Legal Environmental Assistance Foundation

1115 NORTH GADSDEN STREET, TALLAHASSEE, FLORIDA 32303-6327 904-681-2591

February 12, 1993

HAND DELIVERED

Chairman J. Terry Deason and Commissioners
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399

RE: Docket No. 920840-OT

Dear Chairman Deason and Commissioners:

The staff recommendation on this docket is up for your consideration on February 16, 1993, but "parties may not participate". Hence, the Legal Environmental Assistance Foundation, Inc. (LEAF) is submitting written comments on the staff recommendation in lieu of verbal participation at the agenda conference.

LEAF commented upon the earlier version of the rules by letter dated November 12, 1992. (agenda backup, pages 38-41). Unfortunately, the staff's recommended rule does not sufficiently respond to LEAF's comments. If the staff recommendation is adopted then the rules will be legally infirm. More importantly, the staff's recommended rules will not provide for a fair and expeditious means of conducting the Commission's administrative proceedings.

Without a waiver of LEAF's other concerns, I believe that the issue of exceptions deserves specific consideration in your deliberations on the staff recommendation.

As noted in LEAF's earlier comments, Section 120.57 (1)(b)4, Florida Statutes, creates a right for parties to proceedings "to file exceptions to any order or hearing officer's recommended order". Under the staff recommendation the right to file exceptions to a recommended/proposed order of a Division of Administrative Hearings Hearing Officer and a single Commissioner acting as the hearing officer is provided in Proposed Rules 25-22.056 (1)(b) and (4)(b).

However, when a Section 120.57, Florida Statutes, hearing is conducted by a panel of two or more Commissioners of the full Commission, the proposed rule does not provide a means for a party to the proceeding to file exceptions. See, Proposed Rule 25-22.056 (1)(a).

ACK ____
AFA ____
APP 1
CAF ____
CMU ____
CTR ____
EAG ____
LEG 1
LIN 6
OPC ____
RCH 1
SEC 1
WAS ____
OTH ____

A Public Interest Law Firm

Recycled Paper

Parties to quasi-judicial Commission proceedings, such as the recent Cypress need determination, devote considerable time to preparation of proposed findings of fact and post-hearing briefs and issue statements. In practice, the Commissioners that decide such cases must rely upon the staff recommendation. However, when a staff recommendation wrongly addresses a proposed finding of fact, there is no recourse under the Commission's rules but to file a Motion for Rehearing or to take a judicial appeal[1].

In Van Gorp Van Service, Inc. v. Mayo, 207 So.2d 425, 427 (Fla. 1968), the Court held that "petitions for reconsideration" in that case were actually exceptions within the purview of the Administrative Procedure Act. The Diamond Cab Co. of Miami v. King, 146 So.2d 889 (Fla. 1962) standard which the Commission routinely applies to Motions for Rehearing is different than the proper standard of review for exceptions.

Accordingly, LEAF respectfully requests that you adopt a rule which expressly provides that exceptions may be filed to any Section 120.57, Florida Statutes, order of the Commission where a panel, or the full Commission, hears the testimony and considers the evidence.

Thank you for your consideration.

Sincerely,

Ross Stafford Burnaman
Attorney
Energy Advocacy Program

encl.
cc: Parties of Record (w/o encl).

---

[1] For example, in the Cypress docket, LEAF filed a Motion for Reconsideration (attached) in the nature of exceptions that was rejected by the Commission: "LEAF has merely reargued issues we have already fully considered." (Order PSC-92-1493-FOF-EQ, page 8).

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition to Determine Need for Electrical Power Plant to be Located in Okeechobee County by Florida Power and Light Company and Cypress Energy Partners, Ltd.

DOCKET NO. 920520-EQ
FILED: 12-1-92

/

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC. AND DEBORAH B. EVANS' MOTION FOR RECONSIDERATION OF FINAL ORDER

Legal Environmental Assistance Foundation, Inc. (LEAF) and Deborah B. Evans, pursuant to the Notice of Further Proceedings or Judicial Review in Public Service Commission (PSC) Final Order PSC-92-1355-FOF-EQ (Final Order), and Rule 25-22.060, Florida Administrative Code (FAC), move for reconsideration of said order. In support of the motion, LEAF and Evans state:

1. LEAF and Evans were parties to the administrative proceeding and are adversely affected by the Final Order.

2. LEAF and Evans have not previously filed a motion for reconsideration with respect to the Final Order.

3. LEAF and Evans assert that the PSC failed to consider matters of fact and law as more specifically alleged in the following paragraphs, and such failure impaired the correctness of the Final Order. [All references to Findings of Fact are to LEAF/Evans' Proposed Findings of Fact].

SUMMARY OF GROUNDS FOR REHEARING

4. The Final Order failed to address post-hearing issues identified by LEAF/Evans. The Final Order overlooked fact and law on "mitigate". The Final Order overlooked the law on conservation. The Final Order contains a finding that is not supported in the record. The Final Order fails to separately state findings of fact

and conclusions of law, as required by law and PSC rule.

TWO LEAF/EVANS ISSUES REGARDING FPL'S CONSERVATION BURDEN OF PROOF WERE NOT ADDRESSED

5. As permitted under PSC rules, LEAF and Evans identified two new issues in the Post-hearing Statement of Issues and Positions. [LEAF/Evans' Post-hearing Statement of Issues and Positions, Page 2]; Fla. Admin. Code Rule 25-22.056 (3)(a). While, LEAF/Evans' pleading conformed to the PSC rule, the Commission failed to consider and address the two new issues in the Final Order[1].

6. The two clearly identified new issues were:

> A. Did FPL prove the composite system impact of the conservation programs approved by the PSC prior to the filing of the CEP need petition?
>
> B. Did FPL prove the deferral or avoidance of new supply-side resources that result from the conservation programs approved by the PSC prior to the filing of the CEP need petition?

7. LEAF/Evans asserted that their positions on the new issues (A and B, above) were "no" and "no". LEAF/Evans' Post-Hearing Brief provided argument regarding the new issues. [LEAF/Evans' Post-Hearing Brief, pages 19-23].

---

[1] The conservation criterion of the need statute is discussed under the heading "Need for Capacity 1998-1999" at pages 5-7 of the Final Order. The Final Order states in relevant part: "we regularly review FPL's conservation plans and programs, and are thus familiar with FPL's conservation efforts" (page 6), and "we find that, subject to the rate impact measure screening test, FPL has adequately considered cost-effective non-generation alternatives, and has reasonably compared demand side and supply side options" (page 6). "LEAF correctly states the FPL did not consider the impact of recently approved conservation programs....we had approved none of these programs when FPL's power planning process was performed. Nonetheless, these programs would not significantly impact FPL's need for approximately 800-900 MW in the 1998-1999 timeframe" (page 7).

8. During the course of the hearing in this docket, official recognition was granted to PSC Order 22176 (Order on Conservation). The order was specifically cited in LEAF/Evans' Post-Hearing Brief and Post-Hearing Statement of Issues and Positions with respect to the two new, specifically identified, issues. Order 22176 provides in relevant part:

> For every demand-side offering each utility shall furnish the data listed. . . .Each utility shall identify the composite system impact of all demand-savings programs as measured by reductions in overall system summer and winter demand and gigawatthours. The deferral or avoidance of new supply-side resources that result from these programs shall be identified.

9. LEAF/Evans' Proposed Finding of Fact 68 provided:

> FPL did not submit an analysis of the composite system impacts or the deferral or avoidance of new supply-side resources of all of its approved conservation programs (as of May 22, 1992) in this docket. [Petition, pp. 11-12, Pet. Ex. 1 pp. 14-17 and pp. 62-65; T-1934 L 110- T-1935 L 12; T-1879, L-24 to T-1880 L 2; T-2023].

10. The Final Order ruled on the proposed finding: "Reject this finding as being vague. We are unable to understand the meaning of this proposed finding." (Final Order, page 44).

11. LEAF/Evans assert that the Commission committed error in failing to address two of the most fundamental aspects of FPL's burden to go forward with evidence and ultimate burden of proof regarding conservation pursuant to Section 403.519, Florida Statutes (1991). LEAF/Evans' two new issues related to two explicit and clear requirements under Order 22176 (Order on Conservation) -- for FPL to identify (1) composite system impacts

of DSM on demand and energy requirements and (2) deferral or avoidance of supply-side resources from those programs - but neither is addressed in the Final Order. Clearly, reconsideration is warranted since the Commission failed to consider or overlooked points of law in the Final Order. Diamond Cab Co. of Miami v. King, 146 So.2d 889 (Fla. 1962).

12. The Commission's "finding" that it is "familiar" with FPL's conservation efforts without any discussion of whether that "familiarity" is derived from knowledge of FPL's compliance with the Order on Conservation is inappropriate in this quasi-judicial proceeding, given LEAF/Evans' specific proposed finding of fact, identification of post-hearing issues and briefing of this issue.

THE FINAL ORDER OVERLOOK FACTS AND LAW REGARDING "MITIGATE"

13. Issue 22 stated:

> Has FPL adequately considered and implemented all cost effective conservation and non-generation alternatives which would mitigate all or part of the need for approximately 800-900 MW in the 1998-1999 timeframe?

14. The Final Order does not clearly address the facts and law that control the proper resolution of this issue.

15. The issue was carefully framed to include the phrase "all or part" in conjunction with mitigate. LEAF/Evans' Post-hearing Brief presented extensive argument regarding the proper interpretation of "mitigate". (Pages 14-16).

16. Notwithstanding the manner in which the issue was framed and LEAF/Evans' legal arguments, the Final Order is confusing and inconsistent on the issue of whether part of the projected need

could be met with conservation[2].

17. The Final Order provides in one section (page 6, emphasis supplied):

> We are not convinced ...that conservation measures can defer FPL's need for 800-900 MW of capacity in 1998-1999. While it is conceivable that additional cost-effective conservation can be implemented by FPL, we are not persuaded that over 800 MW of additional high load factor conservation can be in place in time to cost-effectively defer FPL's need in 1998-1999.

However, on the following page, the Final Order states:

> On balance, we find that FPL has adequately considered reasonably available conservation and non-generation alternatives which could mitigate all or part of its need for new capacity. (page 7).

18. In addition, the Final Order creates, but does not explain, a new category of "high load factor" conservation - a matter neither at issue in the Prehearing Order, nor raised by any party in post-hearing pleadings.

19. While the discussion of conservation in the Final Order implies that additional conservation must be available to defer FPL's entire 800-900 MW of projected 1998-1999 need, it concludes that FPL "adequately considered" measures that could mitigate all

---

[2] The transcript of the agenda conference, attached at Exhibit A to Cypress Energy Partners' Petition for Reconsideration (filed October 27, 1992 in this docket), indicates that Issues 17 and 22 were related and contains the following exchange at page 9:
MR. JENKINS: Issue 17 has to do with the availability of additional conservation measures to avoid the megawatt need for the plant....
COMMISSIONER EASLEY: All right. That is assuming, and the way the issue is phrased it assumes the full capacity need?
MR. JENKINS: Yes....

or part of the need for new capacity. This conclusion, however, fails to account for specific findings of fact that establish FPL's ability to mitigate part of the alleged need for 800-900 MW in 1998-1999 based upon already-approved conservation programs, including 95 MW from the Revised HELP program[1]. Thus, it is more than "conceivable" that FPL can implement additional cost-effective conservation to mitigate part of FPL's 1998-1999 capacity needs - it is established fact, accepted in the Final Order!

20. The statement that the Revised HELP program and FPL's three commercial/industrial programs (approved after FPL's 1991 planning process) "would not significantly impact FPL's need for approximately 800-900 MW in the 1998-1999 timeframe" (page 7) is inconsistent with several findings of fact in the Final Order (see footnote 3, above). To mitigate the need by about one-fifth -- the additional conservation savings demonstrated by FPL testimony -- is significant! Obviously, those undisputed facts were overlooked by the Commission.

21. The Final Order is inconsistent with the Commission's rules if "mitigate" is construed to mean "eliminate". Fla. Admin. Code Rules 25-22.081 (5) ("timing and size of the proposed plant"); 25-17.008 (3), which incorporates the Manual on Cost-Effectiveness ("avoided unit, in whole or in part")(page 3).

THE ORDER OVERLOOKS LAW ON FPL'S CONSERVATION OBLIGATIONS

22. The Final Order obviously overlooks the Commission's most

---

[1] LEAF/Evans' Adopted Findings of Fact No.: 19, 20, 21, 22, 23, 25, 26, 28, 29, 64, 65, 66, 76, 85, 86, 87, 88, 100.

recent interpretation of Section 403.519, Florida Statutes. However, no rationale is given for changing the standard as set forth in the Tampa Electric Company need determination order.

23. As set out in full in LEAF/Evans' Post-Hearing Brief, the Tampa Electric order sets out a two-prong test whereby a utility must prove that it:

> has reasonably implemented conservation measures included in its conservation plan....and that it has reasonably considered conservation measures that might mitigate the need for this proposed plant.

Yet in the Final Order in this case, the Commission changed the test:

> we find that, subject to the rate impact measure screening test, FPL has adequately considered cost-effective non-generation alternatives and has reasonably compared demand side and supply side options. (page 6).

24. There is no factual or legal basis for the Commission's use of a new standard, which is inconsistent with established facts and the statutory language and intent of FEECA. Further, in the section of the Final Order on "Cost-Effectiveness", there is no discussion of this new standard.

25. There are several accepted Findings of Fact in the Final Order which the Commission must have overlooked in its statement of the new standard: (1) FPL did not include all of its projected (and RIM cost-effective) 1998 conservation capacity deferral benefits in describing the need for Cypress[4]; (2) FPL performed RIM analysis

---

[4] See, Findings of Fact 14, 19, 21, 22, 23, 25, 26, 28, 29, 65, 66, and 76.

only for individual programs, and not for its entire DSM plan[5]; (3) the RIM test does not measure customer bill impacts[6]; (4) FPL has not evaluated the customer bill impacts of programs which fail the RIM test but pass the total resource cost (TRC) test, notwithstanding the rebuttal exhibit in this docket which staff in error interpreted as doing so, when it only analyzed rate impacts [7]; and (5) FPL's cost-effectiveness comparisons of demand side options with various supply alternatives, which combined with the rejection of FPL's fuel cost projections, preclude any legitimate comparison of conservation which FPL rejected in its RIM prescreen[8].

26. The Commission's rules and prior orders regarding conservation address "cost-effectiveness" in terms of three tests. Order 24745 (July 2, 1991); Rule 25-17.008, FAC (and Manual on Cost-Effectiveness). In unequivocal language, the Commission has stated: "In evaluating conservation and direct load control programs, the Commission will review the results of all three tests to determine cost-effectiveness." (Page 3 of the Manual on Cost-Effectiveness). Further, cost-effectiveness "shall be on a revenue requirements basis for all programs under consideration." (Id., emphasis supplied).

---

[5] See, Finding of Fact 77.

[6] See, Finding of Fact 113.

[7] See, Findings of Fact 112, and 65.

[8] See, Findings of Fact 14, 86, 87, and 88.

THE FINAL ORDER CONTAINS A FINDING NOT SUPPORTED BY EVIDENCE

27. The Final Order rejected proposals offered by LEAF/Evans' witness Mr. John Plunkett of Resource Insight, Inc. that FPL could increase conservation savings. The pivotal reason for that rejection was: "Mr. Plunkett's proposals do not appear to be cost-effective." (Page 6).

28. If this "reason" is a finding of fact, which it appears to be, it is not supported by record evidence. The two statements which accompany the "finding" mistake the record evidence, citing two parts of the record which do not support the finding in any manner.

29. The first citation, Tr-1922, is a reference to a general claim by FPL witness Nelson Hawk during his summary of his rebuttal testimony to Mr. Plunkett -- no facts are provided to support the claim. And, as Exhibit 54 shows, the facts are just the opposite.

30. The second citation, Exhibit 54 ("Rate Impact of Plunkett proposal"), includes FPL's analysis of a version of Mr. Plunkett's analysis which was superseded by a new analysis (JJP-12 revised). [T-1958-1960; T-2018-2020; Ex. 54; Finding of Facts 65, 112 and 113]. The $1.4 Billion "cost" cited by the Final Order is in reality a net benefit transfer between ratepayers which reflects lost revenues from money not paid by the ratepayers who save electricity[9]. Exhibit 54, in fact, shows that Plunkett's proposal would be cost effective under the TRC and Participants tests. [Ex. 54, pages 10 and 11]. The actual impact on ratepayers (as reflected

[9] FPL's $1.4 Billion figure was based solely on FPL's RIM analysis. [T-2020, L 3-17; Ex. 54, page 12].

in revenue requirements -- the total cost paid by customers) of the Plunkett proposals analyzed by FPL would be a cost savings of over $1.2 Billion, rather that an additional cost of $1.4 Billion. [Ex. 54, page 10]. Thus, the statement that LEAF's proposals would cost FPL ratepayers more than new generation is patently absurd.

THE FINAL ORDER FAILS TO PROVIDE SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

31. The Commission's Final Order overlooks the legal requirement imposed by statute and agency rules that findings of fact and conclusions of law be separately stated. Section 120.59 (1), Florida Statutes (1991); Rule 25-22.059 (1), FAC. See, Greyhound Lines, Inc. v. Mayo, 207 So.2d 1, 5 (Fla. 1968).

WHEREFORE, LEAF/Evans respectfully request that the PSC reconsider the Final Order, and enter an Amended Final Order that: (1) determines that FPL did not meet its burden of proof to show the composite system impact of its approved conservation programs (2) determines that FPL did not meet its burden of proof to show the deferral or avoidance of new supply side resources that result from its approved conservation programs (3) adopts LEAF/Evans Proposed Finding of Fact 68 (4) deletes reference to "familiarity" with FPL's conservation filings (5) clarifies that "mitigate" means "lessen" and finds that part of FPL's 1998-1999 need can be met with already-approved conservation programs (6) deletes reference to "high load factor conservation" (7) deletes reference to a new standard of "subject to the rate impact measure screening test" cost-effective non-generation alternatives (8) strikes the finding disputing the "cost-effecitvness" of Mr. Plunkett's proposals, and

(9) denies the need for the proposed power plant, in part, because FPL failed to meet its burden of proof regarding conservation to mitigate the need for 800-900 MW of capacity in 1998-1999.

Respectfully submitted,

Ross S. Burnaman, Attorney
Debra Swim, Attorney
Legal Environmental Assistance
Foundation, Inc.
1115 N. Gadsden Street
Tallahassee, Florida 32303
(904) 681-2591

Terry R. Black
Pace University Energy Project
Center for Environmental
Legal Studies
78 North Broadway
White Plains, New York 10603
(914) 422-4067