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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination)
of Need for an Electrical Power)
Plant in Okeechobee County by)
Okeechobee Generating Company,)
L.L.C.)
_____)

DOCKET NO. 991462-EURECCIOUS AND REPORTING
Submitted for filing: October 15, 1999

FLORIDA POWER CORPORATION'S MOTION
TO DISMISS THE PETITION

Pursuant to Rule 28-106.204, Fla. Admin. Code, Florida Power Corporation ("FPC") files this motion to dismiss the Petition for Determination of Need for An Electrical Power Plant filed with the Florida Public Service Commission (the "Commission") on September 24, 1999.

FPC incorporates by reference as though set forth fully herein each of the grounds for dismissal contained in Florida Power & Light Company's Motion to Dismiss Petition filed on October 8, 1999. As further grounds for this motion, FPC states that Okeechobee Generating Company, L.L.C. ("OGC") is not a proper "applicant" under Section 403.519, Fla. Stats., or the Florida Electrical Power Plant Siting Act (the "Siting Act"), §§ 403.501-.518, Fla. Stats., as explained more fully herein.

The Florida Supreme Court has held that an independent power producer ("IPP"), like OGC, which does not have an obligation to serve retail customers in Florida, "will be able to obtain a need determination for a proposed project *only after a power sales agreement has been entered into with a utility.*" *Nassau Power Corp. v. Deason*, 641 So. 2d 396, 399 (1994)(*Nassau*

- AFA _____
- APP _____
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- WAW _____
- OTH _____

II) (emphasis added). OGC's petition in this case does *not* allege that OGC has entered into a power sales agreement with any Florida retail utility. Rather, OGC proposed to construct and operate a "merchant plant" with no up-front commitments for *any* if its capacity. Accordingly, as a matter of law, OGC is not in a position to file a petition for a determination of need.

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FPSC-RECORDS/REPORTING

In Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., Order No. PSC 99-0535-FOF-EM (Mar. 22, 1999)(Duke), the Commission granted a “Joint Petition” for a determination of need filed together by an IPP and a Florida municipal retail utility, the Utilities Commission, City of New Smyrna Beach (“UCNSB”). Duke and UCNSB argued, and the Commission ultimately agreed, that together they constituted a “joint power agency,” within the meaning of the Siting Act. The joint petitioners alleged that they had executed a contract by which Duke committed a certain amount of capacity from the proposed project to meet the need of UCNSB.

Although FPC submits that the Commission exceeded its authority in granting the Joint Petition in the *Duke* case for the reasons that FPC previously argued to this Commission and for the reasons that FPC is presenting on appeal to the Florida Supreme Court, *even if the Duke* case were correctly decided it differs from this case. In this connection, Commissioner Jacobs stated in his separate opinion in the *Duke* case:

I would restrict the determination of standing to the petition as filed, i.e., a request by the partnership to certify need of the full plant capacity. . . . I believe the holding of the Florida Supreme Court in Nassau Power Corporation v. Beard . . . controls. Thus, to be a proper applicant, an EWG must be tied by contract to a co-applicant who is a utility. In the instant docket, Duke New Smyrna is a proper applicant only because of the relationship between the parties to the partnership.

Id. p. 64 (emphasis added).

Whether the *Duke* decision was right or wrong given the Joint Petition then before the Commission, the Commission should dismiss OGC’s petition in this case. There is certainly no basis in the *Nassau* cases, Section 403.519, or the Siting Act to conclude that a stand-alone “merchant plant” may obtain a determination of need under existing Florida law.

In its petition, OGC asserts that it is an “electric utility” under Section 366.02(2). (Petition, at 1). This, presumably, is the predicate for OGC’s assertion that it is a proper “applicant” under Section 403.519, Fla. Stats. (The term “applicant” is defined in the Siting Act as an “electric utility.” See Section 403.503(4), Fla. Stats.). The problem is, under Section 366.02(2), an “electric utility” is defined as an electric utility that “owns, maintains, or operates an electric generation, transmission, or distribution system within the state.” It is clear on the face of OGC’s petition that it does not currently meet this definition. OGC nowhere alleges that it *now* “owns, maintains, or operates an electric generation, transmission, or distribution system within the state.” In essence, OGC is contending, then, that *if* the Commission *ultimately approves* its petition, OGC may *then* be qualified to *file* such a petition. This is an exercise in bootstrap logic, not a valid statutory argument.

Further, Section 366.04(2), Fla. Stats., provides that the Commission “*shall have power over electric utilities for the following purposes*”:

(a) to prescribe uniform systems and classifications of accounts; (b) to prescribe a rate structure *for all electric utilities*; (c) to require electric power conservation [and] (d) to approve territorial agreements”

Section 366.04(2), Fla. Stats. (emphasis added). OGC states in its petition, however, that it will sell power under market rates approved by the Federal Energy Regulatory Commission (FERC). Petition, ¶ 4. Since this Commission’s enabling statute provides (among other things) that *this* Commission shall “prescribe a rate structure *for all electric utilities*” (making no exception for entities like OGC), and since OGC admits in its petition that *this* Commission may *not* prescribe a rate structure for its proposed “merchant plant” project, it follows that OGC must *not* be an “electric utility” within the meaning of Florida law.

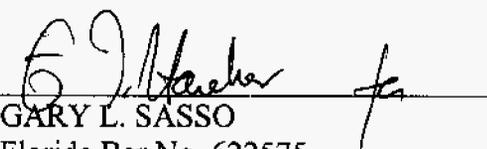
Accordingly, OGC has not alleged a proper basis to permit this Commission to conclude that it is an "electric utility" within the meaning of Florida law, or that it may qualify *in its own right* as an "applicant" to file a petition for a determination of need.

WHEREFORE, FPC respectfully requests this Commission to dismiss the petition for failure to meet applicable requirements of law.

Respectfully submitted,

FLORIDA POWER CORPORATION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FLORIDA POWER CORPORATION'S MOTION TO DISMISS THE PETITION has been furnished by fax and U.S. Mail to Robert Scheffel Wright and John Moyle as counsel for Okeechobee Generating Company, L.L.C. and U.S. Mail to all other counsel of record this 15th day of October, 1999.



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