

State of Florida



## Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** May 10, 2007

**TO:** Commission Clerk (Cole)

**FROM:** Division of Economic Regulation (Harlow, Ballinger, Breman, Brown, Bulecza-Banks, Lester, Matlock, Springer, Stallcup)  
Office of the General Counsel (Brubaker, Fleming, Holley)

**RE:** Docket No. 060635-EU – 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.

**AGENDA:** 05/22/07 – Regular Agenda – Posthearing Motion for Limited Reopening of the Record and for Leave to File Supplemental Testimony – Parties May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** McMurrian

**CRITICAL DATES:** The Applicants have waived any applicable deadlines for Commission action under Rule 25-22.080, F.A.C.

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\ECR\WP\060635.RCM.DOC

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### Case Background

On September 19, 2006, Florida Municipal Power Agency (FMPA), JEA, Reedy Creek Improvement District (RCID), and City of Tallahassee (collectively Applicants) filed a petition for a need determination for the proposed Taylor Energy Center (TEC), a 765 megawatt supercritical pulverized coal plant. The TEC is expected to be placed in service in May 2012, and will be located on a 3,000 acre greenfield site in Taylor County. The Applicants consist of three municipal electric utilities, JEA, RCID, and the City of Tallahassee, along with FMPA, a wholesale power company composed of 30 municipal electric utilities. All of TEC's 765

megawatt capacity will be fully subscribed by the Applicants, and will serve retail customers of the municipal utilities.

Intervention was granted to the Sierra Club, Inc., John Hedrick, Brian Lupiani, Rebecca J. Armstrong and Anthony Viebesie (collectively, Sierra Club), the Natural Resources Defense Council, Inc. (NRDC), and John Carl Whitton, Jr. (Whitton).<sup>1</sup>

A formal administrative hearing was held on January 10 through 12, and 18, 2007. The Commission deferred its consideration of staff's posthearing recommendation from the February 13 to the March 13, 2007, Agenda Conference. On March 9, 2007, the Applicants filed a motion for limited reopening of the record and for leave to file supplemental testimony (motion), together with supplemental prefiled testimony of Myron Rollins, and a cover letter waiving any applicable deadlines for Commission action established by Rule 25-22.080, Florida Administrative Code. Upon request of the Applicants, the posthearing recommendation was deferred to permit an opportunity for the Commission to address the Applicants' motion. On March 16, 2007, NRDC and Whitton separately filed responses in support of the Applicants' motion, provided certain requests are met.

This recommendation addresses the Applicants' motion to reopen the record and for leave to file supplemental testimony. The Commission has jurisdiction pursuant to Section 403.519, Florida Statutes.

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<sup>1</sup> Intervention was granted by Order No. PSC-06-0867-PCO-EU, issued October 20, 2006 with respect to Rebecca J. Armstrong; by Order No. PSC-06-0898-PCO-EU, issued October 26, 2006, with respect to the Sierra Club, John Hedrick, and Brian Lupiani; by Order No. PSC-06-0954-PCO-EU, issued November 15, 2006, with respect to Anthony Viegbesie; by Order No. PSC-06-0957-PCO-EU, issued November 16, 2006, with respect to John Carl Whitton, Jr.; and by Order No. PSC-06-0971-PCO-EU, issued November 21, 2006, with respect to the NRDC.

### **Discussion of Issues**

**Issue 1:** Should the Applicants' motion for limited reopening of the record and for leave to file supplemental testimony be granted?

**Recommendation:** Yes. The record should be reopened for the limited purpose of taking evidence on the revised production cost modeling for the City of Tallahassee and its effect on the Applicants' petition for determination of need, and leave should be given for filing the supplemental testimony and exhibits filed with the Applicants' motion. The Commission should defer its consideration of the posthearing recommendation until additional proceedings are conducted on this limited matter. Additional procedures and controlling dates should be established by separate order of the Prehearing Officer, allowing discovery and hearing on the limited matters raised in the Applicants' motion and supplemental testimony and exhibits. (Brubaker)

### **Staff Analysis:**

#### **Applicants' Motion**

The Applicants state that a few days prior to filing their motion, it came to their attention that certain revised assumptions should be incorporated in the production cost modeling used to determine the economic effect of the City of Tallahassee's participation in TEC. The Applicants contend that they have worked diligently to perform additional production cost modeling for the City of Tallahassee in order to incorporate the revised assumptions and to determine the resulting effect on the City's cost-effectiveness analyses. Changes were also made to the modeling of TEC for the other Applicants, and those results were likewise reviewed for any changes in cost-effectiveness. The Applicants request leave to file supplemental testimony and exhibits by witness Myron Rollins, explaining the revisions to the City of Tallahassee's modeling and the results of the revisions.

The Applicants contend that reopening the record to address these limited matters will ensure that the Commission can base its final decision on the most accurate information available. Recognizing that the Commission, Commission staff, and the Intervenors will desire to review this additional information, the Applicants request that the Commission defer its consideration of staff's posthearing recommendation, and request a further evidentiary hearing, if needed, for the limited purpose of taking testimony and evidence relating to the revised modeling.

The Applicants state in their motion that they have contacted counsel for all Intervenors, and that the Intervenors do not object to the relief requested provided that the Intervenors have the opportunity to conduct discovery and cross-examine Mr. Rollins under oath.

#### **NRDC and Whitton's Responses**

In its response, NRDC states that it does not object to granting the Applicants' motion on the following grounds: (1) that NRDC, and all other Intervenors, would have an adequate opportunity to conduct discovery including written interrogatories, requests for production of

documents and oral depositions; (2) that a prehearing order would be issued by the Commission which set discovery, rebuttal testimony, prehearing statements, trial, and posthearing brief dates; and (3) that a reasonable amount of time be given to accomplish all of the above. NRDC further requests that the Intervenor be consulted before the Commission develops the hearing schedule and sets procedural deadlines; further, NRDC requests that the hearing date be set no sooner than 60 days from March 16, 2007, the date its response was filed. NRDC contends that the modeling errors identified by the Applicants are significant, and agrees with the Applicants that it is appropriate for the Commission to consider the limited matters raised in the Applicants' motion and supplemental testimony and exhibits.

Whitton states in his response that he does not oppose granting the Applicants' motion, and supports the Commission basing its ultimate decision on this docket on the most accurate available information. However, Whitton requests that in granting the motion, the Commission provide adequate opportunity and time for limited discovery. Whitton supports the timeframe proposed in NRDC's response as being reasonable.

### Staff Analysis

The supplemental testimony filed with the Applicants' motion indicates that the modeling results presented at hearing for the City of Tallahassee overestimated the amount of savings associated with the City of Tallahassee's participation in the TEC by approximately \$53.9 million. The City only became aware of this discrepancy in the modeling as part of its internal evaluations of a potential new project. Neither the City nor the firm which prepared the need filing realized that the modeling assumptions underlying the results presented at the hearing were incorrect until after the Commission deferred its consideration of staff's posthearing recommendation at the February 13, 2007, Agenda Conference.

Although the Commission is generally hesitant to reopen the record of any proceeding, it may do so when new evidentiary proceedings are warranted based on changed circumstances.<sup>2</sup> In order to reopen the record of a case, there must be a significant change of circumstances not present at the time of the proceedings, or a demonstration that a great public interest will be served.<sup>3</sup>

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<sup>2</sup> See Order No. PSC-00-1777-PCO-TP, issued September 28, 2000, in Docket No. 980119-TP, In re: Complaint of Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. for violation of the Telecommunications Act of 1996; petition for resolution of disputes as to implementation and interpretation of interconnection, resale and collocation agreements; and petition for emergency relief; see also Order No. PSC-99-0093-FOF-WS, issued January 15, 1999, in Docket No. 950495-WS, In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties; Order No. PSC-98-0509-PCO-SU, issued April 14, 1998, in Docket No. 950387-SU, In re: Application for a rate increase for North Ft. Myers Division in Lee County by Florida Cities Water Company - Lee County Division.

<sup>3</sup> See McCaw Communications of Florida, Inc. v. Clark, 679 So. 2d 1177 (Fla. 1996); Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679 (Fla. 1979); Peoples Gas System v. Mason, 187 So. 2d 335 (Fla. 1966); see also Order No. PSC-00-1511-FOF-TP, issued August 21, 2000, in Docket No. 991267-TP, In re: Complaint and/or petition for

The discrepancy in the City of Tallahassee's production cost modeling was discovered after the record had closed. In this instance, the Applicants and Intervenors agree that the revised information provides new evidence that may be material to the Commission's decision in this matter. If the new evidence is competent and relevant, staff believes that the Commission should admit it into the record and consider it. Staff agrees that examination of this new evidence should involve a reasonable opportunity to conduct discovery and a hearing, and to file testimony, prehearing statements, and posthearing briefs. Staff also believes that the 60-day time frame suggested by NRDC and Whitton should reasonably accommodate the interests of all parties; however, staff recommends that the time should run from the date of the Commission's vote on this matter at the May 22, 2007, Agenda Conference.

In the interest of allowing the Commission to make a fully informed decision, staff recommends that the record should be reopened for the limited purpose of taking evidence on the revised production cost modeling for the City of Tallahassee and its effect on the Applicants' petition for determination of need, and that leave should be given for filing Mr. Rollins' supplemental testimony and exhibits. The Commission should defer its consideration of the posthearing recommendation until additional proceedings are conducted on this limited matter. Additional procedures and controlling dates should be established by separate order of the Prehearing Officer, allowing discovery and hearing on the limited matters raised in the Applicants' motion and supplemental testimony and exhibits.

Docket No. 060635-EU

Date: May 10, 2007

**Issue 2:** Should the docket be closed?

**Recommendation:** No. The docket should remain open to conduct the limited reopening of the record as discussed in Issue 1, and to thereafter allow final disposition of the Applicants' need petition. (Brubaker)

**Staff Analysis:** The docket should remain open to conduct the limited reopening of the record as discussed in Issue 1, and to thereafter allow final disposition of the Applicants' need petition.