

Dorothy Menasco

From: Butler, John [John.Butler@fpl.com]
Sent: Monday, March 16, 2009 3:51 PM
To: Filings@psc.state.fl.us
Cc: Jennifer Brubaker; 'Kelly.jr@leg.state.fl.us'; 'yang.y.song@credit-suisse.com'; 'SaporitoEnergyConsultants@gmail.com'; 'sugarman@sugarmansuuskind.com'; 'mbrasswell@sugarmansuuskind.com'
Subject: Electronic Filing: Docket 080677-EI / FPL's Response to Saporito Pet/Intervene
Attachments: Response in opposition to Saporito petition to intervene.doc; Response in opposition to Saporito petition to intervene.pdf

Electronic Filing

a. Person responsible for this electronic filing:

John T. Butler, Esq.
700 Universe Boulevard
Juno Beach, FL 33408
561-304-5639
John.Butler@fpl.com

b. Docket No. 080677-EI
In Re: Application for Increase in Rates by Florida Power & Light Company

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

d. There are a total of 11 pages

e. The document attached for electronic filing is Florida Power & Light Company's Response in Opposition to Petition to Intervene of Thomas Saporito and Saporito Energy Consultants

John T. Butler
Managing Attorney
Florida Power & Light Company
(561) 304-5639
(561) 691-7135 Fax
John.Butler@fpl.com

DOCUMENT NUMBER - DATE

02261 MAR 16 8

FPSC-COMMISSION CLERK

3/16/2009

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Increase in Rates by)
Florida Power & Light Company)

Docket No. 080677-EI
Date: March 16, 2009

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION
TO PETITION TO INTERVENE OF THOMAS SAPORTIO
AND SAPORITO ENERGY CONSULTANTS**

Florida Power & Light Company ("FPL") hereby respectfully responds in opposition to the Saporito Energy Consultants Petition for Leave to Intervene (the "SEC Petition"), and states as follows.

Background and Summary

On March 9, 2009¹, Mr. Saporito filed the SEC Petition seeking to intervene both as an individual and as a representative of SEC. The stated purpose of the intervention is to address "whether FPL improperly misled its rate-payers in its assessment of costs associated with the operation of its existing power plants and whether FPL should be allowed to charge its customers for these costs."

The intervention request should be denied for several reasons. With regards to SEC, the SEC Petition fails to allege that SEC is a legal entity with the capacity to maintain or intervene in a legal action. Furthermore, even if SEC was a legal entity under Florida law, Mr. Saporito is not entitled to appear and represent SEC or SEC's clients because he is not an attorney or "qualified representative" as required by Commission rules. With regard to Mr. Saporito's request to intervene as an individual, he has a long-standing history with FPL that evidences a clear pattern of filing actions for improper purposes, including the intent to coerce an offer of employment or other economic consideration from FPL and to delay the proceedings in question.

¹ The SEC Petition was apparently filed and served electronically on Saturday, March 7, 2009. Consistent with the Commission's policy on electronic filing, this means that the SEC Petition is treated as having been filed on the next business day.

DOCUMENT NUMBER-DATE

02261 MAR 16 8

FPSC-COMMISSION CLERK

FPL submits that his attempt to intervene here is no exception to that pattern and would add nothing but confusion and delay to this proceeding. An intervenor, as with any other party to a Commission proceeding, is obligated to participate in good faith, and not for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. Mr. Saporito's history of involvement in FPL proceedings strongly suggests that his intervention would be for these improper purposes. The interests of FPL customers will be well represented by others. Accordingly, Mr. Saporito should not be permitted to intervene in his individual capacity. Alternatively, if he is permitted to intervene in any capacity, the Commission should make clear at the outset that his participation must be limited strictly to proper issues in this proceeding and that abuse of the proceeding will not be tolerated. Specifically, any order granting intervention should state that issues related to Mr. Saporito's competitive economic interests or other issues that advance his personal or business interests are beyond the scope of this rate case proceeding, and that Mr. Saporito must comply with applicable statutes and rules governing proceedings before the Commission.

Argument

A. SEC Lacks Legal Capacity to Intervene and Fails to Allege an Adequate Basis for Intervention

SEC is not a legal entity with the capacity to participate in this proceeding. Only certain groups of individuals or business entities are recognized by Florida law as legal entities distinct from their members, which are affirmatively granted the capacity to sue and be sued by statute. *See, e.g.*, § 607.0302, Florida Statutes. The SEC Petition alleges only that SEC is a "viable concern"; there is no allegation that SEC is a corporation, non-profit corporation, or any other entity with the legal capacity to sue under Florida law. *See* SEC Petition, at p. 3. Moreover, a

review of the records of the Florida Department of State, Division of Corporations, indicates that SEC is not currently registered with the state as such an entity.

Even if SEC had the legal capacity to intervene, it has failed to allege that it will suffer any injury in fact as a result of the resolution of any issues that are addressed in this proceeding. The SEC Petition does not allege that SEC is a customer of FPL or otherwise will be substantially affected by the outcome of this proceeding.

The SEC Petition also fails to establish associational standing. There is no allegation that SEC and/or its clients constitute any kind of association. Moreover, even if the intervention request contained such allegations, the test for associational standard has not been met. The Commission has previously denied similar requests for intervention by SEC,² and it should do so again here.

B. Mr. Saporito is Not Entitled to Represent SEC or SEC's Clients

The Commission's rules require that a party be represented by an attorney or a "qualified representative." Rule 28-106.106(1), Fla. Admin. Code. To the extent Mr. Saporito is purporting to represent SEC and/or SEC's clients' interests, he should not be permitted to do so. Mr. Saporito is not an attorney, and has not made the required filing of qualifications for consideration to become a "qualified representative." Rule 28-106.106(2)(a), Fla. Admin. Code. Accordingly, Mr. Saporito is not entitled to represent SEC or SEC's clients before the Commission in this proceeding. As with SEC's request to intervene, the Commission has

² See Order No. PSC-08-0733-PCO-EI, Docket No. 080001-EI, Fuel and Purchased Power Cost Recovery Clause, dated November 3, 2008; and Order No. PSC-08-0596-PCO-GU, Docket No. 080002-EI, Energy Conservation Cost Recovery Clause, dated September 16, 2008.

previously denied similar requests for intervention by Mr. Saporito as SEC's representative,³ and should do so here.

C. Mr. Saporito Should Not be Permitted to Intervene as an Individual

An examination of the long standing history between Mr. Saporito and FPL demonstrates that Mr. Saporito is acting improperly in attempting to intervene in these proceedings. FPL has been the target of more than 20 years of abusive, vexatious, and meritless litigation against FPL and its affiliates by Mr. Saporito (and alter egos of Mr. Saporito, e.g., SEC) in a variety of fora.

1. Discrimination Complaints Against FPL

In 1988 Mr. Saporito was terminated from employment with FPL for cause. He subsequently filed two whistleblower discrimination complaints against FPL with the U.S. Department of Labor ("DOL") under Section 210 (now 211) of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 ("ERA"). After ten years of fully litigating those claims before the DOL and in federal courts, DOL found that FPL's termination of Mr. Saporito was based on "overwhelming" evidence that Mr. Saporito was repeatedly insubordinate, "insolent," "blatantly lied" and "clearly lied" to management, and engaged in a "mockery of management's role." See *Saporito v. Florida Power & Light Co.*, 89-ERA-07, (Recommended Decision and Order, Oct. 15, 1997), *aff'd*, Administrative Review Board (ARB) Case No. 98-008 (Final Decision and Order Aug. 11, 1998), *aff'd sub nom*, *Saporito v. U.S. Dep't of Labor*, 192 F.3d 130 (11th Cir. 1999) (*per curiam*) (unpublished table decision), *reh'g en banc denied*, 210 F.3d 395 (11th Cir. 2000) ("ARB I") (emphasis in original ALJ Recommended Decision).

In 2004, more than five years after the DOL ARB's final decision in ARB I (and four years after the Eleventh Circuit's affirmance of that decision), Mr. Saporito filed motions

³ id.

seeking reconsideration of DOL's decision in ARB I. The ARB denied Mr. Saporito's motions and dismissed the case. See *Saporito v. Florida Power & Light Co.*, ARB Case No. 04-079, 2004 WL 3038071 (Dec. 17, 2004) ("ARB II"). Mr. Saporito then petitioned the Eleventh Circuit for review of both the ARB I and ARB II decisions. The Court dismissed on *res judicata* grounds, See *Saporito v. Dep't of Labor*, Case No. 05-10749-DD (11th Cir. Jun. 2, 2005) (*reh'g denied*, Jul. 21, 2005) (unpublished decision), and the U.S. Supreme Court denied Mr. Saporito's request for review. See *Saporito v. Dep't of Labor*, 546 U.S. 1150 (2006).

Mr. Saporito has also filed a host of whistleblower discrimination complaints against FPL with DOL that were derived from Mr. Saporito's 1988 discrimination complaint. All of these derivative complaints were dismissed by DOL. *Saporito v. Florida Power & Light Co.*, 1996 WL 580922 (ARB Jul. 19, 1996 (ERA complaint dismissed as "frivolous")); *Saporito v. Florida Power & Light Co.*, 1995 WL 848177 (Sec'y Sept. 7, 1995) (ERA complaint dismissed); *Saporito v. Florida Power & Light Co.*, 1994 WL 897461 (Sec'y Aug 8, 1994) (ERA complaint dismissed).

Mr. Saporito has not limited his complaints to FPL. Indeed, his litigious nature is further demonstrated by his filing of blacklisting and/or retaliatory discharge and/or related claims against numerous other companies and against DOL itself.⁴

Incredibly, in July 2005, Mr. Saporito sought *re-employment* with FPL and employment with an FPL affiliate. When Mr. Saporito was not hired, he filed another discrimination claim

⁴ See *Saporito v. FedEx Kinkos Office and Print Services, Inc.*, 2005-CAA-18; *Saporito v. Central Locating Services, Ltd. and Asplundh Tree Expert Co.*, 2005-CAA-13; *Saporito v. GE Medical Systems Adecco Technical*, 2005-CAA-7; *Saporito v. Central Locating Services, Ltd. and Asplundh Tree Expert Co.*, 2004-CAA-13; *Saporito v. Quarles & Brady et al*, 2004-CAA-9; *Saporito v. BellSouth*, 2004-CAA-8; *Saporito v. Dep't of Labor*, 2003-CAA-9; *Saporito v. GE Medical Systems and Adecco Technical Services*, 2003-CAA-2; *Saporito v. GE Medical Systems and Adecco Technical Services*, 2003-CAA-1; *Saporito v. The Atlantic Group, Inc.*, 94-ERA-29; *Saporito v. Arizona Public Service Co., et al*, 93-ERA-45; *Saporito v. Houston Lighting & Power Co.*, 93-ERA-28; *Saporito v. Arizona Public Service Co., et al*, 93-ERA-26; *Saporito v. Houston Lighting & Power Co., et al*, 92-ERA-45; *Saporito v. Houston Lighting & Power Co., et al*, 92-ERA-38; and *Saporito v. Arizona Public Service Co., et al*, 92-ERA-30.

with DOL in January 2006. That claim was voluntarily withdrawn by Mr. Saporito and was dismissed. *Saporito v. Florida Power & Light Co.*, 2006-ERA-8 (ALJ Mar. 24, 2006).

On May 18, 2008, Mr. Saporito again applied for re-employment with FPL. When he was not hired, he filed yet another discrimination complaint with DOL. An ALJ recommended that this claim be dismissed as time barred, concluding that Mr. Saporito's complaint represented an "obvious and profound abuse" of the whistleblower protection laws. *Saporito v. Florida Power & Light Co.*, ALJ Case No. 2008-ERA-014 at 4 (Oct. 2, 2008) (appeal to ARB pending). The day before Mr. Saporito electronically filed the SEC Petition in this case, another DOL ALJ recommended that a separate discrimination complaint that Mr. Saporito had filed in August 2008 against FPL alleging blacklisting be dismissed. *Saporito v. Florida Power & Light Co.*, ALJ Case No. 2009-ERA-001 (Mar. 5, 2009). Yet another discrimination complaint filed by Mr. Saporito against FPL in November 2008 with DOL is pending at the investigative stage. *Saporito v. Florida Power & Light Co.*, OSHA Case No. 4-1050-09-012, filed Nov. 26, 2008 (investigation pending).

2. Mr. Saporito's NRC Filings Against FPL

Mr. Saporito has also sought to initiate numerous proceedings against FPL during this twenty-year period before the U.S. Nuclear Regulatory Commission ("NRC"). He has filed numerous requests for enforcement action against FPL⁵ and hearing requests, all of which were

⁵ See, e.g., *Florida Power & Light Co.*, (St. Lucie Nuclear Power Plant Units 1 and 2; Turkey Point Nuclear Generating Plant Units 3 and 4) DD-98-10, 48 NRC 245 (1998); *Florida Power & Light Co.*, (St. Lucie Nuclear Power Plant Units 1 and 2; Turkey Point Nuclear Generating Plant Units 3 and 4) DD-97-20, 46 NRC 96 (1997); *Florida Power & Light Co.*, (St. Lucie Nuclear Power Plant Units 1 and 2) DD-96-19, 44 NRC 283 (1996); *All Licensees*, DD-95-8, 41 NRC 346 (1995); *Florida Power & Light Co.*, (Turkey Point Nuclear Generating Plant Units 3 and 4; St. Lucie Nuclear Power Plant Units 1 and 2) DD-95-7, 41 NRC 339 (1995); *Florida Power & Light Co.*, (Turkey Point Nuclear Generating Plant Units 3 and 4) DD-90-1, 31 NRC 327 (1989); *Florida Power & Light Co.*, (Turkey Point Nuclear Generating Plant Units 3 and 4) DD-89-8, 30 NRC 220 (1989); *Florida Power & Light Co.*, (Turkey Point Nuclear Generating Plant Units 3 and 4) DD-89-5, 30 NRC 73 (1989).

ultimately denied.⁶ Mr. Saporito's pattern of harassment and vexatious litigation against FPL continued in 2008 and 2009, when Mr. Saporito filed eight separate petitions with NRC seeking enforcement action against FPL regarding FPL's nuclear operations. All of these petitions were denied.⁷ Mr. Saporito also attempted to initiate four NRC licensing proceedings involving FPL and its affiliates in 2008. All of these requests were rejected by the NRC's Atomic Safety and Licensing Board.⁸

3. Intervention in Proceedings Before This Commission

This is Mr. Saporito's third attempt to intervene in FPL-related Commission proceedings.⁹ In the prior instances, Mr. Saporito's request was based on FPL actions that would have no impact to Mr. Saporito at all, and each was denied for failure to show proper standing. Although FPL respects the rights of truly interested and affected persons to intervene, it is clear that Mr. Saporito continues to attempt to intervene in proceedings against FPL regardless of the

⁶ See, e.g., *Florida Power & Light Co.* (St. Lucie Nuclear Plant, Units 1 and 2), Memorandum and Order, (Denying Request for Hearing) slip op. at 11 (Aug. 15, 2008); *Florida Power & Light Co.*, (Turkey Point Nuclear Generating Plant, Units 3 and 4) LBP-91-2, 33 NRC 42 (1991), *aff'd* CLI-91-5, 33 NRC 238 (1991); *Florida Power & Light Co.*, (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73 (1990); *Florida Power & Light Co.*, (Turkey Point Nuclear Generating Plant, Units 3 and 4) LBP-90-16, 31 NRC 509 (1990) (Admitted to the proceeding), *reversed*, LBP-90-24, 32 NRC 12 (1990) (Saporito dismissed from proceeding based upon lack of standing due to changed circumstances) *aff'd* ALAB-952, 33 NRC 521 (1991) *aff'd* CLI-91-13, 34 NRC 185 (1991); *Florida Power & Light Co.*, (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325.

⁷ *FPL re Turkey Point Security Issues*; filed Apr. 27, 2008, denied Jul. 7, 2008; *FPL re Refusal to Rehire*; filed July 5, 2008, denied Aug. 4, 2008; *FPL re 1988 Termination*; filed Aug. 3, 2008, denied: Oct. 27, 2008; *FPL re Florida Bar referral*; filed Sept. 10, 2008, denied Dec. 5, 2008; *FPL re Request for NRC Sanctions*; filed Sept. 27, 2008, denied Dec. 5, 2008; *FPL re Turkey Point Security Issues*; filed Sept. 28, 2008, denied Nov. 20, 2008; *FPL re Request for NRC Sanctions*; filed Oct. 5, 2008, denied Dec. 5, 2008; *FPL re: Phipps*; filed Jan. 1, 2009, denied Jan. 26, 2009.

⁸ *Florida Power & Light Company* (St. Lucie Nuclear Plant, Units 1 and 2), LBP-08-14, 69 NRC ___ (slip op.) (2008); *Florida Power & Light Company* (Turkey Point Nuclear Plant, Units 3 and 4), LBP-08-18, 68 NRC ___ (slip op.) (2008); *FPL Energy Point Beach, LLC* (Point Beach Nuclear Plant, Unit 1), LBP-08-19, 68 NRC ___ (slip op.) (2008); *FPL Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP 08-20, 68 NRC ___ (slip op.) (2008). Even more illustrative of the baseless nature of these intervention petitions filed with the NRC is that Saporito's residence (as represented by the Jupiter, Florida address listed on his pleadings) is more than 100 miles from Turkey Point and is more than 1000 miles from the Point Beach and Seabrook reactors. Saporito never alleged any credible connection with these regions of the United States that are very distant from his residence.

⁹ *id.*

merits of his claims, the nature of the proceeding, or the actual impact to him of the issue of concern in the matter.

The facts outlined in the response to the SEC Petition illustrate a pattern of harassment that has continued largely unabated for almost 20 years at the NRC and DOL and that has worsened in 2008. On a reasonable reading of the facts, Mr. Saporito has never accepted the fully litigated findings of the DOL, as twice affirmed by the 11th Circuit and by the refusal of the U.S. Supreme Court to hear his case, that FPL did not discriminate against him. His vexatious litigation, including his intervention petition filed in this docket, is a blatant attempt to bring leverage against FPL for employment and/or financial gain, as illustrated in his previous complaint to the DOL that FPL is refusing to establish a business partnership with him.¹⁰ The Commission should not facilitate this abusive behavior by permitting Mr. Saporito to intervene here.

Section 120.569(2)(e), F.S., provides that a party to an administrative proceeding such as this docket may not file any pleading, motion, or other document for improper purposes. Specifically, it provides:

All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

¹⁰ See Docket numbers 08001-EI, Fuel and Purchased Power Cost Recovery Clause; and 08002-EI, Energy Conservation Cost Recovery Clause; *see also* Mr. Saporito's complaint filed in *Saporito v. Florida Power & Light Co.*, OSHA Case No. 4-1050-09-012, filed Nov. 26, 2008 (investigation pending).

Mr. Saporito has made repeated attempts to intervene in FPL matters which have no impact on him, and has a factually determined history of improper behavior related to FPL. Mr. Saporito's actions are clearly retaliatory in nature, and are in attempt to harass, cause unnecessary delay, and are frivolous. These actions result in added work by FPL and the Commission in responding to Mr. Saporito's pleadings, and therefore needlessly increase the cost of litigation. Mr. Saporito's actions, and the SEC Petition, are for improper purposes, and the SEC Petition should be denied.

4. Customers Would Not be Harmed by Denying Mr. Saporito's Intervention

Mr. Saporito has pointed to no special customer interest he intends to represent or how his representation would provide any distinct form of protection for customers. To the contrary, there is every reason to expect that customers' interests will be well protected in this proceeding. OPC, which is charged with representing the citizens of Florida in proceedings before the Commission, has already given notice of its intervention in this proceeding. In short, there is no risk that residential customers will not be adequately represented should Mr. Saporito's request to intervene be denied.

Conclusion

WHEREFORE, for all of the foregoing reasons, FPL respectfully requests that the Commission deny the SEC Petition and refuse to allow SEC or Mr. Saporito to intervene in this proceeding. Alternatively, if Mr. Saporito is permitted to intervene in any capacity, the Commission should make clear at the outset that his participation must be limited strictly to proper issues in this proceeding and that abuse of the proceeding will not be tolerated. Specifically, any order granting intervention should state that issues related to Mr. Saporito's competitive economic interests or other issues that advance his personal or business interests are

beyond the scope of this rate case proceeding, and that Mr. Saporito must comply with applicable statutes and rules governing proceedings before the Commission.

Respectfully submitted,

R. Wade Litchfield, Esq.
Vice President and Chief Regulatory Counsel
John T. Butler, Esq.
Managing Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
Telephone: (561) 304-5639
Facsimile: (561) 691-7135

By: /s/ John T. Butler
John T. Butler
Fla. Bar No. 283479

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically this 16th day of March, 2009, to the following:

Jennifer Brubaker
Florida Public Service Commission
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-1400
jbrubake@psc.state.fl.us

Credit Suisse *
Yang Song, Equity Research
yang.y.song@credit-suisse.com

J.R. Kelly, Esq.
Office of Public Counsel
e/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
Attorneys for the Citizens of the State
of Florida
Kelly.jr@leg.state.fl.us

I.B.E.W. System Council U-4 *
Robert A. Sugarman
D. Marcus Braswell, Jr.
c/o Sugarman & Susskind, P.A.
100 Miracle Mile, Suite 300
Coral Gables, FL 33134
Attorneys for IIBEW System Council U-4
sugarman@sugarmansuskind.com
mbraswell@sugarmansuskind.com

Saporito Energy Consultants *
Thomas Saporito
Post Office Box 8413
Jupiter, FL 33468-8413
SaporitoEnergyConsultants@gmail.com

* Indicates interested person

By: /s/ John T. Butler
John T. Butler
Fla. Bar No. 283479