

BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Petition to Determine Need for an) Docket No. 060635-EU
Electrical Power Plant in Taylor County by)
Florida Municipal Power Agency, JEA,) Dated: November 20, 2006
Reedy Creek Improvement District and)
City of Tallahassee)
_____)

**APPLICANTS' MOTION TO STRIKE CERTAIN ISSUES OF DISPUTED
FACT RAISED IN PETITION TO INTERVENE**

Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee (“Applicants”), 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. 6(g), 6(i), 6(j), 6(o), 6(p), 6(t), 6(u), 6(v), 6(w), 6(x), and 6(y)) raised in the Petition to Intervene filed by Dianne V. Whitfield, Carole E. Taitt, and John Carl Whitton, Jr., on October 31, 2006.

Introduction

1. On September 19, 2006, the Applicants 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. Six weeks later, on October 31, 2006, Dianne V. Whitfield, Carole E. Taitt, and John Carl Whitton, Jr., filed a petition to intervene (“Whitton Petition”) in this proceeding. On

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 Applicants 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 Applicants 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.

November 16, 2006, the Public Service Commission's Pre-Hearing Officer granted the Petition to Intervene of Mr. Whitton, and the PSC denied the Petition to Intervene by Ms. Whitfield and Ms. Taitt. See Order No. PSC-06-0957-PCO-EU (Nov. 16, 2006).

3. As further discussed below, the Whitton 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 Applicants respectfully request the Pre-Hearing Officer to strike those issues that are beyond the scope of the Commission's jurisdiction from the Whitton 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(g), 6(i), 6(j), 6(u), 6(v), 6(w), 6(x), and 6(y) of the Whitton Petition to 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(g) asks the Commission to assess “the ability of the proposed pulverized coal plant to comply with the proposed more stringent particulate standards of the Environmental Protection Agency.” Whitton Petition at ¶6(g) (emphasis added). Likewise, Paragraph 6(i) refers to the costs of the proposed plant’s alleged “detrimental effect on the public health and the environment of our State . . .” Id. Similarly, Paragraph 6(j) asserts that the Commission should assess “any economic costs associated with detrimental effects on the public health and the environment of our State.” Id. In Paragraph 6(u), Whitton asks the Commission to assess whether the Applicants considered “carbon compliance costs.” Id. Paragraph 6(v) asks the Commission to assess the Applicants’ calculation of “costs of more stringent Clean Air Interstate Rule (‘CAIR’) standards.” Id. Paragraphs 6(w), 6(x), and 6(y) ask the Commission to assess the “costs associated with changes to the environment”, the “cost of further mercury pollution of Florida’s water resources,” and the long-term environmental costs of operating a coal plant. Id. Thus, Whitton 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 Applicants' cost-effectiveness analysis does consider the costs of compliance with existing regulations. Contrary to Whitton'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. See Order Nos. PSC-06-0867-PCO-EU (Oct. 20, 2006), PSC-06-0954-PCO-EU (Nov. 15, 2006).

10. The Applicants therefore respectfully request that the Pre-Hearing Officer strike the “disputed issues” raised in Paragraphs 6(g), 6(i), 6(j), 6(u), 6(v), 6(w), 6(x), and 6(y) from the Whitton 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 Commission has no authority to assess the “riskiness” of the Project and no authority over the siting of the plant.

11. Paragraph 6(t) of the Whitton Petition to Intervene incorrectly suggests that the Commission should evaluate whether the proposed power plant is assuming “unnecessary risks” in its site selection, “given the potential water quality, sinkhole, and toxic substances issues at the site.” Whitton Petition, at ¶6(t).

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 Mr. Whitton 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. Furthermore, the Commission has already noted, in its Order granting intervention to Mr. Whitton, that the Commission does not have jurisdiction over the siting of the plant. See Order No. PSC-06-0957-PCO-EU, at p.2 (Nov. 16, 2006) (“issues relating to the siting of the plant are under the purview of the Florida Department of Environmental Protection”).

14. Accordingly, the Applicants respectfully request that the Pre-Hearing Officer strike Paragraph 6(t) from the Whitton Petition and preclude from consideration the issues raised therein to the extent the Whitton Petition suggests that the Applicants must demonstrate that the proposed project is the “least risky” alternative and that the Commission has authority over the siting of the plant.

III. The Commission has no authority over the public health impacts of the proposed plant.

15. Paragraphs 6(i) and 6(j) of the Whitton Petition incorrectly suggest that the Commission must assess whether the Applicants have assessed the public health impacts of the proposed plant. Whitton Petition, ¶¶ 6(i) and (j). As discussed above, Section 403.519, F.S.,

² It should be noted that the issue as proposed by Whitton is also vague and ambiguous. The Whitton 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.

sets forth an exclusive list of the criteria the Commission must consider in conducting its needs analysis. “Public health impacts” are not one of the criteria listed in Section 403.519, F.S., and therefore, “public health impacts” raise issues that are beyond the jurisdiction of the Commission. See Panda Energy, 813 So.2d at 54 n.10, quoting Tampa Electric Co., 767 So.2d at 435. As the Supreme Court stated in Panda Energy, if Mr. Whitton 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.10.³ The Commission cannot and should not establish new criteria for need determinations in this proceeding.

16. Accordingly, the Applicants respectfully request that the Pre-Hearing Officer strike the issues raised in Paragraph 6(i) and 6(j) from the Whitton Petition and preclude them from consideration in this proceeding to the extent they suggest that the Commission should depart from established criteria in need determination proceedings by assessing public health impacts.

IV. The Commission cannot and should not depart from established criteria for assessing costs.

17. Paragraph 6(y) of the Whitton Petition suggests that the evaluation of costs in this proceeding must be consistent with “state and federal agencies’ policies encouraging more environmentally benign, renewal energy options.” Whitton Petition, ¶6(y). Consistency with 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. The

³ It should be noted that the issues as proposed by Whitton are also vague and ambiguous, as discussed above in relation to “riskiness”. The Whitton Petition fails to identify what types of public health impacts should be considered by the Commission, and fails to identify how those impacts 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.

Commission cannot and should not establish new criteria for assessing costs in this proceeding. Further, the issue of the consistency of the project with state and federal energy or environmental policy is ambiguous and speculative, and not a proper matter for this proceeding.

18. Accordingly, the Applicants respectfully request that the Pre-Hearing Officer strike the issues raised in Paragraph 6(y) from the Whitton Petition and preclude them from consideration in this proceeding to the extent they suggest that the Commission should depart from established criteria for assessing costs in need determination proceedings.

V. **The Commission cannot and should not consider issues related to local government resolutions.**

19. The Applicants also move to strike Paragraph 6(p) of Whitton's Petition, which questions whether the Applicants have complied with the a resolution purportedly passed by the Taylor County Board of County Commissioners. Even assuming *arguendo* that any such resolution was properly passed by the County and that it is somehow binding and enforceable, it is clearly not a matter within the Commission's jurisdiction in this proceeding.

20. Under Section 403.508(3), F.S., of the PPSA, Taylor County is also one of the statutory parties to the certification proceeding. Just as issues relating to environmental and natural resource impacts are within the expertise and jurisdiction of the relevant environmental agencies, here, the expertise and jurisdiction over applicable local ordinances, regulations, standards, or criteria that apply to the proposed electrical power plant lie with the local government. Section 403.507(2), F.S., also places jurisdiction over such matters within the purview of the local government:

Each local government in whose jurisdiction the proposed electrical power plant is to be located shall prepare a report as to the consistency of the proposed electrical power plant with all applicable local ordinances, regulations, standards, or criteria that apply to the proposed electrical power plant, including any

applicable local environmental regulations adopted pursuant to s. 403.182 or by other means.

21. The Commission should leave consideration of local government issues with the entity to whom the Legislature has designated jurisdiction and which has the expertise to address these issues. Accordingly, the Applicants respectfully request that Paragraph 6(p) be stricken from the Whitton Petition and precluded from consideration in this proceeding.

WHEREFORE, in accordance with the above discussion, Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee respectfully request that the Pre-Hearing Officer strike certain issues raised in Paragraphs 6(g), 6(i), 6(j), 6(o), 6(p), 6(t), 6(u), 6(v), 6(w), 6(x), and 6(y) of the Petition to Intervene filed by Dianne V. Whitfield, Carole E. Taitt, and John Carl Whitton, Jr., and preclude such issues from consideration in this proceeding.

RESPECTFULLY SUBMITTED this 20th 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 Whitton Petition to Intervene in Docket No. 060635-EU was served upon the following by U.S. Mail and electronic mail(*) on this 20th day of November, 2006:

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