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Sent: Tuesday, January 09, 2007 5:44 PM
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Cc: Virginia Dailey; Katherine Fleming
Subject: Docket 060635

Attachments: Applicants' response in Opposition to NRDC's Motion for Official Recognition.doc

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Electronic Filing

a. Person responsible for this electronic filing:

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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 10 pages.

e. The document attached for electronic filing is Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee's (Applicants') Response in Opposition to NRDC's Motion for Official Recognition.

Thank you for your cooperation.

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BEFORE THE FLORIDA 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: January 9, 2007

FLORIDA MUNICIPAL POWER AGENCY, JEA, REEDY CREEK IMPROVEMENT DISTRICT AND CITY OF TALLAHASSEE'S (APPLICANTS') RESPONSE IN OPPOSITION TO NRDC'S MOTION FOR OFFICIAL RECOGNITION

Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee ("Applicants"), by and through their undersigned counsel, hereby respond in opposition to the Natural Resources Defense Council's (NRDC's) Motion for Official Recognition served after the close of business on Monday, January 8, 2007. For the reasons discussed below, NRDC's Motion for Official Recognition should be denied because the information offered for official recognition is subject to dispute.

1. The Order Establishing Procedure in this proceeding established a deadline for motions for official recognition of "two business days prior to the first scheduled hearing date," which would have been Monday, January 8, 2007. See Order No. PSC-06-0819-PCO-EU, at 7. The NRDC served its motion after the close of business on January 8, 2007, at 7:03 p.m. Thus, NRDC's motion is untimely and should be rejected on that basis.

2. Notwithstanding the previous paragraph, Applicants do not object to the NRDC's Motion for official recognition of the following items:

- Sections 366.80 – 366.85, 403.519, 403.501 – 403.519, Florida Statutes; and
- Chapter 2006-230, Laws of Florida.

These documents are "public statutory laws" of the Florida Legislature, and thus, are appropriate for official recognition, pursuant to Section 90.201, Florida Statutes ("F.S.").

3. The Applicants object to the NRDC's Motion for official recognition of the following items:

a. H.R. 6, Energy Policy Act of 2005;

b. McCain Lieberman Senate Bill 139 (Climate Stewardship Act of 2003);

c. McCain Lieberman Senate Amendment 2028 (Climate Stewardship Act of 2003);

d. Energy Information Agency, Analysis of S.139, the Climate Stewardship Act of 2003 (June 2003);

e. Energy Information Agency, Analysis of Senate Amendment 2028, the Climate Stewardship Act of 2003 (May 2004);

f. Florida Department of Environmental Protection, DRAFT Whitepaper on Climate Change Science and Policy

g. Editorial, "Carbon Control: DEP Fires a Warning Shot", Tallahassee Democrat (Dec. 29, 2006)

These documents are neither "statutory laws", nor "official actions" of the government, nor "contents of the Federal Register," nor "facts not subject to dispute," and thus, are not appropriate for official recognition, pursuant to Section 90.202, F.S.

4. The Florida Supreme Court has stated:

> The established rule in respect to judicial notice is that it should be exercised with great caution. The matter judicially noticed must be of common and general knowledge. Moreover, it must be authoritatively settled and free from doubt or uncertainty.

Makos v. Prince, 64 So.2d 670, 673 (Fla. 1953) (en banc), citing Amos v. Moseley, 74 Fla. 555, 777 So. 619 (Fla. 1917). The Supreme Court has also stated that judicial notice is "essentially

premised on notions of convenience to the court and to the parties; some facts need not be proved because knowledge of the facts judicially noticed is so notorious that everyone is assumed to possess it." Huff v. State, 495 So.2d 145, 151 (Fla. 1986) ("first, the facts to be judicially noticed must be of common notoriety, and second, courts should exercise great caution when using judicial notice"), also citing Amos v. Moseley, 74 Fla. 555. "[J]udicial notice is not intended to fill the vacuum created by the failure of a party to prove an essential fact." Huff, 495 So.2d at 151.

5. In order to qualify for official recognition, pursuant to Section 90.202(5), F.S., the legislative and executive branch documents proposed by NRDC for official recognition must be "[o]fficial actions of the legislative, executive, and judicial departments of the United States and of any state, territory, or jurisdiction of the United States." Official recognition under Section 90.202, F.S., is discretionary and "the matter need not be judicially noticed unless sufficient information to support its truth is furnished to the court." West, Fla. Stat. Ann. §90.202, Law Revision Council Note, at p. 187.

6. "Official actions" have been determined to include executive orders, official records, and legislative journals. West, Fla. Stat. Ann. §90.202, Law Revision Council Note, at p. 189. See, e.g., Re Betmar Utilities, Docket No. 910963-WU, Order No. PSC-93-1719-FOF-WU (Nov. 30, 1993) (because DEP Final Order constitutes "official action of an executive department of the State of Florida," official recognition was proper); Wencel v. State, 915 So.2d 1270, 1272 (Fla. 4th DCA 2005) (court can take official recognition of administrative agency order where report does not contain inadmissible hearsay). In contrast, government reports, such as those offered by NRDC, are not the proper subject of official recognition. See Ernst v. South Fla. Water Management District, DOAH Case No. 8604533, 1987 WL 487703 (Jul. 15, 1987)

(Rec. Order),[1] at pp. *10-11; Re Nassau Power Corp., Docket No. 910816-EU, Order No. PSC-25748 (Feb. 18, 1992) (a status report filed by utility, as required by Commission order, is not an "official action" of the government; thus, official recognition was denied); Re Tampa Electric Company, Docket No. 031033-EI, Order No. PSC-05-0312-FOF-EI (Mar. 21, 2005) (denying official recognition for a stipulation from a separate docket).

7. Further, in order for official recognition to be taken of "[f]acts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court," or "[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned," pursuant to Sections 90.202(11) and (12), F.S., such facts must be indisputable and commonly known. See Maradie v. Maradie, 680 So.2d 538, 542 (Fla. 1st DCA 1996).

Draft Federal Legislation

8. NRDC is proposing for official recognition three pieces of draft federal legislation:

- H.R. 6 in the 109th Congress (the Energy Policy Act of 2005),
- S.139 in the 108th Congress (McCain Lieberman Climate Stewardship Act of 2003), and
- S.A. 2028 in the 108th Congress (McCain Lieberman Senate Amendment to the Climate Stewardship Act of 2003).

9. Draft legislation is neither "public statutory law" nor an "official action" of the legislative branch of the government, pursuant to Sections 90.201 and 90.202, F.S. This is a particular concern with controversial draft legislation, such as that offered by NRDC, when there are multiple amendments, separate companion bills, and conference substitute bills. For example,

[1] The Recommended Order was adopted *in toto* in the Final Order by the South Florida Water Management District on August 13, 1987. See 1987 WL 487073, at pg. *19.

the Climate Stewardship Act has been a pending legislative proposal since 2003, and currently has at least seven iterations in the form of amendments or companion bills.[2] Not one of the draft legislative bills offered by NRDC for official recognition has been officially approved by Congress; indeed, none have been approved by even one house of Congress. Such draft legislation is not appropriate for official recognition by this Commission.

Government Discussion Papers

10. NRDC is proposing for official recognition three government discussion papers, two by the Energy Information Agency of the Department of Energy, and one by the Florida Department of Environmental Protection. These are:

- Energy Information Agency, "Analysis of S.139, the Climate Stewardship Act of 2003", Document No. SR/OIAF/2003-02 (June 2003) (available at http://www.eia.doe.gov) (hereinafter "EIA 139 Analysis");
- Energy Information Agency, "Analysis of Senate Amendment 2028, the Climate Stewardship Act of 2003", Document No. SR/OIAF/2004-06 (May 2004) (available at http://www.eia.doe.gov) (hereinafter "EIA 2028 Analysis"); and
- Florida Department of Environmental Protection, DRAFT "Whitepaper on Climate Change Science and Policy" (December 2006) (available at http://www.carboncontrolnews.com) (hereinafter "FDEP Draft Whitepaper").

11. The FDEP Draft Whitepaper sent by NRDC as an electronic attachment to its Motion for Official Recognition is clearly labeled "DRAFT." On its face, this document is not an official action of the Florida Department of Environmental Protection.[3] It is not a final document and does not represent any official statement or action of the FDEP. This FDEP Draft

[2] See, e.g., S. 139 of 108th Congress, S.A. 2028 of 108th Congress, H.R. 4067 of 108th Congress, S. 342 of 109th Congress, S. 1151 of 109th Congress, H.R. 759 of 109th Congress, and S.A. 826 to H.R. 6 of 109th Congress.

Whitepaper is merely an opinion paper drafted by one or more persons within FDEP, which is considerably distant from an official rule or final agency action. See Ernst v. South Fla. Water Management District, 1987 WL 487703, at pp. *10-11 (FDEP opinion of General Counsel was not an "official action" because it was "not an expression of fact" and was "subject to dispute and not intrinsically accurate"; agency report was not "official action" because contents were subject to dispute and could "hardly be characterized as being authoritatively settled"). Similarly, this FDEP Draft Whitepaper is a draft opinion from someone within FDEP, not an expression of fact, subject to considerable dispute, not an "official action" of the agency. Thus, the FDEP Draft Whitepaper is not appropriate for official recognition.

12. Similarly, both federal documents clearly state that they are not "official actions" of the respective government agency, but rather informational documents. For example, the EIA 139 Analysis and EIA 2028 Analysis both state on page 1:

> The information contained herein ... should not be construed as advocating or reflecting any policy position of the Department of Energy or of any other organization. Service Reports are prepared by the Energy Information Administration upon special request and are based on assumptions specified by the requestor.

Further, the EIA 139 Analysis (pp. iii-iv) is replete with caveats as to the import and appropriate use of the analysis:

> EIA does not take positions on policy questions. It is the responsibility of EIA to provide timely, high-quality information and to perform objective, credible analyses in support of the deliberations of both public and private decisionmakers. This report does not purport to represent the official position of the U.S. Department of Energy or the Administration. . . .
>
> As is always the case when peer reviews are undertaken, not all the reviewers are in agreement with all the methodology, inputs, and conclusions of the final report. The contents of this report are solely the responsibility of EIA. . . .

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[3] Applicants do not stipulate to the authenticity of this FDEP Draft Whitepaper. The document is not available on the FDEP website and the NRDC has offered no evidence to authenticate the source of this document.

> The projections in the reference case in this report are not statements of what will happen but of what might happen, given the assumptions and methodologies used. . . . EIA does not propose, advocate, or speculate on future legislative and regulatory changes. . . .

To the best of Applicants' knowledge, these documents have not been published in the Federal Register, and thus are not appropriate for official recognition pursuant to Section 90.202(3), F.S. In contrast to official rule-making decisions, administrative orders in contested decisions, or official notices of agency action, which are published in the Federal Register, these analysis and discussion documents cannot be considered to be "official actions" of the Department of Energy. See Ernst v. South Fla. Water Management District, 1987 WL 487703, at pp. *10-11

Newspaper Editorial

13. NRDC also proposes for official recognition a newspaper editorial from the Tallahassee Democrat dated December 29, 2006. This editorial is clearly not appropriate for judicial recognition. Neither the editorial itself, nor its contents, are "facts not subject to dispute," as required by Sections 90.202(11) and (12), F.S. See Maradie v. Maradie, 680 So.2d 538, 542 (Fla. 1st DCA 1996). By definition, an editorial is an expression of opinion, not fact. Accordingly, NRDC's motion for official recognition of a newspaper editorial comment should be denied.

Hearsay Rule May Apply; These Documents Cannot Be Used as Substantive Evidence

14. Further, even if some of the above-mentioned documents are found to be appropriate for official recognition, the documents may not be used as a conduit for inadmissible hearsay. In Burgess v. State, regarding judicial notice of a court file, the Florida Supreme Court recently stated:

> Although a trial court may take judicial notice of court records, see §90.202(6), Fla. Stat. (1997), it does not follow that this provision permits the wholesale admission of hearsay statements contained within those court records. We have never held that such otherwise inadmissible documents are automatically

> admissible just because they were included in a judicially noticed court file. To the contrary, we find that documents contained in a court file, even if that entire court file is judicially noticed, are still subject to the same rules of evidence to which all evidence must adhere.

Burgess v. State, 831 So.2d 137, 141 (Fla. 2002), quoting Stoll v. State, 762 So.2d 870, 876-77 (Fla. 2000). The same rule should apply to NRDC's documents: even if the government whitepaper reports are allowed into the record through official recognition, those documents cannot be used as a conduit for inadmissible evidence such as hearsay. The contents of those documents are inadmissible hearsay evidence without proper substantiation. See also Ernst v. South Fla. Water Management District, 1987 WL 487703 at pp. *10-11 and n.6 (party proposing documents for official recognition improperly relied on those documents to support its proposed findings of fact); Wencel v. State, 915 So.2d 1270, 1272 (Fla. 4th DCA 2005) (court can take official recognition of administrative agency order where report does not contain inadmissible hearsay).

15. NRDC has waited until the very eve of the hearing to attempt to introduce more than 600 pages of information as evidence into this proceeding. NRDC has had ample opportunity to develop the record, when it filed its petition to intervene and throughout the discovery period, in this proceeding. NRDC should not be allowed to fill a vacuum in the record created by its own failure to produce evidence of the essential elements of its case. NRDC should not be allowed, on the eve of the hearing, to paper the record through its Motion for Official Recognition with more than 600 pages of hearsay and otherwise inadmissible information.

WHEREFORE, for the foregoing reasons, the Applicants respectfully request that the NRDC's untimely Motion for Official Recognition be denied.

RESPECTFULLY SUBMITTED this 9th day of January, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Applicants' Response in Opposition to NRDC's Motion for Official Recognition in Docket No. 060635-EU was served upon the following by electronic mail on this 9th day of January, 2007:

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