



Public Service Commission
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DATE: SEPTEMBER 30, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYO)

FROM: OFFICE OF THE GENERAL COUNSEL (BROWN) *MCB DS az*
DIVISION OF ECONOMIC REGULATION (HAFF) *MSA VJ JDT*

RE: DOCKET NO. 020262-EI - PETITION TO DETERMINE NEED FOR AN
ELECTRICAL POWER PLANT IN MARTIN COUNTY BY FLORIDA POWER
& LIGHT COMPANY.

DOCKET NO. 020263-EI - PETITION TO DETERMINE NEED FOR AN
ELECTRICAL POWER PLANT IN MANATEE COUNTY BY FLORIDA POWER
& LIGHT COMPANY.

AGENDA: 10/01/02 - REGULAR AGENDA - DECISION PRIOR TO HEARING
PARTIES MAY PARTICIPATE AT THE COMMISSION'S DISCRETION

CRITICAL DATES: HEARING BEGINS OCTOBER 2, 2002.

SPECIAL INSTRUCTIONS: PETITION FOR REVIEW OF PREHEARING OFFICER'S
ORDER COMPELLING DISCOVERY. NO SEPARATE
REQUEST FOR ORAL ARGUMENT WAS FILED.

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020262.RCM

CASE BACKGROUND

On May 20, 2002, the Florida Action Coalition Team (FACT) petitioned to intervene in this need determination proceeding. Florida Power & Light Company (FPL) objected to FACT's petition, contending that FACT had not shown that it had standing as an association to intervene in the case on behalf of its members. FACT filed an amended petition to intervene on June 26, 2002, in which it provided some additional information to support its allegations that it had the appropriate standing. FPL again responded that FACT had not demonstrated standing and suggested

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that FACT had the affirmative burden to prove up the issue if contested. FPL stated:

[T]he law is clear that FACT has the burden of proving, not merely alleging standing. This factual controversy may necessitate a preliminary evidentiary hearing before the Commission or prehearing officer on the issues surrounding FACT's standing, after FPL has had an opportunity to conduct appropriate discovery on the matter.

FPL's Response to FACT's request for Leave to Amend Petition to Intervene and Amended Petition to Intervene, p.4.

On July 11, 2002, the Prehearing Officer granted FACT's intervention, finding that FACT had:

. . . adequately alleged that the substantial interests of a substantial number of its members may be affected by the Commission's decision in these dockets, and that those interests are both the type of interest the Commission's need determination proceedings are designed to protect and the type of interest FACT is entitled to represent on behalf of its members.

On August 8, 2002, FPL served discovery on FACT, consisting of 13 interrogatories, 15 Requests for Production of Documents, and a Notice of Deposition of Ernie Bach, FACT's founder and executive director. The discovery sought information and documents regarding FACT's funding, the source of FACT's attorney's fees for representation of FACT in this case, a listing of all members of FACT, prior participation in other Commission proceedings and related matters.

The discovery initiated a flurry of procedural jousting between the parties. FACT filed objections to FPL's discovery on August 14, 2002. FPL filed a Motion to Compel Mr. Bach's deposition, and a Motion to Compel FACT's responses to its interrogatories and PODs on August 21, 2002. FACT filed limited responses to the discovery on August 23, 2002, and on August 26, 2002, FACT filed a Motion for Protective Order, Motion for Order Limiting Discovery, and a Motion for Stay in Relation to Florida Power & Light Company's First Request for Production of Documents and First Set of Interrogatories. FACT contended that FPL had

waived its right to contest FACT's standing to intervene, because FPL had not moved for reconsideration of the Order granting intervention within the time permitted in the Order's notice of further proceedings or judicial review. FACT also declined to produce Mr. Bach for deposition while its motion for protective order was pending. Both parties filed responses to each other's motions on August 29, 2002.

On September 13, 2002, the Prehearing Officer issued Order No. PSC-02-1260-PCO-EI, Granting FPL's Motions to Compel Discovery and Denying FACT's Motion for Protective Order, Motion for Order Limiting Discovery, and Motion for Stay. On September 16, 2002, FACT filed a Motion for Protective Order to the Full Commission Pending Resolution of Motion for Reconsideration. FACT asserted that it would not make Mr. Bach available for a deposition until the full Commission ruled on its Motion for Reconsideration of Order No. 1260. On September 20, 2002, FACT filed a Motion to Quash the Subpoena Duces Tecum that FPL served for Mr. Bach's deposition,¹ and on September 24, 2002, FACT filed a Motion for Reconsideration by the full Commission of the Prehearing Officer's Order No. PSC-02-1260.

This recommendation addresses Fact's Motion for Reconsideration. As of this writing, the time for filing FPL's response to the motion has not run. If FPL's response is received before the Agenda, staff will see that copies are delivered to the Commissioners immediately.

¹ On September 20, 2002, FACT also served revised responses to FPL's interrogatories and PODs in which it attempted to answer most of the discovery more completely than it had previously, although it continues to object to the deposition of Mr. Bach, and to questions relating to FACT's funding and the payment of FACT's attorney's fees for representation in this case.

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ISSUE 1: Should the Commission grant the Florida Action Coalition Team's Motion for Reconsideration to the Full Commission?

RECOMMENDATION: No. The Commission should deny the motion for reconsideration. The Prehearing Officer's Order compelling discovery from FACT made no mistake of fact or law, and constituted a reasonable exercise of discretion and authority to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of the case.

STAFF ANALYSIS:

ORDER NO. PSC-02-1260-PCO-EI

In Order No. PSC-02-1260 granting FPL's motion to compel discovery and denying FACT's motion for protective order and other motions, the Prehearing Officer considered FPL's contention that FACT was required to submit to discovery related to its standing to intervene. FPL had argued that the original order granting FACT's petition to intervene could only be conditional, because it was based solely on FACT's allegations of standing in its petition, not on proven facts.

Continuing to challenge the veracity of the assertions FACT has made in its filings, FPL contends: that FACT is actually sponsored by, and represents the interests of, the independent power producers who have intervened in this case; that FACT still has the obligation to prove associational standing to intervene; and that FPL should be able to conduct discovery on that subject in order to contest FACT's standing at the administrative hearing scheduled for October 2-4, 2002. FPL asserts that Order No. PSC-02-0934-PCO-EI, issued July 11, 2002, only granted intervention to FACT preliminarily, subject to further investigation and proof at hearing.

Order No. PSC-02-1260, p. 2

The Prehearing Officer also considered FACT's contention that FPL had waived its right to contest FACT's standing to participate in the case -- and thus to require discovery from FACT on the subject -- because FPL had failed to request reconsideration of the Order granting intervention within the time and in the manner

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provided by the "Notice of Further Proceedings" section of the intervention order.

FACT has refused to answer FPL's interrogatories and request for production of documents, or to make its founder, Ernie Bach, available for deposition. FACT asserts that the order granting its intervention in the proceeding was not conditioned on any further proof of standing. According to FACT, since FPL did not seek reconsideration of the intervention order within the time and in the manner prescribed by Commission rules, FPL waived its right to further contest FACT's standing, and any discovery on that subject now would not lead to any admissible evidence.

Order No. PSC-02-1260, p. 2.

FACT had argued that since the intervention order did not expressly reserve the question of standing for further proof at hearing, it was no longer at issue in the case. FACT had also requested that if the Prehearing officer determined that it must respond to FPL's discovery, the discovery should be limited to matters strictly related to the particular legal elements of associational standing.

Reviewing the intervention order's recitation of the principles of associational standing and the allegations that supported his initial determination that FACT was entitled to intervene, the Prehearing Officer said:

In initially granting FACT's intervention, Order No. PSC-02-0934 applied those principles to the allegations FACT asserted in its pleadings. It is true that the Order granted intervention without expressly reserving the issue of standing for proof at hearing. All orders issued by this Commission, however, are subject to, and incorporate, the requirements of organic law; and parties to administrative proceedings have an affirmative duty to prove standing - not just allege standing - when another party contests that standing. See, Agrico, 406 So.2d at 482; and NAACP, Inc. ex rel. NAACP v. Florida Bd. Of Regents, 2002 Fla. App. Lexis 2012 (Fla. 1st DCA 2002). Contrary to FACT's assertion, under Commission rules, FPL

would not have been required to ask for reconsideration of an order that it believed complied with Florida law.

Order No. PSC-02-1260, p.4.

The Prehearing Officer ordered FACT to submit Mr. Bach for deposition and provide all the requested information relating to FACT's associational standing that was not privileged and was reasonably likely to lead to admissible evidence. The Prehearing Officer also permitted FPL to seek discovery related to FACT's positions in the case to the extent that the information had not already been provided in FACT's pleadings. No further limitation on discovery was imposed.

FACT'S MOTION FOR RECONSIDERATION

In its Motion for Reconsideration, FACT asserts that two mistakes of fact or law in Order No. PSC-02-1260 warrant reversal.

First, Fact contends that FPL's motion to compel discovery on the question of FACT's standing to participate in this need determination should have been denied because FPL had not requested reconsideration of the Prehearing Officer's earlier order granting FACT intervention. FACT argues that the "Notice of Further Review" language, which is standard for all Commission procedural orders, required FPL to request reconsideration, and since FPL had not made such a request, it had waived its right to contest FACT's standing any further. FACT contends that the Prehearing Officer committed "fundamental error" by requiring FACT to submit to discovery under these circumstances, because FACT's intervention had become "final" for purposes of interlocutory review when the time for reconsideration had passed.

Second, FACT contends that Order No. PSC-02-1260 should have provided further protection with respect to discovery, as it had requested in its Motion for Order Limiting Discovery. FACT contends that the Prehearing Officer should "have protected FACT from annoyance, oppression, and undue burden and expense by strictly limiting any FPL discovery to the issue of 'associational standing' and any other issues related to the core purpose of these hearings. . ." Motion for Reconsideration, p.16

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ANALYSIS

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or that the Prehearing Officer failed to consider in rendering his Order. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). A motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Staff recommends that FACT's Motion for Reconsideration does not meet this standard. FACT has not demonstrated any point of fact or law which the Prehearing Officer overlooked or failed to consider in rendering his Order. As described above, Order No. PSC-02-1260 fully addresses, and rejects, FACT's argument that FPL waived its right to contest FACT's standing and conduct discovery on the issue. As Order No. PSC-02-1260 clearly explains, in Florida, a participant in an administrative proceeding has an obligation to prove standing - not just allege standing - when contested. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981); NAACP, Inc. ex. Rel. NAACP v. Florida Bd. Of Regents, supra. The Prehearing Officer made no mistake of law in ruling that FACT was still required to prove standing in this case and therefore required to answer discovery on the question.

Nor did the Prehearing Officer make any mistake of law in tailoring the Order on discovery as he did. The presiding officer in an administrative hearing has the authority and discretion under Florida's Rules of Administrative Procedure to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of the case. In Order No. PSC-02-1260 the Prehearing Officer exercised that discretion reasonably. FPL had propounded a limited number of questions and requests to FACT related to FACT's organization and FACT's interest in the case that were not unduly burdensome or oppressive. The Prehearing Officer reviewed those requests and required responses, subject to the

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exclusion of privileged and irrelevant matters. He determined that no further limitations were necessary, and he made no mistake of law or fact in doing so. Rule 1.280(c), Florida Rules of Civil Procedure provides that, ". . . for good cause shown the court . . . may make any order to protect a party or person from annoyance, embarrassment, oppression or undue burden that justice requires. . ." (Emphasis supplied) It is clear that Order PSC-02-1260 was a reasonable exercise of the Prehearing officer's discretion under these circumstances, and Staff recommends that FACT's Motion for Reconsideration should be denied.

ISSUE 2: Should these dockets be closed?

RECOMMENDATION: No. The dockets should remain open.

STAFF ANALYSIS: The dockets should remain open to conduct further proceedings in the case.

MCB