BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Joint Petition to determine need for electric power plant to be located in Okeechobee County by Florida Power and Light Company and Cypress Energy Partners, Limited Partnership.	DOCKET NO. 920520-EQ ORDER NO. PSC-92-1493-FOF-EQ ISSUED: 12/28/92

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
BETTY EASLEY

ORDER DENYING RECONSIDERATION

A hearing was held on August 19 through August 28, 1992, on the joint petition of Florida Power and Light ("FPL") and Cypress Energy Partners, Limited Partnership ("Cypress") for a determination of need for a coal-fired power plant. Nassau Power Corporation ("Nassau"), Ark Energy, Inc. and CSW Development-I, Inc. ("Ark") and the Legal Environmental Assistance Foundation, with Deborah B. Evans ("LEAF"), Okeechobee County, the Florida Department of Environmental Regulation, the Florida Municipal Power Agency, and J. Mokowski Associates participated as intervenors.

On August 28, 1992, at the conclusion of the hearing, parties were advised that Motions for Reconsideration must be filed within five days after the Special Agenda. A Special Agenda was held on October 22, 1992 at which time the joint petition for determination of need filed by FPL and Cypress was denied.

On October 27, 1992, both Cypress and FPL requested reconsideration and oral argument. Nassau responded to both requests for reconsideration and oral argument, filed a cross-motion for reconsideration, and requested oral argument on October 30, 1992. Cypress and FPL also resubmitted requests for reconsideration after the November 23, 1992 issuance of the Order Denying Determination of Need in this docket.

On November 3, 1992, Ark filed a response to FPL's and Cypress's reconsideration requests and LEAF moved to strike the requests for reconsideration. Thereafter, on November 6, 1992, Cypress filed a response to LEAF's motion to strike, and also filed a motion to strike Nassau's cross-motion, along with a provisional response to the cross-motion. On November 9, 1992, FPL responded to Nassau's cross-motion. On December 1, 1992, LEAF and Deborah Evans requested reconsideration and oral argument.

We granted oral argument on all motions for reconsideration filed in this docket. Oral argument was conducted on the motions on Wednesday, December 2, 1992.

DOCUMENT NUMBER-DATE
14935 DEC 28 FPSC

CYPRESS' MOTION

In its Petition for Reconsideration, Cypress argued that the Commission overlooked or failed to consider competent substantial evidence which demonstrates that Cypress is the most reliable, cost-effective alternative available to FPL; that the Commission relied on written and verbal recommendations from staff that were not part of the record and were, in some cases, wrong; and that the Commission erroneously construed the provisions of Section 403.519, Florida Statutes. Both Ark and Nassau responded by arguing that Cypress failed to raise any matter that the Commission overlooked at the time of the decision.

The case of State v. Green, 106 So.2d 817 at 818, (Fla. 1st DCA 1958) contains a useful discussion of the purpose of a motion or petition for reconsideration:

> The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision. Judges are human and subject to the frailties of humans. It follows that there will be occasions when a fact, a controlling decision or a principle of law even though discussed in the brief or pointed out in oral argument will be inadvertently overlooked in rendering the judgment of the court. There may also be occasions when a pertinent decision of the Supreme Court or of another District Court of Appeal may be rendered after the preparation of briefs, and even after oral argument, and not considered by the court. It is to meet these situations that the rules provide for petitions for rehearing as an orderly means of directing the court's attention to its inadvertence.
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> It is not a compliment to the intelligence, the competency or the industry of the court for it to be told in each case which it decides that it has "overlooked and failed to consider" from three to twenty matters which, had they been given proper weight, would have necessitated a different decision.

> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

In its response, Ark states that Cypress' petition constitutes reargument of the merits of the case, and that, in reality, Cypress simply objects to the fact that the Commission's evaluation of record information requires rejection of the Cypress proposal. While we generally agree with Ark, Cypress' motion discusses one matter appropriate to a motion for reconsideration, which we appreciate being brought to our attention. Cypress correctly points out that we asked staff to provide the current fuel price as it existed on the date of our vote and that the price provided by staff was wrong.

If, in reaching our determination, we had relied on the incorrect information provided by staff, or if that information had a bearing on our decision, we would not hesitate to reconsider it. We can state unequivocally however, that we did not place reliance on the incorrect information provided by staff in reaching our determination here. In fact, we based our determination of cost-effectiveness on evaluation of fuel prices over the long term. A given price as it existed in a point of time was not a deciding factor, and we did not rely on the incorrect information provided by staff in reaching our determination.

Cypress' argument that staff failed to call attention to record evidence which favors Cypress places undue emphasis on the role of staff's recommendation in the decision making process. The recommendation is merely advisory. This Commission makes decisions on the record as a whole. We gave due consideration to those evidentiary matters cited by Cypress in its motion. We simply reached a different conclusion than that argued by Cypress. No legitimate ground for reconsideration has been shown.

Cypress has also pointed out an error in Exhibit 31, which has been referred to as staff's "acid test". That exhibit, which was purported to reflect a constant price differential between gas and coal, inexplicably reflects a gas price decrease beginning in the year 2020. This is an obvious error which may be corrected

mathematically. Even with the error, the changes in later years (2020 and after) in net present value have less impact than changes in earlier years, and therefore the erroneous information did not make a difference in our decision in this docket. Put another way, correction of the error does not cause us to reach a different result.

In their oral arguments, both FPL and Cypress placed undue emphasis on staff's so called "acid test" (Ex. 31). The acid test was not a deciding factor in determining whether the Cypress project was the most cost-effective alternative. Rather, the acid test was simply an analytical tool utilized to compare projects under a fictional scenario wherein fuel prices maintain a constant differential.

Although we utilized a somewhat similar "acid test" in determining the need for Tampa Electric Company's Polk County unit (Docket No. 910833-EI), we emphasize that the test is merely an analytical device and not, in and of itself, a means to determine cost-effectiveness. We do not view the test as a forecast and certainly do not believe that gas prices and coal prices will maintain the constant differential reflected in the test. We may or may not choose to compare projects under such a fictional constant fuel differential in future need cases and therefore we do not view the "acid test" as policy or precedent to be followed in future need cases.

Cypress also argues that the Commission has construed Section 403.519, Florida Statutes," in a restrictive manner that is inconsistent with the plain meaning of the statute." (Motion For Reconsideration at p.1) Cypress contends that the Commission is not required to find that a proposed power plant is the most cost-effective alternative available, but is only required to take that factor into account along with others.

Section 403.519 requires that the Commission shall take into account whether the proposed plant is the most cost-effective alternative available. This is exactly what the Commission did in this docket. We have neither given the cost-effective criteria undue weight, nor have we minimized the importance of cost-effectiveness. Cypress may be disappointed because it was not determined to be the most cost-effective alternative available. This is not, however, an adequate ground for reconsideration.

FPL'S MOTION

In its Request for Reconsideration, FPL argues that the Commission failed to consider evidence that the Cypress project is the most cost-effective alternative under scenarios assuming both higher and lower natural gas prices; that the Commission overlooked facts regarding staff's Exhibit 9, which the recommendation relied upon to support a conclusion that the Cypress project is not FPL's most cost-effective alternative; that the Commission failed to consider evidence that FPL properly assessed fuel-capital cost flexibility; and that the Commission and staff adopted a fuel-capital cost flexibility analysis as a new standard for review of the project.

FPL first argues that the Commission failed to consider that Cypress is the most cost-effective alternative under either FPL's base case forecast, or under the forecasts reflecting lower gas and oil prices. Suffice it to say that we analyzed the Cypress project under several forecasts and concluded that given present fuel prices, capital costs, and current market trends the Cypress pulverized coal plant is not the most cost-effective alternative to meet FPL's 1998-1999 need. FPL's argument on this issue is merely a reargument of matters previously considered by this Commission.

FPL's second argument concerns the fact that exhibit 9 compares the Cypress contract price to the developer costs faced by Ark or Nassau. We were well aware of this fact at the time we made our decision. If the contract price of Cypress was compared to the contract prices submitted by Ark and Nassau, the Cypress project would have been even less cost-effective. The makeup of exhibit 9 is not a matter that we failed to consider or overlooked, but is something we were fully cognizant of at the time we made our determination.

FPL's third argument is that it did assess fuel-capital cost flexibility in determining Cypress to be its most cost effective alternative. This Commission in making its determination was well aware of FPL's analysis. In fact FPL's "Petition to Determine Need For Electrical power Plant 1998-1999", which we thoroughly analyzed, contains information and data regarding FPL's comparison of the pulverized coal and combined cycle options. FPL's assessment of fuel-capital cost flexibility was considered. We simply disagreed with FPL's assessment that Cypress is the most cost-effective alternative available. This not a proper ground for reconsideration.

Finally, FPL is incorrect in its argument that we adopted a new standard for review with the fuel-capital cost flexibility analysis. Our standard for review in need determination proceedings is to take into account "whether the proposed plant is the most cost-effective alternative available." We will continue to comply with this statutory directive. Contrary to FPL's argument there has been no policy change and this is not a proper ground for reconsideration.

Although FPL's motion may point out facts which, if assigned the weight and importance urged by FPL, could support another result, it has shown no fact that we overlooked or failed to consider. Rather, FPL concludes that we must have failed to consider the factual issues urged in its motion, because we did not reach what FPL considers the "correct" conclusion. FPL's request for reconsideration is therefore denied.

NASSAU'S CROSS MOTION

Nassau's Cross-Motion for Reconsideration is limited to Issue 43: What action, if any, should the Commission take if need for capacity and energy is determined by the Commission, but the Cypress/FPL project is not approved?

Nassau believes that we should order FPL to negotiate on the basis of Nassau's proposed contract, arguing that we overlooked prior orders in the FPC and TECO need determinations, in which we effectively established the need determination hearing as the time and place for third parties to show their ability to meet utility need for capacity and energy.

Cypress and FPL responded to Nassau's Cross-Motion. Cypress moved to strike the Cross-Motion, and argued that not only did we expressly consider our prior orders, but that Nassau attempted to read too much into the orders themselves. FPL argued that there is nothing in the orders cited by Nassau that could be interpreted as suggesting that Nassau is entitled to a contract.

We decline to strike Nassau's Cross Motion. However, we believe it is not well founded. Rather than point out a fact precedent or rule of law which we overlooked in making our decision, Nassau merely urges that we re-weigh the evidence and precedent already considered. As pointed out by Cypress, we expressly considered the FPC and TECO need determination orders at several stages of the proceeding, although not requested to do so in connection with Issue 43. The orders simply cannot be read to mandate the result urged by Nassau: that FPL be ordered to

negotiate with Nassau at this point. We therefore deny Nassau's Cross-Motion for Reconsideration

LEAF'S MOTION TO STRIKE

LEAF argued that the requests for reconsideration filed by both Cypress and FPL should be stricken because they predate the Commission's final order in this docket and because they include portions of the staff recommendation. The same argument also applies to the transcript of the Special Agenda Conference which Cypress attached as Exhibit A to its Petition for Reconsideration. Cypress's response to the Motion to Strike relied upon the terms of Rule 25-22.080, Florida Administrative Code.

LEAF argued that until the Commission's final order has been issued, there is no final agency decision from which reconsideration could be requested. Thus, even though Rule 25-22.080, Florida Administrative Code, Electrical Power Plant Permitting Proceedings, requires petitions to be filed within five days of the Commission's decision, the requests for reconsideration were not timely. LEAF's argument is not well taken. At the end of its Special Agenda Conference, we specifically directed the parties to file any motions for reconsideration within five days after the Special Agenda. FPL and Cypress complied with that deadline. We therefore decline to grant LEAF's motion to strike the requests for reconsideration.

We do however, strike the copy of the Special Agenda transcript attached to Cypress' petition for recommendation as well as the staff recommendation excerpts included in both Cypress' and FPL's requests. These items are not properly part of the administrative record under Section 120.68(5)(a) and 120.57(1)(b)(6). Occidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla. 1977). There are presently two cases pending before the Florida Supreme Court[1] in which this Commission has contested the inclusion of staff recommendations and agenda conference transcripts in the appellate record. The parties should not be allowed to bring these items in through the "back door" by filing them as attachments to their motions for reconsideration.

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[1]Citizens v. Beard, et al., Case No. 79,675, (Docket No. 910001-EI and 920001-EI) and Florida Power & Light Co. v. Beard, et al., Case No. 79,338 (Docket No. 910004-EU and 920004-EU).

The provision in Rule 25-22.080, Florida Administrative Code, that parties file petitions for reconsideration within five days of the agenda conference, is required in order to allow us to complete the need determination process within the short statutory time frame allowed under the Electrical Power Plant Siting Act. However, it places the parties in the position of requesting reconsideration of a decision without an order memorializing that decision. Under these circumstances, we believe it to be appropriate for parties to refer to (but not insert in the record) the recommendation and transcript because there is no order to which they can direct the Commission's attention. However, the operation of Rule 25-22.080 should not act to expand the record to include items not properly a part thereof. We therefore strike the attachments.

LEAF'S MOTION FOR RECONSIDERATION

In its motion, LEAF has merely reargued issues we have already fully considered. The argument we previously heard on whether conservation and demand side management could defer FPL's need for capacity and energy was thorough and detailed. LEAF ably argued these issues in its brief. The purpose of a motion for reconsideration is to point out some matter of law of fact which the Commission failed to consider or overlooked in its prior decision. Diamond Cab Co. of Miami v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 161 (Fla. 1 D.C.A. 181). It is not an appropriate avenue for rehashing arguments which have already been fully considered.

The so called "two clearly identified new issues" which were first identified by LEAF in its brief are not truly new issues, but are merely a more narrow and specific rephrasing of issues which have already been considered. The mere rephrasing of narrow issues which are subsumed by larger issues already being considered does not impose a requirement on this Commission to address the "new issues" and does not create a legitimate ground for reconsideration.

Finally, it does not appear that LEAF has been adversely affected by the Commission's order in this docket. Our final decision in this docket is that the petition for determination of need for the Cypress project shall be denied. This is exactly the relief requested by LEAF. Having not been adversely affected by our Order, LEAF's standing to seek reconsideration is questionable at best.

It is therefore

ORDERED by the Florida Public Service Commission that the Request For Reconsideration filed by Florida Power and Light Company on October 27, 1992, and the Resubmitted Request For Reconsideration filed by Florida Power and Light Company on December 1, 1992, are hereby denied. It is further

ORDERED that the Petition For Reconsideration filed by Cypress Energy Partners on October 27, 1992, and the Resubmitted Request For Reconsideration filed by Cypress Energy Partners on December 2, 1992, are hereby denied. It is further

ORDERED that the Motion To Strike Nassau Power Corporation's Cross-Motion For Reconsideration, filed by Cypress Energy partners on November 6, 1992, is hereby denied. It is further

ORDERED that the Motion To Strike Requests For Reconsideration filed by the Legal Environmental Assistance Foundation and Deborah B. Evans on November 3, 1992, is hereby granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that the Cross-Motion For Reconsideration filed by Nassau Power Corporation on October 30, 1992, is hereby denied. It is further

ORDERED that the Motion For Reconsideration Of Final Order filed by the Legal Environmental Assistance Foundation and Deborah B. Evans on December 1, 1992, is hereby denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 28th day of December, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MAP:bmi

by: Kay Flynn
Chief, Bureau of Records

NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

Any party adversely affected by the Commission's final action in this matter may request 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 by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.