

Ruth Nettles

From: Jessica_Cano@fpl.com
Sent: Thursday, January 10, 2008 4:45 PM
To: Filings@psc.state.fl.us
Cc: Katherine Fleming; Jennifer Brubaker; Charles Beck; Minimushomines@aol.com; vkaufman@asglegal.com; zeasterling@ouc.com; wmiller@mbolaw.com; ryoung@yvlaw.net; fred.bryant@fmpa.com; jody.lamar.finklea@fmpa.com; dan.ohagan@fmpa.com; bmoline@publicpower.com; roger@fmpa.com; DickJA@jea.com; ParaPG@jea.com
Subject: Electronic Filing for Docket No. 070650-EI / FPL's Response in Opposition to JEA's Petition to Intervene
Attachments: FPL's Response in Opposition to JEA's Petition to Intervene.doc; Attachments to FPL's Response in Opposition to Petition to Intervene.pdf

Electronic Filing

a. Person responsible for this electronic filing:

Jessica A. Cano, Esq.

700 Universe Boulevard

Juno Beach, FL 33408

561-304-5561

Jessica_Cano@fpl.com

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 12 pages, including the attachments.

e. The document attached for electronic filing is Florida Power & Light Company's Response in Opposition to JEA's Petition to Intervene, with attachments.

(See attached file: FPL's Response in Opposition to JEA's Petition to Intervene.doc) (See attached file: Attachments to FPL's Response in Opposition to Petition to Intervene.pdf)

Jessica Cano
Attorney
Law Department

Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
561-304-5226
Jessica_Cano@fpl.com

1/10/2008

DOCUMENT NUMBER-DATE
00281 JAN 10 8
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 10, 2008

**FLORIDA POWER & LIGHT COMPANY'S
RESPONSE IN OPPOSITION TO JEA'S PETITION TO INTERVENE**

Pursuant to 28-106.204, Florida Administrative Code, Florida Power & Light Company ("FPL") hereby files its response in opposition to the petition to intervene filed by JEA, and in support thereof states:

1. JEA is a public agency and statutory commission existing under the laws of the State of Florida. JEA Petition at 1. In support of its request to intervene, JEA states that FPL is required by statute and Florida Public Service Commission ("Commission") rule to hold discussions with other electric utilities regarding potential co-ownership, and that the Commission must ensure that meaningful discussions with other electric utilities have in fact occurred before making an affirmative determination of need. JEA Petition at 2, 4. The relief requested by JEA is not of a type contemplated by section 403.519, Florida Statutes, and may not be sought in this need determination. As a result, JEA's alleged interest in seeking that relief does not give it standing to intervene. *Agrico Chemical Co. v. Dep't of Env'tl. Regulation*, 406 So. 2d 478 (Fla. 2nd DCA 1981), *rev. denied*, 415 So. 2d 1359 (Fla. 1982).

I. FPL is Not Required by Statute to Hold Joint Ownership Discussions with Other Electric Utilities

2. JEA states that FPL is required by statute and Commission rule to hold discussions with other electric utilities. JEA Petition at 2. This is an inaccurate interpretation of section 403.519(4)(a)(5), Florida Statutes, and Rule 25-22.081(2)(d), F.A.C. Section 403.519(4)(a)(5) states simply that an applicant must include in its petition "[i]nformation on

DOCUMENT NUMBER-DATE

00281 JAN 10 8

FPSC-COMMISSION CLERK

whether there were any discussions with any electric utilities regarding ownership of a portion of the nuclear or integrated gasification combined cycle power plant by such electric utilities.” This is merely an informational requirement. There is no expectation, stated or implied, that discussions must take place. By only requiring information on whether there were any discussions, the informational requirement would be satisfied by an applicant stating that no such discussions were had. FPL fulfilled this informational requirement by informing the Commission that preliminary discussions related to joint ownership opportunities in Turkey Point 6 and 7 have in fact occurred. Similarly, Rule 25-22.081(2)(d) requires only that an applicant include in its petition for a determination of need “a summary of any discussions with other electric utilities regarding ownership of a portion of the plant by such electric utilities.” Again, this is only an informational requirement. And by requesting a summary of any such discussions, this language also indicates that there is no statutory requirement to engage in joint ownership discussions. The plain language of the statute and the rule directly contradicts JEA’s assertion that joint ownership discussions are required.

II. The Need Determination Proceeding is Not Intended to Ensure Joint Ownership Opportunities for Other Electric Utilities

3. Section 403.519(4) lists the elements that the Commission must address in making a determination of need for a nuclear power plant, and co-ownership is not one of them. Section 403.519(4)(b) states that the Commission shall “take into account matters within its jurisdiction, which it deems relevant” in making such a determination, and lists three such matters, none of which authorize the relief sought by JEA in its intervention. Indeed, nothing in Section 403.519(4) or elsewhere in the Florida Statutes enables the Commission to “ensure that meaningful discussions with other electric utilities have in fact occurred before making an

affirmative determination of need.” JEA Petition at 4. Rather, Section 403.519(4)(a)(5) is merely an informational requirement, as discussed above.¹

4. The Legislature has not “designed the need determination proceeding to, among other things, ensure that other electric utilities are afforded the opportunity to discuss ownership interest in a proposed nuclear power plant” as asserted by JEA. JEA Petition at 3. There is no ambiguity in the language of section 403.519(4), but JEA’s position nonetheless implies that it is somehow ambiguous, that it must mean more than it says. This assertion is 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). The relevant legislative history here directly contradicts JEA’s contention. An amendment to Senate Bill 888 was proposed that would have required the Siting Board to consider whether an allowance had been made for minority ownership by other utilities in a proposed nuclear power plant. That amendment was withdrawn, however, and the language ultimately adopted as section 403.519(4)(a)(5) was added instead. *See* Senator Amendment Barcode 484342 (April 25, 2006) (attached hereto as Attachment 1); Senator Amendment Barcode 843116 (April 27, 2006) (attached hereto as Attachment 2). Thus, the Legislature considered but did not adopt the notion that joint ownership should be a condition or criterion in determining whether a nuclear plant may be sited and built in Florida.

5. JEA’s assertion that acceptance of the plain language of the statute would somehow render that language “meaningless” is incorrect. Statutory informational requirements

¹ In assessing the need for a project whose capacity significantly exceeds the applicant’s projected need, it may be particularly important for the Commission to know of any discussions that such applicant has had with other potential co-owners. But that is not the case in this instance, in which FPL’s petition and supporting testimony demonstrate a need well in excess of the capacity that the proposed nuclear units will provide.

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.

6. Contrary to the implication of JEA's ultimate request for relief, the Legislature did not intend through the language of section 403.519(4)(a)(5) to confer upon JEA or any other utility 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 scope and purpose of a need determination proceeding before the Commission is clearly delineated by statute and does not include JEA's stated purpose. JEA's assertion that whether FPL has held adequate and meaningful discussions is "at issue" is itself incorrect. JEA Petition at 2.

III. JEA Lacks Standing to Intervene in this Proceeding

7. Because the relief requested by JEA is not contemplated by section 403.519(4), JEA has failed to assert a sufficient basis for this Commission to grant it standing as an intervenor in this proceeding. An intervenor must demonstrate that its “substantial interests” will be affected. § 120.52(12)(b), Fla. Stat.; 25-22.039, F.A.C. The standard to establish whether a party has a “substantial interest” in a proceeding under the Administrative Procedure Act was set forth in *Agrico Chemical Co. v. Department of Environmental Regulation*, in which the court stated:

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.

406 So. 2d at 482. JEA has failed to demonstrate that it meets the second prong of this test, because its asserted interest in having the Commission reach conclusions about the proper extent of joint ownership and whether FPL’s discussions have been “adequate and meaningful” is not within the zone of interests that section 403.519(4) is intended to protect. *Agrico* expressly rejects the use of “bootstrapping” to establish standing, by requiring that the substantial interest upon which standing is premised be one that the proceeding in question is actually designed to protect. There is nothing in section 403.519(4) that is designed to protect the asserted interest of JEA in engaging in joint ownership discussions with FPL. Therefore, JEA has failed to meet the *Agrico* test, and its petition to intervene should be denied. *See Agrico*, 406 So. 2d at 482 (holding that the petitioners were unable to show that the nature of their asserted injury was protected by chapter 403 of the Florida Statutes, and reversing the Department of Environmental

Regulation's decision to deny Agrico's construction permit on the basis that petitioners were erroneously granted standing).

8. If JEA is nonetheless permitted to intervene, the Commission should clarify that the scope of this proceeding does not include issues related to joint ownership discussions. Pursuant to Rule 25-22.039, intervenors "take the case as they find it." See *Riviera Club v. Belle Mead Development Corp.*, 194 So. 783, 784-85 (Fla.1940). This case, a determination of need for FPL's Turkey Point 6 & 7, is not an appropriate forum to consider JEA's arguments in support of a state-wide policy to encourage the joint ownership of nuclear generation facilities or its specific interests in joint ownership. JEA should not be permitted to hijack the proceeding and convert it into a forum for its own, unrelated and non-jurisdictional purposes.

9. FPL specifically requests that, if intervention is granted, the Commission clarify in its order that (i) the requirement in section 403.519(4)(a)(5) for FPL to report its joint ownership discussions is for informational purposes only; (ii) the scope of this proceeding does not extend to requiring FPL to offer JEA joint ownership of Turkey Point 6 and 7, nor to taking discussions about joint ownership into consideration in determining the need for Turkey Point 6 and 7; and (iii) JEA will not be permitted to raise issues, engage in discovery, or examine witnesses beyond the proper scope of the proceeding.

WHEREFORE, FPL respectfully requests that the Commission deny JEA's petition to intervene for lack of standing. Alternatively, if the Commission does grant JEA intervenor status, FPL requests that the Commission clarify the proper scope of this proceeding and of JEA's participation therein, as described above.

Respectfully submitted this 10th day of January, 2008.

R. Wade Litchfield, Vice President &
Associate General Counsel

Mitchell S. Ross

John T. Butler

Bryan S. Anderson

Antonio Fernandez

Jessica A. Cano

Florida Power & Light Company

700 Universe Boulevard

Juno Beach, Florida 33408-0420

Stephen Huntoon

Florida Power & Light Company

801 Pennsylvania Avenue, Suite 220

Washington, D.C. 20004

Kenneth A. Hoffman

Rutledge, Ecenia, Purnell & Hoffman, P.A.

215 South Monroe Street, Suite 420

P. O. Box 551

Tallahassee, FL 32302-0551

Attorneys for Florida Power & Light Company

By: /s/ John T. Butler

John T. Butler

Fla. Bar No. 283479

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 10th day of January, 2008, to the following:

Katherine E. Fleming, Senior Attorney
Florida Public Service Commission
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Charles J. Beck, Deputy Public Counsel
Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400

Frederick M. Bryant
Jody Lamar Finklea
Daniel B. O'Hagan
Attorneys for Florida Municipal Power Agency**
and Florida Municipal Electric Association**
P.O. Box 3209
Tallahassee, FL 32315-3209

Kenneth P. Ksionek
Zoila P. Easterling
Orlando Utilities Commission**
500 South Orange Avenue
Orlando, FL 32801

Roger Fontes
Florida Municipal Power Agency**
8553 Commodity Circle
Orlando, FL 32819

Bob Krasowski
1086 Michigan Avenue
Naples, FL 34103-3857
On Behalf of Jan M. Krasowski and Bob
Krasowski

Roy C. Young
Young van Assenderp, P.A.
225 South Adams Street, Suite 200
Tallahassee, FL 32301
Attorney for Orlando Utilities Commission**

William T. Miller
Miller, Balis & O'Neil, P.A.
1140 19th St., N.W., Suite 700
Washington, DC 20036
Attorney for Seminole Electric Cooperative,
Inc.**

Vicki Gordon Kaufman
Anchors Smith Grimsley
118 North Gadsden Street
Tallahassee, FL 32301
Attorney for Seminole Electric Cooperative, Inc.**

Barry Moline
Florida Municipal Electric Association**
P.O. Box 10114
Tallahassee, FL 32302-2114

James Dickenson/P.G. Para
JEA**
21 West Church Street
Jacksonville, FL 32202

**Indicates not an official party of record as of the date of this filing

By: /s/ John T. Butler
John T. Butler
Fla. Bar No. 283479