

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Duke Energy New	)	
Smyrna Beach Power Company, L.L.P.	)	
for Declaratory Statement Concerning	)	
Eligibility To Obtain Determination	)	DOCKET NO. 971446-EU
of Need Pursuant to Section 403.519,	)	FILED: December 8, 1997
Florida Statutes.	)	

**DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY, L.L.P.'s  
CONSOLIDATED MOTION TO STRIKE FLORIDA POWER CORPORATION'S  
ANSWER TO PETITION FOR DECLARATORY STATEMENT AND FLORIDA  
POWER CORPORATION'S MOTION TO DISMISS PROCEEDINGS**

Duke Energy New Smyrna Beach Power Company, L.L.P., ("Duke")  
by and through undersigned counsel and pursuant to Rule 25-  
22.037, Florida Administrative Code ("F.A.C.") and Rule 1.140(f),  
Florida Rules of Civil Procedure ("F.R.C.P.") hereby files this  
consolidated motion to strike Florida Power Corporation's  
("FPC's") Answer to Petition for Declaratory Statement and Motion  
to Dismiss Proceeding and in support thereof states:

1. On November 4, 1997 Duke filed with the Florida Public

ACK \_\_\_\_\_ Service Commission ("FPSC" or "Commission") a Petition for  
AFA \_\_\_\_\_  
APP 3 Declaratory Statement (the "Petition") which initiated this  
CAF \_\_\_\_\_ proceeding. In the Petition, Duke asked that the Commission  
CMU \_\_\_\_\_  
CTR \_\_\_\_\_ confirm that it is an "applicant" eligible to pursue a  
EAG 5 \_\_\_\_\_  
LEG \_\_\_\_\_ determination of need pursuant to Section 403.519, the Power  
LIN \_\_\_\_\_ Plant Siting Act and applicable Commission rules. On December  
OPC \_\_\_\_\_  
RCH 17 \_\_\_\_\_, FPC filed an Answer to Petition for Declaratory  
SEC 1 \_\_\_\_\_  
WAS \_\_\_\_\_  
OTH \_\_\_\_\_

DOCUMENT NUMBER-DATE  
**12542 DEC-86**  
FPSC-RECORDS/REPORTING

Statement (the "Answer") and Motion to Dismiss Proceeding (the "Motion to Dismiss").

2. FPC's Answer is not legally appropriate in this proceeding and should be stricken. In addition, FPC's Answer and Motion to Dismiss are clearly untimely and as such should be stricken as immaterial to this proceeding.

FPC's Answer is Legally Inappropriate

3. Rules 25-22.020 through 25-22.022, F.A.C., are the Commission's rules governing declaratory statement proceedings. These rules make no reference to, and do not otherwise authorize the filing of, an answer in response to a petition for declaratory statement. This is because an answer is not the appropriate response to a petition for declaratory statement.<sup>1</sup>

4. As a general rule, a party is entitled to file an answer only when affirmative relief is being sought against that party. This is a proceeding for a declaratory statement that by its very nature affects only Duke--no affirmative relief is being sought against FPC. Accordingly, FPC's Answer is not legally

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<sup>1</sup>Though styled an "answer", FPC's Answer is not a responsive pleading. Rather, it is a lengthy treatise setting forth FPC's opposition to the concept of merchant power plants that would more appropriately have been submitted to Commission Staff at the November 7, 1997 Commission Staff workshop that focused on merchant power plants.

appropriate.

5. Assuming an answer could be filed in a declaratory proceeding, the only time an answer would be appropriate is if disputed issues of material fact exist. See Department of Administration v. University of Florida, 531 So. 2d 377, 380 (Fla. 1st DCA 1988). In its Petition to Intervene and Request for Administrative Hearing, filed in this docket on December 1, 1997, FPC specifically requests that the Commission convene a hearing pursuant to Section 120.57(2), Florida Statutes. A hearing under Section 120.57(2), Florida Statutes, is only appropriate if no disputed issues of fact exist. Thus by requesting such a hearing, FPC has conceded that no disputed issues of fact exist in this proceeding and under the rationale of University of Florida, FPC is not entitled to file its Answer.

FPC's Answer and Motion to Dismiss are Untimely

6. Assuming, arguendo, that FPC's Answer were authorized, Rule 25-22.037, F.A.C., specifically provides that any party or intervenor may file an answer to a petition or a motion in opposition to a petition within twenty (20) days of service of the petition.

7. Rule 1.140(g), F.R.C.P., provides that "[a] party may

move to strike . . . redundant, immaterial, impertinent or scandalous matter from any pleading at any time."

8. Rule 25-22.037, F.A.C., specifically requires any answer or responsive motion to be filed within 20 days. FPC's Answer and Motion to Dismiss were filed over twenty-six (26) days after Duke filed its Petition and were thus clearly filed well outside the clearly prescribed period for a timely filing. Accordingly, FPC has waived its right to file an Answer and Motion to Dismiss and the Answer and Motion to Dismiss should be stricken as immaterial to this proceeding.

WHEREFORE, Duke Energy New Smyrna Beach Power Company, L.L.P., respectfully requests that the Florida Public Service Commission STRIKE Florida Power Corporation's Answer and Motion to Dismiss filed in this docket as untimely.

Respectfully submitted this 8th day of December, 1997.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail or hand-delivery(\*) on this 8th day of December, 1997 to the following:

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