

Matthew M. Childs, P.A.

January 12, 2001

-VIA HAND DELIVERY-

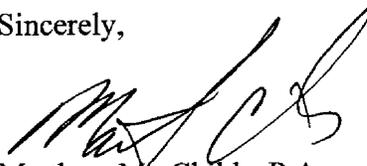
Ms. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 001148-EI

Dear Ms. Bayó:

In compliance with the Order Establishing Procedure in this docket and Rule 25-22.028, F.A.C., I am enclosing for filing the original and seven (7) copies of Florida Power & Light Company's Response in Opposition to Dynegy, Inc.'s Petition to Intervene, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows 98, and the word processing software in which the document appears is WordPerfect 9.

Sincerely,



Matthew M. Childs, P.A.

Enclosure

cc: Counsel of record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Review of Florida Power & Light)
Company's proposed merger with Entergy)
Corporation, the formation of a Florida)
transmission company ("Florida transco"),)
and their effect on FPL's retail rates.)
_____)

DOCKET NO. 001148-EI
Dated: January 12, 2001

**FLORIDA POWER & LIGHT COMPANY'S
RESPONSE IN OPPOSITION
TO DYNEGY, INC.'S PETITION TO INTERVENE**

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby respectfully submits this response in opposition to the petition to intervene that was filed by Dynegy, Inc. ("Dynegy") in this proceeding, and in support thereof states the following:

1. Rule 28-106.205, F.A.C., requires that a petition to intervene in a Commission proceeding contain allegations sufficient to demonstrate that the person seeking intervention is entitled to participate in the proceeding, either as a matter of constitutional or statutory right or pursuant to Commission rule, or because the person's substantial interests are subject to determination or will be affected by the proceeding. Dynegy does not allege, nor could it, that it has a constitutional, statutory or regulatory right to intervene. Therefore, in order to demonstrate that it is entitled to intervene, Dynegy's petition would have to contain allegations sufficient to demonstrate that its substantial interests will be affected. Dynegy's petition contains no such allegations and, instead, clearly shows that Dynegy has no interests that would warrant intervention.

2. To demonstrate standing to intervene under the “substantial interest” test, a potential intervener must show that (a) it will suffer injury in fact as a result of the agency action contemplated in the proceeding that is of sufficient immediacy to entitle it to a hearing, and (b) the injury suffered is a type against which the proceeding is designed to protect. *Ameristeel Corp. v. Clark*, 691 So.2d 473, 477 (Fla. 1997) (quoting *Agrico Chemical Co. v. Dep’t of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981)). Mere economic losses due to increased competition are not of sufficient immediacy to warrant intervention. *Florida Soc’y of Ophthalmology v. State Board of Optometry*, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988). And speculation on the potential occurrence of injurious events fails to meet the “injury in fact” requirement. *Village Park Mobile Home Ass’n, Inc. v. State, Dep’t of Bus. Regulation*, 506 So.2d 426, 434 (Fla. 1st DCA 1987).

3. This proceeding was initiated by the Commission to

consider the effect on FPL’s retail rates of: 1) the planned formation of a regional transmission organization for peninsular Florida; and 2) FPL’s planned merger with Entergy Corporation.

Order Establishing Procedure, No. PSC-00-2105-PCO-EI, issued November 6, 2000 (emphasis added). The stated scope of the proceeding is consistent with the Commission’s regulatory authority over FPL’s retail electric utility business. The Commission has not undertaken, nor could it properly undertake, an investigation into impacts on other aspects of FPL’s and its affiliates’ business that do not concern retail rates.

4. Dynege’s petition to intervene does not allege that it is a retail customer of FPL. To the contrary, it suggests that Dynege only takes wholesale transmission service from FPL. *See*

Dynergy petition at ¶5. Therefore, Dynergy has alleged no direct interest that this proceeding is designed to protect.¹

5. Dynergy goes on to allege that it is a competitor of FPL in the wholesale power market, and that its ability to compete with FPL in that market will be affected by the availability, reliability and cost of electric transmission services provided by FPL, as well as by the electricity rate that could be established if FPL's merger with Entergy is approved. *Id.* at ¶¶6 and 10. These allegations fail to add substance to Dynergy's bid for intervention. Dynergy expresses concern over matters -- the health of the wholesale power market and the terms and conditions of transmission and wholesale power rates -- that are well outside the Commission's jurisdiction, not to mention the stated scope of this proceeding. Dynergy's only attempt to address this fatal shortcoming is to allege, vaguely and insubstantially, that the Commission's determination of retail rates somehow could lead to changes in wholesale and/or transmission rates charged by FPL to Dynergy. *Id.* at ¶9. At best, this is mere speculation about the potential occurrence of injurious events, which *Village Park Mobile Home Ass'n* clearly holds is inadequate to meet *Agrico's* "injury in fact" requirement.

¹ Even if Dynergy could allege that it is an FPL retail customer, intervention would not be appropriate. First of all, there are two parties to this proceeding whose express purpose is to protect the interest of retail ratepayers: the Office of Public Counsel and the Florida Industrial Power Users Group. Permitting intervention by individual retail customers merely because they are customers would add nothing but redundancy. Moreover, *Agrico* requires that a party who is seeking to intervene allege that it will suffer "injury in fact" from contemplated agency action. Mere speculation as to the potential occurrence of such an injury is insufficient. This proceeding is an investigation, designed to inform the Commission about the proposed Florida Transco and the FPL-Entergy merger. The Commission has not proposed any agency action in this proceeding, and FPL has not sought agency action. FPL fails to see how the conduct of such an investigation possibly could lead to the "injury in fact" to retail customers that is contemplated by *Agrico*.

6. Not only does the petition fail to allege an interest that would entitle Dynegy to intervene, its characterization of “disputed issues of material fact” and “ultimate fact” signals Dynegy’s intent to steer this proceeding in an inappropriate and improper direction. Paragraph 11 of the petition identifies the following “disputed issues of material fact”:

- “The effect of the proposed merger on FPL’s earnings.” ¶11 (a). This proceeding is not an earnings review, nor should it be.
- “The effect of the proposed merger on FPL’s market power.” ¶11 (b). The subject of FPL’s “market power” is within the scope of neither this proceeding nor the Commission’s jurisdiction.
- “The effect of the proposed merger on competition in Florida’s wholesale power market.” ¶11 (c). The Commission has no authority to consider the effect of the proposed merger on the wholesale power market and has not proposed to do so in this proceeding.
- “The effect of the proposed merger on the adequacy, availability, reliability, and cost of electric transmission capacity in the Florida market.” ¶11 (d). To the extent that the Commission has jurisdiction over this subject, it does not relate to the issue of wholesale transmission service, which is clearly the focus of Dynegy’s interest.
- “The appropriate allocation of FPL revenues between retail and wholesale customers.” ¶11 (e). This proceeding is not about jurisdictional separation of revenues, nor should it be.

- “The appropriate acquisition adjustment to be made in setting retail rates for FPL retail customers after the merger.” ¶11 (f). This issue has been the subject of Staff inquiry; there is nothing to suggest that it is of unique interest to Dynegy or that Dynegy would bring any useful expertise to bear on it.

The “ultimate fact” identified in Paragraph 12 of the petition is likewise irrelevant to the proceeding’s proper purpose: “the merger’s impact in assessing FPL’s earnings and market dominance.” Again, Dynegy betrays its true interest: FPL’s position in the wholesale power market, not its provision of retail electric service. Dynegy effectively concedes that it is looking for something very different than what this proceeding is intended to provide and that its intervention would serve no purpose other than to disrupt and misdirect.

WHEREFORE, FPL respectfully requests that the Commission deny Dynegy’s petition to intervene in this proceeding.

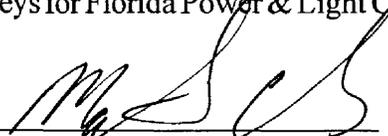
Respectfully submitted,

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Attorneys for Florida Power & Light Company

By: _____


Matthew M. Childs, P.A.
John T. Butler, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of FPL's Response in Opposition to Dynegy, Inc.'s Petition to Intervene in Docket No. 001148-EI was served by Hand Delivery (*) or mailed this 12th day of January 2001 to the following:

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By: 
Matthew M. Childs, P.A.