

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Lee County,)
Florida for Declaratory Statement) DOCKET NO. 011356 -EQ
Of Exemption, Pursuant to Section)
377.709(6), Florida Statutes, From) FILED: October 11, 2001
Determination of Need Requirement)
of Section 403.519, Florida Statutes)
_____)

PETITION FOR DECLARATORY STATEMENT BEFORE
THE FLORIDA PUBLIC SERVICE COMMISSION

Lee County, Florida ("Lee County"), pursuant to Section 120.565, Florida Statutes,¹ and Rule 28-105.002, Florida Administrative Code ("F.A.C."), hereby respectfully requests the Florida Public Service Commission's ("Commission" or "PSC") declaration that, on the facts and law as set forth below, Lee County is exempt from having to obtain a determination of need for the contemplated expansion to the Lee County Resource Recovery Facility (the "Facility"). Lee County has a real and immediate need for the Commission's declaration because the Commission decision will determine how Lee County proceeds with the certification process for its planned expansion to the Facility. In support of its petition, Lee County states as follows.

In summary, Lee County owns and operates the Facility, a "solid waste facility" within the meaning of Section

¹ All references herein to Florida Statutes are to the 2001 edition thereof.

377.709(2)(f), Florida Statutes, having a nominal electric generating capacity of approximately 40 megawatts ("MW"). Lee County is preparing to file with the Florida Department of Environmental Protection its application for the certification of its planned expansion to the Facility by approximately 20 to 25 MW, which will bring the total electric generating capacity of the Facility to approximately 60 to 65 MW. Pursuant to the plain and unambiguous language of Section 377.709(6), Florida Statutes, Lee County's planned expansion of the Facility is exempt from the Commission's need determination process articulated in Section 403.519, Florida Statutes. The Commission has the statutory responsibility and jurisdiction to administer both Sections 377.709 and 403.519, Florida Statutes, and accordingly, Lee County is entitled to the requested declaratory statement from the Commission.

PROCEDURAL BACKGROUND

1. The name and address of the Petitioner is:

Lee County, Florida
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Telephone (941) 479-8181
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2. All pleadings, motions, orders, and other documents directed to the Petitioner are to be served on the following:

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and

David M. Owen, Esq.
Lee County Attorney's Office
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with a courtesy copy to:

Lindsey J. Sampson, P.E., Director
Lee County Division of Solid Waste Management
1500 Monroe Street (ZIP 33901)
Post Office Box 398
Fort Myers, Florida 33902-0398.

DECLARATORY STATEMENT SOUGHT

3. Based upon the facts and law as set forth below, Lee County respectfully requests the Commission's declaration that:

Pursuant to Section 377.709(6), Florida Statutes, Lee County is exempt from having to obtain a determination of need from the Commission as articulated in Section 403.519, Florida Statutes, for the planned expansion of the Lee County Resource Recovery Facility from the Facility's current capacity of approximately 40 MW to its projected capacity of approximately 60 to 65 MW.

STATUTES AND ORDERS INVOLVED

4. Lee County seeks the Commission's declaratory statement granting Lee County's exemption from the Commission's need determination process. The requested declaratory statement involves the following statutes, rules, and cases.

- a. Section 403.519, Florida Statutes, which establishes the determination of need process that the Commission administers with respect to the siting of electrical power plants under the Florida Electrical Power Plant Siting Act, Sections 403.501-.518, Florida Statutes (the "Siting Act").
- b. Section 377.709(2)(f), Florida Statutes, which provides as follows:

(f) "Solid waste facility" means a facility owned or operated by, or on behalf of, a local government for the purpose of disposing of solid waste, as that term is defined in s. 403.703(13), by any process that produces heat and incorporates, as a part of the facility, the means of converting heat to electrical energy in amounts greater than actually required for the operation of the facility.

- c. Section 377.709(6), Florida Statutes, which provides as follows:

(6) EXEMPTIONS.-- A new solid waste facility, as defined in this section, not greater than 75MW, or a solid waste facility expansion of not greater than 50MW, shall be exempt from the need determination process outlined in s. 403.519.

- d. Commission Rules 25-22.080-.081, F.A.C., which implement Section 403.519 and govern the Commission's need determination processes.
- e. Tampa Electric Co. v. Garcia, 767 So. 2d 428 (Fla. 2000).

- f. Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994).
- g. Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992).

FACTS

5. Lee County owns the Lee County Resource Recovery Facility, which is located in unincorporated Lee County, Florida. The Facility initially achieved commercial in-service status in December, 1994. The Facility is operated by Covanta Energy of Lee, Inc., formerly Ogden Martin Systems of Lee, Inc., on behalf of the County pursuant to a twenty-year operations contract which expires in December 2014. The Facility receives and disposes of solid waste by burning the waste in the Facility's furnaces. This combustion process then produces steam from boilers, which is then directed through the Facility's steam turbine generator to produce electricity. Approximately 5 to 10 MW of the Facility's output is used to operate the Facility, and the remaining 30 to 35 MW of the Facility's output is sold to Seminole Electric Cooperative, Inc. ("Seminole"). Accordingly, the Facility is a "solid waste facility" within the meaning of Section 377.709(2)(f), Florida Statutes. Seminole purchases the Facility's output on a firm capacity and energy basis, pursuant to a negotiated power purchase agreement. Seminole in turn uses the power purchased from Lee County to meet the needs of its ten member electric distribution cooperatives.

6. Lee County is preparing to file its application for a modification to the Site Certification for the Facility. Through this application, Lee County is seeking the Siting Board's authorization to increase the Facility to its planned capacity of 1,800 tons per day ("TPD") of solid waste throughput by adding the final boiler and one additional steam turbine generator to the existing physical plant of the Facility. The expansion of the Facility will comprise approximately 20 to 25 MW of additional capacity, and the Facility's total capacity, once the expansion is complete, will be approximately 60 to 65 MW.

DISCUSSION AND ANALYSIS OF APPLICABLE LAW

7. The permitting of certain power plants in Florida is subject to the processes established in the Siting Act and in Section 403.519, Florida Statutes,² which governs the "determination of need" for such power plants. In summary, power plants, including expansions thereof, that have a steam or solar energy cycle of 75 megawatts ("MW") or more must follow the permitting procedures pursuant to the Siting Act, while those using other technologies and those with steam or solar energy cycles less than 75 MW may, but are not required to, pursue permitting under the Siting Act. Fla. Stat. § 403.503(12). The Commission has exclusive jurisdiction over the determination of

² Section 403.519 is part of the Florida Energy Efficiency and Conservation Act, commonly referred to as "FEECA."

need issue in connection with site certification applications. Fla. Stat. § 403.519; Florida Chapter of the Sierra Club v. Orlando Utilities Commission, 436 So. 2d 383, 387 (Fla. 5th DCA 1983) (District Court of Appeals affirmed Siting Board's final certification order, holding, inter alia, that "the language [in Section 403.519], as well as the language from section 403.508(3), compels the finding that the PSC is the sole judge as to the need for the power plant, with the hearing officer and, indeed, the Siting Board, bound by that determination.") The rules by which the Commission fulfills its responsibilities under Section 403.519 are codified at Rules 25-22.080-.081, F.A.C.

8. Because Lee County is a charter county organized under the Florida Constitution and general law, Lee County is a proper applicant for both Site Certification by the Siting Board pursuant to the Siting Act and, where applicable, for the Commission's need determination pursuant to Section 403.519, Florida Statutes. See Fla. Stat. §§ 403.503(4)&(13).

9. The Commission is also the agency responsible for administering Section 377.709, Florida Statutes. Section 377.709 relates primarily to the funding of local government solid waste facilities that generate electricity. Among other things, Section 377.709 authorizes the Commission to establish an advance funding program for solid waste facilities and requires the Commission to establish rules relating to the purchase by electric utilities of electric capacity and energy produced by

local government solid waste facilities. In addition, Section 377.709(6) exempts from the Commission's need determination process under Section 403.519, Florida Statutes, both new solid waste facilities having capacity less than 75 MW and expansions of solid waste facilities of less than 50 MW. This exemption was enacted by the Florida Legislature in 1994 (Chapter 94-321, Laws of Fla.).

10. Lee County's need for this declaratory statement arises from statements made in certain opinions of the Florida Supreme Court which indicate that need determinations are only available for power plants being built by retail-serving utilities to meet the needs of their retail customers or by entities having contracts with such retail-serving utilities. In the earliest of this line of cases, the Florida Supreme Court stated in a footnote that the need criteria in Section 403.519, Florida Statutes, are utility-specific and unit-specific, thereby rejecting a cogenerator's claim that need for its project, which was to provide power to a retail-serving utility pursuant to a "standard offer contract" with pricing based on the costs of a "statewide avoided unit," had already been determined by the Commission in its approval of the "standard offer contract." Nassau Power Corp. v. Beard, 601 So. 2d 1175 at 1178 n.9 (Fla. 1992).³ In a subsequent case, the court affirmed the

³ The actual holding of Nassau Power v. Beard was that the cogenerator had appealed the wrong order in having failed to

Commission's order that held that an independent cogeneration power producer was not a valid applicant for a determination of need unless it had a contract with a retail-serving utility to provide power to meet such utility's needs for power for its retail customers. Nassau Power Corp. v. Deason, 641 So. 2d 396, 398 (Fla. 1994). In that opinion, the court stated that, under the Commission's interpretation, which the court affirmed:

[A] non-utility generator will be able to obtain a need determination for a proposed project only after a power sales agreement has been entered into with a utility. The non-utility generator will be considered a joint applicant with the utility with which it has contracted.

Id. at 398.

11. In the last case of this line, the Commission held that the contract requirement of Nassau Power v. Deason did not extend to cases wherein the applicant proposed to build and operate a wholesale power plant, where the applicant had no power to force any retail-serving utility to purchase its output, and where the proposed plant would not be in any retail-serving utility's rate base. In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 99 FPSC 3:401

appeal an earlier Commission order enunciating the Commission's policy of determining need on a utility-specific basis. Id. at 1178-79.

(hereinafter "Duke/New Smyrna Beach"), reversed sub nom. Tampa Electric Co. v. Garcia, 767 So. 2d 428 (Fla. 2000). Although the Commission distinguished the facts in Duke/New Smyrna Beach from those in Nassau Power v. Deason, notably the facts that the applicant in Duke/New Smyrna Beach had no power to force any Florida utility to purchase its power and that the costs of the proposed plant could not be imposed on any retail-serving utility's captive customers, 99 FPSC 3:434-35. On appeal, however, the Florida Supreme Court reversed, holding, inter alia, that

A determination of need is presently available only to an applicant that has demonstrated that a utility or utilities serving retail customers has specific committed need for all of the electrical power to be generated at a proposed plant.

Tampa Electric v. Garcia, 767 So. 2d at 434.

The court also stated that

the statutory scheme embodied in the Siting Act and FEECA was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates.

Id. at 435.

12. It is worth noting that the Siting Board and the Commission have granted numerous site certifications and need determinations for waste-to-energy facilities where the applicant was a single entity, usually a county, that neither had responsibility for serving retail electric customers nor had a

power sales contract with a retail-serving utility at the time of the site certification proceedings. See, e.g., In Re: North Broward County Resource Recovery Project Power Plant Siting Certification Application P.A. 86-22, DOAH Case No. 86-0674 (Fla. Power Plant Siting Bd., March 9, 1987) and In Re: Petition by Broward County for a Determination of Need for a Solid Waste-Fired Electrical Power Plant, Docket No. 850915-EU, Order No. 15723 (Fla. Pub. Serv. Comm'n, February 21, 1986); In Re: Hillsborough County Resource Recovery Project Power Plant Siting Certification Application PA 83-19, DOAH Case No. 84-2789 (Fla. Power Plant Siting Bd., December 20, 1984) and In Re: Petition by Hillsborough County for Determination of Need for a Solid Waste-Fired Cogeneration Power Plant, Docket No. 830419-EU, Order No. 12610 (Fla. Pub. Serv. Comm'n, October 14, 1983); In Re: Pinellas County Power Plant Certification Application PA 83-18, DOAH Case No. 83-2355 (Fla. Power Plant Siting Bd., March 20, 1984) and In Re: Petition by Pinellas County for Determination of Need for a Solid Waste-Fired Cogeneration Power Plant, Docket No. 830417-EU, Order No. 12611 (Fla. Pub. Serv. Comm'n, October 14, 1983); In Re: Application for Power Plant Site Certification of Lee County Solid Waste Resource Recovery Facility, DOAH Case No. 90-3942EPP (Fla. Power Plant Siting Bd., June 17, 1992) and In Re: Petition for Determination of Need for a Solid Waste-Fired Cogeneration Power Plant by Lee County, Docket No. 900454-EQ, Order No. 23963 (Fla. Pub. Serv. Comm'n, January 7, 1991). In 1993, after the

court's decision in Nassau Power v. Beard but before the enactment of Section 377.709(6), the Commission also granted a determination of need for an expansion of the Dade County Resources Recovery Facility, even though there was no contract in place for the additional output to be produced by the expansion. In Re: Petition to Determine Need for Proposed Capital Expansion Project of the Dade County Resources Recovery Facility, an Existing Solid Waste Facility, by Metropolitan Dade County, FPSC Docket No. 930196-EQ, Order No. PSC-93-1715-FOF-EQ at 3, 6 (Fla. Pub. Serv. Comm'n, November 30, 1993).

13. The question posed by this petition thus becomes: whether the Florida Supreme Court's statements in the earlier Nassau cases and in Tampa Electric v. Garcia may somehow be construed to override or negate the clearly articulated exemption enacted by the Legislature in Section 377.709(6), Florida Statutes, so as to require that Lee County must obtain a need determination based on a demonstration that the output of the proposed Facility expansion is fully committed to meeting the specific needs of Florida retail-serving electric utilities and those utilities' customers.⁴

⁴ In point of fact, Lee County's existing power purchase agreement with Seminole Electric Cooperative obligates Seminole to purchase the additional capacity and energy to be produced by the expanded Facility. Lee County seeks the Commission's declaratory statement in order to avoid wasting both the Commission's and Lee County's time and resources on an unnecessary -- both as a matter of law and as a matter of policy -- need determination proceeding.

14. Lee County is entitled to the requested declaratory statement by the plain and unambiguous language of Section 377.709(6), Florida Statutes. The cardinal rule to be followed in applying statutes is that legislative intent, as reflected in the plain language of the statute, controls. "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resort to the rules of statutory interpretation. The plain and obvious provisions must control." 49 Fla. Jur. 2d Statutes § 111 (1984 & Supp. 1994). "Where legislative intent as evidenced by statute is plain and unambiguous, there is no necessity for any construction or interpretation of the statute, and courts need only give effect to the plain meaning of its terms." State v. Egan, 287 So. 2d 1 (Fla. 1973).

15. Here, the language of Section 377.709(6), Florida Statutes, is clear and unambiguous: new solid waste facilities with capacity less than 75 MW and solid waste facility capacity expansions less than 50 MW are exempt from the need determination process outlined in Section 403.519, Florida Statutes. Neither Nassau Power v. Beard, nor Nassau Power v. Deason, nor Tampa Electric v. Garcia addressed the case of a need determination for a solid waste facility. Even considering that solid waste facilities are, typically, qualifying facilities under both federal law and the Commission's rules, the Commission should note that it granted the need determination for the Dade County

Facility expansion after the court's opinion in Nassau Power v. Beard was rendered. This at least strongly implies that the Commission has recognized that the Legislature's declared policy favoring solid waste facilities supersedes the utility-specific need requirements articulated by the Commission in its orders and affirmed by the Florida Supreme Court in Nassau Power v. Beard. There is no indication whatsoever in either Nassau Power Corp. v. Deason or in Tampa Electric v. Garcia that the Supreme Court meant to apply those cases to override the provisions of Section 377.709(6) so clearly articulated by the Florida Legislature.

16. It could be suggested that certain provisions of the Siting Act also require a need determination for the expansion. Section 403.508(3), Florida Statutes, provides that an affirmative determination of need is a condition precedent to holding a site certification hearing, and Section 403.510, Florida Statutes, provides that in the event of conflict between any provision of the Siting Act and any other statute, the Siting Act controls. Thus it might be suggested that, by operation of the "supremacy" provision of Section 403.510, the "need determination as condition precedent" requirement of Section 403.508(3) supersedes the limited exemption from the need determination process afforded by Section 377.709(6).

17. However, such a suggestion fails by the application of several standard rules of statutory construction. First, in interpreting a statute, the courts must presume that the

Legislature intended every part of a statute to have a purpose. 49 Fla. Jur. 2d Statutes § 179 (1984 & Supp. 1994). As the Florida Fourth District Court of Appeals stated in State v. Zimmerman, 370 So. 2d 1179, 1180 (Fla. 4th DCA 1979),

It is an axiom of statutory construction that the legislature would not enact a purposeless and therefore useless piece of legislation. Sharer v. Hotel Corporation of America, 144 So. 2d 813 (Fla. 1962). It is the judiciary's duty to uphold and give effect to all provisions of a legislative enactment, and to adopt any reasonable view that will do so. Tyson v. Lanier, 156 So. 2d 833 (Fla. 1963).

(Citations in original.) Here, the hypothetical suggestion given would directly and inescapably imply that the Legislature enacted Section 377.709(6) as a "purposeless and therefore useless piece of legislation." Florida law does not allow such a result. Moreover, in the absence of a showing to the contrary, all laws are presumed to be consistent with each other, and where possible, it is the duty of the courts to adopt a construction of a statutory provision that harmonizes and reconciles it with other statutory provisions. 49 Fla. Jur. 2d Statutes § 180 (1984 & Supp. 1994); Woodgate Development Corp. v. Hamilton Invest. Trust, 351 So. 2d 14, 16 (Fla. 1977); State v. Putnam County Development Authority, 249 So. 2d 6, 10 (Fla. 1971). The provisions of Sections 377.709(6) and 403.508(3) are readily harmonized by recognizing that Section 377.709(6) is a legislatively created exemption to the general need determination requirement, and that this exemption was adopted by the

Legislature in furtherance of its clearly articulated policy favoring solid waste facilities. See Fla. Stat. § 377.709(1).

18. Second, this hypothetical suggestion would conflict with the principle of statutory construction that a more specific statute governs a more general statute. 49 Fla. Jur. 2d Statutes § 182 (1984 & Supp. 1994). As the Florida Supreme Court stated the principle,

A specific statute always prevails over a general statute to the extent of any irremediable inconsistency. Adams v. Culver, 111 So. 2d 665 (Fla. 1959). In effect, the former is construed as an exception to the latter.

People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373, 1377 n.5 (Fla. 1991) (citation in original). In this instance, Section 377.709(6) is a specific statute that expressly exempts certain solid waste facility expansions from the need determination process, whereas Section 403.508(3) is a general requirement for need determinations within the site certification process. Accordingly, the specific statutory provision, that is, the exemption provision of Section 377.709(6), takes precedence over the general requirement of Section 403.508(3).

19. Next, the hypothetical suggestion would conflict with the basic principle that a more recently enacted statute controls or overrides an older statute. 49 Fla. Jur. 2d Statutes § 181 (1984 & Supp. 1994); State v. Parsons, 569 So. 2d 437, 438 (Fla.

1990); Askew v. Schuster, 331 So. 2d 297, 300 (Fla. 1976). This principle, however, only applies where the provisions in question are hopelessly inconsistent. In this case, as articulated above, the provisions of Sections 377.709(6) and 403.508(3) are readily harmonized.

20. Finally, requiring a need determination for the specified classes of solid waste facilities and expansions would not only render useless the express provisions of Section 377.709(6), it would also frustrate the express policy purposes articulated by the Legislature in enacting Section 377.709, namely to promote and encourage the "combustion of refuse by solid waste facilities to supplement the electricity supply," which "not only represents an effective conservation effort but also represents an environmentally preferred alternative to conventional solid waste disposal in this state." Fla. Stat. § 377.709(1).

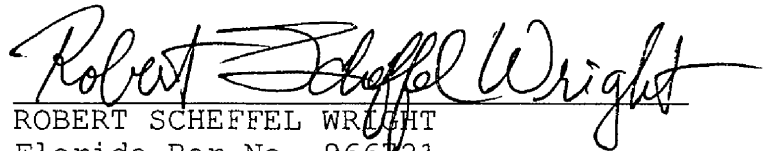
CONCLUSION

As presented in the foregoing analysis, the plain and unambiguous language of Section 377.709(6), Florida Statutes, exempts Lee County's proposed 20 to 25 MW expansion of the Lee County Resource Recovery Facility from the need determination process outlined in Section 403.519, Florida Statutes. There is no authority to indicate that the Florida Supreme Court's holdings in Nassau Power v. Deason or Tampa Electric v. Garcia in

any way impair this legislatively created exemption. Requiring a need determination for the proposed expansion would render Section 377.709(6) a nullity, would needlessly waste the Commission's and Lee County's time and resources, and is plainly contrary to the Legislature's articulated policy favoring solid waste facilities both as an energy conservation measure and as an environmentally preferred means of solid waste disposal. Lee County has a real and immediate need for the requested declaration, and accordingly, the Commission should grant Lee County's petition.

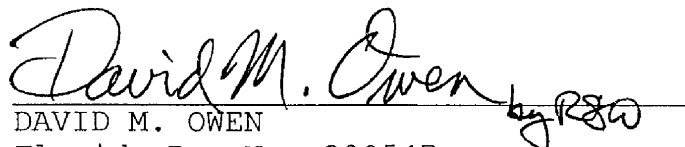
WHEREFORE, Lee County, Florida, respectfully requests the Commission to enter its order declaring that, on the facts and law as presented herein, and in particular pursuant to Section 377.709(6), Florida Statutes, Lee County is exempt from having to obtain a determination of need for the planned expansion to the Lee County Resource Recovery Facility pursuant to Section 403.519, Florida Statutes.

Respectfully submitted this 11th day of October, 2001.



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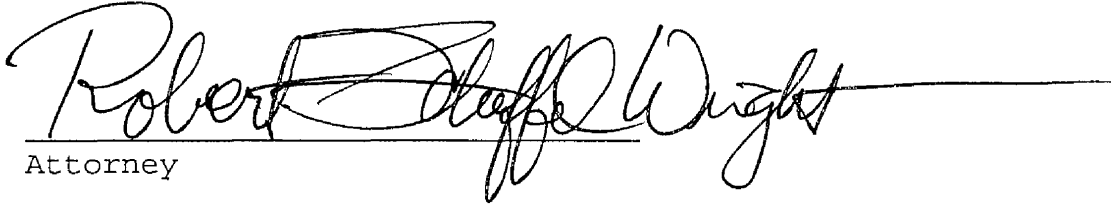
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery (*), or U.S. Mail, on this 11th day of October, 2001, to the following:

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