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Subject:	Electronic Filing for Docket No. 070650-EI / FPL's Response in Opposition to Florida Municipal Electric Association's Petition to Intervene
Attachments:	FPL's Response in Opposition to FMEA's Petition to Intervene.doc; Attachments to FPL's Response in Opposition to Petition to Intervene.pdf

Electronic Filing

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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. The document is being filed on behalf of Florida Power & Light Company.

d. There are a total of 11 pages, including the attachments.

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

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

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Response
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Attachment
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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: December 14, 2007

FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO FLORIDA MUNICIPAL ELECTRIC ASSOCIATION'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 the Florida Municipal Electric Association ("FMEA"), and in support thereof states:

1. FMEA is the state trade association comprised of Florida's thirty-four municipal electric utilities. FMEA Petition at 1. In support of its request to intervene, FMEA states that its members are interested in pursuing discussions with FPL regarding joint ownership of Turkey Point 6 and 7, and asserts that (i) FPL is required by statute and Florida Public Service Commission ("Commission") rule to hold such discussions with other electric utilities, and (ii) the Commission must ensure that meaningful discussions with other electric utilities have in fact occurred before making an affirmative determination of need. FMEA Petition at 2, 4. The relief requested by FMEA is not of a type contemplated by section 403.519, Florida Statutes, and may not be sought in this need determination. As a result, FMEA's alleged interest in seeking that relief does not give it standing to intervene. *Agrico Chemical Co. v. Dep't of Envtl. 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. FMEA states that FPL is required by statute and Commission rule to hold discussions with other electric utilities. FMEA 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 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 reading of the statute and the rule directly contradicts FMEA'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 FMEA 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." FMEA 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 FMEA. FMEA Petition at 4. In fact, the legislative history directly contradicts FMEA'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. Contrary to the implication of FMEA's ultimate request for relief, the Legislature did not intend through the language of section 403.519(4)(a)(5) to confer upon FMEA's members 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

[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.

coerce such opportunities. The relief sought by FMEA has no basis in the plain language of section 403.519(4)(a)(5) and is specifically contradicted by the legislative history of this provision. The scope and purpose of a need determination proceeding before the Commission is clearly delineated by statute and does not include FMEA's stated purpose. FMEA's assertion that "[a]t issue is whether FPL has held adequate and meaningful discussions" is itself incorrect. FMEA Petition at 3.

III. FMEA Lacks Standing to Intervene in this Proceeding

6. Because the relief requested by FMEA is not contemplated by section 403.519(4), FMEA 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. FMEA 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 interests of FMEA's members in engaging in joint ownership discussions with FPL. Therefore, FMEA 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).

7. If FMEA 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 FMEA's arguments in support of a state-wide policy to encourage the joint ownership of nuclear generation facilities or its members' specific interests in joint ownership. FMEA should not be permitted to hijack the proceeding and convert it into a forum for its own, unrelated and non-jurisdictional purposes.

8. 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 FMEA's members 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) FMEA will not be permitted to raise issues, engage in discovery, or examine witnesses beyond the proper scope of the proceeding.

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

Respectfully submitted this 14th day of December, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 14th day of December, 2007, to the following:

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