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Subject: Electronic Filing for Docket No. 070650-EI / FPL's Brief in Opposition to Intervention
Attachments: FPL's Brief in Opposition to Intervention.doc

Electronic Filing

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b. Docket No. 070650-EI

In re: Florida Power & Light Company's Petition to Determine Need for Turkey

Point Nuclear Units 6 and 7 Electrical Power Plant

c. Documents are being filed on behalf of Florida Power & Light Company.

d. There are a total of 8 pages in the attached document.

e. The document attached for electronic filing is Florida Power & Light Company's Brief in Opposition to Intervention.

(See attached file: FPL's Brief in Opposition to Intervention.doc)

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Florida Power & Light Company's Petition to Determine Need for Turkey Point Nuclear Units 6 and 7 Electrical Power Plant	))))	Docket No. 070650-EI Filed: January 3, 2008

FLORIDA POWER & LIGHT COMPANY'S
BRIEF IN OPPOSITION TO INTERVENTION

Pursuant to the Notice of Oral Argument issued by the Florida Public Service Commission (the "Commission") on December 24, 2007, Florida Power & Light Company ("FPL") hereby files its brief in opposition to the petitions to intervene filed by Seminole Electric Cooperative, Inc. ("Seminole"), the Orlando Utilities Commission ("OUC"), the Florida Municipal Power Agency ("FMPA"), and the Florida Municipal Electric Association, Inc. ("FMEA"), collectively the "proposed intervenors."

The Notice directed FPL and the proposed intervenors to address the following issues: (1) whether each of the proposed intervenors has a substantial interest in the adequate, reliable, or cost-effective supply of electricity in the state, such that it is therefore entitled to intervene in this proceeding; (2)(a) whether each of the proposed intervenors has a substantial interest in ensuring that FPL holds discussions with potential co-owners as to the proposed nuclear units, and to include in its petition a summary of those discussions, such that it is therefore entitled to intervene in this proceeding; and (2)(b) if so, what the specific authority is which requires FPL to conduct, or the Commission to compel FPL to conduct, such discussions with potential co-owners, in the context of this proceeding. The Notice limited briefs to six pages, which does not

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leave room for more general discussion of the proposed intervenors' petitions. FPL previously filed responses to the petitions, which it incorporates herein by reference.[1]

I. The proposed intervenors do not have a substantial interest in the adequate, reliable, or cost-effective supply of electricity in the State that entitles them to intervene in this proceeding.

Whether a person has a "substantial interest" in an administrative proceeding sufficient to entitle that person to intervene is determined by a two prong test that each of these proposed intervenors has failed to meet. *See Agrico Chemical Co. v. Dept. of Envtl. Regulation*, 406 So.2d 478, 482 (Fla. 2nd DCA 1981), *rev. denied*, 415 So.2d 1359 (Fla. 1982) ("We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 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."). The proposed intervenors may have a generalized interest in the adequate, reliable, or cost-effective supply of electricity in the state, but they do not have a "substantial interest" in those matters that, as a matter of either fact or law, would support intervention in this proceeding.

None of the proposed intervenors has shown in its petition to intervene that it will suffer any "injury in fact" related to the adequate, reliable, or cost-effective supply of electricity, as a result of the Commission's granting an affirmative determination of need for FPL to proceed with its Project. Indeed, the proposed intervenors have all indicated that they *support* the Project. The only issues that the proposed interventions raise regarding the Project concern the potential for future co-ownership. The proposed intervenors have not identified any manner in which actual joint ownership, much less a "discussion" of potential joint ownership, would affect

[1] The responses are identified in the Commission's Document Filings Index for this docket as 10807-07 and 10808-07 (Seminole); 10926-07 and 10927-07 (OUC); 10928-07 and 10929-07 (FMPA); and 10930-07 and 10931-07 (FMEA).

the Project's impact on the adequate, reliable, or cost-effective supply of electricity.[2] In short, they have not shown any injury-in-fact with respect to those supply issues and, as a result, each has failed to meet the first prong of the *Agrico* test.

Each proposed intervenor also has failed to meet the second prong of the *Agrico* test. A need determination proceeding under section 403.519(4) is not designed to protect the interests of electric utilities that are not participants in the proposed electric power plant. Commission findings as to cost-effectiveness and need are specific to the applicant petitioning for the need determination. The Commission and the Supreme Court of Florida have held that "the need to be determined under section 403.519 is 'the need of the entity ultimately consuming the power'." *Nassau Power Corp. v. Deason*, 641 So. 2d. 396, 399 (Fla. 1994), quoting *Nassau Power Corp. v. Beard*, 601 So. 2d 1175, 1178 (Fla. 1992); *Re Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities*, Order No. 22341, 108 P.U.R. 4th 398, 414 (F.P.S.C. 1989) (stating that system reliability and integrity, need for electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available are "clearly...utility and unit specific"). The proposed intervenors are not participants in FPL's Project at this point. As a result, their interests in an adequate, reliable, and cost-effective supply of electricity are not "substantial interests" entitling them to intervene in this proceeding.[3]

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[2] At the issue identification conference, some of the proposed intervenors suggested that the Project's size and location could affect the reliability of Florida's transmission grid. Again, however, whatever transmission impact the Project might have will not be affected by the ownership arrangements. Furthermore, the FRCC has a Transmission Planning Process that FPL will have to follow in order to interconnect and integrate the Project into the transmission grid, and the proposed intervenors will have ample opportunity to participate in that process if they feel that there are transmission-reliability issues that FPL has not adequately addressed

[3] FPL expects the proposed intervenors to argue that the Commission has previously granted intervention in need proceedings to non-participating utilities. However, FPL is aware of only two such instances, both involving FPL and both easily distinguishable. The applicants in those proceedings were proposing to build merchant power plants that would produce power for sale on an uncommitted basis throughout Florida and elsewhere. The applicants were requesting an affirmative need determination based on the general need for power by all of the State's electric

II. The proposed intervenors do not have a substantial interest in ensuring that FPL holds discussions with potential co-owners such that they are entitled to intervene in this proceeding, and there is no authority that requires FPL to conduct, or the Commission to compel FPL to conduct, discussions with potential co-owners.

The proposed intervenors do not have a statutorily recognized "substantial interest" in ensuring that FPL holds discussions with potential co-owners, or that FPL includes in its petition a summary of those discussions, such that they are entitled to intervene in FPL's need determination proceeding. Their interests in pursuing co-ownership discussions are not interests that section 403.519(4) is designed to protect. The plain language of section 403.519(4) does not require that co-ownership discussions take place, and it does not state that such discussions should provide any basis for the Commission's need determination. There is no ambiguity in this language and, as a result, there is no need or occasion to rely upon legislative intent or legislative history. Notwithstanding the statute's clarity, the proposed intervenors' positions imply that it is somehow ambiguous, that it must mean more than it says. These assertions are unfounded and should be rejected; however, if one were to find any ambiguity in the statute then it would be appropriate to consider the relevant legislative history. *See Crescent Miami Center, LLC v. Florida Dept. of Revenue,* 903 So. 2d 913, 918 (Fla. 2005) (stating that only if statutory intent is unclear from the plain language of the statute may the courts apply rules of statutory construction and explore legislative history to determine legislative intent). As explained in FPL's responses to the intervention petitions, there was a proposed amendment to Senate Bill 888 which would have required the Siting Board to consider "whether an allowance has been made...for minority ownership...by electrical cooperatives and municipal electric utilities."

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utilities. Because the applicants were thus suggesting that part of FPL's future need for power might be met by the proposed plants but provided no details or commitments as to when or the extent to which FPL's needs would be met, FPL had a legitimate need to participate in those proceedings. In contrast, FPL's petition to determine need for Turkey Point 6 & 7 is not based on any other utility's need for power. *See In re: Joint petition for determination of need by Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company*, Docket No. 981042-EM; *In re: Petition for determination of need by Okeechobee Generating Company*, Docket No. 991462-EU.

However, this proposed amendment was replaced with an informational requirement for the applicant to include in its petition "whether there were any discussions with any electric utilities regarding ownership of a portion of the plant." Of course, it was this latter version that was ultimately adopted. *See* § 403.519(4)(a)(5). This legislative history, consisting of the affirmative proposal, withdrawal and replacement of an amendment specifically relating to joint-ownership discussions, directly contradicts the proposed intervenors' contention that section 403.519(4)(a)(5) should be interpreted to require joint ownership discussions and to authorize consideration of those discussions in the need-determination process.

FMEA's, FMPA's, and Seminole's assertions that acceptance of the plain language of the statute would somehow render that language "meaningless" is incorrect. Statutory informational requirements are not rendered meaningless simply because they do not authorize an entity to intervene based upon the entity's interest in the information that is provided. Rather, the legislature may simply want certain types of information to be made public in administrative proceedings. Imagine the nearly limitless scope of intervention if everyone with an interest in, for example, the information that electric utilities provide in their FERC Form 1 filings were permitted to intervene in Commission proceedings on the basis of that interest. Furthermore, it would be counter-productive to the development of new nuclear generation in Florida to import into section 403.519 any substantive requirements related to joint ownership discussions, or a Commission determination on the adequacy thereof, at such an early stage of the development process. Doing so would only complicate and delay the licensing process, and would be inconsistent with the Legislature's intent to promote new nuclear generation.

The proposed intervenors have also asserted an interest in ensuring that FPL includes a summary of its discussions in its petition for an affirmative determination of need for Turkey

Point 6 & 7. However, this is simply a matter of pleading sufficiency, which the Commission is well equipped to handle on its own; it certainly cannot confer an independent basis for intervention. Finally, FPL would note that section 403.519(4) and Rule 25-22.081(2) do not contain any requirements or criteria concerning the adequacy of the applicant's summary of co-ownership discussions.

The language of section 403.519(4) does not contain any specific requirement for FPL to conduct, or for the Commission to compel FPL to conduct, discussions related to joint ownership. The lack of such a requirement or Commission authority supports the conclusion that the proposed intervenors' interests in joint ownership discussions fall outside the zone of interests that this proceeding is designed to protect.

In summary, the Legislature did not intend through the language of section 403.519(4)(a)(5) to confer upon the proposed intervenors any preference, advantage or leverage, commercial or otherwise, in negotiating a potential joint ownership arrangement. Nor did the Legislature intend to task the Commission with a duty to promote, oversee, administer, or broker any such joint ownership relationship, or that a need determination proceeding become a forum for one utility to pursue or coerce such opportunities. The relief sought by the proposed intervenors has no basis in the plain language of section 403.519(4)(a)(5) and is specifically contradicted by the legislative history of this provision. The scope and purpose of a need determination proceeding before the Commission is clearly delineated by statute and does not encompass what the proposed intervenors seek.

Respectfully submitted this 3rd day of January, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically this 3rd day of January, 2008, to the following:

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