

BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Petition to Determine Need for an Electrical Power Plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee) Docket No. 060635-EU
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) Dated: November 9, 2006
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APPLICANTS' MOTION TO STRIKE CERTAIN ISSUES OF DISPUTED FACT RAISED IN THE SIERRA CLUB'S PETITION TO INTERVENE

Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee (“Participants”), by and through their undersigned attorneys, and pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C.), file this Motion to Strike¹ certain issues (Paragraph nos. 5(v), 6.a, 6.b, 6.c, 6.d, and 7) raised in the Petition to Intervene filed by The Sierra Club, Inc., John Hedrick, Barry Parsons, and Brian Lupiani (“Sierra”) on October 20, 2006.

Introduction

1. On September 19, 2006, the Participants filed their Petition and accompanying Need for Power Application requesting the Commission to determine need for the Taylor Energy Center pursuant to the Florida Electrical Power Plant Siting Act (“PPSA”), Chapter 403, Part II, Florida Statutes.

2. On October 20, 2006, Sierra filed a petition to intervene (“Sierra’s Petition”) in this proceeding. On October 27, 2006, the Public Service Commission’s Pre-Hearing Officer

¹ Because this motion to strike is in the nature of a motion to dismiss the identified issues, this motion is being submitted in compliance with the rule on motions to dismiss, Rule 28-106.204, F.A.C. The Participants recognize that the scope of the issues in Commission proceedings is typically addressed during an informal issues identification conference and/or pre-hearing conference. Nevertheless, the Participants file this motion in order to prevent any suggestion that they have waived the right to challenge the cognizability of the issues addressed in this motion.

granted Sierra's Petition to Intervene, with the exception that the PSC denied the Petition to Intervene by Mr. Barry Parsons. *See* Order No. PSC-06-0903-PCO-EU.

3. As further discussed below, Sierra's Petition raises numerous "Disputed Issues of Material Fact" ("issues"), which are beyond the scope of the Commission's jurisdiction and inappropriate for consideration in need determination proceedings. Accordingly, the Participants respectfully request the Pre-Hearing Officer to strike those issues that are beyond the scope of the Commission's jurisdiction from Sierra's Petition, as more fully identified below, and preclude them from consideration in this need determination proceeding.

Discussion

I. The Commission cannot and should not consider environmental externalities or speculate as to future environmental regulations.

4. As the Commission has previously recognized, the PPSA sets forth a comprehensive process for the licensing of new and expanded steam electric generation plants. See In re: Petition of Florida Power & Light Company to determine need for electric power plant -- Martin Expansion Project, Order No. 23080, 1990 WL 488769 (1990) ("FPL Martin"); In re: Petition of Florida Power & Light Company to determine need for electric power plant -- Lauderdale Repowering, Order No. 23079 (1990). There are several divisions of responsibility under the PPSA, but the final decision on certification is made by the Governor and Cabinet sitting as the Siting Board. §403.509, F.S. Ultimately, the Siting Board must make a decision "that will fully balance the increasing demands for electrical power plant location and operation with the broad interests of the public." §403.502(2), F.S. In particular, the Siting Board is charged with the responsibility, among other things:

To effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility, including air and water quality, fish and wildlife, and the water resources and other natural resources of the state.

§403.502(2), F.S.

5. The Siting Board's decision is made on the record developed before an Administrative Law Judge who is charged with preparing a recommended order based on all evidence of record at the final certification hearing. §403.508(2)(a), F.S. Under Section 403.508(3), F.S., the Commission is one of several statutory parties to the certification hearing. Other statutory parties include, but are not limited to, the Florida Fish and Wildlife Conservation Commission, the applicable water management district, and the Department of Environmental Protection ("DEP"). §403.508, F.S. These agencies have the expertise, and jurisdiction under the PPSA, to address any environmental and natural resource impacts. §403.507, F.S.

6. The Commission's role in the PPSA process is set forth in three separate statutory sections. Section 403.507(4), F.S., requires the Commission to prepare a report as to the present and future need for the electrical generating capacity to be supplied by the proposed power plant. That report "may include the commission's comments with respect to any matters within its jurisdiction." (emphasis added). The factors to be considered by the Commission in the preparation of that report are spelled out in more detail in Section 403.519, F.S, which states in pertinent part:

In making its determination [of need], the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, the need for fuel diversity and supply reliability, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant. . .shall serve as the commission's report required by s. 403.507(4).

(emphasis added).

7. The “disputed issues of fact” in Paragraphs 6.b and 6.c of Sierra’s Petition to intervene appear to raise environmental considerations that are beyond the Commission’s jurisdiction and, therefore, inappropriate for consideration in this need determination proceeding and inclusion in the Commission’s PPSA report. Specifically, Paragraph 6.b asks the Commission to assess “external costs, such as environmental mitigation costs” and asserts the Participant’s “proposed compliance with *existing* environmental regulations appear to underestimate true costs, in the face of fast-moving public debate over emissions regulations for coal-fired power plants.” Sierra’s Petition at ¶6.b (emphasis added). Likewise, Paragraph 6.c refers to “the *possibility* of additional costs of emissions costs.” *Id.* (emphasis added). Thus, Sierra appears to be arguing that the Commission must consider externalities and the “possibility” of future environmental regulations.

8. The Commission has previously refused to consider environmental externalities in need determination proceedings when evaluating cost-effectiveness of a proposed power plant.

The Commission explained:

The forum in which the Legislature intended the record to be developed on the environmental impacts of proposed power plants is the forum in which the agencies charged with environmental matters have the greatest input: the final certification hearing. Given the existence of this forum and the lack of jurisdiction over the subject matter, the Commission should not seek to expand its need determination proceedings to cover environmental and natural resource issues.

This does not mean that the Commission should not consider the cost of equipment reasonably believed to be required to actually operate the proposed plants. These costs were developed in the record of this proceeding and are discussed in Issue 23. Externalities which involve a balancing of public good versus need for new generation are the matters which are properly excluded from consideration by this body and best left to the environmental agencies and ultimately the Governor and Cabinet. Therefore, we find that the Commission can

not and should not consider the cost to the state and its citizens of the environmental and natural resource impacts of the proposed [plant].

In re FPL Martin, 1990 WL 488769, at p.16.

9. In accordance with this precedent, the Participants' cost-effectiveness analysis does consider the costs of compliance with existing regulations. Contrary to Sierra's suggestion, however, the Commission cannot speculate as to whether Congress or the Florida Legislature will enact a new environmental emissions control program, nor as to how or when any such program would be implemented. See Duval County School Bd. v. Spruell, 665 So. 2d. 262 (Fla. 1st DCA 1996) (Court refused to speculate as to results of future agency action). Indeed, the Commission has previously recognized that it cannot reach findings of fact relating to proposed or possible regulations because such findings of fact require speculation as to what might or might not occur. See Re Gulf Power Company, Docket No. 921155-EI, Order No. PSC-93-1376-FOF-EI (Sep. 20, 1993); Re Gulf Power Company, Docket No. 921155-EI, Order No. PSC-94-0264-FOF-EI (Mar. 8, 1994) (order denying motion for reconsideration of Order No. PSC-93-1376-FOF-EI). Significantly, the Pre-Hearing Officer has already recognized that the potential costs associated with future carbon dioxide regulation are too speculative and conjectural for consideration in this proceeding. Order No. PSC-06-0899-PCO-EU (Oct. 26, 2006).

10. The Participants therefore respectfully request that the Pre-Hearing Officer strike the "Disputed issues" raised in Paragraphs 6.b and 6.c from Sierra's Petition and preclude such issues from consideration in this proceeding to the extent they call for the Commission to assess environmental externalities and potential future environmental regulations.

II. The Participants are not required to demonstrate that the Project is the “least risky alternative” and the Commission has no authority to oversee management of the project.

11. Paragraphs 5(v), 6.a, and 7 of Sierra’s Petition to Intervene incorrectly suggest that the Commission should evaluate whether the proposed power plant is the “least risky” alternative and that the Commission should “reserve authority” over the Participants’ management of the project.

12. Section 403.519, F.S., sets forth an exclusive list of the criteria the Commission must consider in conducting its needs analysis. Section 403.519 provides, in pertinent part:

In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available.

“Risk” is not one of the criteria listed in Section 403.519, F.S., and therefore, is an issue that is beyond the jurisdiction of the Commission. See Panda Energy International v. Jacobs, 813 So.2d 46, 54 n.10 (Fla. 2002), quoting Tampa Electric Co. v. Garcia, 767 So.2d 428, 435 (Fla. 2000). In Panda Energy, when the Court was asked to expand the Commission’s needs analysis to include a criterion not included in Section 403.519, the Florida Supreme Court refused to do so, stating:

“[T]he solution for the PSC or other interested entities if they desire to expand the PSC’s authority is to seek an amendment to the statute. ... We find that the Legislature must enact express statutory criteria if it intends such authority for the PSC. Pursuant only to such legislative action will the PSC be authorized to consider [a new criterion].”

Id. Nothing in the PPSA gives the Commission any authority to consider “risks” of a proposed power plant in its needs analysis. As the Supreme Court stated in Panda Energy, if Sierra wishes

to add a new criterion to the Commission's needs analysis, the Legislature must adopt that criterion by statute. Panda Energy, 813 So.2d 46, 54 n.10.²

13. Likewise, nothing in the PPSA or any other statute gives the Commission authority to oversee management of proposed power plants, particularly when, as here, the project owners are municipalities and other non-investor-owned electrical utilities over which the Commission has no ratemaking authority. See Order No. PSC-95-0461-FOF-EG, at p.3 (1995) (recognizing that “[t]he Commission does not have rate setting authority over municipal and cooperative utilities.”).

14. Accordingly, the Participants respectfully request that the Pre-Hearing Officer strike Paragraphs 5(v), 6.a, and 7 from Sierra's Petition and preclude from consideration the issues raised therein to the extent they suggest that the Participants must demonstrate that the proposed project is the “least risky” alternative and that the Commission should retain authority to oversee management of the project.

III. The Commission cannot and should not depart from established criteria for assessing conservation and DSM measures.

15. Paragraph 6.c of Sierra's Petition to Intervene incorrectly suggests that Participants must demonstrate in this proceeding that there are no conservation or demand-side management (DSM) measures that would “mitigate the possibility of additional costs of emissions.” As discussed above, the Commission cannot speculate as to the potential impacts of future emission regulation. Moreover, the applicable statutory criterion in Section 403.519(3), F.S., requires consideration of whether the reasonably available conservation measures might

² It should be noted that the issues as proposed by Sierra are also vague and ambiguous. Sierra's Petition fails to identify what types of risks should be considered by the Commission – economic, environmental, political, etc. – and fails to identify how those risks should be evaluated or weighed by the Commission. Such ambiguity underscores the need for legislative direction if such issues are to be considered in a need determination proceeding.

mitigate the *need* for the proposed plant. It does not require or authorize the Commission to speculate as to whether conservation measures would mitigate the “possibility” of emission costs associated with possible future environmental regulations.

16. Paragraph 6.d of Sierra’s Petition further suggests that the evaluation of conservation and DSM measures in this proceeding must be consistent with “emerging” policy trends in other jurisdictions. Consistency with emerging policy trends is not one of the criteria listed in Section 403.519, F.S., and therefore, is an issue that is beyond the jurisdiction of the Commission for the reasons discussed above. Consistent with established Commission precedent, the Participants’ Application and supporting testimony demonstrates that there are no reasonably available conservation measures that would mitigate the need for the proposed power plant. The Commission cannot and should not establish new criteria for assessing conservation and DSM measures in this proceeding. As the Commission has previously recognized, because the Commission does not have rate setting authority over municipal and other non-investor-owned utilities, it is appropriate to allow the governing bodies of these utilities latitude in evaluating conservation and DSM measures. See Order No. PSC-95-0461-FOF-EG, at p.3 (1995) (order approving original conservation goals for JEA, Tallahassee, and other municipal and cooperative utilities). Moreover, because the criteria for assessing conservation and DSM measures have implications for all Florida utilities, it is not appropriate to establish new criteria in a piece-meal fashion in individual need determination proceedings.

17. Accordingly, the Participants respectfully request that the Prehearing Officer strike the issues raised in Paragraphs 6.c and 6.d from Sierra’s Petition and preclude them from consideration in this proceeding to the extent they suggest that the Commission should depart

from established criteria for assessing conservation and DSM measures in need determination proceedings.

WHEREFORE, in accordance with the above discussion, Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee respectfully request that the Prehearing Officer strike certain issues raised in Paragraphs 5(v), 6.a, 6.b, 6.c, 6.d, and 7 of Petition to Intervene of The Sierra Club, Inc., John Hedrick, and Brian Lupiani and preclude such issues from consideration in this proceeding.

RESPECTFULLY SUBMITTED this 9th day of November, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Applicants' Motion to Strike Certain Issues of Disputed Fact Raised in the Sierra Club's Petition to Intervene in Docket No. 060635-EU was served upon the following by U.S. Mail and electronic mail(*) on this 9th day of November, 2006:

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