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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C.

RECORDS AND REPORTING DOCKET NO. 991462-EU

Submitted for filing: October 15, 1999

FLORIDA POWER CORPORATION'S EMERGENCY PETITION FOR WAIVER OF RULE 25-22.080 AND REQUEST FOR STAY

Introduction

Pursuant to Section 120.542, Florida Statutes, and Uniform Rules Chapter 28-104, F.A.C., Florida Power Corporation ("FPC") hereby petitions the Florida Public Service Commission (the "Commission") for an emergency waiver of the time requirements of Rule 25-22.080 applicable to the need proceeding commenced by Okeechobee Generating Company, L.L.C.'s ("OGC"). FPC requests that this proceeding be stayed pending the Florida Supreme Court's disposition of the Duke appeal and this Commission's conclusion of its investigation in the Reserve Margin docket. Generic Investigation Into Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida, Docket No. 981890-EU.

OGC has represented in its written submissions to the Commission that it will not file its

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request for site certification until June 2000 and that it does not anticipate proceeding to a final hearing on site certification until early 2001. (Exhibits to OGC's need petition, Executive Summary p. 36-37). Yet, OGC has filed its petition for a determination of need before the Florida Supreme Court has resolved the threshold question whether this Commission has authority to site a "merchant plant" and before this Commission has completed its investigation

into a number of important matters that OGC seeks to place in issue in its petition (e.g., whether

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uncommitted capacity may be counted toward utility reserves, whether a 20% reserve margin planning criterion is appropriate for Peninsular Florida). By jumping the gun and filing its need petition at this time, OGC has triggered the application of the time limits set forth in Rule 25-22.080. In accordance with that rule, intervenor testimony must be filed in this important matter by November 8, scarcely three weeks away from the present date, and a final hearing on OGC's need petition has been scheduled for December 6-8, 1999. Under the current schedule, the Commission's resolution of this matter will be completed by early February 2000.

Given OGC's admission that it has no intention of seeking actual site certification of this project until next summer or going to hearing on that application until the year 2001, there is no reason to hurry up and wait. In further support of this petition, FPC states as follows:

1. The name and address of the petitioner are:

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2. All pleadings, motions, orders, and other documents directed to the petitioner are

to be served on:

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3. FPC seeks an emergency waiver of the time constraints set forth in Commission

Rule 25-22.080, which states in pertinent part:

(2) Within 7 days following receipt of a petition [seeking a determination of need for an electrical power plant], or in its order commencing a proceeding on its own motion, the Commission shall set a date for hearing, which shall be within 90 days of receipt of the petition or of issuance of its order. Following the hearing, each party may make submittals to the Commission on a time schedule to be determined in accordance with the requirements of each proceeding, but terminating no later than 120 days from the receipt of the petition. The matter will be placed before the Commission on an agenda which will permit a decision no later than 135 days from the date of receiving the petition or the issuance of the order commencing the proceeding. A petition for reconsideration must be filed within 5 days of the Commission's decision.

4. Absent a waiver, this Rule requires the Commission to hold a public hearing within 90 days and then to enter an order within 135 days of the commencement of this proceeding. Under this Rule, this proceeding must be completed by early February. (Section

403.519, Fla. Stat., however, imposes no time limits on a need proceeding.) As demonstrated by FPC's Petition to Intervene, FPC's substantial interests will be affected by this proceeding. For several reasons set forth below, FPC asks the Commission for an emergency waiver of the applicable time limits so that FPC may mitigate or avoid prejudice to its substantial interests.

**Purpose of the Underlying Statute Achieved and Substantial Hardship or Violation of Principles of Fairness**

5. It is well established that a waiver of an administrative rule *shall* be granted when a person affected by the rule demonstrates that: (1) the purpose of the underlying statute would be or has been achieved by other means, and (2) the application of the rule would create a substantial hardship or violate principles of fairness. Fla. Stat. § 120.452. These conditions exist in this case.

6. As a threshold matter, the Florida Supreme Court is currently considering in the Duke appeal the fundamental issue whether the Commission has statutory authority to grant a determination of need for a "merchant plant." If FPC prevails in that appeal, no good will come of adjudicating OGC's petition in the timeframe contemplated by the Commission's rule. By incurring the expense and disruption associated with participating in this proceeding at this time, FPC, other parties, and the Commission would be forced to suffer an undue hardship that could and should be avoided by awaiting the outcome of the Supreme Court's decision.

7. At the same time, the purpose of the applicable statute, Section 403.519, Fla. Stat., would be served by delaying this proceeding until the Supreme Court determines whether that statute even permits the Commission to act favorably on OGC's petition. In fact, Section 403.519 does not impose time limits for rendering a decision on a petition seeking a

determination of need. The time limits set forth in Rule 25-22.080 were adopted to implement the Florida Electrical Power Plant Siting Act, Section 403.501, et. seq., Fla. Stat., which imposes time limits for the completion of site certification proceedings. Unlike the rule, the statutory time constraints found in the Siting Act apply only to a need determination when a “complete application” for site certification has been made. See, Fla. Stat. § 403.507 and § 403.5066. But OGC has not yet commenced a site certification proceeding. Indeed, OGC has stated that it does not intend to do so until June 2000 and that it does not anticipate proceeding to a hearing on site certification until early 2001. (Exhibits to OGC’s need petition, Executive Summary p. 36-37). Accordingly, rushing to take this proceeding to a final hearing in December 1999 will plainly not serve the purpose of any Florida Statute. To the contrary, expediting this proceeding will serve only to prevent interested parties like FPC from having adequate time to participate meaningfully and effectively to protect their substantial interests, and will likewise handicap the Commission in its effort to afford due deliberation to all matters raised in the course of the proceeding.

8. In the same vein, it is revealing that despite the fact that this Commission hastened to render its decision in the Duke case, the Duke project has not been finally certified by the Florida Siting Board for the simple and sensible reason that Duke has recognized that it should not proceed any further with the permitting process absent a definitive resolution by the Florida Supreme Court of the most fundamental legal issues. With Duke’s consent, the Siting Board has stayed any further action on Duke’s petition pending a decision by the Florida Supreme Court. The same considerations should apply to OGC’s application as well. Just as the Siting Board has stayed its hand in the Duke proceeding, this Commission should conserve its

resources and the resources of all affected parties by staying further action in this proceeding until the Florida Supreme Court has spoken.

9. Moreover, OGC also admits that it has not obtained its EWG certification from the Federal Energy Regulatory Commission ("FERC") for the (nominal) 550 MW plant described in its need petition. (Petition 7 n.2). It follows, then, that OGC cannot credibly claim that it would be prejudiced by a delay under the existing statutory scheme. Given all this, a rule waiver and stay of this proceeding is eminently logical, and, by the same token, a hurried need determination would be an obviously inefficient use of the time and resources of the Commission and all affected parties.

10. In addition, in its petition, OGC calls upon this Commission to pre-determine questions that the Commission has only begun to investigate in the Reserve Margin docket, such as whether the Commission should adopt (via later rule-making) a 20% reserve margin planning criterion for Peninsular Florida. (Petition p. 18).

11. The Commission initiated the Reserve Margin investigation to examine the appropriate methodology for determining Peninsular Florida reserves. State-regulated utilities such as FPC are mandatory participants in that investigation. (Request to Establish Docket; 12/17/98). The hearing in that docket is presently scheduled for November 2nd and 3rd. The parties' post-hearing statements are not due until December 2, 1999.

12. Given the procedural posture of the Reserve Margin investigation, OGC's contention that some "Peninsular Florida" need has been identified in that investigation puts the cart before the horse. The Commission has adopted no position on this issue, and the

Commission's *Advisory* Staff has made no recommendation concerning methodology, let alone concerning the adequacy of the reserves presently planned for Peninsular Florida.

13. Indeed, whether and how to reflect or incorporate uncommitted capacity (such as "merchant plants") in a methodology for determining reserves is one of the issues presently being investigated by the Commission. Issue 3 in the Reserve Margin docket states in pertinent part:

How should the individual components of an individual or peninsular Florida percent reserve margin planning criterion be defined:

A. Capacity available at time of peak (Ex. QF capacity, firm and non-firm purchases and non-committed capacity). . .(emphasis added).

Attachment to Prehearing Officer's Order Clarifying Scope of Proceeding; Docket Procedures and Establishing Issues, Docket No. 981890-EU, Generic Investigation Into Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida.

14. By filing its need petition now, OGC is attempting to have the Commission pre-determine not only that (1) uncommitted (here, "merchant plant") capacity should be incorporated into a methodology for determining the adequacy of planned reserves in Peninsular Florida, but also that (2) Peninsular Florida reserves are inadequate, and OGC's proposed "merchant plant" can meet some portion of that need. Going forward in this fashion would be fundamentally unfair to FPC and other parties participating in the Reserve Margin investigation and to the Commission itself. It creates the potential for confusion of issues in the two proceedings and for unfair prejudice of FPC's interests in one proceeding by events occurring in the other. At a minimum, it would foster the appearance of unfairness, which would be detrimental to the interests of this Commission and to all participants in both proceedings.

15. Finally, FPC will be hard-pressed to protect its substantial interests in the compressed time-frame contemplated by the rules and this Commission's scheduling order. Under the current schedule, FPC is required to prepare and submit testimony in less than a month concerning a proposed project that first surfaced when the petition was filed. OGC filed no ten-year site plan in advance of this proceeding that might suffice to put FPC on notice that OGC intended to initiate this proceeding. And OGC did not serve its need petition on FPC. Rather, FPC learned about the petition on its own less than two weeks ago.

#### **Emergency**

16. In view of the afore-described circumstances, preparing to participate and to defend its substantial interests in the time permitted by the rule and the current scheduling order will subject FPC and other similarly situated parties to undue hardship and manifest unfairness. The December hearing dates will have come and gone if the Commission considers this petition for rule waiver under the usual 90 day timeline. FPC needs immediate relief from the schedule in this docket. Moreover, given the pending Duke appeal, the procedural posture of the Reserve Margin docket, and OGC's stated intention to wait until June 2000 to apply for site certification, the Commission's consideration of OGC's petition at this time would be unnecessary, prejudicial, and inefficient. The risk of prejudice to FPC and others of the existing schedule far outweighs any remote prejudice to OGC of the requested rule waiver and stay.

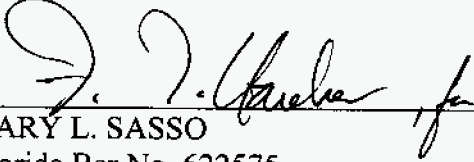
WHEREFORE, FPC respectfully petitions for an emergency waiver of the time constraints imposed upon need petitions under Rule 25-22.080 and also requests that the proceeding on OGC's need petition be stayed pending judicial resolution of the Duke appeal and the completion of the Reserve Margin investigation.



Dated this 15<sup>th</sup> day of October 1999.

Respectfully submitted,

FLORIDA POWER CORPORATION



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FLORIDA POWER CORPORATION'S EMERGENCY PETITION FOR WAIVER OF RULE 25-22.080 AND REQUEST FOR STAY has been furnished by fax and U.S. Mail to Robert Scheffel Wright and John Moyle as counsel for Okeechobee Generating Company, L.L.C. and U.S. Mail to all other counsel of record this 15<sup>th</sup> day of October, 1999.

  
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