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Jonathan E. Sjostrom

October 15, 1999

Blanca S. Bayó, Director
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Florida Public Service Commission
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By Hand Delivery

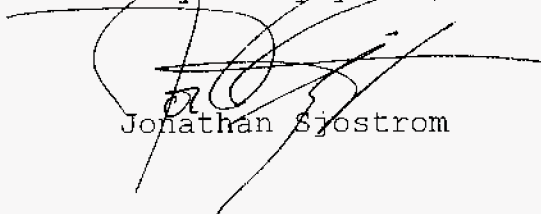
Re: DOCKET NO. 991462-EU

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") in Docket No. 991462-EU are the original and fifteen (15) copies of Florida Power & Light Company's Memorandum in Opposition to Petitioner's Motion to Strike Portions of Florida Power & Light Company's Petition for Leave to Intervene.

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

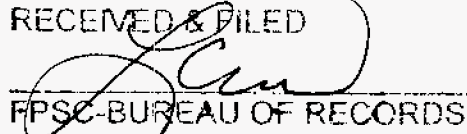
Very truly yours,



Jonathan Sjostrom

- AFA _____
- APP _____
- CAP _____
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- ~~CTR~~ _____
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cc: Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination)
of Need for Electric Power Plant) Docket No. 991462-EU
in Okeechobee County by Okeechobee) Filed: October 15, 1999
Generating Company, L.L.C.)
_____)

FPL'S MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION TO
STRIKE PORTIONS OF FLORIDA POWER & LIGHT COMPANY'S
PETITION FOR LEAVE TO INTERVENE

Proposed intervenor, Florida Power & Light Company ("FPL") hereby responds in opposition to petitioner Okeechobee Generating Company's ("OGC") motion, dated October 14, 1999, to strike portions of FPL's petition for leave to intervene.

Petitioner's motion raises two arguments as supposed bases to strike various portions of FPL's petition. Each of these arguments fails to approach even a colorable basis to strike anything.

As a preliminary matter, petitioner's motion is not permitted under the Commission's rules, the Uniform Rules or the Administrative Procedure Act. Petitioner moves to strike pursuant to rule 1.140(f) of the Florida Rules of Civil Procedure. That rule does not apply in administrative proceedings. The legislature mandated the adoption of uniform rules for administrative proceedings, and such rules were adopted. But the motion to strike rule of the Florida Rules of Civil Procedure has not been adopted by the Commission nor by the

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Uniform Rules of Procedure and has not been imposed by the Administrative Procedure Act. Various specific discovery rules of the Florida Rules of Civil Procedure have been specifically adopted, but the motion to strike rule has not. See, e.g. Fla. Stat. § 120.569(2)(d) & (2)(i)2; and Uniform Rule 28-106.208 (adopting discovery provisions of the Florida Rules of Civil Procedure). Therefore, the fundamental authority asserted by the petitioner -- Rule 1.140(f) of the Florida Rules of Civil Procedure -- is nonexistent in this proceeding.

With respect to petitioner's "reasoning" petitioner's first argument is that FPL addresses the merits of its position and the relief it seeks in its petition. Petitioner seems disconcerted to discover that FPL's Petition to Intervene "contains numerous allegations and legal argument concerning the merits of OGC's Petition." One wonders what else a petition to intervene might contain. But according to some logic discernable only to petitioner, "FPL's merits arguments are wholly immaterial and irrelevant to its Petition to Intervene and should be stricken." OGC's Motion to Strike at ¶3, page 2.

Apparently, OGC's view of a petition to intervene is that intervenor should establish only that it has a protectable interest but must leave to mystery the legal and factual basis of how or why its interest can and should be protected in a way different from that asserted in the initial petition. This seems

rather a startling proposition of law -- that a party seeking to intervene in a proceeding is forbidden from stating its position as to the merits of the controversy, not to mention the obvious corollary that the petitioner alone defines the scope of the legal and factual issues on the merits. Moreover, analysis of the merits of the initial petition typically can -- and here does -- demonstrate that the petitioner's request, if granted, would harm intervenor's substantial interests. OGC's purported proposition is startling, but only because it is profoundly, obviously wrong.

OGC claims its proposition of law arises from Uniform Rule 28-106.205. According to petitioner "nothing in Rule 28-106.205, F.A.C., authorizes the use of a petition to intervene as a vehicle for arguing the merits of the case."

Petitioner's argument requires either a conscious misreading of Rule 28-106.205 or a failure to read the whole rule. The third sentence of Rule 28-106.205 states: "The petition [to intervene] **shall** conform to Rule 28-106.201(2). . . ." Rule 28-106.201(2) states:

(2) All petitions filed under these rules **shall** contain:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, and telephone number of the petitioner; name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's

substantial interests will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) **A statement of all disputed issues of material fact.** If there are none, the petition must so indicate;

(e) **A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief;** and

(f) A demand for relief.

The relief sought by FPL is not simply to intervene in the abstract, like a spectator at a football game. The relief sought by FPL is the denial of the petition. Thus, the very rule petitioner claims as authority for striking FPL's "merits arguments" affirmatively and unmistakably requires FPL to make them. Certainly "**disputed issues of material fact**" cannot be identified without addressing the merits of the claim.

Similarly, "**A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief**" cannot exist divorced from the merits of the proceeding.

Petitioner cites no opinion or order supporting the proposition that a petition to intervene should be stricken to the extent that it "contains numerous allegations and legal

argument concerning the merits."¹ There is no authority for petitioner's position because petitioner's position is baseless.

Petitioner's second argument is that FPL's petition to intervene should be stricken because of what petitioner characterizes as holdings by the Commission in its Duke Energy order. Petitioner contends that some statements in the Commission's Duke Energy order contradict various of FPL's arguments. Petitioner further contends that only OGC's view of the Duke Energy order and its applicability here can be considered. OGC even goes so far as to assert its conclusion Duke Energy involved "a similarly situated merchant plant developer" before the first witness has testified to anything.

Neither FPL nor the Commission is bound to OGC's views of the affect of the Duke Energy order. And of course whether OGC is "a similarly situated merchant plant developer" remains wholly a disputed issue of material fact, unless disputed issues of fact are for some reason to be taken on faith because, petitioner simply states that it is "similar" so some other entity involved in some other proceeding.

¹Indeed, in the only case cited by petitioner for this proposition, the venerable Pentecostal Holiness Church, Inc. v. Mauney, 270 So.2d 762, 769 (Fla. 4th DCA 1972), from which petitioner wrenches 2 words out of context, the Fourth DCA found reversible error a lower court order striking a defense the plaintiff asserted was "wholly irrelevant."

FPL's petition to intervene relied upon binding, unreversed precedent of the Florida Supreme Court and it is certainly appropriate for FPL to so rely. Duke Energy is not binding precedent. Moreover, the Duke Energy order is on appeal to the Florida Supreme Court and the Florida Supreme Court never reversed any of the numerous decisions relied upon by FPL.

Unless FPL's arguments are foreclosed by binding precedent, FPL must continue to rely upon the unreversed, binding Florida Supreme Court cases cited in the petition to intervene, and, of course, it is perfectly proper to do so. Such reliance is no basis to strike anything.

Fundamentally, OGC's motion to strike is an attempt to control the scope of this matter with no factual or legal basis to do so. The Duke Energy order is binding as to Duke alone and, of course, even if that order were to operate in the way OGC hopes, it cannot be assumed at this point that OGC can prove that it is "a similarly situated plant developer" even before the first scintilla of evidence is introduced.

CONCLUSION

OGC's motion to strike should be stricken because it is frivolous, FPL's petition to intervene should be granted immediately and sanctions should be entered to discourage OGC from further squandering the resources of the Commission and the parties. Particularly given the extraordinarily accelerated

docket, the Commission should not countenance frivolous motions that serve no purpose other than to divert the Commission and the parties from the onerous task at hand.

DATED this 15th day of October, 1999.

Respectfully submitted,

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Attorneys for Florida Power
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BY: 

Matthew M. Childs, P.A.

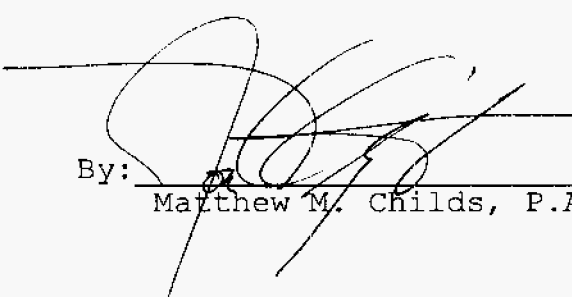
CERTIFICATE OF SERVICE
DOCKET NO. 991462-EU

I **HEREBY CERTIFY** that a true and correct copy of Florida Power & Light Company's Memorandum in Opposition to Petitioner's Motion to Strike Portions of Florida Power & Light Company's Petition for Leave to Intervene has been furnished by Hand Delivery* this 15th day of October, 1999 to the following:

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