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Subject: Docket 060635

Attachments: Docket 060635 - Applicant's Response in Opposition to Motion to Extend Discovery Schedule.pdf



Docket
5 - Applicant's
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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 "Motion to Extend Discovery Schedule and Filing Date for Testimony and Exhibits of the Sierra Club, Inc., John Hedrick, Barry Parsons and Brian Lupiani".

Thank you for your cooperation.

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DOCUMENT NUMBER-DATE
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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 23, 2006

**APPLICANTS' RESPONSE IN OPPOSITION TO "MOTION TO EXTEND
DISCOVERY SCHEDULE AND FILING DATE
FOR TESTIMONY AND EXHIBITS OF THE SIERRA CLUB, INC.,
JOHN HEDRICK, BARRY PARSONS AND BRIAN LUPIANI"**

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 "Motion to Extend Discovery Schedule and Filing Date for Testimony and Exhibits" filed by The Sierra Club, Inc., John Hedrick, Barry Parsons and Brian Lupiani ("Sierra") on October 20, 2006. As discussed below, Sierra's motion does not establish good cause for an extension of the current schedule. Furthermore, despite its title, Sierra'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 month later, on October 20, 2006, Sierra 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 20, 2006, a full two weeks after issuance of the OEP, Sierra filed a pleading entitled “Motion to Extend Discovery Schedule and Filing Date for Testimony and Exhibits” (“motion”). Sierra’s motion seeks at least a one-month extension of the deadline for intervenor testimony until late November 2007 – after the currently scheduled close of testimony, including rebuttal testimony – as well as a corresponding extension of the other deadlines established in the OEP. Thus, Sierra’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.¹

Discussion

I. Sierra has not established any basis for an extension.

5. Sierra provides no factual or legal support for its assertion that the OEP violates Sierra’s rights to “due process.” While Sierra 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, F.A.C., which establishes specific time-frames for the hearing and final action in need

¹ 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 Sierra’s request would extend the hearing date at least one month 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.

for power proceedings. In the last five need proceedings, for example, the OEPs established similar deadlines for the filing of intervenor testimony. *See In re 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, Sierra provides no basis to conclude that more time is needed to prepare intervenor testimony than what has been provided in prior Commission orders. Sierra can provide no basis for these allegations because the proposed power plant has been extensively discussed in the local communities for over a year, including a public referendum in the City of Tallahassee. Thus, Sierra has had ample time to engage potential witnesses.

7. 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). Sierra'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, Sierra cites no cases whatsoever in support of its claim that “due process” somehow warrants extension of the procedural schedule.

II. Sierra’s motion is untimely and does not establish any basis for reconsideration of the Order Establishing Procedure.

8. Although Sierra’s pleading is labeled a “Motion to Extend Discovery Schedule and Filing Date for Testimony and Exhibits,” 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, Sierra’s motion, which was filed on October 20, 2006, must be denied as untimely.

9. In any event, Sierra’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*.

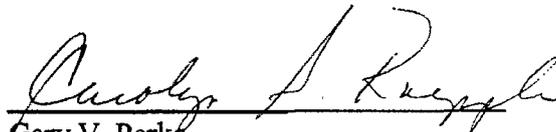
10. Without presenting any evidentiary support, Sierra’s motion includes only conclusory allegations of a need for additional time. It does not even purport to identify any specific point of fact or law that the Prehearing Officer overlooked or failed to consider in

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 “Motion to Extend Discovery Schedule and Filing Date for Testimony and Exhibits” filed by The Sierra Club, Inc., John Hedrick, Barry Parsons and Brian Lupiani on October 20, 2006.

Respectfully submitted, this 23rd day of October, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Applicant's Response in Opposition to "Motion to Extend Discovery Schedule and Filing Date for Testimony and Exhibits" in Docket No. 060635-EU was served upon the following by electronic mail on this 23rd day of October, 2006:

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