

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for determination of need for
Okeechobee Clean Energy Center Unit 1, by
Florida Power & Light Company.

DOCKET NO. 150196-EI

FILED: November 16, 2015

**SOUTHERN ALLIANCE FOR CLEAN ENERGY’S RESPONSE IN OPPOSITION TO
FLORIDA POWER & LIGHT COMPANY’S MOTION TO STRIKE OR EXCLUDE
PORTIONS OF THE DIRECT TESTIMONY OF NATALIE A. MIMS**

The Southern Alliance Clean Energy (“SACE”) respectfully submits its Response in Opposition to Florida Power & Light Company’s (“FPL”) motion to strike or exclude specific portions of the pre-filed direct testimony of Natalie A. Mims filed on behalf of SACE in this proceeding. The Commission should deny FPL’s motion, as SACE is not, through the testimony of Ms. Mims, requesting reconsideration of, or attempting to re-litigate, the Commission’s most recent DSM Goals Order, Order No. PSC-14-0696-FOF-EU, which established FPL’s “reasonably achievable” DSM goals. In contrast, the purpose of Ms. Mims’ testimony is to demonstrate that there are additional conservation measures “reasonably available” to FPL which might mitigate the need for the proposed OCEC Unit 1. Furthermore, the Commission should not strike or exclude Ms. Mims’ testimony from this docket pursuant to the doctrines of administrative finality, collateral estoppel, or res judicata, because the issues involved in these two separate and distinct proceedings are not identical and thus have not been actually litigated. Finally, given that there is no meritorious legal basis for striking or excluding Ms. Mims’ testimony, it would be erroneous as a matter of law to do so simply for purposes of ‘administrative economy.’ Ultimately, it is up to the Commission, and not FPL, to decide what weight it deems appropriate to give to all evidence offered in this proceeding.

I. SACE IS NOT ATTEMPTING TO REQUEST RECONSIDERATION OF COMMISSION ORDER NO. PSC-14-0696-FOF-EU IN THIS NEED DETERMINATION.

FPL's first contends that SACE is, through Ms. Mims' testimony, attempting to do nothing more than seek reconsideration of the Commission's most recent DSM Goals Order, Order No. PSC14-0696-FOF-EU, issued December 16, 2014 in Docket No. 130199-EI. As pointed out by FPL, and as SACE is fully aware, such a request would be untimely, as the time to file a petition for reconsideration of this Order expired in late December of 2014. Had SACE wished to request reconsideration of Order No. PSC14-0696-FOF-EU, it would have done so through proper procedural means and in a timely fashion.

Further, SACE acknowledges that the Commission, in Docket No. 130199-EI, was required to set what it determined to be "appropriate" or "reasonably achievable" DSM goals for FPL. *See* § 366.82(2), F.S.; Rule 25-17.0021(1), F.A.C. However, in this need determination docket pursuant to § 403.519, F.S., the issue is not what FPL's "appropriate" or "reasonably achievable" DSM goals are. In sharp contrast, the issue in this need determination is, pursuant to the plain language of § 403.519, F.S., whether there are conservation measures taken by or "reasonably available" to FPL or its members which might mitigate the need for the proposed OCEC Unit 1. These are, quite simply, different issues, arising under different statutory provisions. Thus, the purpose of Ms. Mims' testimony is not to attempt to re-litigate what FPL's "reasonably achievable" DSM goals are, but instead to proffer evidence of additional, "reasonably available" conservation measures which might mitigate the need for FPL's proposed OCEC Unit 1.¹ Commission Staff's Issue 2 provides:

Issue 1: Are there any renewable energy sources and technologies or conservation measures taken by or reasonably available to Florida Power & Light,

¹ *See, e.g.*, Mims Testimony, at p. 11, line 23 – p. 12 line 4.

which might mitigate the need for the proposed Okeechobee Clean Energy Center Unit 1?

The Commission is statutorily required to take this issue into account in this proceeding pursuant to § 403.519, F.S., which it was not faced with in FPL's most recent DSM Goal setting proceeding.

Moreover, as discussed herein below, Commission precedent establishes that while the "reasonably achievable" DSM goals set by the Commission in FPL's most recent DSM goals proceeding are evidence of "reasonably available" conservation measures which might mitigate the need for the proposed OCEC Unit 1 in this docket, these DSM goals are certainly not conclusive in this proceeding as to whether or not there are additional conservation measures "reasonably available" to FPL which might mitigate the need for the proposed OCEC Unit 1. Furthermore, Commission precedent is clear that these "reasonably achievable" DSM goals do not have any preclusive effect on SACE offering testimony as to whether or not there are additional conservation measures "reasonably available" to FPL which might mitigate the need for the proposed OCEC Unit 1.

II. MS. MIMS' TESTIMONY IS NOT BARRED FROM COMMISSION CONSIDERATION IN THIS DOCKET PURSUANT TO THE DOCTRINES OF RES JUDICATA, ADMINISTRATIVE FINALITY, OR COLLATERAL ESTOPPEL.

FPL next argues that specific portions of Ms. Mims' pre-filed direct testimony should be stricken or excluded from this matter pursuant to the doctrines of administrative finality, collateral estoppel, and/or res judicata. As a threshold matter, and as conceded by FPL in its motion, all of the elements of res judicata are not met in this matter, because there are different causes of action involved in this need determination as opposed to the DSM goals case. Thus, the Commission should give no consideration to FPL's res judicata argument. *See* FPL Motion,

at ¶ 13, 15. Moreover, the doctrines of administrative finality and collateral estoppel are inapplicable to this matter because, as discussed above, the issues involved are not identical, and thus have not been litigated. SACE is not attempting, through Ms. Mims' testimony or otherwise, to re-litigate the issues of how the Commission sets FPL's DSM goals or what FPL's DSM goals are. Rather, as discussed hereinabove, SACE, through the testimony of Ms. Mims, is offering evidence of additional conservation measures reasonably available to FPL, which might mitigate the need for the proposed OCEC Unit 1. This is precisely what is at issue in this need determination, and was not at issue in the DSM goals docket.

A. APPLICATION OF THE DOCTRINE OF ADMINISTRATIVE FINALITY TO THIS MATTER WOULD BE IMPROPER AS THE COMMISSION HAS CONSISTENTLY CONSIDERED EVIDENCE OF ADDITIONAL CONSERVATION MEASURES, ABOVE AND BEYOND APPROVED DSM GOALS, IN PRIOR NEED DETERMINATIONS.

FPL argues the Commission should apply the doctrine of administrative finality to this matter and strike or exclude portions of Ms. Mims' testimony. However, the doctrine is not applicable to this matter, as SACE is not seeking reconsideration of the Commission's most recent DSM goals Order. Moreover, review of Commission Orders in prior need determinations demonstrates that, contrary to FPL's contentions, the Commission considers whether or not there are additional, "reasonably available" conservation measures, above and beyond a utility's "reasonably achievable" DSM goals, which might mitigate the need for a proposed power plant.

The doctrine of administrative finality provides that there must be a "terminal point" in every administrative proceeding at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein. *Florida Power Corp. v. Garcia*, 780 So.2d 34, 44, (Fla. 2001). Administrative finality is considered the "counterpart to res judicata" in the field of administrative law. *Id.*; see also *Delray Medical Center, Inc. v. State*

Agency for Health Care Admin., 5 So.3d 26, 29 (Fla. 4th DCA 2009).² As discussed in Section I. hereinabove, SACE is not seeking reconsideration of the Commission’s most recent DSM Goals Order, nor is SACE seeking to re-litigate the issues of how the Commission sets FPL’s DSM goals or what FPL’s DSM goals are. Thus, Order No. PSC14-0696-FOF-EU is final and dispositive of the rights and issues involved herein, and SACE is in no way attempting to request reconsideration of that Order, or re-litigate said Order, through Ms. Mims’ testimony.

FPL further, and erroneously, contends that it, like applicants in all need determinations prior to this instant matter, is relying upon its Commission approved DSM goals as its “reasonably achievable” level of conservation in this need determination, and that as a result there are, *as an established factual matter*, before any evidence is heard by the Commission, absolutely no conservation measures “reasonably available” to it which might mitigate the need for its proposed OCEC Unit 1. While the undersigned was unable to locate any statutory or regulatory definitions of “reasonably achievable” or “reasonably available,” the plain definitions of these terms demonstrate that the legislature intended that additional conservation measures would be considered under a “reasonably available” standard.³ Moreover, review of prior Commission need determination Orders, in fact many of the same Orders cited by FPL in its Motion, demonstrates that the Commission interprets these terms in the same manner. For example, in *In re: Petition to Determine need for modernization of Port Everglades Plant by Florida Power & Light Company*, Order No. PSC-12-0187-FOF-EI, issued April 9, 2012, the

² As discussed above, as conceded by FPL in its motion, all of the elements of res judicata are not met in this matter, because there are different causes of action. As such, application of administrative finality would be inappropriate for this reason alone.

³ According to the Merriam-Webster dictionary, “Achieve” is defined as “to carry out successfully; to get or attain as the result of exertion.” In contrast, “available” is defined as “present or ready for immediate use.” “Available” is clearly a lesser threshold, and Commission precedent interpreting these two terms simultaneously reflects that.

Commission held, in regards to whether there were any conservation measures taken by, or reasonably available to, FPL which might mitigate the need to proposed modernization:

FPL's forecast of resource needs takes into account all projected DSM from cost-effective programs approved by this Commission. No additional cost-effective DSM has been identified in this proceeding which could mitigate the need for new generation.

Id. at 7 (emphasis added). Clearly, the Commission was, in the context of this FPL need determination, willing to consider evidence of additional conservation measures above and beyond Commission approved "reasonably achievable" DSM. The Commission also considered the potential for additional "reasonably available" conservation measures beyond Commission approved DSM in *In re: Petition to determine need for Hines Unit 3 in Polk County by Florida Power Corp.*, Order No. PSC-03-0175-FOF-EI, issued February 4, 2003. The Commission held:

We approved FPC's DSM Goals and DSM plan in Docket Nos. 971005-EG and 991789-EG, respectively FPC's DSM programs have successfully met our established DSM goals and if FPC achieves its future goals, then there appears to be very little additional conservation measures that can be taken by or reasonably available which might mitigate the need for the proposed power plant We find there are no additional cost-effective conservation measures available that might mitigate FPC's need for Hines Unit 3.

Id. at 12 (emphasis added). Similarly, in *In re: Petition to determine need for an electrical power plant in Martin County by Florida Power & Light Company; In re: Petition to determine need for an electrical power plant in Manatee County by Florida Power & Light Company*, Order No. PSC-02-1743-FOF-EI, issued December 10, 2002, the Commission held in regards to conservation measures:

We find that there are no further conservation measures available to Florida Power & Light Company that might mitigate the need for Martin Unit 8 or Manatee Unit 3. FPL has already implemented a considerable amount of cost-effective conservation and DSM. This level of DSM was quantified in FPL's DSM goals, which the Commission set in August, 1999 The preponderance of the evidence in this proceeding supports FPL's position that there are no

additional cost-effective conservation or DSM measures available that might mitigate FPL's need for Martin Unit 8 or Manatee Unit 3.

Id. at 10 (emphasis added); *see also In re: Petition for determination of need for West County Units 1 and 2 electrical power plant in Palm Beach County by Florida Power & Light Company*, Order No. PSC-06-0555-FOF-EI, issued June 28, 2006 (noting that “FPL is committed to continuing to assess and is working to identify *additional* cost-effective DSM) (emphasis added). Ultimately, FPL is wrong when it contends that a utility can simply rely upon the Commission's findings of “reasonably achievable” DSM in a DSM goals docket as conclusive evidence that there are no additional “reasonably available” conservation measures which might mitigate the need for a proposed power plant in a need determination.

B. APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL TO THIS MATTER WOULD BE IMPROPER AS THE COMMISSION HAS CONSISTENTLY CONSIDERED EVIDENCE OF ADDITIONAL CONSERVATION MEASURES, ABOVE AND BEYOND APPROVED DSM GOALS, IN PRIOR NEED DETERMINATIONS.

Because it knows its arguments based on improper reconsideration and administrative finality fail, FPL next contends that the specific portions of Ms. Mims' testimony should be stricken or excluded from the record in this docket pursuant to the doctrine of collateral estoppel. However, for the same reasons set forth hereinabove, application of the doctrine would be inappropriate, because all of the elements of the doctrine are not met – specifically, the issues involved in FPL's most recent DSM goals case and those in the present need determination are simply not identical, and thus could not have not been actually litigated.

In order for collateral estoppel to be applicable, the following elements must be met: (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the

party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. *In Re Turkey Creek, Inc.*, Order No. PSC-95-1445-FOF-WS, at 5 (citing *Greenplatt v. Drexel Burnham Lambert Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985)).

As discussed in detail hereinabove, the issues involved in this need determination are not identical to the issues involved in FPL's most recent DSM Goals case, and thus have not been actually litigated. In this need determination proceeding, the issue is not what FPL's "appropriate" or "reasonably achievable" DSM goals are. Rather, the issue is whether there are any additional conservation measures "reasonably available" to FPL which might mitigate the need for the proposed OCEC Unit 1. This issue, which arises under the plain language of § 403.519, F.S., was not at issue in the DSM Goals case, and was not litigated in that case. Moreover, as demonstrated above, Commission precedent demonstrates that the Commission does not, as contended by FPL, for purposes of a subsequent need determination, simply accept a utility's "appropriate" or "reasonably achievable" DSM goals as being dispositive of the issue of whether or not there are additional, "reasonably available" conservation measures which might mitigate the need for a proposed power plant. The Commission should reject FPL's argument to apply collateral estoppel as a bar to Ms. Mims' testimony in this need determination.

III. COMMISSION CONSIDERATION OF FPL'S 'ADMINISTRATIVE ECONOMY' ARGUMENT WOULD BE ERRONEOUS AS A MATTER OF LAW.

Finally, FPL argues that 'administrative economy' would be promoted by the exclusion of Ms. Mims' testimony from this proceeding. However, as demonstrated above, there is simply no legal basis for doing so, and excluding testimony solely on the basis of 'administrative

economy' would be erroneous as a matter of law. As a result, this is a properly contested issue in this need determination and one that demands Commission consideration.

The Commission is required in this need determination to consider whether there are additional conservation measures "reasonably available" to FPL which might mitigate the need for the proposed OCEC Unit 1. SACE, through the testimony of Ms. Mims, has presented evidence that there are in fact such measures. Moreover, as pointed out by FPL, it has filed a significant amount of rebuttal testimony by Dr. Steven R. Sim to rebut Ms. Mims' testimony. Ultimately, it is up to the Commission, and not FPL, to decide what weight to give to all testimony in this docket, including Ms. Mims' testimony, as well as the rebuttal testimony of Dr. Sim. For these reasons, FPL's administrative economy argument fails.

Respectfully submitted this 16th day of November, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing was served by electronic mail this 16th day of November, 2015, to the following:

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