

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Lee County,
Florida, for declaratory
statement of exemption, pursuant
to Section 377.709(6), F.S.,
from determination of need
requirement of Section 403.519,
F.S.

DOCKET NO. 011356-EQ
ORDER NO. PSC-01-2390-DS-EQ
ISSUED: December 11, 2001

The following Commissioners participated in the disposition of
this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER GRANTING PETITION OF LEE COUNTY, FLORIDA
FOR DECLARATORY STATEMENT

By the Commission:

BACKGROUND

On October 11, 2001, Lee County, Florida filed its petition
requesting a declaration that Lee County is exempt from having to
obtain a determination of need for a contemplated expansion to Lee
County's Resource Recovery Facility (Facility). Lee County owns
the Facility, which is located in unincorporated Lee County,
Florida.

Under the Florida Electrical Power Plant Siting Act (Chapter
403, Florida Statutes), we are empowered to make a determination of
need for any electrical power plant for which an applicant seeks
certification under the act. As set forth in Sections 403.508(3)
and 403.503(12), Florida Statutes, the Siting Act requires a need
determination prior to certification of any generating facility
greater than 75 MW, but provides that a need determination may be
obtained for a smaller facility. Lee County filed its petition for

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determination of need for the Facility on May 10, 1990 in Docket No. 900454-EQ. On January 7, 1991, we issued Order No. 23963 granting Lee County's need determination petition.

According to Lee County's Petition, the Facility has a nominal electric generating capacity of approximately 40 MW. 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.

As described in the Petition, p. 5-6, 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.¹ 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.

Lee County believes that the 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.

¹ Section 377.709(2)(f) defines solid waste facility as "...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."

Lee County is therefore uncertain whether the Florida Supreme Court's statements in the Nassau cases² and in Tampa Electric v. Garcia³ may 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. According to Section 377.709(6), Florida Statutes, both new solid waste facilities having capacity less than 75 MW and expansions of solid waste facilities of less than 50 MW are exempt from the need determination process. Lee County is now preparing to file with the Florida Department of Environmental Protection its application for the certification of a 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.

DISCUSSION

We grant Lee County's Petition for Declaratory Statement that its expansion is exempt from the need determination process pursuant to Section 377.709(6), Florida Statutes. Since Lee County's Resource Recovery Facility is a "solid waste facility" within the meaning of Section 377.709(2)(f), Florida Statutes, its expansion by 20-25 MW is exempt from the need determination requirement pursuant to Section 377.709(6), Florida Statutes.

We believe that any uncertainty on Lee County's part is resolved in this instance because the contemplated facility expansion of 20-25 MW is within the limits provided by the exemption from the need determination process provided in Section 377.709(6), Florida Statutes. As to statements in the Nassau and Tampa Electric v. Garcia cases, those statements appear to have been directed toward implementation of the need determination process as to entities subject to that process, rather than entities exempt from it. Moreover, the exemption is effective

² Nassau Power Corp. v. Beard, 602 So. 2d 1175 (Fla. 1992); Nassau Power Corp. v. Deason, 642 So. 2d 396 (Fla. 1994).

³ Tampa Electric v. Garcia, 767 So. 2d 428 (Fla. 2000).

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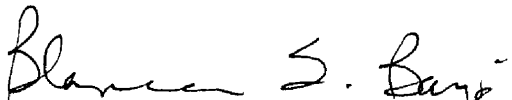
because the enactment of Section 377.709(6), Florida Statutes, in 1994 was subsequent to the revision of the conflict of laws provision of the Siting Act, Section 403.510, Florida Statutes, in 1990. Therefore, the Legislature should be assumed to have enacted Section 377.709(6), Florida Statutes, with knowledge of Section 403.510, Florida Statutes, and with the intent that the exemption provision be effective, rather than nullified by the earlier enacted provision. State v. Zimmerman, 370 So. 2d 1179, 1180 (Fla. 4th DCA 1979); State v. Parsons, 569 So. 2d 437, 438 (Fla. 1990).

In view of the above, it is

ORDERED by the Florida Public Service Commission that the Petition for Declaratory Statement of Lee county, Florida is granted. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 11th day of December, 2001.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

RCB

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.