ORIGINAL

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Florida Power & Light Company's Petition to Determine Need for FPL Glades Power Park Units 1 and 2 Electrical Power Plant
_____/

DOCKET NO.: 070098-EI

INTERVENORS' MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

Intervenors, The Sierra Club, Inc. (Sierra Club), Save Our Creeks (SOC), Florida Wildlife Federation (FWF), Environmental Confederation of Southwest Florida (ECOSWF), and Ellen Peterson (Intervenors), pursuant to Rule 25-22.0376, Florida Administrative Code, hereby file their Motion for Reconsideration and/or for Clarification of the Order Granting Petition for Intervention, Order No. PSC-07-0238-PCO-EI, issued on March 16, 2007 and state:

I. INTRODUCTION

1. On February 1, 2007 Florida Power & Light Company (FPL) filed a petition for determination of need for Glades Power Park Units 1 and 2 electrical power plants in Glades County. The matter has been scheduled for a formal administrative hearing on April 16-17, 2007. The Intervenors filed a Petition to Intervene on March 5, 2007. FPL filed a response to the petition on March 9, 2007. The Prehearing Officer issued an Order Granting Petition for Intervention on March 16, 2007 (the Order).

2. Although the Order granted intervention to Intervenors and found that they have standing in this docket, the Order found that the Intervenors do not have standing with regard to their assertion that their members will be directly affected by the cost of impacts of future carbon regulation, which would unnecessarily increase rates paid by them as customers of FPL. The Order found that "such assessments are speculative and conjectural, rather than real and

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immediate in nature." The Order further stated the decision to grant intervention "should not be construed to permit the Intervenors to raise arguments supporting their second..." assertion of standing. The Order referred to the Intervenors' contention that they will be directly affected by the cost impacts of future carbon costs as their second assertion of standing.

II. NEED FOR CLARIFICATION

3. Consequently, there is an ambiguity in the Order as to whether the Intervenors will be entitled to present testimony and exhibits and supporting argument on the issue of whether FPL has appropriately evaluated the cost of CO_2 emission mitigation costs in its economic analysis. Is the intent of the Order to unequivocally prohibit Intervenors from offering evidence and argument on this issue, or is the intent to point out that no such authority derives from the Order, but may still be authorized if CO_2 emission mitigation costs are a valid issue in the docket? All Parties, including FPL, Staff, OPC, and Intervenors agreed to the following issue at the Issue I.D. Conference held on March 15, 2007:

> **Issue 5:** Has FPL appropriately evaluated the cost of CO_2 emission mitigation costs in its economic analysis?

A copy of the Updated Issue List dated March 20, 2007 is attached as Intervenors' Exhibit 1. Further, all Parties, including FPL, agreed that this issue subsumes the issue of the cost impact of future carbon regulation. Intervenors request clarification of the Order as to their ability to present evidence on the issue of the cost of CO_2 emission mitigation costs, including those costs resulting form future carbon regulation. It should be noted that precisely the same issue, also numbered Issue 5, with identical language, was an issue in the Taylor Energy Center (TEC) need determination case, Docket No. 060635-EU, and the Intervenors in that case were permitted to offer evidence of future carbon regulation/costs. The TEC docket remains pending.

III. IF THE INTENT OF THE ORDER IS TO PROHIBIT INTERVENORS FROM OFFERING EVIDENCE OF CO_2 MITIGATION COSTS UNDER ANY CIRCUMSTANCES, THERE ARE POINTS OF LAW AND FACT THAT THE PREHEARING OFFICER HAS OVERLOOKED OR FAILED TO CONSIDER.

4. As the Commission has consistently held:

> The standard of review for reconsideration of a Commission order is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the order. See *Stewart Bonded Warehouse, Inc. v. Bevis,* 294 So.2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So.2d 162 (Fla 1st DCA 1981).

In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee, Docket No. 060635-EU, Order No. PSC-06-1028-FOF-EU, at p 2. If the Order does indeed prohibit Intervenors from presenting evidence of future CO_2 emission mitigation costs, it is apparently based solely upon a naked, unsupported conclusion, without consideration of any of the evidence in the record. Moreover, the prohibition in the Order purports to preemptively dispose of a valid issue in the case without any opportunity for consideration of the evidence at a formal hearing.

5. There is a substantial amount of evidence that suggests that future carbon costs is a valid issue and much more likely than mere speculation or conjecture. FPL has included carbon forecasts in its petition, testimony, and supporting exhibits. See Corrected Direct Testimony and Supplemental Testimony of David A. Schlissel filed on behalf of Intervenors on March 7, 2007 and March 16, 2007, respectively. FPL is also requesting Commission approval to recover environmental compliance costs associated with Florida Glades Power Park (FGPP). This remains true notwithstanding that this particular claim has been bifurcated. FPL Group, FPL's parent company, has signed on to numerous agreements endorsing the need to address climate

change. Most recently, it endorsed the Joint Statement of the Global Roundtable on Climate Change (GROCC). Schlissel Corrected Direct Testimony at p. 4. FPL has also joined the high profile U.S. Climate Action Partnership (U.S. CAP) which advocates for federal, mandatory legislation of greenhouse gases. Id. at p.5.

6. As stated above, FPL agrees with all Parties that Issue 5 in the March 20, 2007 Updated Issue List, attached as Intervenors' Exhibit 1, addressing future CO_2 emission mitigation costs, is a valid issue that permits Intervenors to present evidence on the issue. The Intervenors and FPL agree that CO_2 emission mitigation costs are of sufficient certainty to be included in FPL's economic analysis. Intervenors, however, dispute FPL's forecasts and have filed testimony and exhibits to support their position that FPL's carbon forecasts are understated. Intervenors should be permitted to present such evidence and supporting argument as part of the evidentiary hearing process. Further, Intervenors raised as a disputed issue of fact in their Petition to Intervene in paragraph 21, "Whether the regulation of CO_2 is sufficiently likely to warrant formal consideration in the needs determination for the FPL plants." This is an issue that under fundamental principles of due process must be fleshed out in a formal evidentiary hearing rather than summarily disposed of in an order granting intervention. The logical consequence of a prohibitory interpretation of the Order is that **no Intervenor** can raise the issue in this case, which would leave FPL as the only party allowed to raise the issue unopposed. The Intervenors respectfully submit that such an outcome would constitute a denial of the due process provisions of the State and federal Constitutions. Intervenors do not believe that it was the Prehearing Officer's intent to create such an outcome, and that the Prehearing Officer overlooked or failed to consider the points of law and fact identified above.

7. In *Agrico Chem. Co. v. Department, Etc.,* 406 So.2d 478, 482 (Fla. 2d DCA 1981), the court found that "before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to section 120.57 hearing...." This "aspect of the test deals with the degree of injury." Id. A sensible application of the *Agrico* test in the present docket is that the injury must be foreseeable within a reasonable time somewhere between "immediate" and speculative and conjectural. That is why *Agrico* does not say "immediate," but rather of "sufficient immediacy," which implies that there are degrees of immediacy. This means that there is a lapse of time before the injury actually occurs, so an Intervenor does not have to be a victim prior to seeking relief any more than there has to be a fatality before a traffic light is installed at a dangerous intersection. An intersection can be evaluated and an assessment of a dangerous condition made that makes an injury reasonably foreseeable using accepted methodology. Likewise, there is abundant evidence and accepted methodology showing that we are on an inexorable path to carbon regulation. It is not surprising that all the parties agree that the issue must be considered at a formal evidentiary hearing. At a minimum, the Commission should permit the Intervenors to present their evidence before deciding whether the *Agrico* test has been met.

8. Counsel for Intervenors has attempted to contact counsel for the parties in this docket and is authorized to represent that Staff takes no position on this motion. Counsel for Intervenors attempted but was unable to kindly make contact with counsel for Office of Public Counsel (OPC). Without commenting on the substance of the motion or its merits, counsel for FPL believes that the motion for reconsideration or clarification is unnecessary.

Wherefore, Intervenors respectfully request the Commission to enter an order:

1. Clarifying that the language in the Order Granting Petition for Intervention is not intended to preclude Intervenors from presenting evidence on a valid issue raised in the docket as to whether or not FPL appropriately evaluated the cost of CO_2 emission mitigation costs in its economic analysis, and/or

2. Acknowledging that the Prehearing Officer overlooked or failed to consider the points of law and fact identified above and entering a finding that Intervenors are permitted to present evidence on whether FPL has appropriately evaluated the cost of CO_2 emission mitigation costs in its economic analysis, and such further relief as the Commission deems appropriate.

Respectfully submitted this 26th day of March, 2007.

/s/ Michael Gross

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 26th day of March, 2007, via electronic mail and US Mail on:

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DOCKET NO. 070098-EI
ISSUE LIST – 03/20/07

Issue 1: Is there a need for the proposed generating units, taking into account the need for electric system reliability and integrity, as this criterion is used in Section 403.519, Florida Statutes?

Issue 2: Is there a need for the proposed generating units, taking into account the need for adequate electricity at a reasonable cost, as this criterion is used in Section 403.519, Florida Statute?

Issue 3: Is there a need for the proposed generating units, taking into account the need for fuel diversity and supply reliability, as this criterion is used in Section 403.519, Florida Statutes?

Issue 4: Are there any conservation measures taken by or reasonably available to Florida Power & Light Company which might mitigate the need for the proposed generating units?

Issue 5: Has FPL appropriately evaluated the cost of CO2 emission mitigation costs in its economic analysis?

Issue 6: Do the proposed FGPP generating units include the costs for the environmental controls necessary to meet current state and federal environmental requirements, including mercury, NOx, SO2, and particulate emissions? (Note: Intervenors propose adding the phrase, "to meet current and future state and federal..." to Issue 6)

Issue 7: Are the proposed generating units the most cost-effective alternative available, as this criterion is used in Section 403.519, Florida Statutes?

Issue 8: Based on the resolution of the foregoing issues, should the Commission grant FPL's petition to determine the need for the proposed generating units?

Issue 9: Should this docket be closed?