BEFORE THE PUBLIC SERVICE COMMISSION

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| 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. | DOCKET NO. 060635-EU<br>ORDER NO. PSC-07-0034-PCO-EU<br>ISSUED: January 9, 2007 |

ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO STRIKE PORTIONS OF PREFILED TESTIMONY AND EXHIBITS
OF WITNESS POWELL AND DENYING REQUEST FOR ORAL ARGUMENT

On September 19, 2006, the Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee (Applicants) filed a petition for a determination of need for a proposed electrical power plant in Taylor County pursuant to Section 403.519, Florida Statutes (F.S.), and Rule 25-22.080, Florida Administrative Code (F.A.C.). By Order No. PSC-06-0819-PCO-EU, issued October 4, 2006, the matter was scheduled for a formal administrative hearing to be held on January 10, 2007. Intervention was granted to the Sierra Club, Inc., John Hedrick, Brian Lupiani (collectively, Sierra Club), and on November 3, 2006, Sierra Club filed the direct prefiled testimony of Hale Powell, along with Exhibits HP1-HP6.

On December 20, 2006, the Applicants filed a Motion to Strike Portions of Testimony and Exhibits filed by the Sierra Club (Motion) with an accompanying Request for Oral Argument.[1] On December 28, 2006, Sierra Club filed its Response to Applicants' Motion to Strike (Response) and its accompanying Request for Oral Argument.

Request for Oral Argument

Having reviewed the pleadings, I find that the parties' arguments are adequately contained in the pleadings, thus making oral argument unnecessary in this instance. Accordingly, the Applicants' and Sierra Club's Requests for Oral Argument are hereby denied.

Applicants' Motion to Strike and Sierra Club's Response

Applicants seek to strike portions of Witness Powell's testimony and Exhibits HP-1, HP-2, and HP-5 because they pertain to issues that are outside the jurisdiction of the Commission, are speculative, without probative value, are hearsay not corroborated by competent evidence,

[1] The Applicants' Request for Oral Argument seeks oral argument before the entire Commission. However, at the Prehearing Conference held in this matter on December 21, 2006, Counsel for the Applicants stated that the Applicants' Request for Oral Argument was incorrect and should have sought oral argument before the Prehearing Officer assigned to this docket and not the entire Commission. Thus, for purposes of this ruling, Applicants' Motion for Oral Argument shall be considered as a request for oral argument before the Prehearing Officer, and not the entire Commission.

are irrelevant to the disputed issues in this proceeding, and are issues for which the witnesses lack the relevant expertise.

The Applicants allege that certain portions of the testimony and exhibits proffered by the Sierra Club regarding environmental issues are irrelevant to this need proceeding because they address matters that are outside the Commission's jurisdiction. The Applicants further allege that certain portions of the testimony and exhibits relate to potential future regulation of carbon emissions, and such potential future environmental regulation is speculative and beyond the scope of cognizable issues in the proceedings. The Applicants also seek to strike portions of the Sierra Club's testimony that relate to demand-side management (DSM) measures which, according to the Applicants, are irrelevant because there has been no showing that the DSM-related information submitted by Witness Powell has any relation to the cost-effectiveness analysis performed by the Applicants. In its Response, Sierra Club argues that all of the issues addressed by Witness Powell's testimony are within the jurisdiction of the Commission. Sierra Club further argues that portions of Witness Powell's testimony and exhibits are relevant to Issue 5 in this proceeding, which addresses whether the Applicants have appropriately evaluated the costs of CO2 emission mitigation costs in their economic analysis. With respect to the portions of Witness Powell's testimony that relate to DSM measures, Sierra Club argues that the economic impact of DSM is relevant to the level of operating and maintenance costs of the plant, to the ability of the Applicants to comply with environmental regulations, to the mitigation of the building of new capacity, and to the level of environmental compliance costs, and as such, should not be stricken.

The Applicants also seek to strike portions of the Sierra Club's testimony and exhibits on the basis that the testimony includes improper opinion testimony for which Witness Powell lacks expertise. The Applicants cite to Section 90.705(2), F.S., which provides that where an expert witness does not have sufficient basis for an opinion included in his testimony, the opinions and inferences of that witness are inadmissible unless the party offering the testimony establishes the underlying facts or data. Specifically, the Applicants argue that Witness Powell does not have any expertise relating to medicine, that his testimony is outside his expertise and knowledge and not otherwise supported by evidence as to the underlying facts or data, and therefore, his testimony should be stricken. In its Response, Sierra Club argues that Witness Powell's professional experience and expertise regarding DSM programs allows him to rely on anecdotal evidence of the impacts of DSM programs and that the testimony and exhibits are the basis for Witness Powell's opinion testimony. Sierra Club additionally argues that the exhibits which the Applicants seek to strike are the facts and data upon which Witness Powell relied on, in part, in forming his expert opinions and are admissible on that basis.

Finally, the Applicants seek to strike portions of the Sierra Club's testimony and exhibits that are allegedly untested hearsay that are not corroborated by competent evidence. Applicants argue that pursuant to Section 90.801, F.S., hearsay evidence that is not supported or corroborated by other record evidence should be stricken from the record. Further, pursuant to Section 120.57(1)(c), F.S., hearsay is not sufficient by itself to support a finding of fact unless the hearsay would be admissible under an exception to the hearsay rule. Specifically, Applicants identify portions of Sierra Club's testimony that were not prepared by the witness or under his

supervision, and as such, are inadmissible hearsay that should be stricken from the record in this proceeding. In addition, Applicants point to Exhibit HP-2 to Witness Powell's prefiled testimony that, according to Applicants, is a gratuitous addition to the witness' testimony as it is never referenced in his testimony. In its Response, Sierra Club argues that in administrative hearings under Chapter 120, F.S., "hearsay evidence, whether received into evidence or not, may be used to supplement or explain other evidence, but shall not be sufficient by itself to support a finding." Rule 28-106.213(3), F.A.C. For this reason, courts have required that the entire record be reviewed before rejecting a finding as unsupported by competent, substantial evidence. Sierra Club additionally argues that the documents and materials that the Applicants wish to strike do not have to be prepared by or under the direct supervision of Witness Powell because they are documents and materials relevant to the issues upon which Witness Powell's opinion is offered and of such a nature reasonably relied upon by other experts in the field.

Ruling

The rules for evidence in administrative hearings are liberal. Section 120.569(2)(g), F.S., provides: "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." Section 90.401, F.S., defines "[r]elevant evidence [as] evidence tending to prove or disprove a material fact." In addition, Section 120.57(1)(c), F.S., provides "hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions."

Upon consideration of the applicable law and arguments raised, I find that the portions of the Sierra Club's testimony and exhibits that relate to environmental considerations, potential future regulation of carbon emissions, and DSM measures are relevant to these proceedings to the extent that they address the issues identified in this docket, including, but not limited to Issue 5. Issue 5 specifically addresses whether the Applicants have appropriately evaluated the costs of CO2 emission mitigation costs in their economic analysis.[2] Accordingly, the Applicants' Motion is denied to the extent that it seeks to strike portions of Sierra Club's testimony and exhibits relating to environmental considerations, potential future regulation of carbon emissions, and DSM measures.

The Applicants' Motion is similarly denied to the extent that it seeks to strike portions of Witness Powell's testimony on the basis that it includes improper opinion testimony. The Applicants did not raise an objection to Witness Powell's qualification as an expert in its prehearing statement as specifically required by the Order Establishing Procedure issued in this

[2] At the prehearing conference, it was noted that including an issue regarding the cost of CO2 emissions is not dispositive of whether or not CO2 emissions makes the proposed plant cost-effective or not. (See, Prehearing Transcript, page 47).

proceeding.[3] Consistent with the Commission's practice to presume a witness to be an expert in the field to which he or she is testifying, Witness Powell shall be allowed to give his opinion testimony.[4] Thus, upon conclusion of cross-examination of Witness Powell at the hearing, and upon consideration of his testimony as a whole, the Commission will be able to afford Witness Powell's testimony the proper weight it deserves.

Finally, I agree that certain portions of Sierra Club's witness testimony and exhibits identified in Applicants' Motion are hearsay. However, I note that Rule 28-106.213, F.A.C. provides that "hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, Florida Statutes." Accordingly, except as noted below, the Applicants' Motion to strike portions of Sierra Club's testimony and exhibits on the basis of hearsay is denied. The Commission may consider those portions of the testimony and exhibits to the extent that they supplement or explain other evidence in the record.

While Chapter 120, F.S., directs agencies to be liberal in the admittance of evidence, parties are expected to lay a foundation for the tribunal to consider proffered exhibits. Simply attaching an exhibit to prefiled testimony without making any attempt to relate the exhibit to the testimony or issues in the case is not sufficient. Juste v. Dept. of Health and Rehabilitation Services, 520 So.2d 69, 7 (Fla. 1st DCA 1988) ("For evidence to be admissible under one of the exceptions to the hearsay rule, it must be offered in strict compliance with the requirements of the particular exception.") Thus, with respect to Exhibit-2 to Witness Powell's testimony, which is not referenced or incorporated in the testimony, the Applicants' Motion is granted.

Based on the foregoing, it is

ORDERED by Commissioner Katrina J. Tew, as Prehearing Officer, that the Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee's Request for Oral Argument and the Sierra Club, Inc., John Hedrick, and Brian Lupiani's Request for Oral Argument are denied. It is further

ORDERED by Commissioner Katrina J. Tew, as Prehearing Officer, that the Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee's Motion to Strike is granted, in part, and denied, in part, as set forth in the body of this Order.

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[3] See, page 5, Order No. PSC-06-0819-PCO-EU, issued October 4, 2006, stating, "[f]ailure to identify such objection [to a witness' qualifications as an expert], will result in restriction of a party's ability to conduct voir dire absent a showing of good cause at the time the witness is offered for cross-examination at hearing."

[4] See, Order No. PSC-95-0576-FOF-SU, issued May 9, 1995, in Docket No. 940963-SU, In re: Application for transfer of territory served by Tamiami Village Utility, Inc., in Lee County, to North Fort Myers Utility, Inc., cancellation of Certificate No. 332-S and amendment of Certificate No. 247-S; and for a limited proceeding to impose current rates, charges, classifications, rules and regulations, and service availability policies.

By ORDER of Commissioner Katrina J. Tew, as Prehearing Officer, this 9th day of January, 2007.

KATRINA J. TEW
Commissioner and Prehearing Officer

(SEAL)

LAH

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 Director, Division of the Commission Clerk and Administrative Services, 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.