

STEEL
HECTOR
& DAVIS

ORIGINAL

Steel Hector & Davis LLP
215 South Monroe, Suite 601
Tallahassee, Florida 32301-1804
850.222.2300
850.222.8410 Fax
www.steelhector.com

August 29, 2002

Elizabeth C. Daley
850.222.2300
edaley@steelhector.com

VIA HAND DELIVERY

Blanca S. Bayó, Director
Division of the Commission Clerk &
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

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Re: Docket Nos. 020262-EI and 020263-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") are the original and seven (7) copies of FPL's Response In Opposition To PACE's Amended Petition To Intervene, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows 2000, and the word processing software in which the document appears is Word 2000.

If you have any questions regarding this transmittal, please contact me at 222-2300.

Very truly yours,

Elizabeth C Daley

Elizabeth C. Daley

Enclosure

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need)
for Proposed Electrical Power Plant in)
Martin County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020262-EI

In re: Petition for Determination of Need)
For Proposed Electrical Power Plant in)
Manatee County of Florida Power and)
Light Company)
_____)

DOCKET NO. 020263-EI

Filed: August 29, 2002

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE
IN OPPOSITION TO PACE'S AMENDED PETITION TO INTERVENE**

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), responds as follows to the Florida Partnership for Affordable Competitive Energy ("PACE") Amended Petition to Intervene (the "Petition"), and states:

PACE seeks to intervene based on its status as a "statewide trade association of independent power producers," and the fact that certain of its members participated in FPL's supplemental request for proposals. PACE indicates that it seeks to intervene to further its members' future "opportunit[ies] to provide cost-effective alternatives to utility-owned capacity" and to further its goals regarding a competitive wholesale marketplace through the precedential value of this proceeding. *Petition* ¶ 6. However, the members that PACE purports to represent either have already intervened and participated as parties to these proceedings in their own right or they did not submit Supplemental RFP proposals and do not have standing individually. Rule 25-22.082,

F.A.C. PACE provides nothing to explain why a trade association should be allowed to participate in a licensing proceeding ostensibly to protect the interests of members that either are already parties or do not have standing.

Moreover, while some of PACE's members (at least those that bid in the RFP) may have standing to intervene and further their interests as bidders, it is clear that PACE's goal is to refocus these proceedings into generic dockets on wholesale competition and the bidding process for the precedential effect on future solicitations. But to the extent that PACE seeks to affect commission policy prospectively, these proceedings are not the proper forum. The Commission already has a proceeding to review and consider changes to the solicitation requirements of Rule 25-22.082, and PACE is an active participant in that proceeding. *See* Docket No. 020398-EQ. To the extent bidders in FPL's supplemental RFP have specific issues regarding their bids, they obviously should be heard. But there is no reason or justification for intervention by a trade association to raise generic issues separate and apart from the bidders. As the relevant PACE members have already intervened, there is simply no proper role left for PACE to play on their behalf. Either PACE's purpose here is to interject improper issues, or its participation will be cumulative of the role played by its members as direct parties. In either event, intervention is improper.

I. PACE Lacks Standing

In *Florida Home Builders Ass'n v. Department of Labor and Employment Sec.*, 412 So. 2d 351, 353 (Fla. 1982), the Florida Supreme Court set forth the test for

determining the standing of associations to participate in administrative proceedings.¹ The Court developed a set of factors to determine whether such an association has standing, with the primary determination being whether a substantial number of the associations' members would have standing in their own right. Thus, PACE's standing will initially be determined by looking to the standing of its members. *Id.* at 353-354; *see also, Friends of the Everglades, Inc. v. Board of Trustees*, 595 So. 2d 186, 188 (Fla. 1st DCA 1992); *Farmworker Rights Org., Inc. v. Department of HRS*, 417 So. 2d 753, 754-55 (Fla. 1st DCA 1982).

Such standing is, in turn, governed by the two-prong test set forth in *Agrico Chem. Co. v. Dept. of Env'tl. Reg.*, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981) and later adopted by the Supreme Court in *Ameristeel Corp. v. Clark*, 691 So. 2d 473 (Fla. 1997):

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Agrico, 406 So. 2d at 482.²

Recognizing that its standing is derivative of that of its members, PACE alleges that its members have standing because they “strive to provide the most cost-effective

¹ While Florida Home Builders was a rule challenge proceeding, the same factors are used in a section 120.57 proceeding, albeit in light of the stricter substantial interest test of *Agrico*. *See Farmworker Rights*, 417 So. 2d at 754-55; *Friends of the Everglades*, 595 So. 2d at 188; Order No. PSC-98-0374-FOF-EG.

² The requirement that the injury be “of a type or nature which the proceeding is designed to protect” limits standing to those issues that are within the agency jurisdiction and which the agency is charged with considering in its permitting decisions. *Ameristeel Corp. v. Clark*, 691 So. 2d at 478; *Agrico*, 406 So. 2d at 482. The requirement of “immediate” injury precludes any claims that are speculative or remote. *International Jur Alai Players' Assn's v. Florida Pari-Mutuel Comm'n*, 561 So. 2d 1224 (Fla. 3d DCA 1990).

electrical power”; in other words, because certain members desire to contract with FPL for power sales. The Commission’s rules clearly require that, in order to claim standing on that basis in a need determination proceeding, the company in question must have submitted a bid in the RFP that preceded the need determination:

The Commission shall not allow potential suppliers of capacity who were not participants to contest the outcome of the selection process in a power plant need determination proceeding.

Rule 25-22.082(8), FAC (emphasis added).³

According to PACE’s Amended Petition, it is an association composed of the following six member companies: Constellation Power, Inc (“Constellation”); Calpine Eastern Corp. (“Calpine”); PG&E National Energy Group (“PG&E”); Mirant Americas Development, Inc. (“Mirant”); Reliant Energy Power Generation Inc. (“Reliant”); and Competitive Power Ventures, Inc. (“CPV”). *See Amended Petition* ¶ 4.

Of those six members, five participated in FPL’s supplemental RFP, either individually or through affiliates. The five participating members were Calpine, CPV, Constellation, Mirant and PG&E.⁴ Four of the five either are, or until recently were, intervenors in these proceedings in their own right.⁵ Thus, PACE cannot claim to be

³ PACE argues that because it is not a “potential supplier” it is not subject to this limitation. However, this ignores that it is an association made up solely of such potential suppliers, and it purports to represent their interests.

⁴ The final PACE member, Reliant Energy, while a bidder in FPL’s initial RFP and at one time a party to this proceeding, did not submit a bid in response to the supplemental RFP and subsequently withdrew voluntarily from the proceedings.

⁵ Calpine has recently withdrawn from the proceedings, withdrawn its Supplemental RFP proposals and determined not to challenge the results of the Supplemental RFP. Mirant and Reliant have similarly withdrawn. PACE cannot claim to come back in and resurrect, on behalf of its members, issues that those members consciously decided not to pursue.

intervening to represent the interests of those parties; they have already intervened to represent their own interests independently of PACE.

The only PACE member that could possibly have standing to join the case **and** which has not done so on its own is PG&E. One unrepresented member with standing out of six is hardly a substantial portion of PACE's membership: "A single member of Petitioner's organization cannot be said to constitute a 'substantial' number." *Florida Poultry Fed., Inc. v. Dept. of Ag. and Consumer Svcs.*, 1998 Fla. Div. Adm. Hear. Lexis 5732 (May 6, 1998). Accordingly, PACE fails the primary requirement for associational intervention -- that the association be intervening to represent the interests of a substantial number of its members.

II. PACE's Members Are Already Adequately Represented.

As noted, PACE claims to intervene to represent the interests of its members, and recognizes that its standing would be derivative of that of its members. *Petition*, p. 2-3. PACE also acknowledges that those members that did not bid in FPL's request for proposals would have no standing to join the proceeding pursuant to Rule 25-22.082. *Id.* Thus, the only interests that PACE could possibly further are those of the five PACE members that participated in the supplemental RFP.

However, all but one of those PACE members have already intervened in these proceedings, and one of those five has now withdrawn as party and withdrawn its bid, giving up its individual standing. There can certainly be no claim here that PACE is standing in the shoes of members that would otherwise go unrepresented. At best, PACE's participation would be cumulative of that of its members.

A putative intervenor may not intervene in a proceeding if its interest is already adequately represented by a party. *Johnson v. Mortham*, 915 F.Supp 1529 (N.D. Fla. 1995) (Court denied intervention to several organizations purportedly representing the interests of its members for failure to demonstrate inadequacy of representation by existing parties with the same interest.) In this proceeding, PACE is purporting to intervene to represent certain of its members (its only plausible basis for standing); however, those members are either already parties or do not have standing because they did not bid or have withdrawn their bid. PACE's individual members are capable of adequately representing their own interests, and any claim that their interest is not adequately represented is spurious at best.⁶

III. Participation by a trade association for the purposes set out in the Petition would improperly shift the focus of the proceeding.

The allegations in PACE's Petition make it clear that its primary interest is in the perceived precedential value of the Commission's decision in these proceedings: "to the extent the decision in these dockets may have precedential effect on future proceedings, by intervening in these dockets PACE can ensure its members' positions on matters of policy and procedure are considered." *Petition*, p. 4. Putting aside the fact that its members are parties and are more than capable of stating their views, it is completely improper to interject issues in a section 120.57 hearing solely for precedential value. *See In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility ("Monsanto")*, Order No. 16581 (September 11, 1986). This is not a rulemaking or generic investigation proceeding to make policy

⁶ As noted, the other PACE members that are not parties are either (i) former parties that decided to withdraw their challenge to the need determinations or (ii) entities that did not bid and have no standing.

prospectively on a general basis. The purpose of a section 120.57 hearing is solely to rule on disputed issues solely with respect to the controversy before the agency.

And, in any case, concerns about “precedential effects” are far too remote and speculative to be a basis for standing. Standing requires a showing of “immediate” injury in fact. The “immediacy” requirement is intended to preclude participation based on stated concerns that are speculative or remote. In that sense, it builds a “reality check” into the injury-in-fact requirement of standing. Accordingly, if the injury alleged is not real and immediate, it is insufficient to entitle the party to a hearing under sections 120.569 and 120.57(1). *See International Jai-Alai Players' Ass'n v. Florida Pari-mutuel Comm'n.*, 561 So. 2d 1224 (Fla. 3d DCA 1990). The possible effect of the Commission’s decision on future proceedings is far too attenuated to confer standing. *See id.*; *Bd. of Optometry v. Florida Society of Ophthalmology*, 538 So. 2d 878, 881 (Fla. 1st DCA 1988); *Village Park Mobile Home Association, Inc. v. Dept. of Business Reg.*, 506 So. 2d 426, 433-434 (Fla. 1st DCA 1987).

For that reason, the Commission has held in prior orders that concerns over legal precedent are not enough to constitute a substantial interest which would allow for intervention:

Having listened to oral argument on these issues and reviewed the petitions [to intervene] of Dade and Gulf, we find that Dade's request for intervention in this docket should be denied. Dade's only interest in this case is the precedent set on issues common to this docket and Docket No. 860786-EI, a pending Section 120.57 proceeding in which Dade is seeking to require Florida Power and Light to wheel power from a lease-financed cogeneration facility. **Potential adverse legal precedent does not constitute the "substantial interest" needed for intervention under our rule (Rule 25-22.39, Florida Administrative Code) or the case law**

Monsanto, supra (emphasis added); *see also In re: Petition of IMC-Agrico Company for a Declaratory Statement Confirming Non-Jurisdictional Nature of Planned Self-*

Generation, Order No. PSC-98-0074-FOF-EU (January 13, 1998) (denying FPL intervention based on its allegations of future precedential effects).

Conclusion

For the foregoing reasons, PACE's Amended Petition to Intervene should be denied.

R. Wade Litchfield, Esq.
Senior Attorney
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408
Telephone: 561-691-7101

Respectfully submitted,

STEEL HECTOR & DAVIS LLP
215 S. Monroe St., Suite 601
Tallahassee, FL 32301-1804
Telephone: 850-222-2300

By: Elizabeth C. Daley
Charles A. Guyton
Florida Bar No. 398039
Gabriel E. Nieto
Florida Bar No. 014759
Elizabeth C. Daley
Florida Bar No. 0104507

CERTIFICATE OF SERVICE
Docket Nos. 020262-EI and 020263-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery (*) or electronically and United States Mail this 29th day of August 2002, to the following:

Martha Carter Brown, Esq.*
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Jon C. Moyle, Jr., Esq.*
Cathy M. Sellers, Esq.
Moyle Flanigan Katz Raymond &
Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301

D. Bruce May, Jr., Esq.*
Karen D. Walker, Esq.
Holland & Knight LLP
315 S Calhoun Street, Ste. 600
Tallahassee, Florida 32301

R.L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, Maryland 21202-7110

Michael B. Twomey, Esq.
Post Office Box 5256
Tallahassee, Florida 32314-5256

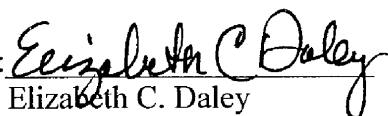
Ernie Bach, Executive Director
Florida Action Coalition Team
P.O. Box 100
Largo, Florida 33779-0100

John W. McWhirter*
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, P.A.
400 North Tampa Street, Suite 3350
Tampa, Florida 33602

Vicki Gordon Kaufman, Esq.*
Timothy J. Perry, Esq.
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301

Joseph A. McGlothlin, Esq.*
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301

Michael Green
1049 Edmiston Place
Longwood, Florida 32779

By: 
Elizabeth C. Daley