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Timolyn Henry\*\*\*\*\*1

## Timolyn Henry

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**From:** Dana Greene [DanaG@hgslaw.com]  
**Sent:** Thursday, October 19, 2006 4:03 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** Harold Mclean; aweiner@ngnlaw.com; Jennifer Brubaker; Katherine Fleming  
**Subject:** Docket 060635-EU

**Attachments:** Docket 060635 - Applicant's Response in Opposition to Emergency Motion for Extension of Time.doc



Docket 060635 -  
Applicant's Re...

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 060635-EU

In re: Petition To Determine Need For an Electrical Power Plant in Taylor County

c. Document being filed on behalf of Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee

d. There are a total of 6 pages.

e. The document attached for electronic filing is the Applicants' Response in Opposition to "Emergency Motion for Extension of Time to File Testimony".

Thank you for your cooperation.

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FPSC-COMMISSION CLERK

# ORIGINAL

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee.

DOCKET NO. 060635-EU

FILED: October 19, 2006

### **APPLICANTS' RESPONSE IN OPPOSITION TO "EMERGENCY MOTION FOR EXTENSION OF TIME TO FILE TESTIMONY"**

Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee ("Applicants"), by and through their undersigned attorneys, hereby respond in opposition to the "Emergency Motion for Extension of Time to File Testimony" filed by Rebecca J. Armstrong ("Armstrong") on October 18, 2006. As discussed below, Armstrong's motion does not establish good cause for an extension of the current schedule. Furthermore, despite its title, Armstrong's motion is in reality a Motion for Reconsideration which must be denied as untimely and because it fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Order Establishing Procedure. Accordingly, the motion must be denied.

#### **Background**

1. On September 19, 2006, the Applicants filed their Need for Power Application requesting the Commission to determine need for the Taylor Energy Center, along with pre-filed direct testimony in support of the application.
2. One week later, on September 26, 2006, Armstrong filed a Petition to Intervene in this proceeding.

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3. On October 4, 2006, the Prehearing Officer issued an Order Establishing Procedure (“OEP”) which, among other things, requires intervenors to file testimony and exhibits by October 24, 2006; i.e., 35 days from the filing of the application and supporting testimony. The OEP also sets the hearing in this matter for January 10, 2006. *See* Order No. 06-0819-PCO-EU.

4. On October 18, 2006, a full two weeks after issuance of the OEP, Armstrong filed a pleading entitled “Emergency Motion for Extension of Time to File Testimony” (“motion”). Armstrong’s motion seeks a four month extension of the deadline for intervenor testimony until January 26, 2007 – over two weeks after the currently scheduled hearing date – as well as a corresponding extension of the other deadlines established in the OEP. Thus, Armstrong’s motion seeks not only an extension of time for filing testimony, but a continuance of the hearing until well beyond the 90 days from the filing of the application as contemplated in Rule 25-22.080, F.A.C.<sup>1</sup>

### Discussion

#### **I. Armstrong has not established any basis for an extension.**

5. Armstrong provides no factual or legal support for her assertion that the OEP “constitutes a violation of a citizen’s Federal and State constitutional rights to due process and a fair hearing.” While Armstrong complains that intervenors would have “only” five weeks after the filing of the Application to file their testimony in response, such a schedule is by no means unusual and is clearly designed to ensure compliance with the Commission’s Rule 22-25.080,

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<sup>1</sup> Although Applicants have agreed to a limited waiver of the 90 day hearing deadline to accommodate this Commission’s busy end-of-the-year schedule, granting Armstrong’s request would extend the hearing date a full four months even assuming a hearing date could be assigned within that time-frame under the Commission’s already crowded docket. Such a lengthy delay is clearly contrary to Commission Rule 25-22.080, F.A.C., and unjustified for the reasons discussed below.

F.A.C., which establishes specific time-frames for the hearing and final action in need for power proceedings. In the last five need proceedings, for example, the OEPs established similar deadlines for the filing of intervenor testimony. *See In Petition for determination of Need for Seminole Generating Station Unit 3*, Order No. PSC-06-0247-PCO-EC (42 days from filing of Petitioner’s testimony); *Petition for determination of Need for West County Units 1 and 2*, Order No. PSC-06-0245-PCO-EI (35 days); *Petition for determination of Need for Treasure Coast Energy Center Unit 1*, Order No. PSC-05-0485-PCO-EM (47 days); *Petition for determination of Need for Hines 4 Power Plant*, Order No. PSC-04-0808-PCO-EI (42 days); *Petition for determination of Need for Turkey Point Unit 5*, Order No. PSC-04-0325-PCO-EI (35 days). Indeed, like the OEP in this proceeding, two of those OEPs required intervenors to file testimony within 35 days after the filing of Petitioner’s testimony.

6. Other than conclusory allegations about the Applicants’ preparation for this proceeding, Armstrong provides no basis to conclude that more time is needed to prepare intervenor testimony than what has been provided in prior Commission orders. To the contrary, Armstrong effectively admits that she is well familiar through “[e]xtensive publicity” that the Applicants have been considering the proposed power plant “for a year or more.” Thus, Armstrong has had ample time to engage potential witnesses.

7. Armstrong’s threat of an appeal rings hollow. Rule 28-106.211, F.A.C, gives the Prehearing Officer broad authority to “issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case[.]” The Florida Supreme Court has recognized this broad authority by reviewing procedural orders by the Commission under the highly deferential abuse of discretion standard. *Panda Energy v. Jacobs, et al, as the Public Service Commission*, 813 So. 2d 46, 49 (Fla. 2002)

(citations omitted). Armstrong's motion provides no basis to conclude that the Prehearing Officer's October 4 order constitutes an abuse of discretion or somehow fails to provide "due process." Indeed, Armstrong cites no cases whatsoever in support of her claim that "due process" somehow warrants extension of the procedural schedule.

**II. Armstrong's motion is untimely and does not establish any basis for reconsideration of the Order Establishing Procedure.**

8. Although Armstrong's pleading is labeled a "motion for extension of time," it is in reality a motion for reconsideration of the time-frames established in the OEP. Under the terms of the OEP and Commission Rule 25-22.0376, F.A.C., any motion for reconsideration of the OEP was due no later than 10 days after issuance of the order; i.e., October 16, 2006. Thus, Armstrong's motion, which was filed on October 18, 2006, must be denied as untimely.

9. In any event, Armstrong's motion does not establish any basis for reconsideration of the OEP. The standard of review for a motion for reconsideration of a Prehearing Officer's order is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the order. See Order No. PSC-04-0251-PCO-EI; citing *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974), *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962), and *Pingree v. Quaintance*, 394 So. 2d 162 (Fla. 1st DCA 1981). 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." Order No. PSC-04-0251-PCO-EI, citing *Stewart Bonded, supra*.

10. Without presenting any evidentiary support, Armstrong's motion includes only conclusory allegations of a need for additional time and a threat of an appeal. It does not even purport to identify any specific point of fact or law that the Prehearing Officer overlooked or

failed to consider in rendering the OEP. Nor is it based on “specific factual matters set forth in the record and susceptible to review.” Accordingly, the motion must be denied.

**Conclusion**

WHEREFORE, for the reasons discussed above, Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee respectfully request entry of an order denying the “Emergency Motion for Extension of Time to File Testimony” filed by Rebecca J. Armstrong on October 18, 2006.

Respectfully submitted, this 19<sup>th</sup> day of October, 2006.

//s//Gary V. Perko  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Applicant's Response in Opposition to "Emergency Motion for Extension of Time to File Testimony" in Docket No. 060635-EU was served upon the following by electronic mail and U.S. regular mail (\*) on this 19th day of October, 2006:

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