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Matthew M. Childs P.A.

August 13, 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 Response to AmeriSteel's Motions in the above referenced docket.

Very truly yours,

Matthew M. Childs
Matthew M. Childs, P.A.

MMC:ml

Enclosure

cc: All Parties of Record

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EPSC RECORDS/REPORTING

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: AUGUST 13, 1997

RESPONSE TO AMERISTEEL'S MOTIONS

Florida Power & Light Company ("FPL") hereby files this Response to AmeriSteel's Motions to Amend and Supplement and for Associated Relief. AmeriSteel's Motions should be denied. Moreover, it's barely concealed effort to improperly submit additional legal argument on a pending Motion and for which oral argument has already been held should be summarily denied. This memorandum is not intended to be FPL's response to the Amended and Supplemental Petition.

Introduction

Pursuant to notice argument was held on FPL's Motion to Deny and Dismiss AmeriSteel's Petition and Protest to Proposed Agency Action on July 15, 1997. FPL's Motion to Deny and Dismiss was filed on June 10, 1997 and the Response thereto by AmeriSteel was filed on June 23, 1997. Under the Commission's rules of practice and procedure, it is the Response to the Motion to Deny and Dismiss which is to contain AmeriSteel's legal argument. See Rule 25-22.037(2)(b).

After deferral from the July 15, 1997 Agenda following oral argument by both parties, this matter was scheduled for further consideration by the Commission at its August 18, 1997 Agenda.

On August 6, 1997 AmeriSteel filed "various pleadings" including its Motion for Leave to file an Amended and Supplemental Petition together with the document entitled "Amended and Supplemental Petition...of AmeriSteel." AmeriSteel's filing of August 6, 1997 was served on FPL by U.S. Mail which would mean that, coincidentally no doubt, FPL would have to file its Response to the Motion no later than August 18, 1997, the day the matter was scheduled for further consideration by the Commission.

The "Amended and Supplemental Petition" is nothing more than additional legal argument submitted improperly and out of time. The "Amended and Supplemental Petition" is not even an amendment to the original. In fact, this filing states:

The Amendment is in addition to AmeriSteel's previously filed Petition which it incorporates herein by reference.

"Amended Petition" at p. 1. Instead of being an amendment or a supplement, the "Table of Contents" provided by AmeriSteel further confirms that the nearly twenty pages of legal argument is intended to be just that---legal argument. The contents of the Amended and Supplemental Petition as identified by that filing are:

1. to address the contemplated change in policy regarding customer standing requirements as revealed at oral argument,
2. to restate AmeriSteel's objection to

the PAA and,

3. to discuss legal deficiencies in the PAA.

It is equally obvious that AmeriSteel did not broach the subject of potentially submitting additional legal argument with the Commission, with the Commission Staff or even FPL. Instead, AmeriSteel waited until shortly before the next Commission Agenda and filed its extensive legal argument without authorization and called it an Amended and Supplemental Petition.

In addition to presenting obviously improper additional legal argument, the legal issues addressed by AmeriSteel are newly fabricated issues. Thus, AmeriSteel chooses to ignore the procedural posture of this case and the Administrative Procedure Act and fabricate that the Commission's Rule 25-22.029(4), F.A.C., provides a standard for "standing" that is less "stringent" than called for by the APA. In addition, by choosing to actively ignore the APA, AmeriSteel reaches the anomalous conclusion that agencies cannot issue Proposed Agency Action orders because the agency must first hold a hearing and base its decision on evidence of record, etc.

The attempt to submit additional legal argument after the time to do so has passed and after oral argument before this Commission is not only improper but prejudicial to FPL.

The clear and obvious intent is to achieve delay in this proceeding and to confuse both the status of the case and the status of the existing allegations and argument on standing and whether a Section 120.57(1) hearing should be held.

The Fabricated Legal Issues

a. There Is No Less Stringent "Standing" Standard

AmeriSteel presents the preposterous new legal argument that Rule 25-22.029(4), F.A.C. provides the standard for standing in PSC proceedings; that the use of the words "may or will" make the PSC's standard less "stringent" and that the application of a standard for standing more "stringent" than that based on the "may or will" language would be a "radical change in agency policy requiring record support to avoid being defective policy under the APA."

The additional gloss on this argument is that the new and improperly more "stringent" standard for standing emerged at oral argument held on July 15, 1997.

AmeriSteel conveniently overlooks that the matter at issue is its petition for a "section 120.57(1) hearing concerning the PSC's Proposed Agency Action." AmeriSteel thus conveniently overlooks that it is the APA, sections 120.569 and 120.57, that provide the right to a hearing and sets the "standards" therefore, not an independent PSC rule. Moreover, and more importantly, AmeriSteel overlooks, with some consciousness that it is so doing, the decision by the Florida Supreme Court in AmeriSteel Corporation v. Clark, 691 So. 2d 473 (Fla. 1997).

The decision in AmeriSteel addressed a PAA issued by the PSC and to which Rule 25-22.029(4) applied. In the AmeriSteel decision, the Florida Supreme Court directly addresses the very Rule 25-22.29 on which AmeriSteel relies for setting a less "stringent" standard for standing than the APA. The Court held:

Only persons whose substantial interests may or will be affected by the Commission's action may file a petition for a 120.57 hearing. See §120.57, Florida Statutes (1995); Fla. Admin. Code R. 25-22.029. To demonstrate standing to intervene under *Agrico*, a petitioner must demonstrate:

1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

406 So. 2d at 482. As the district court explained in that case, the first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. *Id.*

FPL points out that the AmeriSteel Corporation v. Clark opinion is not some unknown or obscure legal precedent. Moreover, the very same attorneys appearing in this proceeding are listed as counsel for AmeriSteel in the AmeriSteel Corporation case. FPL submits that this presentation of a fabricated legal issue and misrepresentation of the law is prejudicial to FPL.

On this point, FPL would add that AmeriSteel's companion contention that the application of the more "stringent" standard must be justified by record evidence because it represents a new policy is equally defective and lacking in any colorable credibility.

b. There is no Requirement for a Hearing in Advance of a PAA

Another episode of active misrepresentation by AmeriSteel occurs when it asserts:

The PAA is not based upon any oral or written evidence, finding of fact, conclusion of law, expert testimony or policy considerations as

required under Florida's Administrative Procedures Act ("the APA"), the Florida Administrative Code ("FAC"), PSC precedent, or Florida case law.

Amended Petition at pp.12 and 13.

AmeriSteel is helped greatly in making this extraordinary assertion by not presenting even one applicable citation to authority of any recognizable kind. This extraordinary assertion would presumably assist AmeriSteel significantly because it would mean the PAA at issue here is invalid. Stated differently AmeriSteel would not have to establish that it was entitled to a hearing after the PAA was entered; it simply argues that the hearing is required before the PAA is entered.

AmeriSteel simply cites authority relating to how 120.57(1) hearings are to be conducted and the standards on appeal in reviewing agency decision made after a 120.57(1) hearing. This precedent does not establish when a 120.57(1) hearing is required. In fact, McDonald v. Dept. of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977), miscited as authority by AmeriSteel, shows that AmeriSteel's present contention is without merit. In McDonald, the Court stated:

Petitioners thereupon requested that formal proceedings be conducted as required by the APA **when a party's substantial interests are to be determined and there is a disputed issue of material fact.** Section 120.57(1).

346, So. 2d 569 at 575. Similarly, the AmeriSteel opinion by the Fla. Supreme Court makes the same point when it states:

Section 120.57, Florida Statutes (1995) and Rule 25-22.029 of the Florida Administrative Code, entitled "Point of Entry into Proposed

Agency Action Proceedings," require the Commission to give notice and an opportunity to be heard to persons affected by its actions.

691 So. 2d at 479. Of course the test to establish entitlement to a 120.57 hearing is another portion of this opinion which AmeriSteel failed to cite. Once again, AmeriSteel has presented a false legal issue and its further consideration would be prejudicial to FPL.

Conclusion

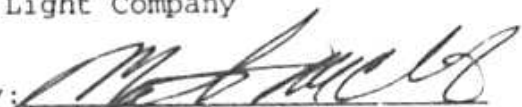
For the reasons stated above, AmeriSteel's Motions should be summarily denied.

DATED this 13th day of August, 1997.

Respectfully submitted,

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

By:


Matthew M. Childs, P.A.
Jonathan Sjostrom

CERTIFICATE OF SERVICE
DOCKET NO. 970410-EI

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to AmeriSteel's Motions has been furnished by Hand Delivery (*), or U.S. Mail this 13th day of August, 1997, to the following:

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