BEFORE

THE PUBLIC SERVICE COMMISSION

OF

SOUTH CAROLINA

DOCKET NO. 2013-392-E

In Re: Joint Application of Duke Energy Carolinas, LLC And North Carolina Electric Membership Corporation For a Certificate of Environmental Compatibility And Public Convenience and Necessity for the Construction and Operation of a 750 MW Combined Cycle Generating Plant Near Anderson, South Carolina	)	**RENEWED OBJECTION TO PETITION TO INTERVENE IN DUKE ENERGY CAROLINA, LLC'S CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC CONVENIENCE AND NECESSITY PROCEEDING**

Pursuant to South Carolina Regs. 103-825, Duke Energy Carolinas, LLC ("Duke Energy Carolinas" or "Company") and North Carolina Electric Membership Corporation ("NCEMC") hereby renew their objection to Invenergy Thermal Development LLC's ("Invenergy or "Petitioner") Petition to Intervene (Renewal) in the above captioned proceeding and for the reasons set forth below ask the Commission to again deny the Petition.

BACKGROUND

On December 3, 2013, Invenergy filed a Petition to Intervene in the above-captioned proceeding. The basis for the intervention was Invenergy's disappointment in not being chosen by Duke Energy Carolinas to build the Lee Combined Cycle Project and the desire to compare for itself its bid to the other bids. Duke Energy Carolinas and NCEMC filed an objection on December 9, 2013 and the Commission, on December 18, 2013, issued Order No. 2013-911 denying Invenergy's petition due to lack of standing. The Commission gave Invenergy until January 7, 2014 to refile its petition and make a proper showing of standing. Invenergy renewed

its petition on January 2, 2014. In its renewed petition, Invenergy essentially restates its original claim, that it should be allowed to intervene because it is disappointed it did not submit the winning bid.

ARGUMENT

I. INVENERGY LACKS STANDING TO INTERVENE IN THIS MATTER

Invenergy has simply repackaged its original claim, that is, that it should be allowed to intervene to compare its bid to the other bids the Company received and thereby obtain a competitive advantage to which it is not entitled. This desire does not give it standing to intervene as found by the Commission in its Order No. 2013-911. The only difference between the original petition and the renewed petition is that the second petition includes two additional allegations, one of them purely speculative in nature and the other irrelevant. First, Invenergy alleges it should have won the bid process. Secondly, Invenergy asserts it has purchased an option on land in Anderson County and has suffered damages because its bid was not selected. Neither allegation demonstrates Invenergy has suffered an injury to a particularized legally protected interest that meets the standing requirements of South Carolina. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Duke Energy Carolinas and NCEMC restate their position with regard to the Commission's authority on intervention. The grant or denial of a petition to intervene is within the sound discretion of the adjudicative body. *See generally Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007).* 26 S.C. Code Ann. Reg. 103-825(A)(3) requires that a petition to intervene in a proceeding before the Commission set forth clearly and concisely: (i) the facts from which the nature of the petitioner's alleged right or interest can be determined; (ii) the grounds of the proposed intervention; and (iii) the position of the petitioner in the proceeding.

Further, the South Carolina Rules of Civil Procedure provide that in exercising its discretion, the adjudicative body must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties. *See* Rule 24(b)(3) SCRCP. A party seeking standing must prove: (i) the petitioner suffered an injury in fact; (ii) the injury and the conduct complained of are causally connected; and (iii) it is likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for the Prot. Of Wildlife v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc.* 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

A. The bid Process.

First, Invenergy seeks to turn this proceeding into one to review the Company's RFP process. The Commission has correctly refused to allow that result and the renewed petition provides no basis for now reaching a different result. The Company's Joint Application demonstrates the Lee Combined Cycle Project was the least cost bid and was appropriately selected by the Company under the supervision of its third party administrator. The Company conducted the RFP process in a manner consistent with other utilities of its size. Invenergy has not alleged and could not support an allegation that the process the Company used violates any Commission regulation or South Carolina law applicable to the Company. And, as with any matter before the Commission, at the hearing of this matter, this Commission will have the opportunity to make whatever inquiry it deems appropriate with respect to the selection process and third party oversight.

Invenergy is a disgruntled bidder, similar to the disgruntled competitor before the South Carolina Supreme Court in *ATC South Inc. v. Charleston County*[1], 669 S.E.2d 337, 380 S.C. 191 (2008). In *ATC*, a property owner sought to rezone its land to allow the construction of a cell phone communications tower. ATC, a competitor in the cell phone communications business, sought to intervene in the zoning proceeding arguing rezoning was improper. The *ATC* Court concluded that where the potential injury or prejudice is only an increase in business competition, such injury or prejudice is insufficient to confer standing. *Id.* at 340, 380 S.C. at 198.

Second, Invenergy appears to believe that if the Commission denies Duke Energy Carolinas' and NCEMC's petition for a certificate of environmental compatibility and public convenience and necessity ("CECPCN") to construct the proposed combined cycle generation facility, it will be the winning bidder. This belief is highly speculative. If the Commission denies Duke Energy Carolinas' and NCEMC's petition, there is no reason to believe the Commission will also direct the Company to select a specific replacement resource. Rather, the Commission is more likely simply to deny the petition before it, as there is no precedent for the Commission's engaging in a resource selection process.

Invenergy's disappointment over not winning the RFP bid process does not provide a proper basis for intervention. Invenergy has not suffered an injury in fact of a legally protected interest as required by the *Lujan* Court, and the State of South Carolina does not protect Invenergy from not being selected to supply the generation the Company needs. Additionally, it is purely speculative as to whether Commission denial of the petition will

[1] The *ATC* case relates to a zoning proceeding, but the Company asserts it is instructive to this proceeding as well.

result in the Company's selecting Invenergy's proposed generating facility. This speculation defeats Invenergy's standing argument. *See Sea Pines,* 345 S.C. at 601, 550 S.E.2d at 291.

B. The land option.

Invenergy's alleged purchase of a land option hoping its bid would be selected, is irrelevant. All bidders incur some costs. That is simply the price all bidders must pay in order to develop and submit a bid. There are inherent risks associated with responding to an RFP. Invenergy had to have known it was not guaranteed to win. Invenergy apparently weighed that risk and decided it was worth purchasing the option. The fact that Invenergy made that decision does not establish an injury caused by the Company or its actions.

The Commission will make the inquiry it deems appropriate with respect to the resource selection process and third party oversight used by Duke Energy Carolinas. If the Commission finds the selection process to be flawed it may deny Duke Energy Carolinas' and NCEMC's petition for a certificate. If a certificate is granted, when the Company seeks recovery of the costs of the facility, the Commission will decide whether those costs are just and reasonable and should be recovered from the Company's customers.

II. PUBLIC POLICY DOES NOT SUPPORT INTERVENTION.

Invenergy's public policy argument fails as well. Invenergy cites *Smiley v. S.C. Dept. of Health & Envtl. Control,* 374 S.C. 326, as generally supportive of its petition. *Smiley* involved an individual's right to intervene in a matter pursuant to a South Carolina statute that at the time allowed "any person adversely affected" by a permitting decision to file a request for a contested hearing. *Id.* at 329. *Smiley* involved a citizen's objection to a permit allowing Wild Dunes to

remove sand from the beach. The petitioner in *Smiley* said the excavation prevented him from using the beach for rehabilitative jogging. Given the statute in place at the time, petitioner's requested involvement was reasonable. No such statute is available for Invenergy to rely upon. Petitioner argues the Company wants the Commission to be unnecessarily rigid in its application of the rules for intervention. The Company wants the Commission to apply the specific facts of this case to the laws and rules for intervention. Intervention can be liberally granted, but there are certain minimum requirements and Invenergy has failed to meet them.

As Invenergy points out, judicial economy is encouraged; however, here, Invenergy has no rights that either the South Carolina Office of Regulatory Staff or the Commission should protect. Consequently, Petitioner's citation of *Berkeley Electric Coop., Inc. v. Mt. Pleasant*, 302 S.C. 186 (1990) for establishing that a governmental entity's representation of a private party's interest misses the mark. Duke met its legal obligations in selecting the Lee Combined Cycle Project and is establishing through this proceeding that a CECPCN should be issued for the Lee Combined Cycle Project. The Commission will have all the information before it needed to fully evaluate the petition and to fully develop the record.

CONCLUSION

Invenergy's renewed Petition to Intervene presents no basis for a finding by this Commission that it has standing. Accordingly, based on Duke Energy Carolinas' and NCEMC's previous objection and the response provided herein, Duke Energy Carolinas and NCEMC respectfully request that the Commission deny the renewed Petition to Intervene.

Respectfully submitted,

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This is to certify that I have caused to be served this the 6th day of January, 2014, one copy of Duke Energy Carolinas, LLC's **RENEWED OBJECTION TO PETITION TO INTERVENE IN DUKE ENERGY CAROLINA, LLC'S CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC CONVENIENCE AND NECESSITY PROCEEDING,** *via* email to the parties set forth below. In the absence of an email address, a hard copy was sent first class mail.

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