

ORIGINAL

Matilda Sanders

From: Dana Greene [DanaG@hgslaw.com]
Sent: Wednesday, November 22, 2006 11:16 AM
To: Filings@psc.state.fl.us
Cc: ljacobs50@comcast.net; sbrownless@comcast.net; barmstrong@ngn-tally.com; psimms@nrdc.org; Jennifer Brubaker; Katherine Fleming; brett@wildlaw.org; jeanne@wildlaw.org
Subject: Docket 060635-EU

Attachments: Docket 060635 - Applicants' Motion to Strike Certain Issues of Disputed Fact Raised in NRDC's Petition to Intervene.pdf

CMP
COM 5
CTR
ECR
GCL
OPC
RCA
SCR
SGA
SEC 1
GTH kimp



Docket
5 - Applicants
Electronic Filing

a. Person responsible for this electronic filing:

Gary V. Perko
Hopping Green & Sams, P.A.
123 S. Calhoun Street
Tallahassee, FL 32301
1-850-425-2359
garyp@hgslaw.com

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 9 pages.

e. The document attached for electronic filing is Applicants' Motion to Strike Certain Issues of Disputed Fact Raised in NRDC's Petition to Intervene

Thank you for your cooperation.

Dana Greene, Legal Assistant to
William H. Green, Gary V. Perko & Virginia C. Dailey Hopping Green & Sams, P.A.
123 South Calhoun Street
P.O. Box 6526
Tallahassee, Florida 32314
850-425-3437 (direct)
850-224-8551 (fax)
danag@hgslaw.com

DOCUMENT NUMBER-DATE
10757 NOV 22 06
FPSC-COMMISSION CLERK

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
Dated: November 22, 2006

APPLICANTS' MOTION TO STRIKE CERTAIN ISSUES OF DISPUTED FACT RAISED IN NRDC'S 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 Strike<sup>1</sup> certain issues (Paragraph nos. 7(b), 7(d), 7(e), 7(f), 7(g), and 7(i)) raised in the Petition to Intervene filed by the Natural Resources Defense Council ("NRDC") on November 2, 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. On November 2, 2006, the NRDC filed a petition to intervene ("NRDC Petition") in this proceeding. On November 21, 2006, the Public Service Commission's Pre-Hearing Officer granted NRDC's Petition in part and denied it in part. See Order No. PSC-06-0971-

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.

PCO-EU (Nov. 21, 2006) (granting NRDC intervention on the grounds of whether the proposed plant will impact the rates charged to NRDC members and on the grounds of whether the Applicants have properly relied on new capacity rather than alternatives). The Pre-Hearing Officer found that the NRDC Petition “fails to state grounds upon which intervention can be granted” with respect to the cost impacts of future carbon regulation and the environmental impacts of the proposed plant. Id. at 3. The Order states: “this decision should not be construed to permit the NRDC to raise arguments [relating to future carbon regulation costs or the environmental impacts of the proposed plant].” Id.

3. As further discussed below, the NRDC 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 NRDC Petition, as more fully identified below, and preclude them from consideration in this need determination proceeding.

### Discussion

#### **I. The Commission cannot and should not 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 7(d), 7(e), 7(f), and 7(g) of the NRDC 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 7(e) asks the Commission to assess whether carbon regulation “should warrant formal consideration” in the needs determination for the proposed plant. NRDC Petition at ¶7(e). Likewise, Paragraph 7(f) asks the Commission to evaluate “the cost of complying with future CO<sub>2</sub> regulation.” *Id.* at ¶7(f). Similarly, Paragraph 7(g) asserts that the Commission should assess whether the failure to consider CO<sub>2</sub> “is a material breach of the Owners’ regulatory obligations” or of the Commission’s obligations. *Id.* at ¶7(g). Paragraph 7(d) refers to the “costs related to complying with future CO<sub>2</sub> regulations”. *Id.* at ¶7(d). Thus, the NRDC is asking the Commission to consider the “possibility” of future environmental regulations.

8. In accordance with long-standing Commission precedent, the Applicants’ cost-effectiveness analysis does consider the costs of compliance with existing regulations. Contrary to the NRDC’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. 1<sup>st</sup> 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 Nos. PSC-06-0867-PCO-EU (Oct. 20, 2006), PSC-06-0954-PCO-EU (Nov. 15, 2006).

9. Indeed, the Pre-Hearing Officer has already ruled that the NRDC has “fail[ed] to state grounds upon which intervention can be granted” with respect to its issue in Paragraphs 7(e), 7(f), and 7(g) relating to “the cost impacts of future carbon regulation” because such an assessment would be “speculative and conjectural, rather than real and immediate in nature.” Order No. PSC-06-0971-PCO-EU (Nov. 21, 2006), at p.3. The Pre-Hearing Officer also ruled that the NRDC has “fail[ed] to state grounds upon which intervention can be granted” with respect to the “effects of increased pollution” because “[i]ssues of environmental compliance ... are under the purview of the Florida Department of Environmental Protection.” Id.

10. The Applicants therefore respectfully request that the Pre-Hearing Officer strike the “disputed issues” raised in Paragraphs 7(d), 7(e), 7(f), and 7(g) from the NRDC 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.”**

11. Paragraph 7(b) of the NRDC Petition to Intervene incorrectly suggests that the Commission should evaluate whether the proposed plant is the “lowest risk” alternative.

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 with 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 the NRDC wishes the Commission to add a new criterion to its needs analysis, the Legislature must adopt that criterion by statute. See Panda Energy, 813 So.2d 46, 54 n.10.<sup>2</sup>

---

<sup>2</sup> It should be noted that the issues as proposed by the NRDC are also vague and ambiguous. The NRDC 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

13. Accordingly, the Applicants respectfully request that the Pre-Hearing Officer strike Paragraph 7(b) from the NRDC Petition and preclude from consideration the issues raised therein to the extent they suggest that the Applicants must demonstrate that the proposed project is the “lowest risk” alternative.

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

14. Paragraph 7(d) of the NRDC Petition incorrectly suggests that the Commission should assess whether conservation and DSM measures offer comparative benefits “[i]n light of all the costs and risks associated with construction of a pulverized coal plant (including costs relating to complying with future CO<sub>2</sub> regulations).” NRDC Petition, at ¶7(d). As discussed above, the Commission cannot speculate as to the potential impacts of future emission regulation. Moreover, the NRDC appears to be suggesting that the Commission depart from its established methodology for assessing DSM cost-effectiveness.

15. Consistent with established Commission precedent, the Applicants’ Application and supporting testimony demonstrate 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).

---

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.



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.

16. Accordingly, the Applicants respectfully request that the Prehearing Officer strike the issues raised in Paragraph 7(d) from the NRDC 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 7(b), 7(d), 7(e), 7(f), 7(g), and 7(i) of the Petition to Intervene filed by the Natural Resources Defense Council, Inc., and preclude such issues from consideration in this proceeding.

RESPECTFULLY SUBMITTED this 22nd day of November, 2006.

HOPPING GREEN & SAMS, P.A.

/s/Gary V. Perko  
Gary V. Perko  
Carolyn S. Raeppe  
Virginia C. Dailey  
Hopping Green & Sams, P.A.  
123 S. Calhoun Street  
Tallahassee, FL 32314  
(850) 222-7500 (telephone)  
(850) 224-8551 (facsimile)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Applicants' Motion to Strike Certain Issues of Disputed Fact Raised in the NRDC Petition to Intervene in Docket No. 060635-EU was served upon the following by U.S. Mail and electronic mail(\*) on this 22nd day of November, 2006:

Brian P. Armstrong, Esq.\*  
7025 Lake Basin Road  
Tallahassee, FL 32312

Patrice L. Simms \*  
Natural Resources Defense Council  
1200 New York Ave., NW  
Suite 400  
Washington, DC 20005

Jennifer Brubaker, Esq.\*  
Katherine Fleming, Esq.\*  
Legal Division  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Suzanne Brownless \*  
Suzanne Brownless, P.A.  
Natural Resources Defense Council  
1975 Buford Blvd.  
Tallahassee, FL 32308

E. Leon Jacobs, Jr. \*  
Williams, Jacobs & Associates, LLC  
P.O. Box 1101  
Tallahassee, Florida 32302

Valerie Hubbard, Director  
Department of Community Affairs  
Division of Community Planning  
2555 Shumard Oak Blvd.  
Tallahassee, FL 32399-2100

Jeanne Zokovitch Paben\*  
Brett M. Paben  
WildLaw  
1415 Devils Dip  
Tallahassee, FL 32308-5140

Buck Oven  
Michael P. Halpin  
Department of Environmental Protection  
2600 Blairstone Road MS 48  
Tallahassee, FL 32301

                    /s/Gary V. Perko                    

Attorney