

ORIGINAL

Matilda Sanders

From: Dana Greene [DanaG@hgslaw.com]
Sent: Wednesday, December 20, 2006 2:58 PM
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 Portions of Testimony & Exhibits filed by Whitton.pdf



Docket 060635 - Applicants' Mo...

Electronic Filing

a. Person responsible for this electronic filing:

Gary V. Perko
Hopping Green & Sams, P.A.
123 S. Calhoun Street
Tallahassee, FL 32301
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 Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee's (Applicants') Motion to Strike Portions of Testimony and Exhibits filed by John Carl Whitton, Jr.

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

- CMP
COM
CTR
ECR
GCL
OPC
RCA
SCR
SGA
SEC
OTH

DOCUMENT NUMBER-DATE

11634 DEC 20 08

FPSC-COMMISSION CLERK.

ORIGINAL

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: December 20, 2006

FLORIDA MUNICIPAL POWER AGENCY, JEA, REEDY CREEK IMPROVEMENT DISTRICT AND CITY OF TALLAHASSEE'S (APPLICANTS') MOTION TO STRIKE PORTIONS OF TESTIMONY AND EXHIBITS FILED BY JOHN CARL WHITTON, JR.

Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee ("Applicants"), by and through their undersigned counsel, pursuant to Rule 28-106.204, Florida Administrative Code, and Rule 1.140(f), Florida Rules of Civil Procedure, hereby moves to strike portions of the testimony (and associated exhibits) of Dian Deevey, submitted by John Carl Whitton, Jr. ("Whitton") in the above-captioned proceeding. Specifically, the Applicants move to strike those portions of testimony and exhibits pertaining to issues that are outside the jurisdiction of the Commission, that are speculative and without probative value, that are hearsay not corroborated by competent evidence and thus irrelevant to the disputed issues in this proceeding, issues for which Ms. Deevey lacks the relevant expertise, and issues not related to the issues in dispute in this proceeding.

ARGUMENT

1. Florida's Administrative Procedure Act requires the Commission to exclude irrelevant, immaterial or unduly repetitious evidence from the proceeding. Section 120.569(2), Florida Statutes; see also Rule 1.140(f), Florida Rules of Civil Procedure (motions to strike "redundant, immaterial, impertinent, or scandalous matter from any pleading); Lewis v. State, 55

Fla. 54, 45 So. 998, 1002 (1908) (“A motion to strike out evidence that has been introduced in a case must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself, and not upon the ground that is not sufficient.”); McClurkin v. Parrish Volvo, Inc., 317 So.2d 85, 86 (Fla. 1st DCA 1975) (trial court has power to strike exhibits which contain redundant, immaterial, impertinent, or scandalous matters); Sonderling v. Sonderling, 600 So.2d 1285, 1287 (Fla. 3d DCA 1992) (allegations that bear some relation to the issues may be struck if they are not an integral part of the case and are offered to gratify private spite or promote public scandal).

2. Section 90.401, Florida Statutes, defines relevant evidence as “evidence tending to prove or disprove a material fact.” Section 90.403, Florida Statutes, provides that “[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issue, misleading the jury or needless presentation of cumulative evidence.”

EVIDENCE RELATING TO ISSUES OUTSIDE THE PSC’S JURISDICTION

3. Testimony regarding environmental issues is irrelevant to this need proceeding because it addresses matters that are outside the jurisdiction of the Public Service Commission. As previously addressed in the Applicants’ Response in Opposition to the Petition to Intervene Filed by Dianne Whitfield, Carole Taitt, and John Carl Whitton, Jr. (filed November 8, 2006), and recognized in the Commission’s order granting Whitton’s Petition to Intervene and denying the Petition to Intervene by Whitfield and Taitt, the environmental issues raised by Whitton relating to the siting of the proposed power plant are outside the Commission’s jurisdiction in this proceeding. See Order No. PSC-06-0957--PCO-EU (Nov. 16, 2006) (Order Granting Intervention) (alleged injury, such as environmental impact, is not of a type that the need proceeding is designed to protect).

4. Many of the issues raised in the testimony and exhibits offered by Whitton relate to environmental considerations that are beyond the Commission's jurisdiction and, therefore, inappropriate for consideration in this Need for Power proceeding and inclusion in the Commission's PPSA report. These include Ms. Deevey's testimony on page 2 (lines 23-25) and page 3 (line 1); and Exhibit DD-1 (addressing the alleged environmental impacts of a proposed coal plant).¹

5. The Applicants therefore respectfully move to strike the portions of Ms. Deevey's testimony and exhibits discussed above and preclude them from consideration in this proceeding.

SPECULATIVE EVIDENCE WITHOUT PROBATIVE VALUE

6. Most of Ms. Deevey's testimony and exhibits relates to potential future regulation of carbon dioxide (CO₂) emissions and apparently seeks to have the Commission make findings of fact concerning potential future CO₂ emission regulation or costs. This includes the following portions of Ms. Deevey's testimony and exhibits:

- Page 3 (lines 19-22) and page 4 (lines 1-5) (assertions regarding regulatory uncertainties and possible carbon emission regulation);
- Page 5 (lines 11-18) (assertions regarding likelihood of carbon emission regulation);
- Page 7 (lines 12-25), page 8 (lines 1-25), page 9 (lines 1-25), page 10 (lines 1-25), page 11 (lines 1-24), page 12 (lines 1-23), and page 13 (lines 1-2) (assertions regarding future carbon emission regulation); and
- Exhibit DD-5 and Exhibit DD-6 (assertions regarding future carbon emission regulation).

7. 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

¹ In addition, Whitton improperly failed to provide the complete version of the report contained in Exhibit DD-1. Exhibit DD-1 constitutes only Chapter 1 (Report Overview) of an eight-chapter report.

to what might or might not occur.² Indeed, the Pre-Hearing Officer has already recognized that the potential costs associated with future carbon dioxide regulation are too speculative and conjectural to confer standing to participate in this proceeding. See Order Nos. PSC-06-0867-PCO-EU (Oct. 20, 2006), PSC-06-0954-PCO-EU (Nov. 15, 2006); Order No. PSC-06-0971-PCO-EU (Nov. 21, 2006). The Applicants have appropriately addressed potential CO₂-related costs by submitting a sensitivity analysis for the Commission's information only. However, because there currently are no federal, state, or local regulations that impose CO₂ mitigation costs on power plants in Florida, the Commission cannot make any dispositive findings regarding potential CO₂ emission costs or otherwise base its decision on what, if any, CO₂ regulation and associated costs may be imposed in the future. Accordingly, the above-referenced portions of Ms. Deevey's testimony and exhibits should be stricken, to the extent that it is being offered to establish the course and impact of future regulation.

EVIDENCE FOR WHICH WHITTON'S WITNESS LACKS EXPERTISE

8. Section 90.705(2), Florida Statutes, provides that where a witness does not have sufficient basis for an opinion included in his testimony, the opinions and inferences of that witness are inadmissible unless the party offering the testimony establishes the underlying facts or data. See also In Re: Complaint of Jory Bricker Against Florida Power Corporation Regarding High Electric Bills, DOAH Recommended Order, Case No. 93-5713, *adopted by PSC*, Order No. PSC-94-0306-FOF-EI (Mar. 17, 1994) (Order Adopting Hearing Officer's Recommended Order) (hereinafter "Bricker Recommended Order") (Commission adopted recommended order which struck evidence for which the "expert qualifications of those giving the opinions contained in the exhibits were not demonstrated").

² 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-ET, Order No. PSC-94-0264-FOF-EI (Mar. 8, 1994) (order denying motion for reconsideration); see also 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).

9. In addition, the Commission has held that non-expert witnesses may not submit opinion testimony. In Re: Application for transfer of territory served by Tamiami Village Utility, Inc., et al, Order No. PSC-95-0576-FOF-SU, at p. 5 (Docket No. 940963-SU) (May 9, 1995) (Final Order) (where witness is not expert, PSC will consider only testimony on factual issues).

10. Whitton's testimony includes improper opinion testimony from a lay witness, including most of the testimony offered by Ms. Deevey. As indicated in her testimony and confirmed in her deposition,³ Ms. Deevey is not an engineer or otherwise an expert in electric utilities and is not an expert in emission allowance price forecasts. Therefore, her testimony which includes opinions regarding electric utility integrated resource planning, biomass generation technology, and emission allowance price forecasts, is improper, lacking a foundation in Ms. Deevey's expertise to opine on such matters.

11. Accordingly, the Applicants respectfully move to strike the portion of Whitton's testimony described above and preclude that information from consideration in this proceeding.

UNSUPPORTED HEARSAY

12. Hearsay evidence that is not supported or corroborated by other record evidence should be stricken from the record. See § 90.801, Florida Statutes (hearsay not admissible unless an exception applies); § 120.57(1)(c), Florida Statutes (hearsay is not sufficient by itself to support a finding of fact unless the hearsay would be admissible under an exception to the hearsay rule); Bricker Recommended Order (striking exhibits containing "uncorroborated hearsay" and that are not properly authenticated, and where the "expert qualifications of those giving the opinions contained in the exhibits were not demonstrated").

³ The deposition transcript has not yet been received. References to the deposition transcript will be provided after Applicants receive a copy of the deposition transcript.

13. Portions of Ms. Deevey's testimony that do not reflect her own personal knowledge and exhibits that were not prepared by Ms. Deevey or under her supervision are inadmissible hearsay and should be stricken from the record in this proceeding. This includes:

- Page 4 (lines 6-14) (assertions regarding achievements and capabilities of outside company are unsupported hearsay);
- Page 6 (lines 15-20) (assertions regarding findings by University of Florida scientists are unsupported hearsay);
- Page 9 (lines 21-22) (assertions regarding report by Union of Concerned Scientists are unsupported hearsay);
- Page 10 (lines 19-24) (assertions regarding report by Synapse Energy Economics, Inc.);
- Page 11 (lines 8-11) (assertions regarding report by EIA);
- Page 11 (lines 17-19) (assertions regarding observations by "many analysts");
- Page 11 (lines 22-24) and page 12 (lines 1-2) (assertions regarding report by Rubin, Bau and Chen); and
- Page 12 (lines 5-8) (assertion regarding "knowledgeable scientists").

14. In addition, Exhibit Nos. DD-2, DD-3, DD-5, DD-6, and DD-7 of Ms. Deevey's testimony are unsupported hearsay. These exhibits were not prepared by Ms. Deevey or under her supervision.

15. These documents and portions of testimony related to them are untested hearsay that are not corroborated by competent evidence. Accordingly, the Applicants respectfully move to strike the portion of Ms. Deevey's testimony and exhibits listed above and preclude that information from consideration in this proceeding.

IRRELEVANT EVIDENCE NOT RELATED TO ISSUES IN THIS PROCEEDING

16. A portion of Ms. Deevey's testimony (page 13, lines 20-22) is irrelevant to the issues in this need determination and appears to be an inappropriate, untimely, after-the-fact attempt by Intervenor Whitton to place into the record evidence in support of Whitton's Motion for Extension of Time to File Testimony which was previously approved in part and denied in part by the Pre-Hearing Officer. This testimony is irrelevant to the issues in this need proceeding because the Pre-Hearing Officer has already ruled on this motion, and the Commission has already ruled on the Intervenors' motion for reconsideration of the Pre-Hearing Officer's ruling.

17. In addition, portions of Ms. Deevey's testimony are irrelevant to the issues in this need proceeding because there has been no showing that the information submitted by Ms. Deevey has any relation to the cost-effectiveness analysis or other analyses performed by the Applicants regarding the proposed TEC plant. This includes the following portions of Ms. Deevey's testimony:

- Page 3 (lines 5-22) and page 4 (lines 1-16) (assertions regarding GRU project, discussed in Exhibit DD-1, are irrelevant because there has been no showing of how that analysis is applicable to the issues before the Commission in this proceeding); and
- Exhibit DD-1 (findings regarding GRU project are irrelevant because there has been no showing of how that analysis is applicable to the issues before the Commission in this proceeding).

18. These portions of testimony described above are irrelevant to the issues in this need determination and inappropriate for consideration by the Commission at this time. Accordingly, the Applicants respectfully move to strike the portion of Whitton's testimony listed above and preclude that information from consideration in this proceeding.

CONCLUSION

For the reasons explained above, the testimony and exhibits offered by Ms. Dian Deevey on behalf of John Carl Whitton, Jr., are irrelevant, immaterial, and unduly repetitious. Accordingly, the Commission should strike those portions of Whitton's testimony and exhibits described above.

RESPECTFULLY SUBMITTED this 20th day of December, 2006.

HOPPING GREEN & SAMS, P.A.

/s/Gary V. Perko
Gary V. Perko
Carolyn S. Raepple
Virginia C. Dailey
Hopping Green & Sams, P.A.
123 S. Calhoun Street
Tallahassee, FL 32314
(850) 222-7500 (telephone)
(850) 224-8551 (facsimile)
Email: GPerko@hgslaw.com
CRaepple@hgslaw.com
VDailey@hgslaw.com

Attorneys for Florida Municipal Power
Agency, JEA, Reedy Creek Improvement
District, and the City of Tallahassee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Applicants' Motion to Strike Portions of Testimony and Exhibits Filed by John Carl Whitton, Jr., in Docket No. 060635-EU was served upon the following by electronic mail(*) or U.S. Mail(**) on this 20th day of December, 2006:

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

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

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

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

Suzanne Brownless*
1975 Buford Boulevard
Tallahassee, Florida 32308

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

Harold A. McLean, Esq.**
Office of Public Counsel
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

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

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

//S//Gary V. Perko

Attorney