BEFORE THE PUBLIC SERVICE COMMISSION

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 ORDER NO. PSC-07-0035-PCO-EU ISSUED: January 9, 2007

ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO STRIKE PORTIONS OF PREFILED TESTIMONY AND EXHIBITS
FOR WITNESSES LASHOF, BRYK, AND SMITH
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 Natural Resources Defense Council (NRDC), and on November 2, 2006, NRDC filed the direct prefiled testimony of Witnesses Daniel Lashof and Dale Bryk, and associated exhibits. Intervention was granted to Rebecca J. Armstrong (Armstrong) on October 20, 2006, and on November 2, 2006, Armstrong filed the direct prefiled testimony of Witness Stephen A. Smith, and associated exhibits, which was later adopted by the NRDC.

On December 20, 2006, the Applicants filed a Motion to Strike Portions of Testimony and Exhibits filed by or adopted by NRDC (Motion) with an accompanying Request for Oral Argument.[1] On December 27, 2006, NRDC 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, Applicants' and NRDC's Requests for Oral Argument are hereby denied.

[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.

Applicants' Motion to Strike and NRDC's Response

The Applicants seek to strike portions of Witnesses Bryk, Lashof, and Smith's[2] prefiled testimony and certain exhibits 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, 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 NRDC regarding environmental issues are irrelevant to this need proceeding because they address matters that are outside the jurisdiction of the Commission. 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. In its Response, NRDC argues that all of the issues addressed by NRDC's testimony are squarely within the jurisdiction of the Commission, and the Commission has considered testimony in previous need determination hearings with regard to the environmental regulatory impacts on different types of electric generating facilities. NRDC further argues that the portions of NRDC'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.

The Applicants also seek to strike portions of NRDC's testimony and exhibits on the basis that the testimony includes improper opinion testimony from lay witnesses. 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 the testimony of Witness Bryk does not provide any support for her alleged expertise in resource planning, and therefore includes improper opinions regarding electric utility integrated resource planning and should be stricken. In its Response, NRDC states that a person is considered an "expert" for the purposes of being able to offer opinion testimony in an evidentiary hearing if he or she has "knowledge, skill, experience, training, or education" which "will assist the trier of fact in understanding the evidence or in determining a fact in issue." Section 90.702, F.S. NRDC further notes that over the years, because virtually all testimony given at the Commission involves opinion testimony on technical issues about which the layman has little, if any, knowledge, certain requirements necessary to qualify a witness as an expert under the Florida Rules of Civil Procedure have been dropped. In addition, NRDC notes that in recent practice, the Commission has simply given all testimony, both opinion and fact, "the weight it deserves."

Finally, the Applicants seek to strike portions of NRDC's testimony and exhibits that are allegedly untested hearsay and 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

[2] The prefiled direct testimony and exhibits of Stephen A. Smith were withdrawn by NRDC from this proceeding at the Prehearing Conference on December 21, 2006. As such, no ruling is necessary on Applicants' Motion to Strike with respect to testimony and exhibits filed by Witness Smith.

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 NRDC's testimony that goes beyond the witness' personal knowledge and exhibits that were not prepared by the witness or under his or her supervision, and as such, are inadmissible hearsay that should be stricken from the record in this proceeding. In addition, Applicants point to certain exhibits to Witnesses Bryk and Lashof's prefiled testimony that, according to Applicants, are gratuitous attachments to the witnesses' testimony as they are never referenced in the witnesses' testimony. In its Response, NRDC argues that hearsay evidence is admissible in a Section 120.57, F.S., hearing and can support a finding of fact if subsequently corroborated at hearing by other admissible testimony, and accordingly, a motion to strike on the basis of hearsay cannot be granted until the final hearing is completed and all evidence of record is reviewed by the trier of fact. NRDC additionally argues that the exhibits which the Applicants seek to strike are the data upon which witnesses Lashof and Bryk relied in part in forming their expert opinions and are admissible on that basis.

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 NRDC's testimony and exhibits that relate to environmental considerations and potential future regulation of carbon emissions 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.[3] Accordingly, the Applicants' Motion is denied to the extent that it seeks to strike portions of NRDC's testimony and exhibits relating to environmental considerations and potential future regulation of carbon emissions.

The Applicants' Motion is similarly denied to the extent that it seeks to strike portions of Witness Bryk's testimony on the basis that it includes improper opinion testimony from a lay witness. An examination of Witness Bryk's testimony reveals that NRDC is not proffering Ms. Bryk as a "lay witness," but as an expert in certain fields. While the description included in Witness Bryk's testimony of her area of expertise and the description of her background and

[3] 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).

experience is somewhat conclusory and limited in nature, the Applicants did not raise an objection to Witness Bryk's qualification as an expert in its prehearing statement as specifically required by the Order Establishing Procedure issued in this proceeding.[4] Consistent with the Commission's practice to presume a witness to be an expert in the field to which he or she is testifying, Ms. Bryk shall be allowed to give her opinion testimony.[5] Thus, upon conclusion of cross-examination of Witness Bryk at the hearing and upon consideration of her testimony as a whole, the Commission will be able to afford Witness Bryk's testimony the proper weight it deserves.

Finally, I agree that certain portions of NRDC's witnesses' testimony and exhibits identified in Applicants' Motion are hearsay. However, I note that Rule 28-106.213(3), 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, F.S." Accordingly, except as noted below, the Applicants' Motion to strike portions of NRDC'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 before the tribunal can 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 certain exhibits attached to NRDC's witnesses' testimony, but not referenced or incorporated anywhere in the prefiled testimony, the Applicants' Motion is granted. Specifically, Exhibits DB-1 and DB-2, and Exhibits DAL-2, DAL-3, DAL-4, and DAL-7 shall be stricken.

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 Natural Resource Defense Council's Request for Oral Argument are denied. It is further

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[4] 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."

[5] 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.

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.

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

KATRINA J. TEW
Commissioner and Prehearing Officer

(S E A L)

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.