

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for
Determination of Need for an
Electrical Power Plant in
Okeechobee County by Okeechobee
Generating Company, L.L.C

DOCKET NO. 991462-EU
ORDER NO. PSC-00-0854-PCO-EU
ISSUED: April 28, 2000

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.
LILA A. JABER

ORDER GRANTING MOTION FOR CONTINUANCE OF HEARING

I. BACKGROUND

On September 24, 1999, Okeechobee Generating Company, L.L.C. ("OGC"), filed a Petition for Determination of Need for an Electrical Power Plant. OGC proposes to construct a 550-megawatt natural gas-fired, combined cycle electrical power plant in Okeechobee County, Florida, ("Okeechobee Generating Project") to commence commercial operation in April 2003. An administrative hearing on OGC's petition was set for March 20-22, 2000. By Order No. PSC-99-2153-PCO-EU, issued November 4, 1999, Florida Power & Light Company ("FPL"), Florida Power Corporation ("FPC"), Tampa Electric Company ("TECO"), and the Legal Environmental Assistance Foundation, Inc. ("LEAF"), were granted leave to intervene in this docket.

On March 13, 2000, OGC filed a motion for continuance of the proceedings in this docket and for a revised procedural schedule. On March 14, 2000, FPL, FPC, and TECO filed responses in opposition to OGC's motion for continuance. On March 15, 2000, FPL filed an amended response to OGC's motion to correct typographical errors in its original response.

II. POSITIONS OF THE PARTIES

In its motion, OGC states that testimony and exhibits filed on its behalf by Dale M. Nesbitt, Ph.D., president of Altos Management Partners, Inc. ("Altos"), were based in part on analyses prepared using a computer model known as the Altos North American Regional

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Electric Model ("the Altos model"). OGC describes the Altos model as a "large, iterative economic model that solves equations for equilibrium power prices, given a specified set of electric demands, fuel prices, generation resources, transmission facilities and constraints, and other variables." OGC asserts that in the course of reviewing the model runs and underlying data in connection with discovery and hearing preparations, Altos personnel discovered several errors in the input data upon which their analyses were based, including the inadvertent omission of the Okeechobee Generating Project itself. In light of the errors, OGC requests a continuance of these proceedings to provide it time "to perform a more comprehensive review of the model run and data that were used by Altos to ensure that the Commission makes its decision on the basis of the best factual data available."

OGC notes that since its analyses were originally prepared in August 1999, the computer modeling technology it used has improved significantly. First, OGC states that MarketPoint™, the software in which the Altos model runs, has advanced from Version 3.0 to current Version 7.0, which allows modeling runs to now be accomplished in 10 to 20 minutes rather than 8 to 16 hours. Second, OGC states that the Altos model itself has been upgraded.

Specifically, OGC requests our approval to withdraw the testimony of Dale M. Nesbitt that was filed on October 25, 1999, and to submit revised testimony and exhibits addressing the need for and the economic impacts of the Okeechobee Generating Project. OGC also requests our approval to file an amended petition and exhibits at the same time, to the extent indicated by the revisions to Dr. Nesbitt's testimony. OGC states that it will file all input and output data supporting the revised analyses within one week of filing its revised testimony, and will make the updated Altos model and Version 7.0 of MarketPoint™ available on the terms previously set forth in Order No. PSC-00-0291-PCO-EU. OGC also commits to treat all interrogatories and document requests made in this docket as having been asked with respect to its revised testimony and exhibits, and to submit responses to those discovery requests within one week of filing its revised testimony.

OGC requests that the procedural schedule be revised to provide for hearings in mid-June 2000. OGC contends that its requested continuance will not prejudice any party's interests or ability to prepare for hearing. Rather, OGC contends, the continuance will be beneficial to all parties: this Commission will be provided with a better factual basis upon which to render its decision; the intervenors will be provided additional opportunities

for discovery to better evaluate the merits of the case; and OGC will be permitted to correct inadvertent errors in its filing. OGC asserts that if the continuance is not granted, OGC will be unable to correct the errors in its analyses and this Commission will be unable to fairly evaluate the merits of OGC's petition.

In its response, FPL asserts that OGC's failure to include the OGC unit as an input in its analyses represents a "fundamental failure to address any impact associated with the OGC facility, and, thus, a total failure to prove either the need for or the cost-effectiveness of the OGC unit." Accordingly, FPL argues, we should not grant a continuance but, instead, should summarily deny OGC's petition for failure to present a prima facie case. Further, FPL argues that we should consider the extent to which OGC should be assessed costs and fees incurred by the intervenors in the case as a result of OGC's "failure to reasonable inquire as to whether the allegations in its petition were true and whether the evidence it was proffering supported the allegations of its petition."

FPL argues that OGC has not shown good cause for its requested continuance. First, FPL contends that the errors in OGC's petition and testimony were foreseeable and should have been caught before now by OGC if it had been diligent. FPL asserts that OGC, throughout this proceeding, has frustrated FPL's reasonable access to the Altos model and the data underlying OGC's testimony, and that FPL incurred enormous expense to gain access to the Altos model and the input data. FPL asserts that its consultants, not Altos personnel, discovered the errors in the course of their review of the model and supporting data and brought the errors to OGC's attention in the deposition of Dr. Nesbitt and Michael Blaha, another of OGC's consultants. FPL argues that OGC should have reviewed its case with due diligence before it filed its petition, and that allowing OGC a "redo" after the intervenors have fully developed their responsive case would be fundamentally unfair.

Second, FPL contends that denial of the requested continuance would not create an injustice to OGC. FPL states that OGC has pressed for a speedy trial in this case and that further delay creates more of an injustice than proceeding to trial.

Third, FPL contends that it would be prejudiced if the continuance is granted. FPL states that by proceeding to the eve of trial on an infirm case, OGC now has the full benefit of FPL's trial strategy. FPL asserts that OGC should not be awarded this advantage, particularly because OGC's errors were the basis for the requested continuance. FPL also states that if OGC is permitted to

update its analyses using a new set of computer models, FPL will not be able to use what it has expended vast resources to learn thus far. Finally, FPL states it is ready to go to trial to "expose OGC and Dr. Nesbitt," and that it would be unfair, with the record fully developed, not to evaluate the merits of OGC's petition based on the record before us.

If OGC's requested continuance is granted, FPL argues that OGC should not be permitted to revise its analyses using an entirely new computer model. If OGC is permitted to use the new models, FPL argues that the terms of FPL's access to the models should be readdressed. Further, FPL argues that if OGC is permitted to file revised testimony, FPL should be allowed additional interrogatories and requests for production to address the new testimony.

FPC, in its response, argues that we should deny OGC's requested continuance and deny and dismiss OGC's petition based on OGC's admission that it has failed to substantiate the central allegations of the petition. FPC contends that it would be unfair if OGC is allowed "to yank away the case it has presented at the eleventh hour" and the intervenors are required to relitigate key aspects of the case that they have exposed to be without merit.

TECO, in its response, argues that we should deny OGC's requested continuance and, instead, dismiss OGC's petition without prejudice. TECO asserts that this Commission and the parties have spent a great deal of time and resources in moving this case toward hearing, and that OGC should not be permitted to take more of that time to reconstruct its analyses. TECO states that OGC should file a new petition with this Commission when it establishes support for its proposed project. In the alternative, TECO asserts that the case should proceed as scheduled.

III. FINDINGS

Pursuant to Rule 28-106.210, Florida Administrative Code, a continuance of hearing may be granted for good cause shown. The rule further requires that requests for continuance be made at least five days prior to the date noticed for the hearing. OGC's request for continuance in this docket was timely made pursuant to the rule. At issue is whether OGC has shown good cause for its requested continuance.

At the outset, we note that the intervenors have offered three options other than granting OGC's requested continuance. The first option presented is for this Commission to deny the requested

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continuance and, on our own motion, to summarily deny OGC's petition for failure to present a prima facie case. Under this option, we are asked to make a determination as to the merits of OGC's petition without the benefit of a hearing and without allowing OGC leave to amend its petition to correct the errors in its analyses. The intervenors have offered no precedent or authority to support such harsh treatment under these circumstances. None of the intervenors filed a motion for summary judgment, and we see no basis to summarily deny OGC's petition on the merits on our own motion.

The second option presented is for this Commission to deny the requested continuance and to hear this case as scheduled. Under this option, the Commission would be put in the undesirable position of hearing the case without the benefit of the most complete and accurate information. While we acknowledge that OGC's own errors were the cause of this situation, proceeding to hearing without the benefit of the most complete and accurate information would not aid us in meeting our duty under Section 403.519, Florida Statutes, to determine the need for OGC's proposed plant.

The third option presented is for this Commission to dismiss OGC's petition without prejudice, leaving OGC the option to refile its petition at a later date. While this option clearly avoids the shortcomings of the first two options presented, it does so at the expense of requiring the parties to relitigate the entire case at some point in the future. Granting a continuance would be a more efficient use of the parties' and this Commission's time and resources by allowing the case to go forward with the focus on that portion of OGC's analysis that contained errors.

Having considered the options offered by the intervenors and the arguments of the parties, we find that OGC has shown good cause why a continuance of this hearing should be granted. Granting a continuance will allow us to hear this case with the benefit of the most complete and accurate record and will allow the parties and this Commission to proceed with this case in the most efficient manner. In reaching these findings, we are sympathetic to the fact that OGC was responsible for the errors cited in its motion and that the intervenors have devoted a great deal of time and expense to prepare for hearing based on OGC's erroneous analyses. To the extent that any party believes it is appropriate to seek recovery of fees and costs under applicable law, that party may file a motion requesting such relief.

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Our grant of a continuance of this hearing is made with the following clarifications. First, OGC's revisions to its testimony and petition shall be limited to those revisions necessary to correct the errors cited in its motion and to demonstrate its corrected analyses. Second, in preparing its revisions, OGC shall be required to use the particular versions of the Altos model and of MarketPointTM that it used to prepare its original filing. In making these two clarifications, we find it important to note that the reason OGC is seeking a continuance is to correct input errors in the analyses underlying its testimony. If OGC is permitted to use the updated versions of the Altos model and MarketPointTM, it would not only be permitted to correct input errors but to try to improve its case. At this stage in these proceedings, we believe it would be inappropriate to permit OGC to shift the basis for its analyses to new and improved computer models.

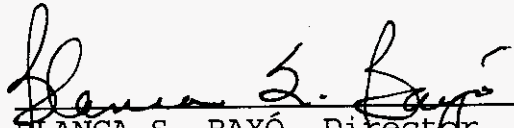
Our grant of a continuance of this hearing is made on the additional condition that the hearing shall be continued to a date to be determined that will allow OGC adequate time to correct the errors cited in its motion and to prepare its revisions, and to allow the intervenors adequate time to make appropriate discovery concerning OGC's revisions. Finally, OGC shall be required to honor the commitments it made in its motion: it shall file all input and output data supporting the revised analyses within one week of filing its revised testimony; it shall continue to make its computer models available to the parties on the terms previously set by the Commission; and it shall treat all interrogatories and document requests made in this docket as having been asked with respect to its revised testimony and exhibits and shall submit responses to those discovery requests within one week of filing its revised testimony.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that Okeechobee Generating Company's Motion for Continuance and Revised Procedural Schedule is granted, subject to the terms set forth in the body of this Order.

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By ORDER of the Florida Public Service Commission this 28th
day of April, 2000.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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DISSENTS

Commissioners Deason and Jacobs dissent.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida

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Administrative Code, if issued by the Commission; or (3) 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. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.