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August 23, 1999

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Florida Public Service Commission
4075 Esplanade Way, Room 110
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RE: DOCKET NO. 981890-EU

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen (15) copies of Florida Power & Light Company's Response to Reliant Energy Power Generation, Inc.'s Petition for Leave to Intervene in the above referenced docket.

Very truly yours,

Charles A. Guyton
Charles A. Guyton

CAG/ld

cc: All Parties of Record

- AFA 2
- APP _____
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- MAS 5
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IN RE: Generic Investigation) DOCKET NO. 981890-EI
Into the Aggregate Electric) DATE: August 23, 1999
Utility Reserve Margins Planned)
for Peninsular Florida)

**RESPONSE OF FLORIDA POWER & LIGHT COMPANY
TO RELIANT ENERGY POWER GENERATION, INC.'S
PETITION FOR LEAVE TO INTERVENE**

Florida Power & Light Company ("FPL") hereby files this its response to the July 30, 1999 Petition for Leave to Intervene in this docket filed by Reliant Energy Power Generation, Inc. ("Reliant"). In support of its response to the effect that intervention is inappropriate, FPL states:

1. This docket is not appropriate for intervention because it is a generic investigation proceeding. The Commission has voted to conduct an investigation. The investigation is preliminary to agency action (the Commission has not taken agency action or proposed agency action). Under the Administrative Procedure Act, an investigation is not to be conducted as a §120.57 proceeding. Section 120.57(5), Fla. Stat. (1997) ("This section does not apply to agency investigations preliminary to agency action.") Similarly, under the Uniform Rules of Procedure adopted pursuant to the APA, the rules governing decisions determining substantial interests,

Chapter 28-106, do not apply to "agency investigations or determinations of probable cause preliminary to agency action." Rule 28.106.101, F.A.C. Intervention, whether under the Uniform Rules of Procedure, Rule 28-106.205, or under the Commission's procedural rules, Rule 25-22.039, is limited to proceedings in which substantial interests are being determined. Since an investigation is not, under the APA, a proceeding in which substantial interests are determined and the rules governing the determination of substantial interests do not apply, intervention is not appropriate in this investigation.

2. If this proceeding were not a generic investigation proceeding such that intervention might otherwise be appropriate then, FPL without waving its objection to that effect, notes that the Petition for Leave to Intervene filed by Reliant does not conform to Rule 28-106.205 or to Rule 25-22.039 (as to Rule 25-22.039 titled Intervention, FPL would point out that although this Rule has been identified in Chapter 25-40.001 as an exception to the Uniform Rules of Procedure, the exception authorized was only as to the timing by which a petition for intervention must be filed.)

3. Looking to Rule 25-22.039, the Commission's procedural rule on intervention, Reliant's petition is deficient. The rule states that the petition "must conform with Commission Rule 25-22.036(7)(a)," but Reliant's petition cannot so comply because the

rule referred to has been repealed. Order No. PSC-99-0413-NOR-PU.

Moreover, the petition to intervene fails to include:

allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding 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 through the proceeding.

Since this requirement is the same as the requirement under the uniform rule addressing intervention, the failure of Reliant's petition to intervene to satisfy this requirement discussed in paragraphs 5 and 6 below is equally applicable here.

4. Looking to Rule 28-106.205, the uniform rule applicable to intervention, Reliant's petition to intervene is deficient. Reliant's petition to intervene does not "conform to Rule 28-106.201(2)" as required.

- a. The petition does not contain a "statement of when and how the petitioner received notice of the agency decision" as required by subsection 28-106.201(2)(c) (because there has been no agency decision, which reflects that this is not a proceeding determining substantial interests because there has not been an agency action, the event necessary to initiate a 120.57 proceeding).
- b. The petition to intervene does not contain a "concise statement of the ultimate facts alleged, including the

specific facts the petitioner contends warrants reversal or modification of the agency's proposed action" as required by Rule 28-106.201(2)(c) (once again certain allegations necessary for a petition have not been made because there has not been any agency action, which is contemplated under the APA and the Uniform Rules as the event initiating a 120.57 proceeding).

c. The petition to intervene does not contain a "statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action (because the agency has not taken proposed action, which is contemplated as preceding a 120.57 proceeding).

d. The petition to intervene does not contain a "statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the agency to take with respect to the agency's proposed action" as required by Rule 28-106.201(2)(g).

5. In addition, nowhere in its petition to intervene does Reliant present allegations:

sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to agency rule or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

This is an essential requirement under Rule 28.106.205 (and Rule 25-22.039). Reliant does not plead any constitutional, statutory or rule based right to participate. Reliant identifies no substantial interest that will be determined; in fact, Reliant concedes that if there are any parties whose substantial interests may be determined in this proceeding it is the substantial interests of "load serving retail utilities" and not Reliant: "In this docket, the Commission will consider the reserve margin that the peninsular load-serving retail utilities should be required to plan and meet." Reliant Petition at ¶ 3.

6. Reliant's attempt to allege that it has substantial interests that "will be affected through the proceeding" are deficient. To have standing to participate in a Section 120.57 proceeding on the basis that the person's substantial interests will be affected, the person must show: "1) that he will suffer an injury in fact of sufficient immediacy to entitle him to a Section 120.57 hearing; and 2) that his injury must be of the type or nature the proceeding is designed to protect." Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), rev. den. 415 So.2d 1359, 1361 (Fla. 1982). "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Id. Both requirements must be satisfied for a person to successfully demonstrate a substantial interest that will be affected by the

determination in the proceeding. Id. Case law in Florida is fairly well developed regarding what it takes to satisfy each of these requirements. Reliant's allegations do not meet the requirements of standing case law.

a. Reliant fails to allege injury.

Nowhere in its petition has Reliant alleged any **injury** as a result of the Commission's potential determination in this case. This is a fatal deficiency, for the Agrico test requires the allegation of **injury**. The fact that Reliant is interested in how the Commission acts in this proceeding is not a basis for standing. The following discussion addresses the necessity of a party such as Reliant alleging an injury rather than a mere interest:

We initially observe that not everyone having an interest in the outcome of a particular dispute over an agency's interpretation of law submitted to its charge, or the agency's application of that law in determining the rights and interests of members of the government or the public, is entitled to participate as a party in an administrative proceeding to resolve the dispute. Were that not so, each interested citizen could, merely by expressing an interest, participate in the agency's effort to govern, a result that would unquestionably impede the ability of the agency to function efficiently and inevitably cause an increase in the number of litigated disputes well above the number that administrative and appellate judges are capable of handling. Therefore, the legislature must define and the courts must enforce certain limits on the public's right to participate in administrative proceedings. The concept of standing is nothing more than a selective method for

restricting access to the adjudicative process, whether it be administrative or purely judicial, by limiting the proceeding to actual disputes between persons whose rights and interests subject to protection are immediately and substantially affected.

Although one need not have his rights *determined* to become a party to a licensing proceeding, **party status will be accorded only to those who will suffer an injury to their substantial interests in a manner sought to be prevented by the statutory scheme.**

Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279, 1284 (Fla. 1st DCA 1988), rev. den., 542 So.2d 1333 (Fla. 1989)(emphasis added). By failing to allege any injury in its petition¹, Reliant has failed the Agrico standing test.

b. Reliant Pleads No Injury In Fact

Indirect, speculative, conjectural, hypothetical or remote injuries are not sufficient to meet the "injury in fact" prong of the Agrico standing test. Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987), rev. den., 513 So.2d 1063 (Fla. 1987); Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988), rev. den., 542 So.2d 1333 (Fla. 1989); International Jai-Alai Players Association v. Florida Pari-Mutual Commission, 561 So.2d 1224 (Fla. 3d DCA 1990. There must be either an actual injury

¹In determining standing, the Commission is limited to the allegations of the pleading. Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987), rev. den., 513 So.2d 1063 (Fla. 1987).

or an immediate danger of a direct injury arising from challenged official conduct to meet this test.

In Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987), rev. den., 513 So.2d 1063 (Fla. 1987), the First District Court of Appeals elaborated on the immediate injury in fact requirement. It stated that, "Agrico requires that a party show that he will suffer an immediate injury as a result of the agency action." 506 So.2d at 432. The court went on to state:

[A]bstract injury is not enough. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury **as a result of the challenged official conduct.** See *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38L.Ed.2d 674 (1974) and *Jerry*, 353 So.2d at 1235. The court in *Jerry* therefore concluded that a petitioner's allegations must be of "sufficient immediacy and reality" to confer standing.

Accordingly, our construction of *Agrico*, *Firefighters*, and *Jerry* leads us to the conclusion that a petitioner can satisfy the injury-in-fact standard set forth in *Agrico* by demonstrating in his petition either: (1) that he has sustained actual injury in fact at the time of filing his petition; or (2) that he is immediately in danger of sustaining some direct injury as a result of the challenged agency's action.

506 So.2d at 433 (emphasis added).

Applying the standard articulated in the Village Park case, it is clear that the allegations in Reliant's petition to intervene

fail to allege either (1) that Reliant has already sustained injury in fact or (2) that Reliant is in immediate danger of sustaining some direct injury as a result of the challenged agency action. Reliant makes no attempt to allege it has already sustained an injury. Instead, it attempts to allege not that it is "immediately in danger of sustaining some direct injury" but that it has interests that may be affected.

Reliant's alleged interests are quite remote and speculative. Reliant has not alleged it has generating assets in Florida. According to Reliant, it is (1) negotiating acquisition of generation assets (which it may or may not acquire due to actions totally independent of this proceeding - remember, Reliant is the second bidder to engage in such negotiations for these assets) and (2) "is otherwise exploring opportunities to participate in the wholesale generation market in Florida." By its own admissions, Reliant has no generation assets in Florida that might be affected by the Commission's determination in this docket, and it may never have such assets. It is highly speculative and conjectural whether it will have such assets.

More importantly, even if Reliant acquires or builds such assets at some indeterminate time in the future, there is no demonstration that the Commission action in this proceeding, if any (remember, the Commission has not taken any action as yet, it has not announced action it intends to take, and the Commission may not

take any action) would affect Reliant's interests. Reliant alleges that the Commission "may consider the manner in which load-serving utilities should take the capacity of wholesale providers into account when quantifying their respective reserve margins." Well, Reliant is not a load-serving utility that will have its interests determined if the Commission makes such a determination, and Reliant has not established that it is even a wholesale provider in Florida. Even if the Commission were to improperly promulgate policy in this proceeding that stated how retail load-serving utilities should take into account wholesale providers when computing reserve margins, this is a remote impact on Reliant. It would not determine Reliant's ability to acquire or build capacity. That is an interest that is determined through contract or in a determination of need. It would not determine Reliant's ability to sell power in a competitive wholesale market; that is an interest determined by prices in the market, not the determinations to be made in this proceeding. Any impact the decision in this docket might have on Reliant is indirect and speculative. It cannot be reasonably concluded that Reliant has met the standard of showing that its substantial interests "will be affected," particularly when the case law setting forth what that requirement means requires a showing of either actual injury or immediate danger of direct injury.

Reliant also alleges a remote, speculative interest as a

potential competitive wholesale provider that a restrictive reserve margin policy developed in this case may adversely affect its interests by limiting the opportunity to construct or acquire generation assets. First, this proceeding is not a proceeding to determine policy. That must be undertaken through rulemaking. So a suggestion that this case may establish policy is inaccurate and not a basis to establish a substantial interest. Second, there are no allegations that even suggest how a decision in this case might or could, much less would, limit Reliant's opportunity to construct and/or acquire generation assets. This proceeding does not address the construction or acquisition of wholesale generation assets in Florida. It is limited to the Commission's reserve margins for the retail utilities over which the Commission has jurisdiction. The proceeding is not intended to address wholesale providers' construction or acquisition of generation assets, and Reliant has failed to plead "any immediate danger of injury" to its potential interests in building or acquiring such assets.

Reliant has pled a highly speculative interest rather than demonstrating that has suffered an injury in fact or that it is immediate danger of suffering an injury in fact. Remote, speculative and conjectural interests that cannot be shown to even be injuries do not pass the "injury in fact" requirement of Agrico Village Park, 506 So.2d at 430,433; International Jai-Alai Players, 561 So.2d at 1226.

c. Reliant's Interests Fall Outside the Zone of Interest

The second prong of the Agrico standing test requires that, "the injury must be of the type or nature the proceeding is designed to protect." 406 So.2d at 482. This requirement is sometimes called the "zone of interest" test. See, Society of Ophthalmology, 532 So.2d at 1285. Typically, when applying the "zone of interest" test, the agency or court examines the nature of the injury alleged in the pleading and then determines whether the statute or rule governing the proceeding is intended to protect such an interest. If not, because the party is outside the zone of interest of the proceeding, the party lacks standing. One important conclusion in the established case law is that absent clear statutory authority, competitive economic interests do not satisfy the "zone of interest" requirement. Agrico, 406 So.2d at 481; Shared Services, Inc. v. State Department of Health and Rehabilitative Services, 426 So.2d 56, 59 (Fla. 1st DCA 1983); Society of Ophthalmology, 532 So.2d at 1279-80; International Jai-Alai Players, 561 So.2d at 1226; City of Sunrise v. South Florida Water Management District, 615 So.2d 746, 747 (Fla. 4th DCA 1993).

Reliant's statement of substantial interests focuses solely on Reliant's competitive economic interests as a potential competitive wholesale provider of electricity in Florida. The fundamental purpose of the statutes pursuant to which the Commission claims to be acting in this case is to assure grid reliability for retail

customers. The various statutory sections under which the Commission acts are designed solely to protect customers. These statutes are not intended to protect or otherwise address the competitive economic interests of wholesale providers of electricity. Reliant's professed interest (not injury, for none is alleged) fall outside the zone of interest of the governing statutes.

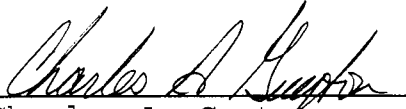
7. Finally, Reliant cannot allege that its substantial interests will be determined or affected in this proceeding without also alleging that the Commission will violate the APA. This proceeding is an investigation preliminary to agency action. No agency action has been taken or proposed. By its express terms Section 120.57 does not apply to agency investigations preliminary to agency action. If, as Reliant alleges, it has substantial interests that may be affected in this investigation, Reliant is also alleging that the Commission is acting improperly by conducting its investigation as a proceeding to determine substantial interests, for Section 120.57(5), Florida Statutes (1997) provides that, [t]his section does not apply to agency investigations preliminary to agency action." Stated differently, this proceeding is an investigation preliminary to agency action; therefore, neither Reliant nor any other entity can have its substantial interests determined in this proceeding. Investigations do not determine substantial interests; that is why

Section 120.57 is, by express terms of the statute, inapplicable to investigations. By alleging that it will have its substantial interests determined in this investigation, Reliant is alleging that the Commission is misapplying the APA.

WHEREFORE, FPL hereby files this its response to the Petition to Intervene by Reliant and submits that intervention is inappropriate.

Respectfully submitted,

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By: 
Charles A. Guyton

CERTIFICATE OF SERVICE
DOCKET NO. 981890-EU

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to Reliant Energy Power Generation, Inc.'s Petition for Leave to Intervene furnished by Hand Delivery*, U.S. Mail this 23rd day of August, 1999 to the following:

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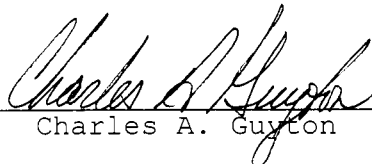
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