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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Duke Energy New Smyrna Beach Power Company, L.L.P. for Declaratory Statement Concerning Eligibility To Obtain Determination of Need Pursuant to Section 403.519, Florida Statutes.	)	DOCKET NO. 971446-EU FILED: December 8, 1997

DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY, L.L.P.'s MOTION TO DISMISS FLORIDA POWER CORPORATION'S PETITION TO INTERVENE AND TO DENY FLORIDA POWER CORPORATION'S REQUEST FOR ADMINISTRATIVE HEARING

Duke Energy New Smyrna Beach Power Company, L.L.P. ("Duke"), by and through undersigned counsel and pursuant to Rule 25-22.037, Florida Administrative Code ("F.A.C.") hereby files this motion to dismiss Florida Power Corporation's ("FPC's") Petition to Intervene and deny FPC's request for an administrative hearing, and in support thereof states as follows.

Introduction

1. On November 4, 1997 Duke filed with the Florida Public Service Commission ("FPSC" or "Commission") a Petition for Declaratory Statement which initiated this proceeding. In the Petition, Duke requested that the Commission confirm that Duke is entitled to apply to the Commission for a determination of need pursuant to Section 403.519, Florida Statutes, and the Florida Electrical Power Plant Siting Act ("Siting Act"). In the

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alternative, Duke requested that the Commission find that no determination of need is required for the project described in the Petition.

2. On December 1, 1997, FPC filed its Petition to Intervene in which it attempted to intervene in this docket. As a matter of law, FPC does not and cannot demonstrate standing to participate in this proceeding and FPC's Petition should be dismissed.

FPC Lacks Standing to Intervene in this Proceeding

3. Though FPC's Petition contains allegations of numerous injuries that FPC will purportedly suffer as a result of Duke's proposed project and which FPC contends serve as the basis for standing in this proceeding, FPC's allegations fall into three general categories: (1) alleged impairment of FPC's ability to plan for, and ensure the reliability of, its transmission system; (2) alleged uneconomic duplication of generating facilities; and (3) alleged injuries flowing from the denial of FPC's status as an indispensable party in some future need determination proceeding. None of these purported injuries are sufficient to provide FPC with standing to participate in this proceeding.

4. In Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 and 415 So. 2d 1361 (Fla. 1982), the court enunciated a two-prong test for establishing standing in a Chapter 120 proceeding. To have a substantial interest in the outcome of an administrative proceeding, the court held that 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 the type and nature which the proceeding is designed to protect.

Id. at 482. FPC's Petition fails to satisfy either prong of the Agrico test.

5. To satisfy the first prong, a petitioner must assert that the agency action will result in an injury which is immediate, not remote. The injury cannot be based on speculation or conjecture. Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); International Jai-Alai Players Association v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1226 (Fla. 3rd DCA 1990) (finding alleged injuries to be "too remote and speculative" to qualify under the first prong of the Agrico test). FPC's Petition contains numerous allegations of injury, all of which

are too speculative to meet the first prong of the Agrico standing test.

6. All of FPC's purported injuries to its substantial interests are linked to the construction of a potential future merchant power plant and FPC asserts that this proceeding somehow will authorize construction of such a plant. FPC's assertion is simply not accurate. The purpose of this proceeding is simply to answer the question posed by Duke. If the Commission determines that Duke is an "applicant" eligible to pursue a determination of need, it by no means follows that Duke will be authorized to immediately construct a merchant power plant, nor that the construction of such a power plant would then adversely affect FPC's ability to plan and operate its system or result in uneconomic duplication. Accordingly, FPC's alleged injuries are too speculative and remote to meet the "immediacy" prong of the Agrico standing test.

7. Moreover, FPC's asserted status as an indispensable party to this proceeding is misplaced. A utility is an indispensable party to a need determination proceeding when the proceeding addresses a facility the output of which will be sold to the utility pursuant to a contemporaneous power purchase contract that the Commission is asked to approve. In the first

place, this proceeding is a declaratory statement proceeding addressing Duke's status as an applicant, not a need determination proceeding, and certainly not a need determination proceeding for a facility whose output FPC would be required to buy. Again, any impact on FPC is at most highly speculative: if the requested declaratory statement is granted, the contemplated merchant plant project will proceed to the need determination and site certification processes and, if successful, will be constructed. FPC is not, and -- unless FPC chooses to enter into a binding contract -- will never be required to buy the plant's output.

8. The second prong of the Agrico test requires a showing that the injury is of the type and nature against which the proceeding is designed to protect. Stated alternatively, a petitioner's injury must fall within the "zone of interest" to be protected by the proceeding and the rules and statutes at issue.

9. As noted above, this proceeding is a declaratory statement proceeding. Section 120.565(1), Florida Statutes, provides that declaratory statements are intended to provide a petitioner with "an agency's opinion as to the applicability of a statutory provision, or of any rule or order of an agency, as

it applies to the petitioner's particular set of circumstances."[1] As such "there will normally be no person, other than the petitioner [in this case Duke] who will be affected by the declaratory statement." Florida Optometric Association v. Department of Professional Regulation, 567 So 2d 928, 936 (Fla. 1st DCA 1990).

10. None of the injuries that FPC has alleged will occur are of the "type and nature" against which a declaratory statement proceeding is designed to protect. By its very nature, this declaratory statement proceeding is designed solely to provide a response to specific questions posed by Duke. As a matter of law, FPC does not fall within the "zone of interest" of the prceeding and thus has no cognizable substantial interest that can be affected. Accordingly, FPC has failed to meet the second prong of the Agrico standing test.

11. As described above, FPC alleges that the proposed merchant power plant may result in "uneconomic duplication" of generating facilities. Under the second prong of the Agrico test, economic injury is not sufficient to form the basis for standing unless the proceeding and underlying statutory framework

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[1]The Commission rule concerning declaratory statements, Rule 25-22.020, F.A.C., contains similar language.

are specifically designed to address economic issues. See Agrico, 406 So. 2d at 482. This declaratory statement proceeding is in no way related to the issue of uneconomic duplication of generating facilities and any alleged economic consequences to FPC as a result of this proceeding do not constitute a cognizable substantial interest under the second prong of the Agrico test. See In Re: Peoples Gas System, Inc., 1995 WL 121390 (Fla. P.S.C., March 13, 1995), Order No. PSC-95-0348-FOF-GU at 3 ("TECO is only speculating what might happen if the rider is implemented. Speculation as to future economic detriment is too remote to establish standing."); In Re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, Docket No. 860725-EU. (Fla. P.S.C.), FPSC Order No. 16581 at 2.

A Hearing is Not Proper in this Proceeding.

12. In its Petition, FPC has requested a hearing pursuant to Section 120.57(2), Florida Statutes (Petition at 18). FPC's request should be denied.

13. Duke's Petition for Declaratory Statement poses a narrowly drawn question that does not affect FPC's substantial interests. The question presented, viz., whether Duke is an

"applicant" eligible to initiate a need determination proceeding, relates solely to Duke's status and rights under a statute administered by the Commission. Duke has properly framed its request for a declaratory statement on the basis of the Commission's application and interpretation of the statute to the facts alleged in its petition: this is thus a question of law for the Commission. Accordingly, a hearing pursuant to Chapter 120, Florida Statutes, is unnecessary to protect FPC's legally cognizable interests, and FPC has no right to request such a hearing. See Florida Optometric Association, 567 So. 2d at 936.

WHEREFORE, Duke Energy New Smyrna Beach Power Company, L.L.P., respectfully requests that the Florida Public Service Commission DISMISS Florida Power Corporation's Petition to Intervene in this docket and DENY Florida Power's Corporation's request for an administrative hearing.

Respectfully submitted this 8th day of December, 1997.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail or hand-delivery(*) on this 8th day of December, 1997 to the following:

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