

State of Florida



# Public Service Commission

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**-M-E-M-O-R-A-N-D-U-M-**

**DATE:** November 8, 2006

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Office of the General Counsel (Brubaker, Fleming) *SB*  
Division of Economic Regulation (Harlow, Brown, Bulecza-Banks, Hewitt, *RET*  
Matlock, ~~Mc~~Roy, Springer, VonFossen) *1/24*

*CBH 1/24*

*ALM*

**RE:** Docket No. 060635-EU – 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.

**AGENDA:** 11/21/06 – Regular Agenda – Decision on Motion for Reconsideration of Non-Final Order – Oral Argument Not Requested; Participation at discretion of the Commission

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Tew

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\060635.RCM.DOC

### Case Background

On September 19, 2006, the Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee (Tallahassee) (collectively, 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, and Rule 25-22.080, Florida Administrative Code (F.A.C.). By Order No. PSC-06-0819-PCO-EU, issued October 4, 2006, controlling dates were established for this docket and the matter was scheduled for a formal administrative hearing on January 10, 2007. On October 20, 2006, the Sierra Club, Inc. (Sierra Club), John Hedrick, Barry

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Parsons, and Brian Lupiani petitioned to intervene in this matter. By Order No. PSC-06-0898-PCO-EU, issued October 26, 2006, intervention was granted to the Sierra Club, Mr. Hedrick, and Mr. Lupiani (collectively, Movants), but denied without prejudice to Mr. Parsons. Simultaneous to their request for intervention, the Movants filed a Motion to Extend Discovery Schedule and Filing Date for Testimony and Exhibits. On October 23, 2006, the Applicants filed a Response in Opposition to the Motion. By Order No. PSC-06-0903-PCO-EU, issued October 27, 2006, the Prehearing Officer granted an extension until November 2, 2006, for filing all intervenor testimony and exhibits.

On October 31, 2006, the Sierra Club, Inc. (Sierra Club), John Hedrick, and Brian Lupiani timely filed a motion for reconsideration of Order No. PSC-06-0903-PCO-EU. On November 2, 2006, Dianne V. Whitfield, Carole E. Taitt, and John Carl Whitton filed a response in support and joinder to the Movants' Motion for Reconsideration.<sup>1</sup> On November 3, 2006, Rebecca Armstrong and Anthony Viegbesie also filed a response in support and joinder.<sup>2</sup> Oral argument was not requested, but may be heard at the Commission's discretion. This recommendation addresses the request for reconsideration. The Commission has jurisdiction pursuant to Section 403.519, Florida Statutes.

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<sup>1</sup> A petition for intervention was filed on October 31, 2006, concerning Ms. Whitfield, Ms. Taitt, and Mr. Whitton, and will be addressed by separate order of the Prehearing Officer.

<sup>2</sup> Rebecca Armstrong was granted intervention on October 20, 2006, pursuant to Order No. PSC-06-0867-PCO-EU. Anthony Viegbesie filed a petition for intervention on November 3, 2006, which will be addressed by separate order.

### Discussion of Issues

**Issue 1:** Should the Commission grant the Movant's motion for reconsideration?

**Recommendation:** No. The motion for reconsideration fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Order. (Fleming, Brubaker)

#### **Staff Analysis:**

##### Standard of Review

The standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. vs. Bevis.

##### Movants' Motion

In its motion, the Movants request that the Commission grant the intervenors an additional 60 days to file their testimony. The Movants state that the order granting them an extension of time to file their testimony until November 2, 2006, does not provide sufficient time to present an independent review and analysis of the Applicants' filing. The Movants contend that the November 2<sup>nd</sup> extension is insufficient given the complex issues in this case, and request that they be given an additional 60 days to file their testimony. In the alternative, the Movants propose that a revised procedural schedule be established incorporating the following: (1) Intervenors will file basic testimony as presently provided; (2) the Applicants will serve the intervenors copies of existing discovery responses on the same date that the responses are served to the PSC staff; (3) Intervenors will serve the Applicants with the first discovery requests no later than five days after filing testimony; (4) Applicants will serve discovery responses to intervenor discovery as soon as possible, but no later than thirty days after receipt; (5) Intervenors will be allowed to file supplemental testimony no later than ten days after receipts of discovery responses; and (6) Applicants will be allowed to file rebuttal testimony to supplemental testimony no later than ten days after receipt of supplemental testimony.

As referenced in the case background, two responses and joinders in support of the motion were filed. The arguments raised in the Intervenor responses are substantially similar to those raised by the Movants.

### Applicants' Response

The Applicants argue that the motion for reconsideration should be denied because the motion does not identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering Order No. PSC-06-0903-PCO-EU, which already granted the intervenors additional time to file their testimony. In addition, the Applicants state that the Movants' motion provides no basis to conclude that the Prehearing Officer's order constitutes an abuse of discretion. Furthermore, the Movants do not provide any evidentiary support for the request that they be granted additional time for filing testimony. The Applicants contend that the Movants have had since September 19, 2006, a full six weeks, to review and analyze the application and testimony and that the Movants' own failure to timely exercise their rights cannot create a basis for an extension of time. Finally, the Applicants contend that the motion simply reargues matters already considered, which is inappropriate in a motion for reconsideration.

### Analysis and Conclusion

The Movants' request for reconsideration fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Order. Order No. PSC-06-0903-PCO-EU, issued on October 26, 2006, granted the Movants additional time to file their testimony. The Movants are simply rearguing matters that were already considered when the Prehearing Officer issued the order granting the extension.

The Movants argue that due process requires that the Commission grant the intervenors additional time to file testimony to allow them a reasonable opportunity to become informed about the utility filings and to complete their own technical analyses, testimony, and exhibits. However, the Movants' motion provides no basis to conclude that the Prehearing Officer's Order constitutes an abuse of discretion. The Prehearing Officer has broad authority to prevent delay. Specifically, Rule 28-106.211, Florida Administrative Code, provides:

The presiding officer before whom a case is pending may issue and orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case . . .

The application was filed on September 19, 2006; thus, the Movants have had six weeks to review and analyze the application and testimony. In addition, as of this date, the Movants have not availed themselves of the opportunity to conduct discovery.

In the alternative, the Movants have requested that a revised procedural schedule be established. This is not appropriate in a motion for reconsideration. Under the schedule proposed, intervenors would file their testimony, as currently provided in the Order (November 2), then serve discovery requests within 5 days (November 7) to which the Applicants would have 30 days to respond (December 7). Intervenors would then file supplemental testimony within 10 days (December 18). Then, Applicants would prepare rebuttal testimony for filing by December 28. Staff believes that the intervenors' proposed schedule is unrealistic because, pursuant to the Order Establishing Procedure, Order No. PSC-06-0819-PCO-EU, Prehearing Statements shall be filed on December 8, 2006 and the Prehearing Conference is currently

scheduled for December 21, 2006. The time frames established in Order Establishing Procedure are both reasonably consistent with those exercised in prior need determination proceedings,<sup>3</sup> and are designed to comport with the requirements of Rule 25-22.080, Florida Administrative Code.

Rule 25-22.080, Florida Administrative Code (“Electrical Power Plant Permitting Proceedings”), provides that the Commission shall set a date for a hearing which shall be within 90 days of receipt of the petition for a need determination, and the matter will be placed before the Commission on an agenda which will permit a decision no later than 135 days from the date of receiving the petition. The Applicants waived the 90-day limit from December 18, 2006, to January 10, 2007, so that a hearing date could be scheduled on the Commission calendar permitting participation at hearing by the full Commission. The Applicants also waived the 135-day limit from February 1, 2007, to February 13, 2007, to permit additional time for post-hearing briefs by the parties and post-hearing recommendation by staff.

In conclusion, the Movants are simply rearguing matters that have already been considered when they were granted the extension to file their testimony until November 2, 2006. Staff recommends that the motion for reconsideration be denied because the motion fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Order.

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<sup>3</sup> For example, see Order No. PSC-06-0521-PCO-EI, issued June 16, 2006, in Docket No. 060424-EI, In re Petition for determination of need for Bobwhite-Manatee 230 kV transmission line in Manatee and Sarasota Counties, by Florida Power & Light Company; and Order No. 06-0190-PCO-EM, issued March 9, 2006, in Docket No. 060155-EM, In re: Petition for determination of need for proposed Stanton Energy Center Combined Cycle Unit B electrical power plant in Orange County, by Orlando Utilities Commission. In their Response, the Applicants cite to these additional examples: Order No. PSC-06-0247-PCO-EC, issued March 23, 2006, in Docket No. 060220-EC, In re: Petition for determination of need for Seminole Generating Station Unit 3 electrical power plant in Putnam County, by Seminole Electric Cooperative, Inc.; Order No. PSC-06-0245-PCO-EI, issued March 23, 2006, in Docket No. 060225-EI, In re: Petition for determination of need for West County Units 1 and 2 electrical power plants in Palm Beach County, by Florida Power & Light Company; Order No. PSC-05-0485-PCO-EM, issued May 4, 2005, in Docket No. 050256-EM, In re: Petition to determine need for Treasure Coast Energy Center Unit 1, proposed electrical power plant in St. Lucie County, by Florida Municipal Power Agency; Order No. PSC-04-0808-PCO-EI, issued August 19, 2004, in Docket No. 040817-EI, In re: Petition for determination of need for Hines 4 power plant in Polk County by Progress Energy Florida, Inc.; Order No. PSC-04-0325-PCO-EI, issued March 30, 2004, in Docket No. 040206-EI, In re: Petition to determine need for Turkey Point Unit 5 electrical power plant, by Florida Power & Light Company.

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**Issue 2:** Should this docket be closed?

**Recommendation:** No. This docket should remain open pending the Commission's final decision in this docket. (Brubaker, Fleming)

**Staff Analysis:** This docket should remain open pending the Commission's final decision in this docket.