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October 8, 1999

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Florida Public Service Commission
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By Hand Delivery

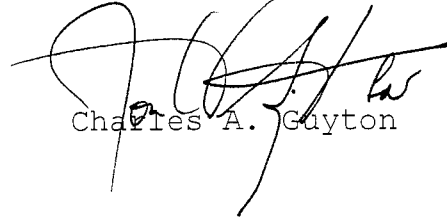
Re: DOCKET NO. 981890-EU

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") in Docket No. 981890-EU are the original and fifteen (15) copies of Florida Power & Light Company's Response to FICA's Petition for Leave to Intervene.

If you or your staff have any questions regarding this filing, please contact me.

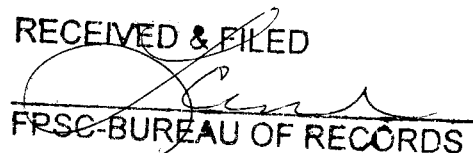
Very truly yours,



Charles A. Guyton

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Generic Investigation) DOCKET NO. 981890-EI
Into the Aggregate Electric) DATE: October 8, 1999
Utility Reserve Margins Planned)
for Peninsular Florida)

RESPONSE OF FLORIDA POWER & LIGHT COMPANY TO
THE FLORIDA INDUSTRIAL COGENERATION ASSOCIATION'S
PETITION FOR LEAVE TO INTERVENE

Florida Power & Light Company ("FPL") hereby files this its response to the October 1, 1999 Petition for Leave to Intervene in this docket filed by the Florida Industrial Cogeneration Association, Inc. ("FICA"). 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 the FICA 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, FICA's petition is deficient. The rule states that the petition "must conform with Commission Rule 25-22.036(7)(a)," but FICA's petition cannot so comply because the

rule referred to has been repealed. Order No. PSC-99-0413-NOR-PU. Even if the Commission's Rule 25-22.036(7)(a) had not been repealed, the FICA petition failed to meet the requirements of that rule prior to repeal. 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 FICA'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, FICA's petition to intervene is deficient. FICA'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 FICA 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). FICA does not plead any constitutional, statutory or rule based right to participate. FICA identifies no substantial interest of FICA's that will be determined.

6. FICA'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. FICA's allegations do not meet the requirements of standing case

law.

a. FICA fails to allege injury.

Nowhere in its petition has FICA 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 FICA 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 FICA 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, FICA has failed the Agrico standing test.

b. FICA 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 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

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).

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 FICA's petition to intervene fail to allege either (1) that FICA has already sustained injury in fact or (2) that FICA is in immediate danger of sustaining some direct injury as a result of the challenged agency action. FICA 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.

FICA's alleged interests are quite remote and speculative. FICA has alleged its members own or operate cogeneration facilities and sell electricity to Florida electric utilities. FICA alleges that "reserve margins, either actual or planned, directly affect the value of cogenerated electricity." The fact is that the price paid by Florida's electric utilities for cogenerated electricity is established either by Commission rule or by contract. This proceeding does not address the rules under which cogenerated power is priced or the contracts under which cogenerated power is bought.

There is absolutely no demonstrated impact of the Commission establishing a reserve margin methodology or even a reserve margin criterion on FICA's members' interests in the price for cogenerated electricity. Conclusory assertions aside, FICA's petition completely fails to show any relationship between the potential Commission action in this proceeding and FICA's professed interest in the price of cogenerated.

FICA also alleges that its members purchase electricity from Florida's electric utilities. FICA further alleges that reserve margins directly affect "the cost and reliability of electricity

purchased by FICA members...." Once again, this is not a proceeding to address the price of electricity paid by FICA's members or any other entity in Florida. If those charges are changed, there will be separate rate proceedings in which the Commission would act, and it would be in those proceedings, not this one limited to investigating reserve margin methodologies, in which FICA's interest might be affected. Once again, FICA has alleged a remote and speculative interest that will not support intervention. It cannot be reasonably concluded that FICA 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.

c. FICA'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.

FICA's alleged interests in the price of cogenerated electricity it would sell to electric utilities and in the price of standby or supplemental power that it would purchase from electric utilities are interests that are not intended to be protected in this proceeding. This proceeding is not intended to establish pricing for cogenerated or any other type of electricity. The docket is intended to investigate the calculation of reserve margins by electric utilities. Such a determination is not a proceeding designed to address the pricing issues FICA attempts to rely upon to justify intervention.

7. Finally, FICA 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 FICA alleges, it has substantial interests that may be affected in this investigation, FICA 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 FICA 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, FICA is alleging that the Commission is misapplying the APA.

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

Respectfully submitted,

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Attorneys for Florida Power
& Light Company

By: 

Charles N. 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 FICA's Petition for Leave to Intervene furnished by Hand Delivery* or U.S. Mail this 8th day of October, 1999 to the following:

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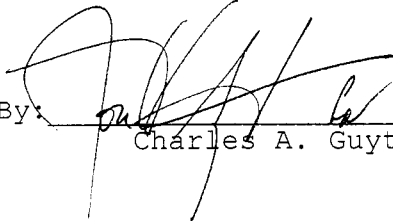
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