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: November 2, 2006

APPLICANTS' RESPONSE OPPOSING MOTION TO RECONSIDER ORDER GRANTING IN PART AND DENYING IN PART MOTION TO EXTEND DISCOVERY SCHEDULE AND TESTIMONY FILING DATE

Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee ("Applicants"), by and through their undersigned attorneys, and pursuant to Rule 25-22.0376(2), Fla. Admin. Code, hereby oppose the "Motion to Reconsider Order Granting in Part and Denying in Part Motion to Extend Discovery Schedule and Filing Date for Testimony and Exhibits of The Sierra Club, Inc., John Hedrick, and Brian Lupiani ("collectively "Intervenors")" filed on October 31, 2006. As discussed below, the Intervenors' Motion does not identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering Order No. PSC-06-0903-PCU-EU (Oct, 26, 2006), which already granted Intervenors additional time to file their testimony. Accordingly, the motion must be denied.

1. As the Commission has stated many times, 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 e.g., Order No. PSC-04-0251-PCO-EI, at p. 2 (March 8, 2004), 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). Intervenors' Motion does not acknowledge, must less satisfy, that standard.

2. 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, at p. 2, citing Stewart Bonded, supra. Intervenors' Motion includes only conclusory allegations of a need for additional time and a vague reference to "due process." Motion at p. 3. 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 Order at issue. Nor is it based on "specific factual matters set forth in the record and susceptible to review." Accordingly, the Motion must be denied.

3. As to Intervenors' reference to "due process," Rule 28-106.211, Florida Administrative Code, 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). Intervenors' Motion provides no basis to conclude that the Prehearing Officer's Order constitutes an abuse of discretion. Likewise, Intervenors cite no cases whatsoever to support their claim that "due process" somehow requires a 45-day extension of the testimony deadline. To the contrary, at least one court found no due process concerns under similar circumstances involving a motion for continuance in an administrative proceeding. See Manasota-88, Inc. v. Agrico Chem. Co., 576 So.2d 781, 782-83 (Fla 2nd DCA 1991) (No denial of due process when intervenor had three weeks to review

modified mitigation plan and to prepare responsive testimony). Indeed, Intervenors' proposed schedule would substantially prejudice the Applicants ability to prepare for hearing.[1]

4. Intervenors' Motion incorrectly asserts that Staff's service of discovery requests somehow indicates a "level of uncertainty in [the Applicants'] filings" which warrants additional time for Intervenors to conduct discovery and prepare their testimony. It is by no means unusual that Staff serves multiple rounds of discovery in need proceedings. The mere fact that discovery has been served does not raise questions about the application; it merely shows that Commission Staff is carefully scrutinizing the application and supporting testimony.

5. Intervenors provide no evidentiary support for the request that they be granted another 45 days "to become informed about the utility filings and to complete their own technical analyses, testimony and exhibits" before they file testimony. See Motion, at p. 3. This assertion ignores the fact that Intervenors have had since September 19, 2006 – a full six weeks now – to review and analyze the application and supporting testimony. It also ignores the fact that Intervenors chose to wait until October 20, 2006 to petition to intervene and they still have not availed themselves of the opportunity to conduct discovery. Intervenors' own failure to timely exercise their rights cannot create a basis for an extension of time.

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[1] Under the schedule proposed on page 4 of the Motion, Intervenors would file "basic testimony" on November 2, then serve discovery requests within 5 days (i.e., Nov. 7), to which the Applicants would have 30 days to respond (i.e., Dec. 7). Intervenors would then file "supplemental testimony" within 10 days (i.e., Dec. 18). Then, the Applicants would prepare rebuttal testimony over the winter holidays for filing by December 28. While Interveners do not explain what they mean by "basic testimony," the clear implication is that the "supplemental testimony" which they propose to file on December 18 would constitute the heart of their case, leaving the Applicants only 10 working days over the winter holidays to depose Intervenors' witnesses by the January 3 discovery cutoff. Moreover, given the 20 day response time for interrogatories and requests for production of documents, there would not be sufficient time for the Applicants to serve written discovery and receive responses by the discovery cutoff, which is only one week before the hearing.

6. As discussed above, Intervenors' Motion does not identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering Order No. PSC-06-0903-PCU-EU (Oct, 26, 2006). Instead, for the most part, the Motion simply reargues matters already considered, which is inappropriate in a motion for reconsideration. See 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). Accordingly, Intervenors' Motion for Reconsideration 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 Reconsider Order Granting in Part and Denying in Part Motion to Extend Discovery Schedule and Filing Date for Testimony and Exhibits of The Sierra Club, Inc., John Hedrick, and Brian Lupiani" filed on October 31, 2006.

Respectfully submitted, this 2nd day of November, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Applicant's Response in Opposition "Motion to Reconsider Order Granting in Part and Denying in Part Motion to Extend Discovery Schedule and Filing Date for Testimony and Exhibits of The Sierra Club, Inc., John Hedrick, and Brian Lupiani" in Docket No. 060635-EU was served upon the following by U.S. Mail and electronic mail(*) on this 2nd day of November, 2006:

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