

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need of Hines Unit 2 Power Plant.

Docket No.: 001064-EI

Submitted for Filing: October 24, 2000

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FLORIDA POWER CORPORATION'S MOTION FOR RECONSIDERATION OF THE PREHEARING OFFICER'S ORDER GRANTING ITS MOTION TO STRIKE STAFF'S PRELIMINARY ISSUE NUMBER 6 AND DENYING ITS MOTION TO STRIKE THE DIRECT TESTIMONY OF BILLY R. DICKENS

Florida Power Corporation ("FPC" or the "Company"), pursuant to Rule 25-22.0376, F.A.C., respectfully moves the Florida Public Service Commission (the "Commission"), for reconsideration of the Prehearing Officer's order granting FPC's motion to strike Staff's issue 6 and denying its motion to strike the direct testimony of Billy R. Dickens.

Introduction

The Prehearing Officer granted FPC's Motion to Strike Staff's issue 6 because she deemed it duplicative of other issues properly before the Commission in this proceeding -- i.e., whether FPC's proposed Hines 2 plant would provide adequate electricity at a reasonable cost and whether the Hines 2 plant was the most cost effective alternative to meet FPC's reliability need -- and denied FPC's motion to strike the direct testimony of Billy R. Dickens because she concluded it was relevant to those issues. With all due respect to the Prehearing Officer, FPC's Motion to Strike should have been granted in its entirety for the reasons presented in FPC's motion.

Staff's issue 6 goes far beyond the issues properly before the Commission in this proceeding and far beyond the Commission's authority --- indeed, that is the very reason Staff expressly stated it as a separate and distinct issue. Mr. Dickens' testimony and sole proposed "alternative" makes this abundantly clear. He addressed only Staff's issue 6 for the express

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purpose of explaining the potential risks “due to the advent of electric generation restructuring,” which he proposed to alleviate by a periodic “market review” of the Hines 2 plant. This “proposal” is the essence of Staff’s issue 6 and it is improper, confiscatory, and violative of FPC’s constitutional rights, for all the reasons in FPC’s Motion to Strike.

Further, the Prehearing Officer overlooked that Staff’s sole witness in this proceeding, Mr. Dickens, expressly stated in his pre-filed testimony that he was “here to address issue 6,” and no other issue. The Prehearing Officer allowed Mr. Dickens’ testimony in this proceeding because she mistakenly concluded that it was, nevertheless, relevant to Staff’s issues 4 and 7: Whether FPC’s proposed Hines 2 power plant would provide adequate electricity at a reasonable cost and whether the Hines 2 plant was the most cost effective alternative to meet FPC’s reliability need. However, the Prehearing Officer overlooked the fact that Mr. Dickens did not believe he was testifying on Staff’s issues 4 and 7; he said his testimony was on Staff’s issue 6, a separate and distinct issue from Staff’s issues 4 and 7. When asked in deposition about Staff’s issues 4 and 7, Mr. Dickens agreed with FPC and flat out said that Hines 2 provided adequate electricity at a reasonable cost and was the most cost-effective alternative available to FPC to meet its reliability need.

For all of these reasons, as more fully explained below, FPC’s Motion for Reconsideration should be granted and both Staff’s issue 6 and Mr. Dickens’ testimony on that issue should be stricken from this proceeding.

#### **Standard of Review**

Because FPC’s Motion to Strike was referred to a Prehearing Officer for consideration and it has not been considered by the Commission panel, FPC’s Motion to Strike should be reviewed de novo. It bears emphasis that Rule 25-22.0376, F.A.C., under which FPC’s files this

Motion, permits an appeal from a non-final order issued by a Prehearing Officer to the full Commission panel assigned to the proceeding. This is significant because the Commission panel is hearing the argument for the first time and it is not being asked to reconsider its decision as a panel (if that were the case, the appropriate rule would be Rule 25-22.060, F.A.C., a separate and distinct provision). Rather, the Commission panel is asked to review the decision of one of its members to whom the motion was referred to as a matter of administrative convenience and efficiency.

Under such circumstances, de novo review is not only appropriate, it is in the interest of fairness, justice, and administrative efficiency, especially when, as in this case, the legal error concerns the critical issue of the Commission's statutory authority. This panel should not be constrained by the Prehearing Officer's prior ruling with respect to its statutory authority. To the contrary, the Commission panel has an obligation to consider whether it is in fact exceeding its statutory authority whenever the issue is raised.

Moreover, de novo review of such legal issues has consistently been recognized. See, e.g., Bennie Demps v. State, corrected slip opinion of the Florida Supreme Court (June 5, 2000); Marina Cooper-Houston v. Southern Railway Co., 37 F.3d 603, 604, n.2 (11<sup>th</sup> Cir. 1994). The same should hold true here. The Commission panel should be free to respectfully disagree with the Prehearing Officer in cases where legal error has occurred in order to avoid reversible error in the final hearing.

For all of these reasons, FPC requests the Commission panel to consider its Motion to Strike de novo. FPC recognizes that to date the Commission has not applied de novo review to motions pursuant to Rule 25-22.0376, F.A.C. because it has not yet drawn the important distinction between the Commission panel's review of a pre-hearing ruling by the Prehearing

Officer and the Commission panel's reconsideration of its own decision. When it comes to the Commission's statutory authority in this instance, however, fairness, justice, and administrative efficiency dictate that FPC's Motion should be considered by the Commission panel anew.

Having said all this, FPC further notes that, regardless of the standard of review applied by the Commission panel here, FPC's Motion for Reconsideration should be granted.

### **SUPPORTING MEMORANDUM**

**A Need Determination Proceeding is Not the Proper Forum to Address Policy Issues, the Commission Does Not have the Power to Consider this Issue and the Supporting Testimony, and Consideration of the Issue would Violate the Fundamental Principle that Hindsight Review of a Utility's Cost Decisions is Improper.**

FPC's Motion to Strike should have been granted in its entirety for the reasons provided in FPC's Motion. Rather than restate here each reason in its Motion, however, FPC incorporates by reference as if fully set forth herein its Motion to Strike Staff's Preliminary Issue Number 6 and the Direct Testimony of Billy R. Dickens, which is attached as Appendix 1 to FPC's Motion for Reconsideration.

FPC must, nevertheless, take issue with the Prehearing Officer's Order. FPC nowhere asserted that the Commission was without the authority to address or establish policy as a general matter. Rather, FPC asserted and continues to assert that (i) the Commission lacks the authority to address or establish such policy in this proceeding and (ii) the Commission certainly lacks the power to address or establish the policy proposed by Staff and Mr. Dickens under Staff's issue 6.

The Prehearing Officer wrongly concludes that Staff's issue 6 is "not an issue that will be answered with a statement of general applicability" but instead is within "the scope of this docket." True, this proceeding is limited to or at least should be limited to "this specific unit,

this specific utility, and this particular time,” as the Prehearing Officer noted in her Order. But Mr. Dickens’ proposal under Staff’s issue 6 is not limited to FPC’s petition with respect to the Hines 2 unit nor is it limited to “this particular time.”

Indeed, Mr. Dickens agrees with FPC that at this time the “Commission should allow the capital and O&M costs of the [Hines 2] unit to be included in rate base for surveillance purposes,” if constructed on time and on budget. He insists that the Commission should only deny cost recovery in the future if “a more cost effective alternative becomes apparent.” (Dickens, p. 7-8). And, in his deposition taken the day before the prehearing when FPC’s Motion to Strike was heard, Mr. Dickens again agreed with FPC that FPC has demonstrated that it has met all the conditions appropriate for the Commission to grant a favorable determination of need, “with the exception of considering what [he has] proposed,” and further testified as follows:

Q: And you would agree that at this point in time, based on the analysis that Florida Power has conducted and the RFP results, that Florida Power has elected the most cost-effective alternative available to it today, right?

A: Today, that’s correct.

(Dickens Dep., App. 2, p. 84, l. 23-25, p. 85, l. 1-3, and p. 79, l. 12-18). Certainly, if the particular facts regarding the Hines 2 unit are considered at this time, as the Prehearing Officer said they should be in this proceeding, Mr. Dickens’ testimony supports FPC’s petition for a determination of need for the Hines 2 unit.

Instead, the Prehearing Officer continues to divorce Staff’s issue 6 from Mr. Dickens’ testimony and proposal when one cannot exist without the other; in point of fact, nowhere in the Order is Mr. Dickens’ proposal to the Commission even mentioned. Yet, when his proposal is taken into account it becomes clear that it involves the Commission in a determination of “how

rates will be impacted,” even though the Prehearing Officer conceded that determination is not the subject of this proceeding but instead is a subject “more properly addressed in a subsequent proceeding if the company files for revenue recovery of the Hines 2 project.” Order, p. 4.

Mr. Dickens’ proposal is found at pages 7-8 of his pre-filed testimony where he was asked “How would you propose that the Commission address the risks associated with the construction of the Hines 2 unit?” His response was that the Commission should include Hines 2 in the rate base at this point in time but that the Commission should “require FPC to periodically, say every five years,” review the then-current market conditions and, if a more cost effective alternative becomes apparent, the Commission could “deny future recovery or authorize an accelerated write off [sic] a certain portion of the remaining book costs of Hines 2 . . . .”

(Dickens, pp. 7-8). Putting it bluntly in his deposition, Mr. Dickens testified as follows:

Q: Okay. Now, of course, the statement of [Staff’s issue 6], is it reasonable to obligate Florida Power Corporation’s retail customers for the costs of the unit for the life of the unit, assumes, does it not, that under current regulatory policy, customers would in fact be obligated for the costs of the unit for the life of the unit?

A: That would be correct.

Q: So what you’re talking about is proposing a change from current regulatory policy; correct?

A: That would be correct.

(Dickens Dep. p. 36, l. 6-16). Under Mr. Dickens’ “proposal,” FPC would be limited to traditional cost-of-service rates when market prices exceed those rates but FPC would be expected to forego even the cost-of-service rates if those rates exceeded market prices. (Id. at p. pp. 88-89). Mr. Dickens made it clear that what his proposal was “fundamentally addressing” was “the downside risk for ratepayers as reflected in issue 6.” (Id. at p. 89, l. 3-10).

Mr. Dickens further made it clear that his “proposal” was not utility-specific, rather, it was “a conceptual framework” based not on “any situation that currently exists” but instead it was based on “looking out into the future and making [his] best judgment about what that future will look like.” (Id. at pp. 38-39). It follows, therefore, that his “proposal” is equally applicable to any utility faced with decisions on future generation resources to meet its needs.

Simply put, then, Staff’s issue 6 and Mr. Dickens’ proposal have nothing to do with Staff’s issues 4 and 7 and Mr. Dickens quite honestly never pretended that they did. Indeed, if those issues must be determined in this proceeding based on “this specific unit, this specific utility, and this particular time,” which certainly is the case as even the Prehearing Officer has acknowledged, Mr. Dickens affirmatively states that the Hines 2 unit is the most cost-effective alternative available to FPC and that FPC has met the requirements for granting its need petition, thus, confirming that Hines 2 will provide FPC’s ratepayers adequate electricity at a reasonable cost. Rather, Staff’s issue 6 and Mr. Dickens’ testimony goes beyond the issues properly before the Commission in this proceeding under Section 403.519 to the very heart of “the determination of how rates will be impacted,” as Mr. Dickens freely admitted.

At the very least, Staff’s issue 6 and Mr. Dickens’ testimony are not appropriate for this proceeding and should be stricken because they require the Commission to make a “determination of how rates will be impacted” by the Hines 2 unit and, as the Prehearing Officer stated in her Order, “[t]hat subject is more properly addressed in a subsequent proceeding if the company files for revenue recovery of the Hines 2 unit.” Order, p. 4. That is the position FPC took in its Motion to Strike and it should have been granted.

It further is readily apparent that Mr. Dickens’ “proposal” is a policy that not only has general applicability to all utilities but one that also in his own words will change current

regulatory policy. The Commission does not have the power to make such changes at all and it certainly does not have that power in a proceeding limited to the determination of the need for a specific utility's proposed plant, for all the reasons provided in FPC's Motion to Strike.

**The Prehearing Officer Erred in Denying FPC's Motion to Strike Mr. Dickens' Testimony when it Granted FPC's Motion to Strike Issue 6 because Mr. Dickens Seeks To Address Only Issue 6.**

FPC's Motion to Strike Issue 6 was granted, albeit for the reason that the Prehearing Officer wrongly concluded that issue was encompassed in Staff's issues 4 and 7. Nevertheless, the Prehearing Officer overlooked the fact that Mr. Dickens expressly said he was "here to address issue 6." (Dickens, p. 2).<sup>1</sup> Mr. Dickens testified on Staff's issue 6 and only on Staff's issue 6. At no point has he offered or even attempted to offer testimony on any other issue. His testimony cannot be re-characterized as addressing another issue by someone else, including the Commission. Accordingly, FPC's Motion to Strike Mr. Dickens' Testimony should have been granted.

**The Prehearing Officer Erred in Denying FPC's Motion to Strike Mr. Dickens' Testimony when it Granted FPC's Motion to Strike Issue 6 because Mr. Dickens' Testimony Supports FPC on the Other Issues in this Proceeding.**

As noted above, to the extent Mr. Dickens' testimony is said to be related to Staff's issues 4 and 7, the Prehearing Officer overlooked the fact that Mr. Dickens agrees with FPC that the Hines 2 plant will provide adequate electricity at a reasonable cost and is the most cost-effective alternative available to FPC. He agrees that FPC has met all the requirements of Section 403.519 necessary to obtain a decision granting its petition for a determination of need and that the Hines

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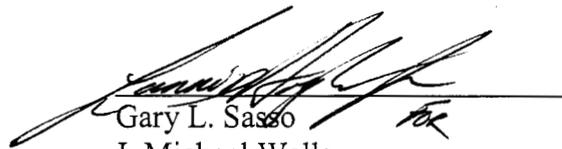
<sup>1</sup> With respect to this argument and the following argument, FPC's Motion for Reconsideration should be granted even under the standard routinely applied by the Commission to motions for reconsideration (albeit erroneously in some cases including this one), that such motions should be granted when a point of fact or law was overlooked or not considered by the Commission in rendering its Order. See In re: Aloha Utilities, Inc., Order No. PSC-00-1628-FOF-WS, (September 12, 2000).

2 unit should be included in the rate base for cost recovery at this time. If Mr. Dickens' position on these issues represents Staff's position, then Staff should stipulate to the Commission granting FPC's petition. Otherwise, Mr. Dickens has nothing to offer the Commission that is not already provided by FPC's witnesses and, accordingly, FPC's Motion to Strike his testimony should have been granted.

**Conclusion**

For all of the foregoing reasons, FPC requests the Commission to grant its Motion for Reconsideration of the Order granting FPC's Motion to Strike Staff's Preliminary Issue Number 6 and Denying the Motion to Strike the Direct Testimony of Billy R. Dickens and grant FPC's Motion to Strike in its entirety.

Respectfully submitted this 24th day of October, 2000.



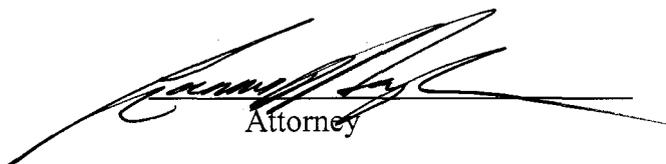
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT a true and correct copy of Florida Power Corporation's Motion for Reconsideration of the Prehearing Officer's Order Granting its Motion to Strike Staff's Preliminary Issue Number 6 and Denying Its Motion to Strike the Direct Testimony of Billy R. Dickens without Appendix have been filed and served by facsimile to Deborah Hart, Esq., as counsel for the Florida Public Service Commission and to Suzanne Brownless, as counsel for Panda Energy International, Inc. The Appendix to this Motion will be forwarded to the clerk's office for filing and served via federal express to Deborah Hart, Esq., as counsel for the Florida Public Service Commission and to Suzanne Brownless, as counsel for Panda Energy International, Inc. The Motion and Appendix has been furnished by U.S. Mail to all other interested parties of record as listed below on this 24<sup>th</sup> of October, 2000.

  
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