

State of Florida



Public Service Commission
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TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (HARRIS) *[Signature]*
DIVISION OF ECONOMIC REGULATION (COLSON) *[Signature]* RC JDT

RE: DOCKET NO. 020953-EI - PETITION TO DETERMINE NEED FOR HINES UNIT 3 IN POLK COUNTY BY FLORIDA POWER CORPORATION.

AGENDA: 12/02/02 - REGULAR AGENDA - DECISION PRIOR TO HEARING - PARTIES MAY PARTICIPATE AT THE COMMISSION'S DISCRETION

CRITICAL DATES: HEARING BEGINS DECEMBER 3, 2002

SPECIAL INSTRUCTIONS: PETITION FOR REVIEW OF PREHEARING OFFICER'S PREHEARING ORDER GRANTING INTERVENTION TO THE FLORIDA PARTNERSHIP FOR AFFORDABLE COMPETITIVE ENERGY. NO REQUEST FOR ORAL ARGUMENT WAS FILED.

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020953\020953.RCM

CASE BACKGROUND

On October 31, 2002, the Florida Partnership for Affordable Competitive Energy (PACE) petitioned to intervene in this proceeding. The petition was denied, without prejudice, in Order No. PSC-02-1536-PCO-EI, issued November 8, 2002. PACE filed an Amended Petition to Intervene on November 15, 2002, and Florida Power Corporation (FPC) filed a Memorandum in Opposition on November 19, 2002. At the November 20, 2002, Prehearing Conference, the Prehearing Office granted intervention; that ruling was incorporated into the Prehearing Order, Order No. PSC-02-1650-PHO-EI, issued November 25, 2002. The Prehearing Order required any Motions for Reconsideration be filed by November 26, 2002.

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On November 26, 2002, FPC filed a Motion for Reconsideration of that part of the Prehearing Order which granted PACE intervention. This recommendation addresses FPC's Motion for Reconsideration. As of this writing, the time for filing PACE's response to the motion has not run. If PACE's response is received before the Agenda, staff will see that copies are delivered to the Commissioners immediately.

ISSUE 1: Should the Commission grant Florida Power Corporation's Motion for Reconsideration to the Full Commission?

RECOMMENDATION: No. The Commission should deny the Motion for Reconsideration. FPC has not demonstrated the Prehearing Officer misapprehended or overlooked any point of fact or law such that his Order is clearly mistaken. (Harris)

STAFF ANALYSIS:

FLORIDA POWER CORPORATION'S MOTION

FPC's initial assertion involves the standard of review which the Commission should apply in a motion for reconsideration of a Prehearing Officer's decision. FPC argues that the full Commission is different decision making entity from the Prehearing officer, and therefore, the standard of review applied to motions for rehearing of the same entity (clear mistake of fact or law) should not be applied. Rather, FPC suggests that the correct standard in ruling on this Motion for Reconsideration is de novo, with no deference to the Prehearing Officer's Order.

FPC then makes a number of arguments that PACE's Intervention is not appropriate in this proceeding, and that the Prehearing Officer's decision constitutes a clear mistake of law. Fundamentally, FPC contends that PACE does not meet the requirements for standing as set forth in Florida Law under *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981) and *Florida Home Builders Ass'n v. Department of Labor and Employment Sec.*, 412 So. 2d 351 (Fla. 1982). FPC argues that PACE's member's competitive interests are not the types of interests this proceeding is designed to protect; that PACE has not alleged that FPC should have selected any one member's proposal as the winner; that PACE's arguments in support of its Amended Petition are not in fact issues in this case; and that PACE's assertion of the generic concerns of its members is

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inappropriate. Finally, FPC contends that Docket No. 020398-EQ, the "bid rule docket", is the more appropriate forum for PACE to raise these issues.

ANALYSIS

As a preliminary matter, FPC argues that the correct standard of review in this type of motion for reconsideration is not whether the Prehearing Officer made a clear mistake of fact or law, but is instead some variant of de novo review by the entire Commission. Staff recommends that this is incorrect; were this argument to be accepted, any party, for any reason, could seek reconsideration to the full Commission of any decision a Prehearing Officer made, rendering the Prehearing Officer superfluous at best.

Instead, 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 FPC's Motion for Reconsideration does not meet this standard. FPC has not demonstrated any point of fact or law which the Prehearing Officer overlooked or failed to consider in rendering his Order. FPC has not demonstrated that the Prehearing Officer overlooked any facts in reaching his decision to allow intervention, or that had additional facts been considered, the decision clearly would have been different.

As to a point of law, FPC would have the Commission substitute the Commission's interpretation and application of the *Agrico* and *Fla. Homebuilders* cases for that of the Prehearing Officer. This is not the standard in granting rehearing; the question is whether the Prehearing Officer overlooked or misapprehended the law such that his decision is clearly mistaken. FPC, in its Memorandum of

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Opposition to PACE's intervention, filed November 19, 2002, made the same arguments about the interpretation of *Agrico* and *Fla. Homebuilders*; the Prehearing Officer had those arguments before him; and it cannot be said, as a matter of law, that the Prehearing Officer made a clear mistake in his application of those cases to the instant facts.

The record is clear that the Prehearing Officer had the facts and law before him, and made the determination that PACE has made factual allegations sufficient to confer standing to intervene in this docket as required by *Agrico* and *Fla. Homebuilders*. It is clear that Order PSC-02-1650 was a reasonable exercise of the Prehearing officer's discretion under these circumstances, and staff recommends that FPC's Motion for Reconsideration should be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. The docket should remain open. (Harris)

STAFF ANALYSIS: The docket should remain open to conduct further proceedings.