

ORIGINAL

Kay Flynn

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Sent: Thursday, December 28, 2006 8:44 AM
To: Filings@psc.state.fl.us
Subject: 2d corrected response to motion to strike, request for oral argument
Attachments: 5684.doc; 5685.doc

Kay: Here are the documents again with my name typed after the /s/. Hope that this is finally correct.
 Thanks,
 Suzanne Brownless

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Oral Argument
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Response in Opposition
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12/28/2006

ORIGINAL

BEFORE THE FLORIDA 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 the
City of Tallahassee.

DOCKET No. 060635-EU
FILED: December 27, 2006

**NRDC'S RESPONSE IN OPPOSITION TO APPLICANTS'
MOTION TO STRIKE PORTIONS OF TESTIMONY AND EXHIBITS
FILED BY THE NATURAL RESOURCES DEFENSE COUNCIL**

The Natural Resources Defense Council (NRDC), pursuant to Rule 28-106.201(1), Florida Administrative Code, and the ruling of Prehearing Officer Katrina Tew at the Prehearing Conference on December 21, 2006, files this Response in Opposition to Applicants' Motion to Strike Portions of Testimony and Exhibits, and in support thereof states as follows:

1. On November 2, 2006 NRDC filed the testimony of Daniel Lashof and Dale Bryk and Rebecca Armstrong filed the testimony of Dr. Stephen A. Smith.
2. The testimony of Dr. Stephen A. Smith was subsequently adopted by NRDC and withdrawn at the Prehearing Conference on December 21, 2006. Dr. Smith will not be appearing or testifying on behalf of any party in this proceeding. For that reason, NRDC considers all arguments filed by the Applicants regarding Dr. Smith's testimony to be moot and will file no response to those arguments.
3. Applicants filed their Motion to Strike Portions of Testimony and Exhibits filed by the Natural Resources Defense Council on December 20, 2006. In its Motion to Strike the Applicants make five basic arguments. The first argument is that testimony is being offered about issues which are "outside the jurisdiction of the Public Service Commission" in that they involve "future carbon regulation", "environmental issues" and "environmental compliance". [App. Motion at p. 2] The second argument is that testimony is being offered which calls for the Commission to make "specific findings of fact

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regarding the likelihood of future regulation [of] carbon dioxide” and “what, if any, CO2 regulation and associated costs may be imposed in the future.” [App. Motion at 4-5] The third argument is that opinion testimony is being offered calling for expertise that NRDC’s witnesses do not possess. [App. Motion at 5-6] The fourth argument is that the testimony contains exhibits and direct testimony that is inadmissible hearsay. [App. Motion at 7-8] The fifth, and final argument, is that portions of Dr. Smith’s testimony are irrelevant to the substantive issues of this need determination. [App. Motion at 9]

Argument 1: All issues addressed by NRDC’s testimony are squarely within the jurisdiction of the Commission.

4. Section 403.519(3), Florida Statutes (2006), applies to non-nuclear power plants and states, in part, as follows:

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.**

[Emphasis added.]

5. Contrary to the assertions of the Applicants, the Commission has considered testimony in previous need determination hearings with regard to the environmental regulatory impacts on different types of electric generating facilities. In the *Cypress Energy*¹ need determination, the Department of Environmental Protection (DEP) and the Legal Environmental Assistance Foundation (LEAF) raised issues specifically addressing the environmental impacts of Cypress Energy’s proposed two 400 MW

¹ In re: Joint Petition to determine need for electric power plant to be located in Okeechobee County by FPL and Cypress Energy, LLP (Cypress Energy), Order No. PSC-92-0827-PHO-EQ (1992), at 15,38, 49, 50.

pulverized coal units.² At that time although the Environmental Protection Agency had enacted the Clean Air Act of 1990, neither agency had fully completed the task of determining exactly what heavy metal emission levels would be applicable to the proposed pulverized coal plant. With regard to the regulation of mercury, the Commission found as follows:

Cypress understands that there may be additional requirements to control the mercury emissions and is willing to assume such risks. The cost of acquiring additional emission control is a burden carried by Cypress and does not affect the power sales agreement. Similarly, any costs to comply with environmental aspects addressing endangered species, wetlands, natural surroundings degradation and other considerations will be borne by Cypress. DER is not committed to the type of control equipment used, as long as it achieves the desired results. **DER's Mr. Oven testified that mercury and other heavy metals from utility plants are not regulated with specific emission limitations. The limits are currently set on a case-by-case review based on the unique characteristics of most sites and plants.**

In re: Joint Petition to determine need for electric power plant to be located in Okeechobee County by FPL and Cypress Energy, LLP, Order PSC-92-1355-FOF-EQ, 92 FPSC 11:363,376-77 (1992), [Emphasis added.]

² Issue 2: "Did FPL reasonably consider the costs of environmental compliance with the 1990 amendments to the Clean Air Act when it evaluated CEP's pulverized coal unit? Issue 23: "Is the viability and feasibility of the FPL/CEP proposal for the two 416 MW pulverized coal fired units adversely affected by the environmental characteristics of the proposed technology and site location?" Issue 36: "Should the PSC consider the costs and benefits associated with environmental externalities in its evaluation of cost-effectiveness in need determinations?" Issue 37: "Is the PSC authorized to consider environmental externalities in need determinations?" Id.

The Commission also considered the cost of anticipated environmental emission compliance in the Martin Units 3 and 4 power plant siting need determination.³ In *Martin Units 3 and 4* the Commission considered the following issue: “Issue 23: Have the reasonably anticipated costs to FPL of environmental compliance for the proposed Martin Unit Nos. 3 and 4 been properly considered by FPL in the selection process?”⁴ At issue was whether the high level of NO₂ emissions in Florida at that time would require Florida Power and Light Company (FPL) to install Selective Catalytic Reduction or “scrubbers” on its proposed combined cycle units to meet restrictions on NO₂ emissions which the parties reasonably believed would be imposed by the Clean Air Act making its way through Congress at the time the petition was filed in July of 1989. 90 FPSC 6:268, 275-76. The Commission found that:

Should DER find that selective catalytic reduction (SCR) is required for emissions control, as both Broward and OPC have argued, then the record indicates that the effect of SCR would be to increase the overall PVRR [present value revenue requirement] of the expansion plan, but the Base Plan would remain the most cost-effective for meeting FPL’s capacity needs. Thus, we find that FPL has taken into account the reasonably anticipated costs of environmental compliance in the unit selection process.

90 FPSC 6: 268,280-81; [Emphasis added.]

6. Clearly, environmental regulation affects the costs of the production of electricity and is properly considered by the Commission as discussed above. And while the Commission has found that

³ In re: Petition of Florida Power and Light Company for determination of need for proposed electrical power plant and related facilities - Martin Expansion Project (Martin Units 3 and 4), 90 FPSC 6:268 (1990).

⁴ In re: Petition of Florida Power and Light Company for determination of need for proposed electrical power plant and related facilities - Martin Expansion Project, Docket No. 890974-EQ, Order No. 22691 (1990) at 32-3.

balancing the need for new electric generation with its impact on the environment is the responsibility of the Governor and Cabinet sitting as the Power Plant Siting Board, the Commission has not totally excluded testimony regarding general environmental impacts from need determination hearings. 90 FPSC 6:268, 287-90. When Ms. Bryk's testimony on pages 9 (lines 24-5) and 10 (lines 1-15) is read in the context of CO₂ emissions and their cost, it is relevant and should not be stricken. The same is true for Dr. Lashof's testimony on pages 4 (lines 3-25) and 5 (lines 1-22). This testimony and DAL-7, the transcript of Dr. Lashof's testimony before the House of Representatives Committee on Government Reform, Subcommittee on Energy and Resources explains the reasons why the regulation of CO₂ produced by power plants is imminent and will affect the cost of electricity at the proposed TEC

generating unit. Like mercury emissions in 1989, the regulation of CO₂ is "reasonably anticipated" and the costs of such regulation should be considered in this proceeding.

7. With regard to the testimony of Dr. Stephen Smith (page 5, lines 23-5; page 6, lines 1-5) objected to on the grounds that it is nonjurisdictional, it has already been withdrawn from this proceeding.

Argument 2: The regulation of CO₂ is reasonably anticipated and must be considered by the Commission to assess whether the TEC generating unit represents the least cost alternative available to the Applicants.

8. The Prehearing Officer approved at the Prehearing Conference Issue No. 5, which asks: "Have the Applicants appropriately evaluated the cost of CO₂ emission mitigation costs in their economic analyses?" Thus, the relevancy of Dr. Lashof's testimony and Exhibit (DAL-7) which the Applicants wish to strike with regard to the "likelihood of future regulation of carbon dioxide (CO₂) emissions" and the costs of that regulation have been ruled upon and affirmed.

9. The costs of CO₂ regulation are an integral part of this need determination, are relevant and must be included for the Commission to have a full understanding of the cost effectiveness of the proposed TEC unit. The testimony which the Applicants wish to strike provides the Commission with the estimates for CO₂ emission allowances that other recognized experts in the field have computed as well as

the regulatory schemes of other states with regard to CO₂ emissions. The Commission has never chosen to operate in a vacuum on policy issues and to the undersigned's knowledge, has never purposely isolated itself from the broader national energy picture on a subject as important as this one. It should not chose to do so now.

Argument 3: Dr. Lashof and Dale Bryk have the expertise to offer opinion testimony regarding CO₂ emissions costs, integrated resource planning and demand side management programs.

10. 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."

§90.702, Florida Statutes. At one time if a witness was to give expert testimony, the Commission required his/her prefiled testimony to follow the steps necessary to qualify a witness as an expert under the Florida Rules of Civil Procedure: 1) a statement of the witness's background, education and experience qualifying them as an expert; 2) a statement of whether the person had ever been tendered and qualified as an expert in other judicial or administrative proceedings, and if so, where ,when and in what area(s); 3) a statement of the exact area of expertise in which the witness was being tendered in the current case and 4) a tender as an expert in that area of expertise.

11. Over the years, apparently because virtually all testimony given at the Commission involves some opinion testimony on technical issues about which the layman has little, if any, knowledge, these requirements were dropped. A review of the Applicants' testimony reveals that although the background, education and experience of each witness is given, no testimony at all is provided for any witness which states the exact area(s) in which they are being offered as an expert, nor are any of the witnesses tendered as an expert in his/her field as required by Florida law. There are seven references to a

witness's previous testimony before other judicial or administrative bodies.⁵ However, it is unclear whether the witnesses were offered as an expert and accepted or simply testified. In recent practice, the Commission has simply given all testimony, both opinion and fact, "the weight it deserves."

12. Under Florida law before a witness is allowed to offer opinion testimony the other side is given an opportunity to question him/her concerning his expertise in the stated area to establish his/her expertise. Whether or not a person is an expert in any field is a factual issue determined by the trier of fact based upon the *voir dire* of the parties. NRDC would suggest that its failure to provide detailed background, education and training for each witness in its prefiled testimony for Dr. Lashof and Ms. Bryk is understandable given the Commission's recent treatment of expert testimony.

13. At Dr. Lashof's deposition he testified that he had a Masters of Science and Ph.D. in Energy and Resources from the University of California at Berkeley awarded in 1980 and 1987, respectively. As part the course work necessary to earn these degrees, Dr. Lashof took courses in mechanical engineering, renewable energy, energy conservation technologies, utility regulation, and electric utility integrated resource planning. Dr. Lashof further testified that he had been the project manager for several projects studying the regulation and costs of CO₂ emissions. Dr. Lashof has evaluated climate policy proposals, reviewed proposed and existing state legislation for CO₂ and reviewed modeling systems which produce CO₂ emission allowance forecasts. Dr. Lashof has published extensively in the area of global warming and CO₂ regulation and testified before the House of Representatives on September 27, 2006 on these topics. See: Exhibits (DAL-1, DAL-6, DAL-7). Dr. Lashof also has extensive experience in the field of demand side management programs as alternatives to supply side options. By virtue of his education and his 19 years of experience in the field of demand side management and CO₂ emission/global warming issues, Dr. Lashof is an expert in these fields and qualified to offer opinion testimony regarding the cost of CO₂ emission allowances and demand side

⁵Fetter, Guarriello, Heller, Klaushner, Kushner Preston and Hoornaert.

management techniques.

14. At her deposition Ms. Bryk testified that she participated in the development of a statewide integrated resource plan for the State of New Jersey as part of her 5 year participation in New Jersey's electric restructuring efforts undertaken under the direction of the New Jersey Public Utilities Commission. As part of that participation, she evaluated demand side management and energy efficiency programs and their cost effective integration into a larger integrated resource plan. Ms. Bryk also testified that she has made extensive reviews of the literature in the areas of demand side management and energy efficiency as part of the development of the New Jersey integrated resource plan. Ms. Bryk is qualified as an expert in the implementation and efficiency demand side management programs as alternatives to the construction of electric generating capacity. Ms. Bryk has the expertise to offer the testimony given in the areas of demand side management as a part of integrated resource planning. None of her testimony should be stricken. Dr. Smith's testimony has already been withdrawn and is no longer at issue in this proceeding.

Argument 4: Hearsay is admissible at a §120.57, F.S., hearing and can support a finding of fact if subsequently corroborated at hearing by other admissible testimony. No motion to strike on the basis of hearsay can be granted until the final hearing is completed and all evidence of record is reviewed by the trier of fact. Further, the exhibits which the Applicants seek to strike are the data upon which Dr. Lashof and Ms. Bryk relied in part in forming their expert opinions and are admissible on that basis pursuant to §90.705, F.S.

15. Experts are allowed to consult with other experts in the formation of their opinion. *Linn v. Fossum*, 894 So.2d 974 (Fla. 1st DCA 2004). Experts are also allowed to rely upon otherwise inadmissible evidence if it is the type of information reasonably relied upon by experts in forming their opinions or inferences on the subject. *U.S. v. Harper*, 460 F.2d 705 (5th Cir.1972). Dr. Lashof and Ms. Bryk are entitled to reference the documents and materials upon which they base their opinion testimony and indeed, are required to do so if questioned by the court or party as to the data upon which their opinion is based. §90.705, Florida Statutes. These documents and materials do not have to be prepared

by them or under their direct supervision as the Applicants argue. The documents and materials must be relevant to the issue upon which the opinion is offered and of such a nature reasonably relied upon by other experts in the field. Clearly, all of the documents sought to be excluded by the Applicants fall within this category and should not be excluded on the basis of hearsay.

16. In administrative hearings under Chapter 120, F.S., “hearsay evidence, whether received into evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient by itself to support a finding.” Rule 28-106.213(3), Florida Administrative Code. For this reason, the courts have required that the entire record be reviewed before rejecting a finding as unsupported by competent, substantial evidence. See: *Pasco County School Board v. FPERC*, 353 So.2d 108, 120-21 (Fla. 1st DCA 1977); *Sunshine Chevrolet Oldsmobile v. Unemployment Appeals Committee*, 910 So.2d 948 (Fla. 2d DCA 2005). It is premature to reject any of the footnotes, exhibits or testimony of Dr. Lashof or Ms. Bryk on the basis of uncorroborated hearsay until the entire hearing is over and the trial record is complete.

Argument 5: Dr. Smith’s testimony has been withdrawn from this proceeding, any objections to its relevancy are now moot.

17. Since Dr. Smith’s testimony has been withdrawn from this case, any objections to it are on the grounds of relevancy or timeliness are rendered moot.

For the reasons stated above, the testimony and exhibits identified by the Applicants should not be stricken.

Respectfully submitted this 27th day of December, 2006 by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by electronic mail as listed and U.S. Mail, this 27th day of December, 2006 to the following:

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