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Matthew M. Childs, P.A.

October 8, 1999

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, FL 32399

RE: DOCKET NO. 991462-EU

Dear Ms. Bayó:

Enclosed for filing please find an original and fifteen (15) copies of Florida Power & Light Company's Motion to Dismiss and Request for Oral Argument and Expedited Consideration of Its Motion to Dismiss in the above referenced docket.

Very truly yours,


Matthew M. Childs, P.A.

MMC:ml
Enclosure
cc: All Parties of Record

- AFA _____
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG 1
- LEG _____
- MAS 3
- OPC _____
- PAI _____
- SEC 1
- WAW _____
- OTH _____

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ORIGINAL

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 8, 1999
Generating Company, L.L.C.)
_____)

FLORIDA POWER & LIGHT COMPANY'S
MOTION TO DISMISS PETITION

Pursuant to Florida Administrative Code Rule 28-106.204, Florida Power & Light Company ("FPL") files this motion to dismiss the Petition For Determination Of Need For An Electrical Power Plant ("Petition") filed with the Florida Public Service Commission ("Commission") on September 24, 1999. The Petition should be dismissed for the following reasons:

1. The Petition fails to allege any facts necessary to support the alleged legal conclusion that OGC is an "electric utility."
2. The Petition fails to allege that OGC, as an alleged "electric utility," has complied with Rule 25-22.082, Florida Administrative Code.
3. The Petition fails to allege that OGC, as an alleged "electric utility," has complied with Rule 25-22.071, Florida Administrative Code."
4. OGC admits in its Petition that it is not an EWG as to the proposed power plant for which it seeks a determination of need.
5. The Petition fails to comply with Rule 28-106.201, Florida Administrative Code.

OGC's failure to plead facts necessary to show it is an "electric utility" and a proper applicant, OGC's failure to plead compliance with Commission rules that must be complied with before the filing of a determination of need petition, and OGC's admission

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that it is not an EWG as to the plant for which it seeks a determination of need result in failing to allege a cause of action and the Commission lacking jurisdiction to consider this matter. The matter should be dismissed without a protracted hearing. FPL more fully develops each of its grounds for dismissal as follows:

Failure To Allege Facts Showing OGC Is An "Electric Utility."

The Petition should be dismissed because the Petition states a legal conclusion that OGC is an "electric utility" under Section 366.02(2), Florida Statutes, (and therefore, presumably an "applicant" under the Siting Act) without alleging any facts or even the essential facts to support this legal conclusion. Unsupported legal conclusions are not to be accepted as fact for purposes of a motion to dismiss. Without allegations demonstrating that OGC is an electric utility, the Petition fails to state a cause of action, the Commission's jurisdiction is not properly invoked, and the Petition should be dismissed.

Petitioner alleges that it "is an electric utility under section 366.02(2)." Petition at 1. Section 366.02(2) provides that "'Electric utility' means any municipal electric utility, investor-owned electric utility, or rural electric cooperative *which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.*" (Emphasis added). The petition is devoid of any allegation that petitioner

"owns, maintains, or operates" any electric facility of any kind within the state.

Although not pled by OGC that it is an electric utility under Chapter 403, section 403.503(13) of the Florida Statutes provides that "'Electric utility' means cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, **engaged in, or authorized to engage in,** the business of generating, transmitting, or distributing electric energy." The petition is likewise devoid of any allegation that petitioner is "engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy." Moreover, the existence of the petition as the petitioner's first and only proceeding before the Commission belies the conclusion that petitioner is engaged in or authorized to engage in any electric generation, transmission or distribution business. Petitioner cannot be "authorized to engage in the business of generating electric energy" in the very proceeding in which it seeks, for the first time, a portion of the authority legally required as a prerequisite to beginning construction of a n electrical power plant.

The petitioner's statement that it "is an electric utility" is a mere legal conclusion. The status of "electric utility" is dependent upon the application of the legal definitions contained

in section 366.02(2) of the Florida Statutes. To plead that an entity is indeed an "electric utility" requires pleading of specific facts to demonstrate that the statutory definition is satisfied. Absent a specific allegation of facts demonstrating present ownership, maintenance or operation of an electric generation, transmission, or distribution system within the state, petitioner's allegation of the status of "electric utility" is a mere and insufficient legal conclusion.

Allegations of legal conclusions in a petition are insufficient under Florida law. As in judicial proceedings, a petition must allege all facts necessary to support a petitioner's right to initiate the proceeding, not mere legal conclusions. Uniform Rule 28-106.201(2)(e) states that a petition to initiate administrative proceedings must contain "A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action." A petition which substantially fails to conform to the pleading requirements of Rule 28-106.201(2) **must** be dismissed. Uniform Rule 28-106.201(4).

Legal conclusions are not ultimate facts. Clearly mere legal conclusions inserted in a complaint are insufficient to state a cause of action unless substantiated by allegations of ultimate fact. A complaint must sufficiently allege ultimate facts which, if established by competent evidence, would support a decree

granting the relief sought." Doyle v. Flex, 210 So.2d 493 (Fla. 4th DCA 1968). The petition must state sufficient facts so that the Commission "in reviewing the ultimate facts alleged may rule as a matter of law whether or not the facts alleged are sufficient as the factual basis for the inferences the pleader seeks to draw and are sufficient to state a cause of action." Beckler v. Hoffman, 550 So.2d 68, 71 (Fla. 5th DCA 1989). A petitioner cannot plead adequately "by alleging in conclusive form, which tracks the language of the statute, acts which lack factual allegations and merely state bare legal conclusions." Ginsberg v. Lennar Florida Holdings, Inc., 645 So.2d 490 (Fla. 3d DCA 1994).

If, as a prerequisite to maintaining a proceeding, a petitioner is required to hold a particular status -- such as the statutorily required status of "electric utility" here -- the petitioner must allege facts demonstrating its status and may not rely on a mere conclusory invocation of such status. Motors Insurance Corp. V. Heavy Lift Services, Inc., 545 So.2d 389 (Fla. 3d DCA 1989) (if an entity must occupy the status of agent to maintain proceeding, entity must allege facts demonstrating agency relationship and may not merely state that agency relationship exists); accord, Cocoris v. Smith, 221 So.2d 13, 15 (Fla. 1st DCA 1969); The Lawyers' Title Guaranty Fund v. Koch, 397 So.2d 455 (Fla. 4th DCA 1981) (if status of partnership or joint venture is prerequisite to a proceeding, litigant must allege specific facts

contended to support the existence of partnership or joint venture); Maiden v. Carter, 234 So.2d 168, 170 (Fla. 1st DCA 1970) (if claim asserted depends upon existence or status of a fiduciary, complaint must allege facts "from which the conclusion could be drawn that defendant acquired an influence over [the claimant] which she abused, or that [the claimant] reposed in defendant a confidence which she betrayed").

Just as each of the conclusory allegations of necessary status was insufficient in the cited cases, the petitioner's conclusory invocation of the phrase "electric utility" is likewise insufficient. The petition does not attempt to allege any facts in support of the legal conclusion that petitioner enjoys the necessary status of "electric utility." Instead, the petition relies solely on the bald legal conclusion that petitioner is an "electric utility." Therefore, the petition fails to allege the "ultimate facts" required by Rule 28-106.201(2) and *must* be dismissed pursuant to Uniform Rule 28-106.201(4). Without allegations demonstrating that OGC is an electric utility, the Petition fails to state a cause of action, the Commission's jurisdiction is not properly invoked, and the Petition should be dismissed.

Failure To Comply With Rule 25-22.082 - a Precondition to Seeking a Need Determination

The Petition should be dismissed because the Petition fails to allege that OGC has complied with the requirements of Rule 25-22.082, Florida Administrative Code, Selection of Generating Capacity, which is an express precondition to the filing of a petition for need determination as an investor owned electric utility. The Petition alleges that OGC is an "electric utility" under Section 366.02(2), Florida Statutes, but the Petition fails to allege that OGC has satisfied the applicable precondition by evaluating "supply-side alternatives to its next planned generating unit by issuing a Request for Proposals." While FPL contests OGC's status as an "electric utility," status as an electric utility is a legal prerequisite to being an applicant authorized to seek a need determination. Therefore if OGC is an electric utility (an investor-owned electric utility), then it must have followed and complied with Rule 25-22.082(2) prior to filing need determination petition. Moreover, OGC cannot avoid the precondition of Rule 25-22.082 by failing to establish it is an electric utility. Nor can OGC avoid the precondition by failing to plead as to Rule 25-22.082 since OGC is required to plead that it is entitled to the relief requested.

Rule 25-22.082(2), F.A.C. requires "each investor-owned electric utility" "prior to the filing a petition for a determination of need for an electrical power plant" to "evaluate

supply-side alternatives to its next planned generating unit by issuing a Request for proposals (RFP).” OGC has not issued such an RFP, and it has not alleged it has issued such an RFP.¹ Therefore, its Petition should be dismissed.

Failure To Comply With Rule 25-22.071 - a Precondition to Seeking a Need Determination.

The Petition should be dismissed for failure of OGC to comply with Rule 25-22.071, Florida Administrative Code. OGC asserts, without demonstration, that it is an “electric utility.” While FPL disputes that undocumented assertion, such status is a requirement to being an applicant entitled to seek a need determination under Rule 25-22.071, Florida Administrative Code and OGC should have filed a ten-year site plan with the Commission “at least three years prior to application for site certification.” OGC has not filed a ten-year site plan with the Commission, instead its Petition alleges that it will begin a site certification proceeding in June 2000. OGC has failed to comply with Rule 25-22.071, Florida Administrative Code; therefore, its Petition should be dismissed.

¹ Although subsection (9) of the rule provides for a potential waiver of this rule, OGC has not applied for such a waiver. Any waiver request must be resolved prior to filing for a determination of need if subsection (2) is to be given effect. The Commission Staff has previously taken the position that any rule waiver must be made pursuant to Section 120.542, Florida Statutes.

OGC's Admission That It Is Not An EWG As To The Proposed Plant.

At page 6 of the Petition OGC alleges it is an EWG, but then OGC acknowledges that its EWG status was based not on the power plant for which it seeks a determination of need but a power plant of a different design. OGC further acknowledges that it is in the process of seeking EWG status for the power plant for which it seeks a determination of need. (Petition at 7, n. 2) By its own admission, OGC does not have EWG status for its proposed power plant. Stated differently, OGC cannot be "authorized to engage in the business of generating, transmitting, or distributing electric energy" as required by section 403.503(13), Florida Statutes, when the plant for which EWG status exists is not to be built. OGC cannot assume authorization to "generate" with a plant for which a need determination and site certification has not issued. Therefore, its Petition should be dismissed.

Failure To Comply With Rule 28-106.201.

Rule 28-106.201, Florida Administrative Code sets forth the requirements for initial pleadings in proceedings to determine substantial interests. One of the required elements in such a petition is a statement of disputed issues of material fact or a statement that the petitioner does not believe there are disputed issues of material fact. OGC's petition fails to satisfy this requirement. Under Rule 28-106.201(4), a petition shall be

dismissed for failure to meet the requirements of Rule 28-106.201.

Therefore, OGC's petition should be dismissed.

DATED this 8th day of October, 1999.

Respectfully submitted,

Steel Hector & Davis LLP
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301
(850) 222-2300

Attorneys for Florida Power
& Light Company

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 Motion to Dismiss has been furnished by Hand Delivery* this 8th day of October, 1999 to the following:

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By: 

Matthew M. Childs, P.A.

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 8, 1999
Generating Company, L.L.C.)
_____)

FLORIDA POWER & LIGHT COMPANY'S REQUEST FOR ORAL ARGUMENT
AND EXPEDITED CONSIDERATION OF ITS MOTION TO DISMISS PETITION


Florida Power & Light Company ("FPL") respectfully requests oral argument and expedited consideration of its motion to dismiss filed contemporaneously herein. Given the expedited hearing schedule and associated deadlines already established, oral argument and expedited consideration are necessary if the issues raised in FPL's motion are to be meaningfully considered.

DATED this 8th day of October, 1999.

Respectfully submitted,

Steel Hector & Davis LLP
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301
(850) 222-2300

Attorneys for Florida Power
& Light Company

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 Request for Oral Argument and Expedited Consideration of Its Motion to Dismiss Petition has been furnished by Hand Delivery* this 8th day of October, 1999 to the following:

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