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VIA FEDERAL EXPRESS

Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.; DOCKET NO. 981042-EM

Dear Ms. Bayo:

Enclosed for filing in the above docket on behalf of Florida Power Corporation are the original and fifteen (15) copies of the Memorandum of Florida Power Corporation in Opposition to Petitioners' Motions to Strike Portions of Prefiled Testimony of Vincent M. Dolan and Michael D. Rib.

We request you acknowledge receipt and filing of the above by stamping the additional copy enclosed.

If you or your Staff have any questions regarding this filing, please contact me at (813) 821-7000.

Very truly yours,

Gary L. Sasso

Enclosures
cc: Counsel of Record
GLS:jlc

ACK
AFA 2
APP
CAF
CMU
CTR
EAG Futrell
LEG 3
LIN 5
OPC
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SEC 1
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION ORIGINAL

In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.	)	DOCKET NO. 981042-EM FILED: November 13, 1998

MEMORANDUM OF FLORIDA POWER CORPORATION IN OPPOSITION TO PETITIONERS' MOTIONS TO STRIKE PORTIONS OF PREFILED TESTIMONY OF VINCENT M. DOLAN AND MICHAEL D. RIB

I. Introduction

Petitioners have moved to strike portions of the testimony of Florida Power Corporation ("FPC") witnesses Vincent M. Dolan and Michael D. Rib on the ground that these portions constitute legal opinions. Neither of these witnesses has provided legal opinions. To the contrary, they have responded to expert testimony provided by petitioners' own witnesses, including Martha O. Hesse, on precisely the same subject areas. It is apparent that petitioners would like to introduce testimony by their witnesses on policy issues in this case while precluding the intervenors from responding fully and directly to that testimony. This is neither warranted by Commission precedent nor principles of fair play. Petitioners' motions should be denied.

II. Argument

To put this matter in context, it is important to recognize that this is a regulatory proceeding being conducted by a regulatory agency pursuant to statutory and regulatory standards and criteria. It is unrealistic and would indeed be improper to maintain that the issues in this case may be discussed wholly apart from the statutory and regulatory context of this

proceeding. To some extent, then, all the issues in this case are necessarily infused with so-called "legal" issues.

For example, Issue 1 in this case (as identified at the prehearing conference) is, "Is there a need for the proposed power plant, taking into account the need for electric system reliability and integrity, as this criterion is used in Section 403.519?" (Emphasis added). This issue may not be addressed fully and properly by the witnesses in this proceeding without some discussion of the statutory requirements.

The mixture of law, policy, and fact in this case is further demonstrated by the testimony of petitioners' own witnesses, particularly Martha O. Hesse. Ms. Hesse states at the inception of her testimony that she intends to address "policy issues," including "federal energy policy" and the "fundamental purposes of utility regulation." (Hesse, at 4). Federal energy policy, of course, eminents from federal law, including the legal proclamations of the Federal Energy Regulatory Commission ("FERC"), a regulatory agency. Likewise, any consideration of the "purposes of utility regulation" inextricably involves some discussion and understanding of what regulatory laws mean and what they are intended to accomplish.

Ms. Hesse states that approving the request of the petitioners to build a merchant plant would be "fully consistent with federal energy policy" and "the basic purposes of utility regulation." (Hesse, at 5). She goes on to opine that "[a] merchant power plant is not included in any regulated utility's rate base" and is "not subject to traditional regulatory treatment" (Hesse, at 6) (emphasis added); "[m]erchant plants are `public utilities' subject to the jurisdiction of the FERC" (Hesse, at 7); and "[m]erchant plants are normally Exempt Wholesale Generators, . . . exempt from regulation by the U.S. Securities Exchange Commission under the Public Utility Holding Company Act of 1935." (Id.) All of these statements, of course, are assertions about the meaning and application of various federal and state laws.

But she does not stop there. She states that "passage of the Public Utility Regulatory Policies Act in 1978 effectively declared that electric generation was no longer a natural monopoly," and that "[p]ursuant to the Energy Policy Act of 1992, competition in wholesale power generation is one of the express goals of national energy policy, and it is thus effectively the law of the land." (Hesse, at 8) (emphasis added). In this vein, she states:

> At least since the passage of the Public Utility Regulatory Policies Act of 1978, the Congress and the FERC have favored competition in the supply of bulk electricity in the United States. This policy objective was carried forward and expanded in the Energy Policy Act of 1992, wherein Congress further acted to promote competition in wholesale power supply by creating a new regulatory category of suppliers, "Exempt Wholesale Generators," which are power plants that may be owned by utilities without subjecting those utilities to regulation under the Public Utility Holding Company Act of 1935.

(Hesse, at 11-12). Continuing her interpretation of federal law, she says that it "is this exemption from holding company regulation that the term `exempt' refers to." (Id. At 12)

Further, she purports to tell this Commission what Congress sought to accomplish in enacting the "Energy Policy Act," and then goes on to describe and discuss FERC's promulgation of Order No. 888 and its ostensible implications for this proceeding. (Id.) Based on what is fundamentally a legal analysis, she concludes that excluding merchant plants "would be inconsistent with and contrary to federal energy policy." (Hesse, at 13).

Her statement, of course, is flat wrong, but if petitioners seek to offer it into evidence they should not be surprised that the intervenors might take issue with it in responsive testimony, which is precisely what has occurred.

Switching to state law, Ms. Hesse asserts that "[t]he argument that the `obligation to serve' vests control over access to the wholesale market in existing retail-serving utilities is a red herring." (Hesse, at 22). The "obligation to serve" that she mentions, of course, is the statutory

one that provides the underpinning of Section 403.519 and the Siting Act. Should she be precluded from addressing this issue in testimony because petitioners' attorneys have briefed the matter in their memoranda in opposition to intervenors' motions to dismiss? Apparently petitioners do not think so. Yet they ask this Commission to apply a double standard in determining whether to accept the testimony of intervenor witnesses that may from time to time allude to the same issue.

Although moving to strike certain portions of the testimony of Mssrs. Dolan and Rib as constituting "legal opinion," petitioners nowhere demonstrate that any of the testimony does in fact express legal opinion. Indeed, it is revealing that in many instances, petitioners cite to fragments of sentences or paragraphs taken out of context from the surrounding material. Read in its entirety, these fragments may be seen for what they are: reference points to the statutory or regulatory framework for this entire proceeding, including occasional allusions to legal positions taken by the intervenors in this proceeding. In each instance, however, the discussion as a whole makes a factual or policy statement, which may be related to or support a position on an issue that has legal dimensions.

The thrust of Mr. Dolan's testimony is that the question whether to permit merchant plant developers to site plants poses a number of very serious policy considerations that cannot be addressed appropriately in the context of this proceeding. He begins by making the point that should be obvious -- at least since the Nassau decisions were handed down, merchant plant developers have not been using Section 403.519 or the Siting Act to build merchant plants in this State. To say this is to recognize a fact that is inextricably bound up with legal issues. But it is an important fact or reality that must be taken into account in order to appreciate the gravity of this issue from a policy perspective.

This leads to the first two pieces of supposedly offending testimony that petitioners seek to strike (shown below by underlining), which we set forth here in context:

> The Joint Petition squarely presents the issue of whether the Commission has the authority to make a determination of need for a merchant plant and, if it has the authority, whether this is an appropriate thing to do. I will not address at this time the Commission's lack of statutory authority to make such a determination of need, which has been discussed in the legal submissions of FPC. The mere fact that we are here today discussing the need petition for the first merchant plant proposal in Florida should give us reason to pause and ask why merchant plants do not currently exist in this State. The answer is quite simple, these plants do not currently exist because by law they are not permitted. That fact alone should cause us to stop this proceeding, but perhaps we should discuss other compelling reasons why this is neither the time nor the place for merchant plants to arrive in Florida. Even if one were to imagine that the statutory authority exists, which it doesn't, it is quite clear that to take that step would amount to an about-face from the Commission's position and the position of the Supreme Court in the Nassau decisions, and, at a minimum, would amount to a re-working of the currently prevailing regulatory understanding and approach in this State.

(Dolan, at 5-6). Petitioners may wish to put their heads in the sand and pretend that merchant plants are sited every day under Section 403.519 and the Siting Act, but they are not. This is a fact that Mr. Dolan mentions, together with the further fact that permitting merchant plants now to use those statutory provisions will amount to a change in the status quo, which is precisely what gives rise to the serious policy issues that Mr. Dolan addresses in the balance of his testimony.

Further, at the outset of the above-quoted testimony, Mr. Dolan expressly disclaims that he intends to develop the legal issues that FPC's legal counsel have briefed in their submissions to the Commission, and he does not discuss the statutory argument in his testimony. To ignore the existence of the current legal landscape, however, is to ignore the serious policy issues that Mr. Dolan does address at some length in his testimony.

Petitioners next seek to strike the following (underlined) portion of Mr. Dolan's testimony:

> In late 1997, the Commission Staff conducted workshops that recognized the novelty of the issues presented by merchant plant penetration in this State, and these workshops were attended by representatives from far and wide. Many important and difficult issues were discussed in these workshops. Thereafter, the full Commission recognized the gravity of these issues, and their wide ranging policy impacts, in denying Duke's request for a declaratory statement affirming a right or opportunity on the part of merchant plant developers to avail themselves of Section 403.519 for a need determination by the Commission.

(Dolan, at 11). The supposedly offending testimony goes on to quote from this Commission's order, pointing out that the Commission stated therein that (1) granting Duke's request for declaratory relief "would carry implications for the electric power industry statewide," and (2) the Commission Staff should discuss with the Chairman "appropriate proceedings to review law and policy as to merchant plant applicants for certificates of need." After quoting the order, Mr. Dolan states that the current need proceeding is not the kind of broad policy vehicle that the Commission requested the Staff to return with to permit further discussion.

The disputed testimony then proceeds as follows:

> Also during the agenda conference, the Commission pointed out that the Legislature had expressed a need for restraint in even considering opening the door to merchant plant development in this State. See VMD-1 (letter from James A. Scott to Hon. Julia Johnson) and VMD-1 (letter from Julia L. Johnson to Hon. Jim Scott). This admonition is truly relevant, and consistent with the Commission's view, in the fact that the Legislature recognizes that matters of such significance, such as the introduction of merchant plants, can be contemplated only in a broad industry review, which by necessity must result in legislative changes that would have significant implications for many aspects of the current regulatory structure in Florida.

(Dolan, at 12).

It is mindboggling that petitioners feel free to rely on the testimony of their witnesses about the content, meaning, and implications of federal statutes and FERC orders as part of an

attempt to beguile the Commission into thinking that ruling in petitioners' favor is somehow required by federal law, but then cry "foul" when intervenors dare to make reference to statements by this very Commission about the serious policy implications of the very issues in this proceeding. It is untenable to argue that Mr. Dolan's testimony on this subject amounts to a "legal" opinion. There is no prohibition against non-lawyers taking cognizance of what this Commission says in its orders. By the same token, petitioners have no credible basis to challenge Mr. Dolan's reliance upon correspondence between the Chair of the Commission and the Legislature of this State that the Chair saw fit to include in the public record of Duke's declaratory statement proceeding.

In fact, in each instance where petitioners seek to strike Mr. Dolan's testimony, he is either alluding to statutory or regulatory matters to provide a context or reference point for a policy position that he is endeavoring to develop, or he is responding directly to Ms. Hesse's testimony, including but not limited to her statements that create the misleading impression that federal energy policy preempts or precludes this Commission from perpetuating the status quo approach of excluding merchant plants from participating in a Section 403.519 proceeding. All of his testimony is entirely appropriate, if not compelled by the testimony of petitioners' own witnesses.

Likewise, petitioners' attack on selected portions of the testimony of Michael D. Rib is misplaced. Like Mr. Dolan, Mr. Rib is not a lawyer, but like Mr. Dolan, he necessarily must take into account the statutory and regulatory framework against which all of his responsibilities at FPC are discharged. Mr. Rib, inter alia, prepares the company's 10-year site plans. He testifies about how different regulatory requirements enter into his work and have a bearing on his assessment of the need for new generating capacity and his other planning responsibilities. In

this connection, he makes some mention of the planning obligations of utilities, like FPC, under the Florida Energy and Efficiency Conservation Act ("FEECA") and the 10-year site plan law.

Petitioners first seek to strike Mr. Rib's quotation (at pp. 8-9 of his testimony) of a paragraph of petitioners' own Joint Petition making clear that it is undisputed in this case that FEECA does not apply to Duke. This hardly amounts to a legal opinion; it is a recitation of something that is undisputed that provides part of the context for Mr. Rib's overall testimony. In the same vein, petitioners seek to strike Mr. Rib's testimony that a utility's obligations under the 10-year site plan requirement and FEECA are implicated in this proceeding for determining need (at pp. 9-10 of his testimony). In this portion of his testimony, Mr. Rib simply reviews the statutory and regulatory framework against which he discharges his planning functions and considers the issue of need for new generating capacity.

To be sure, petitioners approach the issue of "need" as though it is a concept hanging out in the air, and ask their witnesses to address whether "there is a need" for the proposed project without even considering who has the need. But petitioners' decision to depart from the statutory framework in addressing the issue of need in testimony is no reason why the intervenors' witnesses should be precluded from testifying about whether petitioners have demonstrated need under the statutory criteria and requirements.

Next, petitioners seek to preclude Mr. Rib's testimony that, absent Commission regulation over sales by merchant plants, a statutory duty to serve, or executed power purchase agreements, "there would be no mechanism to force merchant plants to meet the needs of retail utilities in Florida when those needs are most severe." (Rib, p. 13). Apart from the fact that this is indisputably true, it certainly is at a minimum a mixed statement of law and fact that has a direct bearing on Mr. Rib's job as a planner. As he explains in other, surrounding testimony that petitioners do not seek to strike, utilities in this State are not permitted to rely upon such

uncommitted, merchant power in projecting their own needs and reserve margins. Surely, Mr. Rib should be permitted to explain fully the context and reasons for testimony that petitioners agree is admissible. It is clear, however, that what petitioners are seeking to do by their motion to strike is to render the testimony of FPC's witnesses incomprehensible by blocking portions here and there that provide a context and flow to that testimony.

Petitioners next seek to strike testimony by Mr. Rib (at pp. 15-16) explaining that merchant plants do not participate in the 10-year site planning process in any meaningful way. Again this involves a mixed question of law and fact, and Mr. Rib is seeking to present his perspective on the issues from the point of view of a planner who operates under and attempts to obey the 10-year site plan obligations applicable to utilities, such as FPC. Further, this testimony is infused with purely factual observations about what Duke has and has not done in the way of disclosing its plans on this project and a related one Duke has since abandoned.

At p. 22, Mr. Rib testifies about the utilities' understanding that it makes no sense to talk about whether the output of an independent power producer is "needed" absent a signed commitment by that power producer to provide capacity and energy to the respective utilities. He mentions by way of providing a point of reference that it is his understanding that this is consistent with existing law, which is, of course, relevant to his duties as a planner for a regulated utility. Petitioners seek to strike this testimony as constituting a legal opinion. To the contrary, Mr. Rib has simply pointed out his understanding, as a utility planner, that a utility must have a contractual commitment from an independent power producer in order to count on its capacity and energy to meet the "need" of the utility.

Petitioners next seek to strike Mr. Rib's observation (at p. 23) that the criteria of Section 403.519 are utility-specific criteria and that this has been recognized by the Commission and the Florida Supreme Court. This is not a matter of opinion; it is a simple declaration of a fact that

petitioners can choose to ignore all they want to, but that utility planners like Mr. Rib must take to heart. Petitioners should not be permitted by their motion to impose upon the intervenors' testimony and this whole proceeding an other-worldly detachment from the reality of the prevailing regulatory landscape in this State by which the utilities and the Commission must be governed in all their planning responsibilities. If petitioners disagree with intervenors' testimony, then let them say so; but they should not be permitted to throttle it before it is ever heard by the Commission.

Finally, petitioners object to the last underlined portion of the following testimony (Rib, at 29):

> As explained more fully in FPC's testimony by Mr. Dolan, Petitioners' request raises serious policy issues that cannot be adequately addressed in this proceeding and that, in fact, require legislative amendments to Section 403.519. In this same vein, Ms. Hesse admits:
>
> > Economic efficiency would be served [by merchant plants] as long as the standard assumptions of competitive markets were met. The chief of these in this case is that externalities must be appropriately valued and incorporated into the price of electricity. Whether that would be the case with a fleet of gas-fired combined cycle plants would be an empirical exercise beyond the scope of this testimony . . . .
>
> Hesse Direct, p. 19 (Emphasis added). The point I wish to make is that whether or not the Florida Legislature would be receptive to Petitioners' arguments after appropriate hearings, Petitioners' testimony does not prove the existence of "need" under Section 403.519, as the statute has been interpreted and applied by the Commission, the Florida Supreme Court, and the regulated utilities in this State.

Again, the basic issues in this proceeding, as delineated in the prehearing order, are whether need has been shown as the need criteria are "used in Section 403.519." It is preposterous to argue that the witnesses in this case must close their eyes to authoritative statements by the Commission and the Florida Supreme Court about what the criteria of Section 403.519 mean. In any normal proceeding, such authoritative statements should provide common ground -- the starting point -- for the whole proceeding. If petitioners wish to persist in treating

the statute as a blank slate that has not been authoritatively construed, then so be it. But they should not be permitted to silence the intervenors who dare merely to acknowledge an understanding that has been common to the regulated utilities in this State. All the parties have to start somewhere in addressing the basic issues whether "need" has been shown. To strike the testimony of intervenors that provides a statutory context and point of reference for many of the statements that follow will serve no useful purpose in this proceeding, and will serve only to distort and impede the presentation of FPC's case.

In support of their motions, petitioners cite this Commission's order in In re: Investigation Into the Appropriate Rate Structure for Southern States Utilities, Inc., 94 FPSC: 3: 724 ("Southern States"). In that case, Commissioner Julia L. Johnson, sitting as the prehearing officer, struck certain expert testimony of an attorney before the final hearing. The testimony at issue was the attorney's "legal opinion concerning the constitutionality of uniform rates, as well as his legal opinion concerning whether the Commission has `jurisdiction to establish conservation rates under various provisions of the Florida Statutes.'" Id. at 725. Significantly, the prehearing officer had already determined that the issue that "addressed the Commission's authority with respect to approving a uniform rate structure, was not appropriate for this proceeding" and "the issue of the constitutionality of uniform rates" was the subject of a pending appeal. Id. at 725-26. For these reasons, the prehearing officer concluded that the disputed testimony was not relevant to the issues in the case.

The prehearing officer went on to say that the testimony would be stricken for the further reason that it constituted legal opinion addressed to what were solely "legal issues." In this case, neither Mr. Dolan nor Mr. Rib purport to offer "legal" opinions, and they certainly do not address their testimony to what are solely "legal issues." To the contrary, although legal requirements are inextricably intertwined with all the factual issues in this case, the gravamen of

the testimony of FPC's witnesses is addressed to factual and policy issues that are very much a part of this proceeding.

III. Conclusion

For the foregoing reasons, petitioners' motions to strike portions of the testimony of FPC's witnesses Vincent M. Dolan and Michael D. Rib should be denied.

Respectfully submitted,

FLORIDA POWER CORPORATION

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CERTIFICATE OF SERVICE

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