

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Generic investigation into the aggregate electric utility reserve margins planned for Peninsular Florida

DOCKET NO. 981890-EU Submitted for filing \_\_\_\_\_, 1999

FLORIDA POWER CORPORATION'S RESPONSE TO THE FLORIDA INDUSTRIAL COGENERATION ASSOCIATION'S PETITION FOR LEAVE TO INTERVENE

FLORIDA POWER CORPORATION (FPC), by its attorneys, hereby responds to The Florida Industrial Cogeneration Association's (FICA) Petition for Leave to Intervene as follows:

INTERVENTION IS NOT PROPER IN THIS GENERIC INVESTIGATION

FPC must safeguard its constitutional, statutory, and regulatory rights by reiterating its objections to the nature of these proceedings as an improper "mix" of an agency investigative proceeding and a formal evidentiary hearing wherein the agency intends to adjudicate issues affecting certain parties' substantial interests. Section 120.57(5), Florida Statutes (1999), and Uniform Rule of Procedure 28-106.101 expressly prohibit this type of "mixed" proceeding. While the Commission is statutorily entitled to engage in certain proceedings, it cannot fashion those proceedings in any way it sees fit, especially when such proceedings conflict with the procedures set out in the Florida Administrative Procedure Act and the Uniform Rules of

2 Procedure promulgated by the Administration Commission.

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FPC continues to assert that the Commission's application of Rule 25-22.036 in the instant proceeding impermissibly conflicts with Uniform Rule of Procedure 28-106.201. Since the Commission cannot satisfy the requirements of Rule 28-106.201, this proceeding is not a valid section 120.57 proceeding and remains a generic investigation. This generic investigation is preliminary to agency action and cannot result in a decision affecting substantial interests.

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Therefore, pursuant to the Commission's own Rule 25-22.039 and Uniform Rule 28-106.205, intervention in these proceedings is not proper.

**FICA'S PETITION DOES NOT SATISFY THE COMMISSION'S RULE OR THE APPLICABLE UNIFORM RULE**

FICA's petition purports to be made pursuant to Rule 25-22.039, Florida Administrative Code. While the Commission has received an exception from the Administration Commission pertaining to Rule 25-22.039, FICA's petition must still include allegations sufficient to show that its substantial interests are subject to determination or will be affected through the proceeding. Fla. Admin. Code R. 25-22.039.

FICA alleges that its "substantial interests" in this proceeding are the value of the cogenerated electricity sold by FICA members, and the cost and reliability of electricity purchased by FICA members from Florida electric utilities. FICA alleges that these "substantial interests" will be affected because reserve margins, "either actual or planned," directly affect the price of electricity and the value of cogenerated electricity.

In addition, FPC objects to the nature of FICA's alleged "substantial interests." FICA's economic concern regarding the price of power that FICA members purchase from Florida electric utilities and concern regarding the potential affect this proceeding may have on the value of cogenerated electricity are market concerns. A decision in this docket may have an indirect affect on market prices for electricity, including cogenerated electricity, but FICA's characterization of its economic concern as a substantial interest is based on pure speculation. The price of electricity, including FICA's cogenerated electricity is based on complex and varied market forces, not simply this proceeding. FICA does not, and cannot, allege sufficient facts to show any direct nexus between this proceeding and the price of electricity. FICA's highly speculative "substantial interest" does not rise to the necessary standard for intervention in this

proceeding. See Agrico Chemical Co. v. Department of Environmental Protection, 406 So.2d 478, 482 (Fla. 2<sup>nd</sup> DCA 1981)(holding that an individual must show that he or she will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and that the injury is of a type or nature which the proceeding is designed to protect.) An intervenor in a section 120.57 proceeding must show that it is actually entitled to a formal 120.57 hearing as well. See id. Therefore, the Commission's rule pertaining to intervention and the Uniform Rule describing the requirements to intervene both refer back to the rules describing requirements for initiating a proceeding. FICA cannot make the necessary showing under either set of rules. The purported purpose of this proceeding is to investigate electric utility reserve margins. This proceeding should not be used to address speculative and indirect economic concerns of bystanders.

FICA's petition does not sufficiently state a basis for intervention in this proceeding because FICA has failed to meet the requirements of Commission Rule 25-22.039. In fact, Rule 25-22.039 may not provide a basis for any party to intervene in any proceeding as it is currently drafted. The Rule specifically states that the Petition to Intervene "must conform with Commission Rule 25-22.036(7)(a)." Fla. Admin. Code 25-22.039. However, that subsection of Commission Rule 25-22.036 has been repealed. This obvious inconsistency within the Commission's own rules raises the possibility that Rule 25-22.039 is facially invalid. Even assuming that the Rule is somehow still applicable, former Rule 25-22.036(7)(a), prior to its repeal, required the prospective intervenor to allege certain facts that FICA has not provided in its petition, including: a statement of all known disputed issues of material fact, a concise statement of the ultimate facts alleged as well as the rules and statutes which entitle the petitioner to relief and a demand for relief. See In Re: Petition for Limited Proceeding to Implement Water

Conservation Plan in Seminole County, 1994 WL 454839 (Fla. P.S.C. 1994). Therefore, FICA has not met its burden pursuant to the requirements of Commission Rule 25-22.039.

Although FPC respectfully disagrees with the Commission's decision to govern this docket as a section 120.57 proceeding, the Uniform Rules of Procedure established by the Administration Commission contains a separate rule describing the requirements for intervention, which is applicable to section 120.57 proceedings. Rule 28-106.205, Florida Administration Code, sets out requirements very similar to Commission Rule 25-22.039. However, while Commission Rule 25-22.039 refers to a repealed subsection of Rule 25-22.036, Rule 28-106.205 refers to Rule 28-106.201(2), which remains in effect. Subsection (2) of Rule 28-106.201 sets out the requirements for a petition to initiate a hearing involving disputed issues of material fact. Therefore, pursuant to the Uniform Rules of Procedure, a petition to intervene should contain all of the necessary allegations to initiate the underlying proceeding.

FICA's petition fails to satisfy the requirements of Rule 28-106.205 and 28-106.201(2). FICA's petition does not contain "[t]he name and address of each agency affected and each agency's file or identification number, if known." Fla. Admin. Code. R. 28-106.201(2)(a). FICA's petition does not contain "[a] statement of when and how the petitioner received notice of the agency decision. Fla. Admin. Code. R. 28-106.201(2)(c). FICA's petition does not contain "[a] statement of all disputed issues of material fact." Fla. Admin. Code. R. 28-106.201(2)(d). FICA's petition does not contain "[a] concise statement of the ultimate facts alleged, including the specific facts the petitioner contains warrant reversal or modification of the agency's proposed action." Fla. Admin. Code. R. 28-106.201(2)(e). FICA's petition does not contain "[a] statement of the specific rules or statutes the petitioner contains require reversal or modification of the agency's proposed action." Fla. Admin. Code. R. 28-106.201(2)(f). FICA's

petition does not contain “[a] statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency’s proposed action.” Fla. Admin. Code. R. 28-106.201(2)(g). FPC asserts that Uniform Rule 28-106.205 should be applied in this proceeding because of the inconsistency present in Commission Rule 25-22.039. FICA cannot allege sufficient facts at the present time to intervene, pursuant to the Uniform Rules, because the Commission has not taken agency action or proposed agency action in the instant proceeding.

FICA’s “Petition for Leave to Intervene” does not allege sufficient facts to satisfy Commission Rule 25-22.039 or Uniform Rule 28-106.205. In addition, FICA’s assertions that its “substantial interests” will be affected by this proceeding are indirect, speculative and based upon economic concerns that are not proper issues to be addressed in this proceeding. Lastly, intervention in the instant proceeding, which is a generic investigation convened pursuant to the Commission’s inherent statutory powers, is not proper because this proceeding has not been properly initiated as a section 120.57 proceeding and cannot determine any party’s substantial interests.

WHEREFORE, FPC respectfully requests the entry of an order denying FICA’s Petition for Leave to Intervene.

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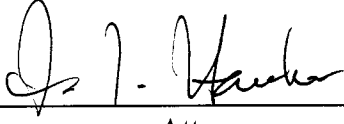
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FLORIDA POWER CORPORATION'S RESPONSE TO THE FLORIDA INDUSTRIAL COGENERATION ASSOCIATION'S PETITION FOR LEAVE TO INTERVENE has been furnished via U.S. Mail to all counsel of record listed below this 11<sup>th</sup> day of October, 1999.

  
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