BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to determine need for Turkey Point Nuclear Units 6 and 7 electrical power plant, by Florida Power & Light Company.	DOCKET NO. 070650-EI ORDER NO. PSC-08-0059-PCO-EI ISSUED: January 28, 2008

ORDER GRANTING INTERVENTION

On October 16, 2007, Florida Power & Light Company (FPL) filed a petition for determination of need for Turkey Point Nuclear Units 6 and 7 electrical power plants in Dade County pursuant to Sections 366.04 and 403.519, Florida Statutes (F.S.), and Rules 25-22.080, 25-22.081, and 28-106.201, Florida Administrative Code (F.A.C.). By Order No. PSC-07-0869-PCO-EI, issued October 30, 2007, the matter has been scheduled for a formal administrative hearing commencing on January 30, 2008.

By petition dated December 11, 2007, Florida Municipal Electric Association, Inc., (FMEA), a state trade association comprised of Florida's thirty-four municipal electric utilities, filed its Petition to Intervene (petition) in this docket. On December 14, 2007, FPL filed a response in opposition to FMEA's petition. On December 19, 2007, FMEA filed a Motion for Leave to File a Reply to FPL's response in opposition.[1]

On December 24, 2007, the Commission issued a notice that oral argument would be heard by the Prehearing Officer on the issue of intervention. Pursuant to the notice, FMEA and FPL filed briefs summarizing their arguments on January 3, 2008. On January 7, 2008, oral argument was heard by FMEA, FPL, and other persons with pending intervention requests in this docket.[2]

Petition for Intervention

In its petition, FMEA contends that it is entitled to intervene in this matter based upon the following assertions: (1) Section 403.519, F.S., and Rule 25-22.081, F.A.C., requires FPL to hold discussions with other electric utilities, and to include in its petition a summary of those discussions with other electric utilities' ownership interests in the proposed nuclear plants;[3] (2)

[1] Neither the Uniform Rules nor our rules contemplate a reply to a response to a motion. The Commission has routinely declined to consider such replies, and as such those arguments need not, and will not, be considered. See, e.g., Order No. PSC-07-0032-PCO-EU, issued January 9, 2007, in Docket No. 060635-EU, In Re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee.

[2] Intervention requests filed individually by the Florida Municipal Power Agency, Orlando Utilities Commission, JEA, and Seminole Electric Cooperative, Inc., will be addressed by separate orders.

[3] Section 403.519(4), F.S., sets forth those matters which the Commission must consider when making its determination on a proposed electrical power plant using nuclear materials:

as a state trade association in need of nuclear base load generation resources FMEA has a substantial interest in pursuing co-ownership opportunities in nuclear base load facilities throughout Florida, specifically the proposed FPL nuclear power plants subject to the Commission's determination in this proceeding; (3) the Commission must ensure that meaningful discussions with electric utilities have occurred before making an affirmative determination of need; and (4) although FMEA has engaged in initial, informal discussions with FPL regarding possible co-ownership opportunities, FMEA must be permitted to intervene and participate in this docket in order to protect its interest and the interests of its members in this regard.

FPL's Response

In its response, FPL asserts that the relief requested by FMEA is not of a type contemplated by Section 403.519, F.S., and thus may not be sought in this need determination. Moreover, FPL states that because the relief requested is not contemplated by Section 403.519(4), F.S., FMEA has failed to assert a sufficient basis for the Commission to grant it standing as an intervenor in this matter.

In support of this contention, FPL asserts that it is not required by statute or rule to hold joint ownership discussions with other electric utilities. Rather, FPL states that Section 403.519(4)(a)(5), F.S., simply requires that an applicant seeking a determination of need for a nuclear power plant must include in its petition information on whether there were any discussions with any electric utilities regarding ownership of a portion of the nuclear power plant. Thus, it is its contention that there is no expectation, stated or implied that discussions with electric utilities must take place. Moreover, FPL argues that it has fulfilled this informational requirement by informing the Commission that preliminary discussions related to joint ownership opportunities in Turkey Point 6 and 7 have occurred.

In addition, FPL contends that Rule 25-22.081(2)(d), F.A.C., 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 each electric utilities."

> In making its determination to either grant or deny the petition, the commission shall consider the need for electric system reliability and integrity, including fuel diversity, the need for base-load generating capacity, the need for adequate electricity at a reasonable cost, and whether renewable energy sources and technologies, as well as conservation measures, are utilized to the extent reasonably available.

In a separate subparagraph, the statute requires additional information which must be included in the applicant's petition, including "[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." Section 403.519(4)(a)5., F.S.

Rule 25-22.081, F.A.C., sets forth the required contents for a petition for nuclear fuel electric plants. Rule 25-22.081(2)(d), F.A.C., specifies that a nuclear power plant petition shall also contain "[a] summary of any discussions with other electric utilities regarding ownership of a portion of the plant by such electric utilities."

FPL asserts that this language does not require it to engage in any joint ownership discussions whatsoever.

FPL further contends that in making a determination of need for a nuclear power plant Section 403.519(4), F.S., requires the Commission to take into account matters within its jurisdiction, which it deems relevant. FPL asserts that the Legislature did not design the determination of need proceeding under Section 403.519(4), F.S., to ensure that other utilities are afforded the opportunity to discuss ownership interest in a proposed nuclear power plant. Thus, FPL contends, a finding that adequate and meaningful discussions with other electric utilities is not a necessary predicate to a determination of need under Section 403.519(4), F.S.

FPL argues in its response that FMEA has failed to establish that its substantial interests will be affected by this proceeding. Citing the two-pronged test for standing in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), FPL argues that FMEA has failed to demonstrate that it meets the second prong of this test because its asserted interest in having this 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 interest that Section 403.519(4), F.S., is intended to protect. FPL thus asserts that FMEA has failed to satisfy the Agrico test, and its petition for intervention should be denied.

Finally, FPL specifically requests that, if intervention is granted, the Commission clarify in its order that (1) the requirement in Section 403.519(4)(a)(5), F.S., for FPL to report its joint ownership discussions is for informational purposes only; (2) the scope of this proceeding does not extend to requiring FPL to offer FMEA's members joint ownership of Turkey Point units 6 and 7, nor to taking discussions about joint ownership into consideration in determining the need for Turkey Point 6 and 7; and (3) FMEA will not be permitted to raise issues, engage in discovery, or examine witnesses beyond the proper scope of the proceeding.

Standard for Intervention

Pursuant to Rule 25-22.039, F.A.C., persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition for leave to intervene. Petitions for leave to intervene must be filed at least five days before the evidentiary hearing, must conform with Rule 28-106.201(2), F.A.C., and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected by the proceeding. Intervenors take the case as they find it.

To have standing, the intervenor must meet the two prong standing test in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The intervenor must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57, F.S., hearing, and (2) that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The "injury in fact"

must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990). See also Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. den., 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote).

Analysis & Ruling

Section 403.519(4)(a)5., F.S. was enacted by the Florida Legislature in 2006. In this regard, FMEA essentially contends that section 403.519(4)(a)5., F.S., and Rule 25-22.081(2)(d), F.A.C., provide a basis for raising co-ownership issues and nuclear access claims in the context of a nuclear power plant need determination proceeding.[4] Accordingly, the consideration of the nuclear access argument advanced by FMEA represents an issue of first impression to the Commission requiring interpretation of the recently enacted statute and associated rule.

Section 403.519(4)(a)5., F.S., requires that a petition for need determination of a nuclear plant shall include information 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. Further, Rule 25-22.081, F.A.C., states that a nuclear power plant petition shall also contain a summary of any discussions with other electric utilities regarding ownership of a portion of the plant by such electric utilities.

At the January 7, 2008, oral argument, FMEA argued that, as an electric utility with an interest in pursuing discussions with FPL regarding the possibility of co-ownership, it was in a unique position to address whether FPL had fully and adequately met the requirements of Section 403.519(4)(a)5., F.S. and 25-22.081(2)(d), F.A.C. FMEA also argued that all Florida electric utilities' interests in nuclear generation have been recognized by the Florida Legislature in its recent amendments to Section 403.519, F.S., which now require applicants such as FPL to include in the need petition participation opportunities discussed with other electric utilities.

I am not persuaded by FMEA's arguments that it has a generalized reliability interest in FPL's proposed nuclear plants. However, I agree that FMEA has a substantial interest in this proceeding to address whether FPL's petition includes: (1) information 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, pursuant to Section 403.519(4)(a)5., F.S.; and (2) a summary of any discussions with other electric utilities regarding ownership of a portion of the plant by such electric utilities, pursuant to Rule 25-22.081(2)(d), F.A.C. Therefore, FMEA shall be granted intervention in this proceeding. However, as with all parties to this proceeding, FMEA's intervention shall be limited to the issues that are within the Commission's jurisdiction, and that the Commission deems relevant.

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[4] Historically, nuclear access claims have been litigated within the federal court system. See generally Florida Cities v. Florida Power & Light Co., 525 F. Supp. 1000 (1981); Alabama Power Co. v. Nuclear Regulatory Commission, 692 F.2d 1362 (1982).

I note in particular FMEA's argument that Section 403.519, F.S., requires FPL to hold discussions with other electric utilities. The plain and unambiguous language of the statute requires the disclosure of whether such discussions took place, and Rule 25-22.081(2)(d), F.A.C., requires only that a summary of any such discussions be included in the petition. As such, I find it unnecessary to look further than the statute itself.[5] A plain reading of the statute does not impose a requirement that FPL engage in such discussions with other electric utilities regarding ownership of a portion of its proposed plants; rather, the statute requires disclosure of whether or not these discussions have taken place. In its brief summarizing its oral argument, FMEA correctly points out that the Commission has the authority to take into consideration any matter within its jurisdiction that it deems relevant, pursuant to Section 403.519(b), Florida Statutes. Consistent with my rulings at the January 14, 2008, Prehearing Conference, while the disclosure aspect of these provisions may be addressed, issues as to the merits of co-ownership will not be entertained in this proceeding.

Conclusion

In conclusion, FMEA meets the two prong standing test in Agrico; therefore, its petition shall be granted as set forth herein. Pursuant to Rule 25-22.039, F.A.C., FMEA takes the case as it finds it.

Based on the foregoing, it is

ORDERED by Commissioner Nathan A. Skop, as Prehearing Officer, that the Petition to Intervene is granted with respect to the Florida Municipal Electric Association, Inc., as set forth herein. It is further

ORDERED that FMEA's motion for leave to file a reply to FPL's response in opposition to FMEA's petition to intervene is denied. It is further

ORDERED that all parties to this proceeding shall furnish copies of all testimony, exhibits, pleadings and other documents, which may hereinafter be filed in this docket, to:

[5] It is a general rule of law that where a statute is unambiguous, the trier of fact need look no further than the statute itself. Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879, 882 (Fla. 1983); see also St. Petersburg Bank and Trust Co. v. Hamm, 414 So. 2d 1071 (Fla. 1982). Even so, the determination that no ambiguity is present does not necessarily foreclose statutory construction. State v. Ross, 447 So. 2d 1380, 1383 (Fla. 4th DCA 1984). In this case, however, even if it were necessary to consider the legislative intent of Section 403.519(4)(a)5., F.S., there is no express statement of legislative intent as to the subparagraph in question.

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By ORDER of Commissioner Nathan A. Skop, as Prehearing Officer, this 28th day of January, 2008.

NATHAN A. SKOP
Commissioner and Prehearing Officer

(S E A L)

JSB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.