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Subject: Docket 060635-EU

Attachments: Docket 060635 - Applicants' Motion to Strike Certain Issues of Disputed Fact.pdf



Docket
5 - Applicants
Electronic Filing

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b. Docket No. 060635-EU

In re: Petition To Determine Need For an Electrical Power Plant in Taylor County

c. Document being filed on behalf of Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee

d. There are a total of 12 pages.

e. The document attached for electronic filing is Applicants' Motion to Strike Certain Issues of Disputed Fact

Thank you for your cooperation.

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FPSC-COMMISSION CLERK

BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Petition to Determine Need for an Electrical Power Plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee

Docket No. 060635-EU
Dated: November 22, 2006

APPLICANTS' MOTION TO STRIKE CERTAIN ISSUES OF DISPUTED FACT

Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee ("Applicants"), by and through their undersigned attorneys, and pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C.), file this Motion to Strike<sup>1</sup> certain issues (Nos. 7, 8, 9, 11, 12, 15, 18, 19, 24, 29, 30, 31, 33, 34, and 35) raised in the Petition to Intervene of Anthony Viegbesie ("Viegbesie") filed September 26, 2006.

Introduction

1. On September 19, 2006, the Applicants filed their Petition and accompanying Need for Power Application requesting the Commission to determine need for the Taylor Energy Center pursuant to the Florida Electrical Power Plant Siting Act ("PPSA"), Chapter 403, Part II, Florida Statutes.

2. On November 3, 2006, Anthony Viegbesie filed a petition to intervene ("Viegbesie's Petition") in this proceeding. On November 15, 2006, the Public Service Commission's Pre-Hearing Officer granted Viegbesie's Petition to Intervene, finding that Viegbesie's Petition states grounds upon which Mr. Viegbesie may intervene on the basis that he

<sup>1</sup> Because this motion to strike is in the nature of a motion to dismiss the identified issues, this motion is being submitted in compliance with the rule on motions to dismiss, Rule 28-106.204, F.A.C. The Applicants recognize that the scope of issues in Commission proceedings is typically addressed during an informal issues identification conference and/or pre-hearing conference. Nevertheless, the Applicants file this motion in order to prevent any suggestion that they have waived the right to challenge the cognizability of the issues addressed in this motion.

is a retail electric customer of Tallahassee and the proposed plant may impact his electric utility rates. See Order No. PSC-06-0954-PCO-EU (Nov. 15, 2006) at p.1. The Pre-Hearing Officer also ruled that Viegbesie's Petition, with respect to his concerns about carbon regulations and the environmental and health impacts of the proposed project, fails to state grounds upon which intervention can be granted in the need proceeding. Id. at p.2.

3. As further discussed below, Viegbesie's Petition raises numerous "Disputed Issues of Material Fact" ("issues"), primarily related to potential environmental impacts, which the Commission repeatedly has held to be beyond the scope of the Commission's jurisdiction and inappropriate for consideration in need for power proceedings. Instead, the Commission has held, such issues are appropriately considered, if at all, by the appropriate environmental agencies and, ultimately, the Siting Board under the PPSA.

4. Accordingly, for the reasons discussed below, the Applicants respectfully request the Prehearing Officer to strike those issues that are beyond the scope of the Commission's jurisdiction from Viegbesie's Petition, as more fully identified below, and preclude them from consideration in this Need for Power proceeding.<sup>2</sup>

#### Discussion

I. **The Commission cannot and should not consider environmental and natural resource impacts and related costs.**

5. As the Commission has previously recognized, the PPSA sets forth a comprehensive process for the licensing of new and expanded steam electric generation plants. See In re: Petition of Florida Power & Light Company to determine need for electric power

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<sup>2</sup> The Applicants recognize that the Prehearing Officer typically addresses the scope of the issues to be addressed in proceedings before the Commission during an informal issues identification conference and/or prehearing conference. Nevertheless, the Applicants file this motion in order to prevent any suggestion that they have waived the right to challenge the cognizability of the issues addressed in this motion.

plant -- Martin Expansion Project, Order No. 23080 (1990) (“FPL Martin”); In re: Petition of Florida Power & Light Company to determine need for electric power plant -- Lauderdale Repowering, Order No. 23079 (1990)). There are several divisions of responsibility under the PPSA, but the final decision on certification is made by the Governor and Cabinet sitting as the Siting Board. §403.509, F.S. Ultimately, the Siting Board must make a decision “that will fully balance the increasing demands for electrical power plant location and operation with the broad interests of the public.” §403.502(2), F.S. In particular, the Siting Board is charged with the responsibility, among other things:

To effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility, including air and water quality, fish and wildlife, and the water resources and other natural resources of the state.

§403.502(2), F.S.

6. The Siting Board’s decision is made on the record developed before an Administrative Law Judge who is charged with preparing a recommended order based on all evidence of record at the final certification hearing. §403.508(2)(a), F.S. Under Section 403.508(3), F.S., the Commission is one of several statutory parties to the certification hearing. Other statutory parties include, but are not limited to, the Florida Fish and Wildlife Conservation Commission, the applicable water management district, and the Department of Environmental Protection (“DEP”). §403.508, F.S. These agencies have the expertise, and jurisdiction under the PPSA, to address any environmental and natural resource impacts. §403.507, F.S.

7. The Commission’s role in the PPSA process is set forth in three separate statutory sections. Section 403.507(4), F.S., requires the Commission to prepare a report as to the present and future need for the electrical generating capacity to be supplied by the proposed power plant. That report “may include the commission’s comments with respect to any matters within its

jurisdiction.” (emphasis added). The factors to be considered by the Commission in the preparation of that report are spelled out in more detail in Section 403.519, F.S, which states in pertinent part:

In making its determination [of need], the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, the need for fuel diversity and supply reliability, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant. . .shall serve as the commission's report required by s. 403.507(4). (emphasis added).

8. Many of the issues raised in Viegbesie’s Petition to intervene relate to environmental considerations that are beyond the Commission’s jurisdiction and, therefore, inappropriate for consideration in this Need for Power proceeding and inclusion in its PPSA report. These include Issue No. 7 (suggesting that the “cost of a carbon tax” should be included in the assessment of costs); Issue No. 8 (questioning the “ability of the proposed pulverized coal plant to comply with the proposed more stringent particulate standards of the Environmental Protection Agency”); Issue No. 9 (suggesting that mercury pollution is somehow relevant to cost-effectiveness); Issue No. 11 (questioning whether the proposed plant is a “cost effective, least risky alternative” considering potential impacts “on the public health and the environment of our State”); Issue No. 12 (questioning whether the proposed plant is “the most cost effective and least risky alternative” considering the potential “health effect of emissions”); Issue No. 18 (suggesting that “global warming” concerns are somehow within the Commission’s jurisdiction); Issue No. 19 (questioning whether carbon dioxide emission levels have been identified); Issue No. 29 (suggesting that the plant must install “carbon dioxide control”); Issue No. 30 (questioning whether the site of the proposed plant presents risk related to “potential water

quality, sinkhole, and toxic substance issues”); Issue No. 31 (questioning the Applicants’ analysis of “projected carbon cost”); Issue No. 33 (suggesting that “costs associated with changes to the environment” are within the Commission’s jurisdiction); Issue No. 34 (suggesting that costs of “mercury pollution of Florida’s water resources” are within the Commission’s jurisdiction); and Issue No. 35 (suggesting that health effects are within the Commission’s jurisdiction).

9. Nothing in the PPSA, and nothing in the other statutes defining the scope of the Commission’s jurisdiction, gives the Commission any responsibility to consider the environmental or natural resource impacts of the construction of new generating facilities. These matters are simply not “within [the Commission’s] jurisdiction” and are, therefore, inappropriate for consideration in this proceeding under Sections 403.507(4) or 403.519, F.S. Indeed, the Commission repeatedly has held that the Commission “does not have statutory jurisdiction over the environment or natural resources in the State of Florida” and that “[t]hese matters are simply not within the jurisdiction of this body and therefore are not properly considered in the need determination[.]” FPL Martin, at 21-22; FPL Lauderdale, at 19. Likewise, the Commission has previously refused to consider environmental externalities in need proceedings when evaluating cost-effectiveness of a proposed power plant. The Commission explained: “This is because the statutory scheme envisions the bifurcation of environmental issues (which are considered by the [DEP]) and regulatory issues (which are considered by the Commission). The Florida Public Service Commission has neither the expertise, the personnel, nor a statutory directive to consider environmental issues.” In re: Joint Petition to determine need for electric power plant to be

located in Okeechobee County by FPL and Cypress Energy, LLP., Order No. PSC-92-1355-FOF-EQ, pp. 15-16 (1992).<sup>3</sup>

10. The Commission's inability to consider environmental issues does not preclude substantially affected persons from raising legitimate environmental issues in an appropriate manner in the certification hearings before the DOAH Administrative Law Judge, nor ultimately before the Governor and Cabinet. In fact, under Section 403.507(5), F.S., the DEP is charged with the responsibility and authority to prepare a project analysis, studies, and reports, to be filed with the Administrative Law Judge. The DEP's project analysis shall include a "statement indicating whether the proposed electrical power plant and proposed ultimate site capacity will be in compliance and consistent with matters within the [DEP's] standard jurisdiction, including the rules of the [DEP]...." §403.507(5), F.S.

11. Given the existence of the site certification forum for consideration of the types of environmental and natural resource issues inappropriately raised in Viegbesie's Petition, there is no policy reason for the Commission to interlope into the jurisdictional areas of other agencies. These areas involve matters within the expertise of the environmental agencies. Additionally, it would be an inefficient use of the Commission's time and resources, and a totally duplicative exercise, for the Commission to attempt to consider these complicated and technical issues in the context of a need determination proceeding. These issues should be left for resolution by the Governor and Cabinet following the certification hearings where the Legislature contemplated

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<sup>3</sup> See also Re Seminole Generating Station Petition for Determination of Need (Docket No. 060220-EC) (Order No. PSC-06-0481-PHO-EC, June 5, 2006) (Notice of Hearing and Prehearing Order):

Only issues relating to the need for the proposed power plant will be heard at this hearing. Separate public hearings will be held before the Division of Administrative Hearings at a later date to consider environmental and other impacts of the proposed plant and associated facilities.

that the environmental agencies would participate, and the environmental and natural resource issues would be considered.

12. The Applicants therefore respectfully request that the Prehearing Officer strike Issues 7, 8, 9, 11, 12, 18, 19, 29, 30, 31, 33, 34, and 35 from Viegbesie's Petition and preclude them from consideration in this proceeding.

**II. The Commission cannot and should not consider issues regarding the "riskiness" of the proposed power plant.**

13. Issues 11, 12, 15, 19, and 30 incorrectly suggest that the Commission should evaluate, in its needs analysis, whether the proposed power plant is the "least risky" alternative. Many of the issues raised in Viegbesie's Petition relate to unexplained "riskiness" of the proposed power plant, which is a criterion that is outside the Commission's jurisdiction, and therefore, those issues, to the extent they relate to "riskiness", are inappropriate for consideration in this Need for Power proceeding. These include Issue No. 11 (questioning whether the proposed power plant is the "least risky alternative" in light of "the Commission's paramount responsibility to protect the consumers of the State of Florida"); Issue No. 12 (questioning whether the proposed plant is the "least risky alternative" in light of "the adverse health effect of emissions" from the plant); Issue No. 15 (questioning whether the proposed plant is the "least risky alternative" in light of the utilities' "ability to obtain transportation of coal supplies" to the plant); Issue No. 19 (questioning whether the proposed plant is the "least risky source of power" in light of "the level of carbon dioxide emissions" projected from the plant); and Issue No. 30 (questioning whether the site involves "unnecessary risks given the potential water quality, sinkhole, and toxic substances issues at the site").

14. Section 403.519, F.S., sets forth an exclusive list of the criteria the Commission must consider in conducting its needs analysis. Section 403.519 provides, in pertinent part:



In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available.

“Risk” of a proposed power plant is not one of the criteria listed in Section 403.519, F.S., and therefore, is an issue that is beyond the jurisdiction of the Commission. See Panda Energy International v. Jacobs, 813 So.2d 46, 54 n.10 (Fla. 2002), quoting Tampa Electric Co. v. Garcia, 767 So.2d 428, 435 (Fla. 2000). In Panda Energy, when the Court was asked to expand the Commission’s needs analysis to include a criterion not included in Section 403.519, the Florida Supreme Court refused to do so, stating:

“[T]he solution for the PSC of other interested entities if they desire to expand the PSC’s authority is to seek an amendment to the statute. ... We find that the Legislature must enact express statutory criteria if it intends such authority for the PSC. Pursuant only to such legislative action will the PSC be authorized to consider [a new criterion].”

Id. Nothing in the PPSA gives the Commission any authority to consider the “riskiness” of the proposed power plant in its needs analysis. As the Supreme Court stated in Panda Energy, if Viegbesie wishes the Commission to add a new criterion to its needs analysis, the Legislature must adopt that criterion by statute. Panda Energy, 813 So.2d 46, 54 n.10.<sup>4</sup>

15. Accordingly, the Applicants respectfully request that the Pre-Hearing Officer strike Issues 11, 12, 15, 19, and 30 from Viegbesie’s Petition and preclude them from consideration in this proceeding.

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<sup>4</sup> It should be noted that the issues as proposed by Viegbesie are also vague and ambiguous. Viegbesie’s Petition fails to identify what types of risks should be considered by the Commission – economic, environmental, political, etc. – and fails to identify how those risks should be evaluated or weighed by the Commission. Such ambiguity underscores the need for legislative direction if such issues are to be considered in a need proceeding.

**III. The Commission cannot and should not consider issues related to hypothetical carbon dioxide regulatory programs.**

16. Issue Nos. 7, 8, 18, 19, 29 and 31 incorrectly suggest that costs related to carbon dioxide controls and a hypothetical “carbon tax” are within the scope of cognizable issues in this proceeding even though there indisputably is no applicable federal or Florida regulatory program that requires carbon dioxide controls or that imposes a “carbon tax” on the proposed Taylor Energy Center. Thus, there is no basis to conclude that the Applicants will incur costs for carbon dioxide controls or some type of carbon tax. The Commission simply cannot speculate as to whether Congress or the Florida Legislature will enact a carbon dioxide regulatory program or tax, nor as to how or when any such program or tax would be implemented. See Duval County School Bd. v. Spruell, 665 So. 2d. 262 (Fla. 1<sup>st</sup> DCA 1996) (Court refused to speculate as to results of future agency action).

17. The Commission has previously recognized that it cannot reach findings of fact relating to proposed or possible regulations because such findings of fact require speculation as to what might or might not occur. See Re Gulf Power Company, Docket No. 921155-EI, Order No. PSC-93-1376-FOF-EI (Sep. 20, 1993); Re Gulf Power Company, Docket No. 921155-ET, Order No. PSC-94-0264-FOF-EI (Mar. 8, 1994) (order denying motion for reconsideration of Order No. PSC-93-1376-FOF-EI). Significantly, the Pre-Hearing Officer has already recognized that the potential costs associated with future carbon dioxide regulation are too speculative and conjectural for consideration in this proceeding. See Order Nos. PSC-06-0867-PCO-EU (Oct. 20, 2006), PSC-06-0954-PCO-EU (Nov. 15, 2006).

18. Accordingly, the Applicants respectfully request that the Pre-Hearing Officer strike Issues 7, 8, 18, 19, 29 and 31 from Viegbesie’s Petition and preclude them from consideration in this proceeding.

IV. **The Commission cannot and should not consider issues related to local government resolutions.**

19. The Applicants also move to strike Issue 24 of Viegbesie's Petition, which questions whether the Applicants have complied with the following resolution purportedly passed by the Taylor County Board of County Commissioners:

THEREFORE, BE IT RESOLVED that the Board of County Commissioners of Taylor County, Florida inform JEA that, if a coal generated power plant is to be located in Taylor County, that JEA request funding from the U.S. Department of Energy for this plant so that it will be built using only the very latest and cleanest technology available, such as the coal gasification process.

Even assuming *arguendo* that any such resolution was properly passed by the County and that it is somehow binding and enforceable, it is clearly not a matter within the Commission's jurisdiction in this proceeding.

20. Under Section 403.508(3), F.S., of the PPSA, Taylor County is also one of the statutory parties to the certification proceeding. Just as issues relating to environmental and natural resource impacts are within the expertise and jurisdiction of the relevant environmental agencies, here, the expertise and jurisdiction over applicable local ordinances, regulations, standards, or criteria that apply to the proposed electrical power plant lie with the local government. Section 403.507(2)(a)3, F.S., also places jurisdiction over such matters within the purview of the local government:

Each local government in whose jurisdiction the proposed electrical power plant is to be located shall prepare a report as to the consistency of the proposed electrical power plant with all applicable local ordinances, regulations, standards, or criteria that apply to the proposed electrical power plant, including any applicable local environmental regulations adopted pursuant to s. 403.182 or by other means.

21. The Commission should leave consideration of local government issues with the entity to whom the Legislature has designated jurisdiction and which has the expertise to address

these issues. Accordingly, Applicants respectfully request that Issue 24 be stricken from Viegbesie's Petition and precluded from consideration in this proceeding.

WHEREFORE, Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee ("Applicants"), respectfully request that the Prehearing Officer strike certain "Disputed Issues of Material Fact" (Nos. 7, 8, 9, 11, 12, 15, 18, 19, 24, 29, 30, 31, 33, 34, and 35, raised in the Petition to Intervene of Anthony Viegbesie and preclude such issues from consideration in this proceeding.

RESPECTFULLY SUBMITTED this 22nd day of November, 2006.

HOPPING GREEN & SAMS, P.A.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Applicants' Motion to Strike Certain Issues of Disputed Fact Raised in Viegbesie's Petition to Intervene in Docket No. 060635-EU was served upon the following by U.S. and electronic mail(\*) on this 22nd day of November, 2006:

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