a PSC Proposed Agency Action to those issues that are in dispute only.

The decision of the Court in Fla. Department of Transportation v. J.W.C. Company 396 So.2d 778 (Fla. 1st DCA 1981) to which Mr. Vandiver referred had been followed by this Commission as establishing the proposition that a protest of an agency's proposed action commenced a de novo proceeding. See, e.g., In re: Request for Approval of 1994 Depreciation Study by United Tel. Co. of Florida and Central Tel. Co. of Florida, 95 FPSC 5:421 and, In re: Limited Investigation into Rate Setting Procedures and Alternatives for Water and Sewer Utilities, 89-5 FPSC 174.

FPL respectfully submits there are several important conclusions that may be drawn concerning the procedure to be followed with respect to AmeriSteel's Protest of Order No. PSC-97-0499-FOF-EI.

1. A protest of "proposed agency action" by the Commission does not commence a de novo proceeding.

2. The Commission is to determine whether the protestant has adequately stated a substantial interest in the Commission action.

3. If a protest is granted, the Commission is to decide whether a Section 120.57(1) or a Section 120.57(2) hearing is required.[5]

---

[4]April 24, 1995 meeting of Committee on Commerce and Economic Opportunities.

[5]In deciding whether the Protest meets the requirements for a Section 120.57(1) hearing this Commission must conclude that AmeriSteel's Protest demonstrates that there are disputed issues of [material]fact requiring such a hearing by identifying the areas of

4. The scope of any hearing held, if a protest is granted, is restricted to issues, in the proposed action, that are placed in dispute by the Protest.

5. Issues in the proposed action that are not disputed by the Protest are deemed stipulated.

Because a de novo proceeding is not commenced by the filing of a protest to a PAA and because the permissible scope of any further proceeding is restricted to the issues, if any, disputed by AmeriSteel's Protest, focus should be given to completing the preliminary steps called for by Rule 25-22.036, Fla. Admin. Code. Stated differently, the filing of a Protest does not give rise to a procedure of offering potential new issues to be addressed.

II. AmeriSteel's Mischaracterizations

AmeriSteel's Protest is based on mischaracterization and sparring with fictitious consequences constructed from such mischaracterization. For instance, AmeriSteel coins the term "Accelerated Depreciation Plan" in the very first paragraph of its twelve page Protest to describe the actions authorized by the PAA. Then, AmeriSteel uses the coined term "Accelerated Depreciation Plan" to explain and justify its arguments and that its substantial interests are affected. (See Protest paragraphs 12, 14, 15 and 23). AmeriSteel knows full well that the PAA authorized no "accelerated depreciation."

Next, AmeriSteel fabricates fictitious consequences. To do

---

controversy and alleging a factual basis for its contention. Fla. Dept. of Transportation v. J.W.C. Co. Inc., 396 So.2d 778, 789 (Fla. 1st DCA 1981; Woodholly Associates v. Dept. of Natural Resources, 451 So.2d 1002, 1004 (Fla. 1st DCA 1984).

this, AmeriSteel coins the term "Stranded Investment Docket," alleges that meetings were held to discuss "a 'continuation of the Plan' approved in the Stranded Investment Docket," (Protest at paragraph 7) and asserts that it has evidence (the so-called RDI Report) that FPL has no stranded investment. (Protest at paragraph 6). AmeriSteel thus fabricates the fictitious consequence that the PAA continues a "Plan", the "Accelerated Depreciation Plan", approved in the "Stranded Investment Docket" to address stranded investment when in fact, it further alleges, independent evidence shows there is no stranded investment for FPL.

Although FPL strongly disagrees with AmeriSteel's assertions concerning the potential for stranded investment, AmeriSteel's assertion and its fictitious conclusion are irrelevant because the PAA deals with "past deficiencies with Commission prescribed depreciation, dismantlement and nuclear decommissioning accruals" not accelerated depreciation and stranded investment.[4]

AmeriSteel continues its theme of mischaracterization and fictitious consequences in its argument that its substantial interests are adversely affected by the PAA. Once again, AmeriSteel relies on its mischaracterization of Docket No. 950359-EI and the action taken there, stating that the PAA (what it calls the "instant proposal to modify and extend the Accelerated Depreciation Plan") "similarly affects AmeriSteel's substantial

---

[4]AmeriSteel is not ignorant of this difference. AmeriSteel had no trouble stating in its April 10, 1997 pleading seeking intervention that: "The Staff proposal is geared primarily toward increased funding to correct theoretical reserve deficiencies. Pleading at paragraph 10.

interests." (Protest at paragraph 14). The object of AmeriSteel's "similarly affects" reference is the preceding paragraph 13 of the Protest. There, AmeriSteel provides the following quote from Order No. PSC-95-1035-PCO-EI:

> "...the Commission would benefit from full exploration of the policy issues to be addressed in this docket...[AmeriSteel's] participation will provide a balance to the concerns of FPL. Having this information will permit the Commission to better assess how the public interest will be served in this docket."

Intriguingly, AmeriSteel excised the following sentence from its quote and substituted an ellipsis. This excised sentence reads:

> FPL has asked the Commission to change its traditional approach to depreciation policy and practice because of the Company's concern about the adverse consequences of stranded investment to its customers.

Order No. PSC-95-1035-PCO-EI at p.2.

Certainly, the sentence AmeriSteel omitted provided important information about the Commission's observation that it "would benefit from a full exploration of the policy issues to be addressed" because the policy issues related to a change to [FPL's] traditional approach to depreciation policy and practice..." That is not the case here and AmeriSteel knows it.

AmeriSteel's argument that a justification for charges to other FPL accounts is similarly based on mischaracterization; but also, specious logic (See paragraph 19 of Protest). In addressing these so-called "additional charges" for nuclear decommissioning and fossil dismantlement (Protest at p. 10), AmeriSteel

characterizes them as "targeted" (when they are not) and then asserts that the "PAA targets additional charges to these reserves as a priority" (emphasis), when it does not. In fact, Attachment A to the PAA shows that they are items 4 and 5 of a 6 item list. Then, AmeriSteel says that because the PAA "targets" the additional decommissioning and dismantlement reserve charges "as a priority" but authorizes placing any "unused charges" in an unspecified depreciation reserve:

> ...the PAA effectively approves significant accelerated amortization of FPL generation assets in advance of a necessary review of the actual needs for added write-downs.

Protest at paragraph 19.

This argument is a complete fabrication laced with AmeriSteel's incorrect characterizations such as "accelerated amortization," "generation asset" and "added write-downs."

First, it is obvious that the decommissioning and dismantlement expenses are expressly stated to be for reserve deficiencies. Second, it is obvious that nuclear decommissioning and fossil dismantlement are expenses and thus there is no "accelerated amortization" or "added write-down." Moreover, the term "reserve deficiency" reflects that less than adequate charges to a particular reserve have been made in the past. Of course, this is precisely what the Commission said in the PAA (Order No. PSC-97-0499-FOF-EI) when it stated:

> We believe this plan is appropriate because it mitigates past deficiencies with Commission prescribed depreciation, dismantlement and nuclear decommissioning accruals.

AmeriSteel then makes the following startling and, under the circumstances rather cynical assertion:

> Regulatory treatment that allows costs that have not been incurred, and costs that are appropriately attributable to future periods, to be charges against current earnings removes the incentives for efficiency associated with generally accepted public utility ratemaking procedures.

Protest at paragraph 19.

Neither the nuclear decommissioning nor the fossil dismantlement charges for reserve deficiencies are for "costs that have not been incurred" or are "costs that are attributable to future periods." Clearly, the actual payment of the cost of decommissioning and dismantlement will occur at some future date but the appropriate accrual of those costs occurs over the useful life of those units. And by definition, a depreciation reserve deficiency reflects costs that have already been incurred. Of course, AmeriSteel knows this all too well but has chosen the other approach.

The cynical aspect of AmeriSteel's assertion relates to its comments concerning "incentives for efficiency." First of all, the decommissioning reserve is a funded reserve. Second, it is because of FPL's significant efforts to improve efficiency and reduce costs that it is able to agree to take the action called for by the PAA without increasing rates. AmeriSteel's tactics should be recognized and the cynicism of AmeriSteel teaching about "generally accepted utility ratemaking procedures" should be thoroughly appreciated.

III. AmeriSteel Fails To Adequately Allege Its Substantial Interest Will Be Affected.

AmeriSteel's Protest does not comply with Rules 25-22.036(7)(a)(2) and 25-22.039 and adequately allege how its substantial interests will be affected by the PAA. As a consequence, this Commission must deny the Protest under Section (9)(b) of Rule 25-22.036.

FPL incorporates and adopts herein its April 25, 1997 Response to Petition of AmeriSteel Corporation for Leave to Intervene. Because of this adoption FPL will not here restate its full argument concerning AmeriSteel's failure to adequately allege how its substantial interests will be affected.

The Commission is well aware of the two-prong test framed by the Court in Agrico[7] for determining whether a person is entitled to intervene in an agency proceeding on the basis of an allegation that its substantial interest will be affected by the agency's action.

The first prong of that test is that the person has shown "that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing." 406 So.2d at 482. Other than the argument based on its misrepresentation of Order No. PSC-95-1035-PCO-EI which has already been addressed, AmeriSteel makes but two conclusory stabs at addressing this test. These are presented in paragraphs 11 and 12 of the Protest. They

[7]Agrico Chemical Company v. The Dept. of Environmental Regulation 406 So.2d 478,482 (Fla. 2d DCA 1981), rev. denied 415 so.2d 1359, 1361 (Fla. 1982).

read:

> 1. "As a large customer of FPL, AmeriSteel has substantial interest in regulatory accounting charges that affect recovery of investments charged to ratepayers and FPL reported earnings."
>
> 2. AmeriSteel has a significant interest in ensuring that FPL does not take unnecessary or unwarranted charges. The proposal to extend the "Added Expense Plan" described in this docket creates a huge amount of additional depreciation and other charges that will offset FPL's revenue and earnings growth in the years 1998 and 1999. [The last two sentences of this paragraph are omitted--they address asserted issues].

In effect, AmeriSteel simply offers a conclusory statement making no attempt to identify an "injury in fact" that will be suffered.

The second prong of the Agrico test is that "his substantial injury is of a type or nature which the proceeding is designed to protect." 406 So. 2d at 482. AmeriSteel makes no apparent effort to even address this requirement in the section of the Protest identified as addressing substantial interest. Instead, however, in paragraph 20 of the Protest, AmeriSteel establishes that 1) it has no direct, non-speculative substantial interest that will be affected in this proceeding and 2) AmeriSteel's interest is not of a type which this proceeding is designed to protect. Paragraph 20 reads:

> 20. If the Plan were not extended, the depressing effect of these added charges on FPL's reported earnings would be lifted, thereby raising the prospect of excess FPL profits and commission hearings to consider if refunds to consumers are warranted. Hearings are needed on the impact this Plan is likely to have on FPL's customers. (emphasis added).

FPL respectfully submits that a person has no right to a Commission proceeding to manufacture the basis for a contention in a future proceeding. Nevertheless, AmeriSteel's, acknowledgement that a "double if" logic chain is required as is a future additional Commission proceeding to reach the result it seeks, establishes its lack of substantial interest here.

It might also be helpful to remove some of the manufactured gloss--such as the term "Accelerated Depreciation Plan" --from AmeriSteel's argument and pose the question: Just how is AmeriSteel's substantial interest adversely affected by correcting the reserve deficiencies, if any, for the cost of nuclear decommissioning by funding the reserve?

AmeriSteel's Protest identifies no disputed issue of material fact associated with addressing the decommissioning reserve deficiency. Moreover, AmeriSteel's Protest identifies no disputed issue of policy or law concerning the decommissioning reserve deficiency. The same is true for the other actions authorized by the Commission in the PAA.

Significantly, nowhere does the AmeriSteel Protest dispute the factual or policy basis for the Commission's conclusion that:

> "This Plan is appropriate because it mitigates past deficiencies with Commission prescribed depreciation, dismantlement, and nuclear decommissioning accruals."

The closest one can come to concluding that AmeriSteel's Protest has identified an issue in dispute is to posit that AmeriSteel has identified as an issue of policy whether it is appropriate to fail to address a reserve deficiency when the

opportunity arises to do so without increasing rates and charges to customers and instead to defer addressing those deficiencies to a later date. Were this an appropriate issue of policy then, this Commission should recognize the past opportunity to argue by AmeriSteel and that AmeriSteel has alleged no substantial interest that need to be addressed in this proceeding.

WHEREFORE, FPL hereby files this Motion to Deny and Dismiss the Petition and Protest of AmeriSteel pursuant to Rule 25-22.037, Fla. Admin. Code. The Protest should be denied because, contrary to the requirements of Rule 25-22.036, Fla. Admin. Code, it fails to adequately state a substantial interest in the Commission action in this Docket. The Protest should also be dismissed because it seeks to expand the scope of any Commission proceeding beyond that permitted by Section 120.80(13)(b), Fla. Stats. and seeks to have the Commission hold "Section 120.57(1)" type hearings despite the failure of AmeriSteel to identify any "disputed issue of material fact" as required by Rule 25-22.036, Fla. Admin. Code.

DATED this 10th day of June, 1997.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP
Suite 601
215 South Monroe Street
Tallahassee, FL 32301
Attorneys for Florida Power
& Light Company

By: _____
Matthew M. Childs, P.A.

CERTIFICATE OF SERVICE
DOCKET NO. 970410-EI

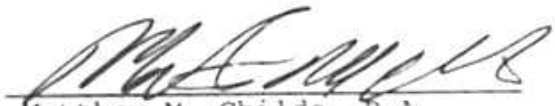
I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Motion to Deny and Dismiss has been furnished by Hand Delivery (*), or U.S. Mail this 10th day of June, 1997, to the following:

Robert V. Elias, Esq.*
Division of Legal Services
FPSC
2540 Shumard Oak Blvd.#370
Tallahassee, FL 32399

John Roger Howe, Esq.
Office of Public Counsel
111 West Madison Street
Room 812
Tallahassee, FL 32399

Richard J. Salem, Esq.
Marian B. Rush, Esq.
Salem, Saxon & Nielsen, P.A.
P.O. Box 3399
Tampa, Florida 33601

Peter J.P. Brickfield, Esq.
James W. Brew, Esq.
Brickfield, Burchette & Ritts
1025 Thomas Jefferson St. NW
Eighth Floor-West Tower
Washington, D.C. 20007



Matthew M. Childs, P.A.