BEFORE THE 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 City of Tallahassee. | DOCKET NO. 060635-EU<br>ORDER NO. PSC-07-0033-PCO-EU<br>ISSUED: January 9, 2007 |

ORDER DENYING MOTION TO STRIKE PORTIONS OF PREFILED TESTIMONY AND EXHIBITS OF WITNESS DEEVEY AND DENYING REQUEST FOR ORAL ARGUMENT

On September 19, 2006, the Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee (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 (F.S.), and Rule 25-22.080, Florida Administrative Code (F.A.C.). By Order No. PSC-06-0819-PCO-EU, issued October 4, 2006, the matter was scheduled for a formal administrative hearing to be held on January 10, 2007. Intervention was granted to John Carl Whitton, Jr. (Whitton), and on November 2, 2006, Whitton filed the direct prefiled testimony of Dian Deevey, along with Exhibits DD1-DD6.

On December 20, 2006, the Applicants filed a Motion to Strike Portions of Testimony and Exhibits filed by John Carl Whitton, Jr. (Motion) with an accompanying Request for Oral Argument.[1] On December 28, 2006, Whitton filed its Response to Applicants' Motion to Strike (Response).

Request for Oral Argument

Having reviewed the pleadings, I find that oral argument is unnecessary in this instance. The parties' arguments are adequately contained and clear in their pleadings. Accordingly, the Applicants' Request for Oral Argument is hereby denied.

Applicants' Motion to Strike

The Applicants seek to strike portions of Witness Deevey's testimony and Exhibits DD-1 through DD-6 because they pertain to issues that are outside the Commission's jurisdiction, are speculative, without probative value, are hearsay not corroborated by competent evidence, are

[1] The Applicants' Request for Oral Argument seeks oral argument before the entire Commission. However, at the Prehearing Conference held in this matter on December 21, 2006, Counsel for the Applicants stated that the Applicants' Request for Oral Argument was incorrect and should have sought oral argument before the Prehearing Officer assigned to this docket and not the entire Commission. Thus, for purposes of this ruling, Applicants' Motion for Oral Argument shall be considered as a request for oral argument before the Prehearing Officer, and not the entire Commission.

irrelevant to the disputed issues in this proceeding, and are issues for which the witness lacks the relevant expertise.

The Applicants allege that certain portions of the testimony and exhibits proffered by Whitton regarding environmental issues are irrelevant to this need proceeding because they address matters that are outside the jurisdiction of the Commission. The Applicants further allege that certain portions of the testimony and exhibits relate to potential future regulation of carbon emissions, and such potential future environmental regulation is speculative and beyond the scope of cognizable issues in the proceedings. The Applicants further argue that portions of Witness Deevey's testimony are irrelevant because there has been no showing that the information submitted by Witness Deevey has any relation to the cost-effectiveness analysis or any other analyses performed by the Applicants regarding the proposed plan and therefore should be stricken. In its Response, Whitton argues that all of the issues addressed by Witness Deevey's testimony are within the jurisdiction of the Commission. Whitton argues that the testimony provided by Witness Deevey is relevant in that it rebuts the Direct Testimony of Witness Preston. Whitton further argues that the portions of Witness Deevey's testimony and exhibits are relevant to Issue 5 in this proceeding, which addresses whether the Applicants have appropriately evaluated the costs of CO2 emission mitigation costs in their economic analysis. Whitton further argues Exhibit DD-1 is admissible for purposes of establishing Witness Deevey's expertise and is also relevant to the proceedings with respect to the cost-effective analysis and other issues in this proceeding.

The Applicants also seek to strike portions of Witness Deevey's testimony and exhibits on the basis that the testimony includes improper opinion testimony from lay witnesses. The Applicants cite to Section 90.705(2), F.S., which provides that where an expert 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. Specifically, the Applicants argue that Witness Deevey is not an engineer or otherwise an expert in electric utilities and is not an expert in emission allowance price forecasts, that her testimony includes improper opinions regarding electric utility integrated resource planning, biomass generation technology, and emission allowance price forecasts, and therefore her testimony should be stricken. In its Response, Whitton states that 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." Section 90.702, F.S. Whitton further argues that the Florida Evidence Code does not require Witness Deevey to be an engineer to be qualified as an expert, and that Witness Deevey possesses the requisite knowledge, skill and/or training to offer opinion testimony regarding electric utility resource planning, biomass generation and emission allowance price forecasts.

The Applicants seek to strike portions of Witness Deevey's testimony and exhibits that are allegedly untested hearsay that are not corroborated by competent evidence. Applicants argue that pursuant to Section 90.801, F.S., hearsay evidence that is not supported or corroborated by other record evidence should be stricken from the record. Further, pursuant to Section 120.57(1)(c), F.S., 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. Specifically, Applicants identify portions of Whitton's testimony that do not reflect the witness' personal knowledge and exhibits that were not prepared by the witness or under her supervision, and as such, are inadmissible hearsay that should be stricken from the record in this proceeding. In its Response, Whitton argues that opinion testimony from experts is admissible pursuant to Section 90.702, F.S. Whitton contends that the testimony and exhibits are the basis for Witness Deevey's opinion testimony. Whitton additionally argues that the exhibits which the Applicants seek to strike are the facts and data upon which Witness Deevey relied in part in forming her expert opinions and are admissible on that basis.

Ruling

The rules for evidence in administrative hearings are liberal. Section 120.569(2)(g), F.S., provides: "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." Section 90.401, F.S., defines "[r]elevant evidence [as] evidence tending to prove or disprove a material fact." In addition, Section 120.57(1)(c), F.S., provides "hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions."

Upon consideration of the applicable law and arguments raised, I find that the portions of Whitton's testimony and exhibits that relate to environmental considerations and potential future regulation of carbon emissions are relevant to these proceedings to the extent that they address the issues identified in this docket, including, but not limited to, Issue 5. Issue 5 specifically addresses whether the Applicants have appropriately evaluated the costs of CO2 emission mitigation costs in their economic analysis.[2] Accordingly, the Applicants' Motion is denied to the extent that it seeks to strike portions of Whitton's testimony and exhibits relating to environmental considerations and potential future regulation of carbon emissions.

The Applicants' Motion is similarly denied to the extent that it seeks to strike portions of Witness Deevey's testimony on the basis that it includes improper opinion testimony from a lay witness. An examination of Witness Deevey's testimony reveals that Whitton is not proffering Ms. Deevey as a "lay witness" but as an expert in certain fields. The Applicants did not raise an objection to Witness Deevey's qualification as an expert in its prehearing statement as specifically required by the Order Establishing Procedure issued in this proceeding.[3] Consistent with the Commission's practice to presume a witness to be an expert in the field to which he or

[2] At the prehearing conference, it was noted that including an issue regarding the cost of CO2 emissions is not dispositive of whether or not CO2 emissions makes the proposed plant cost-effective or not. (See, Prehearing Transcript, page 47).

[3] See, page 5, Order No. PSC-06-0819-PCO-EU, issued October 4, 2006, stating, "[f]ailure to identify such objection [to a witness' qualifications as an expert], will result in restriction of a party's ability to conduct voir dire absent a showing of good cause at the time the witness is offered for cross-examination at hearing."

she is testifying, Ms. Deevey shall be allowed to give her opinion testimony.[4] Thus, upon conclusion of cross-examination of Witness Deevey at the hearing, and upon consideration of her testimony as a whole, the Commission will be able to afford Witness Deevey's testimony the proper weight it deserves.

Finally, I agree that certain portions of Whitton's witness testimony and exhibits identified in Applicants' Motion are hearsay. However, I note that Rule 28-106.213(3), F.A.C. provides that "hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, Florida Statutes." Accordingly, the Applicants' Motion to strike portions of Whitton's testimony and exhibits on the basis of hearsay is denied. The Commission may consider those portions of the testimony and exhibits to the extent that they supplement or explain other evidence in the record.

Based on the foregoing, it is

ORDERED by Commissioner Katrina J. Tew, as Prehearing Officer, that the Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee's Request for Oral Argument is denied. It is further

ORDERED by Commissioner Katrina J. Tew, as Prehearing Officer, that the Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee's Motion to Strike is denied, as set forth in the body of this Order.

[4] See, Order No. PSC-95-0576-FOF-SU, issued May 9, 1995, in Docket No. 940963-SU, In re: Application for transfer of territory served by Tamiami Village Utility, Inc., in Lee County, to North Fort Myers Utility, Inc., cancellation of Certificate No. 332-S and amendment of Certificate No. 247-S; and for a limited proceeding to impose current rates, charges, classifications, rules and regulations, and service availability policies.

By ORDER of Commissioner Katrina J. Tew, as Prehearing Officer, this 9th day of January, 2007.

KATRINA J. TEW
Commissioner and Prehearing Officer

(SEAL)

KEF

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; or (2) 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 the Commission Clerk and Administrative Services, 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.