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Subject: Docket 060635-EU

Attachments: Docket 060635 - Applicants' Motion to Strike Portions of Testimony & Exhibits filed by NRDC.pdf



Docket 060635 - Applicants' Mo...

Electronic Filing

a. Person responsible for this 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 11 pages.

e. The document attached for electronic filing is Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee's (Applicants') Motion to Strike Portions of Testimony and Exhibits filed by The Natural Resources Defense Council.

Thank you for your cooperation.

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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: December 20, 2006
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**FLORIDA MUNICIPAL POWER AGENCY, JEA, REEDY CREEK
 IMPROVEMENT DISTRICT AND CITY OF TALLAHASSEE'S (APPLICANTS')
 MOTION TO STRIKE PORTIONS OF TESTIMONY AND EXHIBITS FILED BY
 THE NATURAL RESOURCES DEFENSE COUNCIL**

Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee ("Applicants"), by and through their undersigned counsel, pursuant to Rule 28-106.204, Florida Administrative Code, and Rule 1.140(f), Florida Rules of Civil Procedure, hereby moves to strike portions of the testimony (and associated exhibits) of Dale Bryk, Dr. Daniel Lashof, and Dr. Stephen A. Smith, submitted or adopted by the Natural Resources Defense Council ("NRDC") in the above-captioned proceeding. Specifically, the Applicants move to strike those portions of testimony and exhibits pertaining to issues that are outside the jurisdiction of the Commission, that are speculative and without probative value, that are hearsay not corroborated by competent evidence and thus irrelevant to the disputed issues in this proceeding, issues for which the NRDC witnesses lack the relevant expertise, and issues not related to the issues in dispute in this proceeding.

ARGUMENT

1. Florida's Administrative Procedure Act requires the Commission to exclude irrelevant, immaterial or unduly repetitious evidence from the proceeding. Section 120.569(2), Florida Statutes; see also Rule 1.140(f), Florida Rules of Civil Procedure (motions to strike

“redundant, immaterial, impertinent, or scandalous matter from any pleading); Lewis v. State, 55 Fla. 54, 45 So. 998, 1002 (1908) (“A motion to strike out evidence that has been introduced in a case must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself, and not upon the ground that is not sufficient.”); McClurkin v. Parrish Volvo, Inc., 317 So.2d 85, 86 (Fla. 1st DCA 1975) (trial court has power to strike exhibits which contain redundant, immaterial, impertinent, or scandalous matters); Sonderling v. Sonderling, 600 So.2d 1285, 1287 (Fla. 3d DCA 1992) (allegations that bear some relation to the issues may be struck if they are not an integral part of the case and are offered to gratify private spite or promote public scandal).

2. Section 90.401, Florida Statutes, defines relevant evidence as “evidence tending to prove or disprove a material fact.” Section 90.403, Florida Statutes, provides that “[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issue, misleading the jury or needless presentation of cumulative evidence.”

EVIDENCE RELATING TO ISSUES OUTSIDE THE PSC’S JURISDICTION

3. Testimony regarding environmental issues is irrelevant to this need proceeding because it addresses matters that are outside the jurisdiction of the Public Service Commission. As previously addressed in the Applicants’ Motion to Strike Certain Issues of Disputed Fact Raised in NRDC’s Petition to Intervene (filed November 22, 2006), and recognized in the Pre-Hearing Officer’s order granting NRDC’s Petition to Intervene, the issues raised by NRDC relating to future carbon regulation and to environmental issues and environmental compliance are outside the Commission’s jurisdiction in this proceeding. See Order No. PSC-06-0971-PCO-EU (Nov. 21, 2006) (Order Granting Intervention) (denying NRDC intervention on two grounds: “cost impacts of future carbon regulation” and alleged “harmful effects of increased pollution”).

The Pre-Hearing Officer's order is consistent with the comprehensive process for the licensing of new and expanded steam electric generation plants established by statute¹ and with long-standing Commission precedent on this issue,² as discussed more fully in Applicants' Motion to Strike Certain Issues of Disputed Fact Raised in the Sierra Club's Petition to Intervene (filed November 9, 2006 in this docket).

4. Many of the issues raised in the testimony and exhibits offered by NRDC 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:

- Ms. Dale Bryk's testimony at page 9 (lines 24-25) and page 10 (lines 1-15) (asserting that "environmental impacts" play a role in the Commission's need determination);
- Dr. Daniel Lashof's testimony at page 4 (lines 3-25) and page 5 (lines 1-22) (assertions regarding environmental impacts of carbon emissions); and
- Exhibit DAL-G (also referred to as Exhibit DAL-7) to Dr. Daniel Lashof's testimony (page 1, second paragraph through remainder of document) (assertions regarding environmental impacts of carbon emissions).

5. In addition, NRDC is sponsoring the testimony of Dr. Stephen A. Smith, which was submitted by Intervenor Armstrong. The testimony of Dr. Smith also includes assertions that are wholly irrelevant to the issues before the Commission in this proceeding and outside the

¹ See §§ 403.519, 403.509, 403.502(2), 403.508(2)(a) and (3), 403.507, F.S. In particular, Section 403.507(4), F.S., provides that the Commission's Power Plant Siting Act (PPSA) report "may include the commission's comments with respect to any matters within its jurisdiction." (emphasis added). The matters within the Commission's jurisdiction in a need determination are limited by Section 403.519, F.S. to the enumerated criteria listed therein.

² See In re: Petition of Florida Power & Light Company to determine need for electric power plant – Martin Expansion Project, Order No. 23080 (1990), at 21-22; In re: Petition of Florida Power & Light Company to determine need for electric power plant – Lauderdale Repowering, Order No. 23079 (1990), at 19; 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 (1992), pp. 15-16.

Commission's jurisdiction in this proceeding. This includes Dr. Smith's testimony at page 5 (lines 23-25) and page 6 (lines 1-5) (assertions regarding the Commission's regulation of water and wastewater utilities). This testimony is irrelevant because the jurisdiction of the Commission over such water and wastewater utilities is not coextensive with the Commission's jurisdiction over electric utilities.

6. The Applicants therefore respectfully move to strike the portions of NRDC's testimony and exhibits discussed above and preclude them from consideration in this proceeding.

SPECULATIVE EVIDENCE WITHOUT PROBATIVE VALUE

7. Certain portions of NRDC's testimony and exhibits relate to potential future regulation of carbon emissions. As discussed below, such potential future environmental regulation is speculative and beyond the scope of cognizable issues in the proceeding.

8. Specifically, Dr. Lashof's testimony apparently seeks to have the Commission make specific findings of fact regarding the likelihood of future regulation carbon dioxide (CO₂) emissions. This includes the following portions of Dr. Lashof's testimony:

- Page 5 (lines 23-24), page 6 (lines 1-25), page 7 (lines 1-25), and page 8 (lines 1-20) (assertions regarding likelihood of future CO₂ regulation);
- Page 10 (lines 21-23), page 11 (lines 1-25), and page 12 (lines 1-18) (assertions regarding potential costs of future CO₂ regulation); and
- Exhibit DAL-G (a/k/a DAL-7) (assertions regarding likelihood of future CO₂ regulation)

9. 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.³ Indeed, the Pre-Hearing Officer has already recognized that the potential costs associated with future carbon dioxide regulation are too speculative and conjectural to confer standing to participate in this proceeding. See Order Nos. PSC-06-0867-PCO-EU (Oct. 20, 2006), PSC-06-0954-PCO-EU (Nov. 15, 2006); Order No. PSC-06-0971-PCO-EU (Nov. 21, 2006). The Applicants have appropriately addressed potential CO₂-related costs by submitting a sensitivity analysis for the Commission's information only. However, because there currently are no federal, state, or local regulations that impose CO₂ mitigation costs on power plants in Florida, the Commission cannot make any dispositive findings regarding potential CO₂ emission costs or otherwise base its decision on what, if any, CO₂ regulation and associated costs may be imposed in the future. Accordingly, the testimony of Dr. Lashof referenced above is without probative value and should be stricken, to the extent that it is being offered to establish the course and impact of future regulation.

EVIDENCE FOR WHICH NRDC'S WITNESSES LACK EXPERTISE

10. Section 90.705(2), Florida Statutes, provides that where a 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. See also In Re: Complaint of Jory Bricker Against Florida Power Corporation Regarding High Electric Bills, DOAH Recommended Order, Case No. 93-5713, *adopted by PSC*, Order No. PSC-94-0306-FOF-EI (Mar. 17, 1994) (Order Adopting Hearing Officer's Recommended Order) (hereinafter "Bricker Recommended Order") (Commission adopted recommended order which struck evidence for which the "expert qualifications of those giving the opinions contained in the exhibits were not demonstrated").

³ 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); see also Duval County School Bd. v. Spruell, 665 So. 2d. 262 (Fla. 1st DCA 1996) (Court refused to speculate as to results of future agency action).

11. In addition, the Commission has held that non-expert witnesses may not submit opinion testimony. In Re: Application for transfer of territory served by Tamiami Village Utility, Inc., et al, Order No. PSC-95-0576-FOF-SU, at p. 5 (Docket No. 940963-SU) (May 9, 1995) (Final Order) (where witness is not expert, PSC will consider only testimony on factual issues).

12. NRDC's testimony includes improper opinion testimony from lay witnesses, including some portions of the testimony offered by Ms. Bryk. Ms. Bryk is an attorney, and is not an engineer, and other than conclusory statements, her testimony does not provide any support for her alleged expertise in integrated resource planning. Therefore, her testimony which includes opinions regarding electric utility integrated resource planning, is improper, lacking a foundation in Ms. Bryk's expertise to opine on such matters.

13. In addition, Dr. Smith does not, according to his testimony, have any expertise relating to the law. Therefore, his testimony which includes legal argument or opinion should be stricken; it is outside his expertise and knowledge and not otherwise supported by evidence as to the underlying facts or data. The following portions of Dr. Smith's testimony are improper on these grounds:

- Dr. Smith's testimony, page 3 (lines 8-13) (argument regarding "due process");
- Dr. Smith's testimony, page 7 (line 11) (argument regarding requirements of "due process"); and
- Dr. Smith's testimony, page 8 (line 16) (argument regarding requirements of "due process").

14. Accordingly, the Applicants respectfully move to strike the portion of NRDC's testimony and exhibits listed above and preclude that information from consideration in this proceeding.

UNSUPPORTED HEARSAY

15. Hearsay evidence that is not supported or corroborated by other record evidence should be stricken from the record. See § 90.801, Florida Statutes (hearsay not admissible unless an exception applies); § 120.57(1)(c), Florida Statutes (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); Bricker Recommended Order (striking exhibits containing “uncorroborated hearsay” and that are not properly authenticated, and where the “expert qualifications of those giving the opinions contained in the exhibits were not demonstrated”).

16. Portions of NRDC’s testimony that are beyond the witness’ personal knowledge and exhibits that were not prepared by the witness or under his or her supervision are inadmissible hearsay and should be stricken from the record in this proceeding. This includes:

- Dr. Lashof’s testimony, page 7 (lines 4-25) and page 8 (lines 1-6) (assertions regarding how various entities allegedly view carbon regulation are unsupported hearsay);
- Dr. Lashof’s testimony, page 8 (lines 10-14) (assertions regarding alleged statements of Duke Energy and NRG executives are unsupported hearsay);
- Dr. Lashof’s testimony, page 10 (lines 21-25) and page 11 (lines 1-10) (assertions regarding emission allowance programs and/or planning processes allegedly adopted by other regulatory bodies, and information posted on the Internet by persons other than Dr. Lashof, are unsupported hearsay)
- Exhibit DAL-B (also referred to as Exhibit DAL-2), Exhibit DAL-C (also referred to as Exhibit DAL-3), Exhibit DAL-D (also referred to as Exhibit DAL-4), and Exhibit DAL-E (also referred to as Exhibit DAL-5) (these documents are unsupported hearsay that were not prepared by Dr. Lashof or under his

supervision; they are also a gratuitous addition to Dr. Lashof's testimony as they are never referenced in the testimony)

- Exhibit DAL-G (also referred to as Exhibit DAL-7): page 3 (block quote), page 8 (block quote), page 9 (first full paragraph and last full paragraph), and the paragraph beginning at the bottom of page 9 and ending at the top of page 10 (assertions regarding statements by others)

17. In addition, all of the exhibits to Ms. Bryk's testimony (comprising approximately 300 pages of material, referred to as Exhibit Nos. DB-1, DB-2, and DB-3 in the Table of Exhibits [although the documents themselves are mislabeled]) are unsupported hearsay. They are gratuitous attachments to Ms. Bryk's testimony as they are never referenced in her testimony. Further, page 6 (lines 17-25) and page 7 (lines 1-3) of Dr. Smith's testimony include unsupported hearsay regarding the statements of the Orlando Utilities Commission and Southern Company.

18. Finally, internet and other materials referenced in the footnotes of Dr. Lashof's and Ms. Bryk's testimony, to the extent that NRDC is attempting to introduce this evidence through the backdoor by referring to these materials in the testimony of Dr. Lashof and Ms. Bryk, should be excluded as uncorroborated hearsay. These materials were not prepared by Dr. Lashof or Ms. Bryk or under either of their supervision.

19. These documents and above-referenced portions of testimony are untested hearsay that are not corroborated by competent evidence. Accordingly, the Applicants respectfully move to strike the portion of NRDC's testimony and exhibits listed above and preclude that information from consideration in this proceeding.

IRRELEVANT EVIDENCE NOT RELATED TO ISSUES IN THIS PROCEEDING

20. Portions of Dr. Smith's testimony are irrelevant to the issues in this need determination and appear to be an inappropriate, untimely, after-the-fact attempt by Intervenor NRDC to place into the record evidence in support of NRDC's Motion for Extension of Time to File Testimony which was previously denied by the Pre-Hearing Officer. This testimony is irrelevant to the issues in this need proceeding because the Pre-Hearing Officer has already ruled on this motion, and the Commission has already ruled on the Intervenor's motion for reconsideration of the Pre-Hearing Officer's ruling.

21. This includes the following portions of Dr. Smith's testimony:

- Page 3 (lines 8-13);
- Page 7 (lines 4-25);
- Pages 8, 9, and 10 (full page); and
- Page 11 (lines 1-7 and lines 9-11).

22. These portions of testimony are irrelevant to the issues in this need determination and inappropriate for consideration by the Commission at this time. Accordingly, the Applicants respectfully move to strike the portion of NRDC's testimony listed above and preclude that information from consideration in this proceeding.

CONCLUSION

For the reasons explained above, the testimony and exhibits offered by Ms. Dale Bryk, Dr. Daniel Lashof, and Dr. Stephen A. Smith on behalf of NRDC are irrelevant, immaterial, and unduly repetitious. Accordingly, the Commission should strike those portions of NRDC's testimony and exhibits described above.

RESPECTFULLY SUBMITTED this 20th day of December, 2006.

HOPPING GREEN & SAMS, P.A.

/s/Gary V. Perko

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Applicants' Motion to Strike Portions of Testimony and Exhibits Filed by The Natural Resources Defense Council in Docket No. 060635-EU was served upon the following by electronic mail(*) or U.S. Mail(**) on this 20th day of December, 2006:

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