

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for  
determination of need for Hines  
Unit 2 Power Plant by Florida  
Power Corporation.

DOCKET NO. 001064-EI  
ORDER NO. PSC-00-1933-PCO-EI  
ISSUED: October 19, 2000

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

On August 7, 2000, Florida Power Corporation (FPC) filed a Petition for Determination of Need For an Electrical Power Plant (said plant hereinafter referred to as "Hines 2" or "Hines 2 Unit"). At present, there are no intervenors in this docket. The hearing is scheduled for October 26 and 27, 2000.

In its Preliminary List of Issues, PSC Staff (Staff) identified the following Issue 6: **Is it reasonable to obligate Florida Power Corporation's retail customers for the costs of the Hines 2 Unit for the expected life of the Unit?** Consistent with the Order Establishing Procedure issued August 30, 2000, Staff filed the testimony of Billy R. Dickens in support of Issue 6 on September 18, 2000.

On October 3, 2000, FPC filed its Motion to Strike Staff's Preliminary Issue Number 6 and the Direct Testimony of Billy R. Dickens, together with its request for oral argument on the Motion. Staff filed its Response to FPC's Motion on October 10, 2000.

FPC's Motion was considered and arguments heard at the Prehearing Conference held on October 11, 2000.

FPC'S ARGUMENTS

FPC seeks to strike Preliminary Issue 6 and Mr. Dickens' testimony "on the grounds that the issue and the testimony supporting that issue are immaterial and impertinent to any issue properly before this Commission in this need determination proceeding." FPC further states that "Staff asks the Commission to take up under preliminary issue number 6 the unknown impact on ratepayers of potential deregulation at some point in time in the future if the costs of the Hines 2 power plant are placed in FPC's rate base over the course of the expected life of the Hines 2 plant."

FPC asserts that Staff's Preliminary Issue 6 is outside the Commission's jurisdiction and "wholly within the realm of the

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Florida Legislature." FPC characterizes Preliminary Issue 6 as strictly a policy issue, and states that the Commission and Staff have "long recognized that a need determination is an inappropriate forum to address such 'policy' issues." FPC argues that policy determinations are strictly reserved for rulemaking procedures or for legislative action.

FPC's next argument is that the Commission does not have the power to consider Preliminary Issue 6. The provisions of Section 403.519, Florida Statutes, direct the considerations to be taken by the Commission in a need determination proceeding. FPC argues that because the other criteria stated in the statute are stated in other identified issues, Preliminary Issue 6 is not within those other criteria. FPC concludes that Preliminary Issue 6 therefore must address "other matters within [the Commission's] jurisdiction which it deems relevant." FPC states that consideration of the issue and Staff's prefiled testimony would violate the legislative prohibition in Section 366.041, Florida Statutes, that "no public utility shall be denied a reasonable rate of return upon its rate base." FPC further asserts that the Commission has refused to entertain cost recovery issues in need determination proceedings, citing its Hines 1 case.

FPC also argues that Mr. Dickens' proposal in response to Preliminary Issue 6 would invite hindsight review of the utility's cost decisions, in contravention of Florida Supreme Court holdings disallowing such review, and that his proposal to disallow the costs of Hines 2 if they exceed market prices is confiscatory.

#### **STAFF'S RESPONSE**

Staff maintains that Preliminary Issue 6 is not an issue of policy, but asserts that there is no prohibition on the Commission to consider policy matters within the context of a need determination. Among others, the Commission previously considered issues regarding the effects of the proposed Hines 1 facility on FPC's credit rating in FPC's last need determination proceeding.

Staff further asserts that the stated concern in Preliminary Issue 6 of whether FPC's ratepayers should be obligated for the costs of Hines 2 over the life of the Unit is squarely within the ambit of issues in Section 403.519 of "adequate electricity at reasonable cost," "most cost-effective alternative," and "other matters within [the Commission's] jurisdiction it deems relevant," specifically the obligation to set rates which are just, fair and reasonable. A conclusion of prudence and the recovery of

associated costs is implicit in the process of determining whether a given proposal is cost-effective and reasonable.

Further, Staff states that the objection to hindsight review is precisely why anticipated economic conditions should be considered at this initial point in the determination of the need for the facility. Staff does not advocate a wholesale denial of cost recovery for Hines 2. The Commission's jurisdiction and obligation include determining just, fair and reasonable rates, pursuant to Sections 366.03 and 366.04, Florida Statutes. Staff suggests that the Commission's finding of need puts the imprimatur of "prudence" on all costs incurred by FPC in planning and constructing Hines 2 (absent a showing of changed circumstances). FPC thereby gains the right to recover those prudent costs. Thus, Staff asserts the Commission must consider the issue now, in the context of the need determination, and with the knowledge of how the regulatory framework has changed over the decade since FPC's last need determination.

#### ANALYSIS

Section 403.519, Florida Statutes, provides the framework for the determination of need for new power plants. The examination to be made by the Commission is set forth in the statute as follows:

...In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity...

While FPC argues that the Commission is, without power to consider issues of policy in a need determination proceeding, and that such matters should be left to rulemaking and legislative action, this argument overstates the place of rulemaking in agency functioning. Section 120.52(15), Florida Statutes, defines a "rule" as:

...each agency statement of **general applicability** that implements, interprets, or **prescribes law or policy** or describes the procedure or practice requirements of an agency... [emphasis added].

Thus, FPC's assertion that this Commission is without authority to address or establish policy is inconsistent with this express legislative pronouncement of that authority.

Section 120.54, Florida Statutes, governing rulemaking, further provides at Subsection (1)(a)2.:

Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:

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b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

Each petition for determination of need presents unique individual issues at a given point in time. Each need determination must be made on a case by case basis, considering all the factors pertinent at the time the matter is heard, including the impact on the ratepayers, over the life of the plant, of that utility's decision to incur the costs of building that plant at that time. This is not an issue that will be answered with a statement of general applicability. The resolution of this docket relates to this specific unit, this specific utility, and this particular time. This is such an individual matter that it is not capable of being defined in such a way as to be "generally applicable," and is therefore not conducive to rulemaking.

FPC also overstates the finding in Hines 1 regarding "policy" issues. In that case, the Hearing Officer concluded that the issue of imposing the same cost and performance obligations on FPC as on QFs, which was an issue unique to that particular docket, was beyond the scope of that proceeding. The Commission did not make a blanket finding that consideration of policy issues is inappropriate in a need determination proceeding.

I do not find that the subject matter of Preliminary Issue 6 is beyond the scope of this docket. The impact on a utility's future rates of an affirmative determination of need is a critical consideration. The finding of need is a determination by the Commission that the utility's plan to construct the proposed unit is prudent. Once that "prudence" is established, and absent some intervening changed circumstances, the Commission is obliged to allow the utility the opportunity to recover these costs. Therefore, consideration of issues relating to the prudence of this proposed plant is appropriate as part of the determination of need. That is not to say that the Commission should address specific cost recovery issues in this proceeding. The prudence of whether the proposed unit should be built is the subject of this case and not a determination of how rates will be impacted. That subject is more properly addressed in a subsequent proceeding if the company files for revenue recovery of the Hines 2 unit.

The preliminary issues that have been identified and agreed upon by Staff and FPC go ultimately to the prudence of the construction of the Hines 2 Unit. Specifically, Preliminary Issues 4 and 7 address the need for electricity at a reasonable cost and whether the proposed plant is the most cost-effective alternative available. In fact, the testimony proffered by Staff Witness Dickens provides his opinion on whether the construction of this plant is the most cost-effective alternative on a long term basis and offers other alternatives. The company's rebuttal witness Cicchetti purports to explain in his testimony why "Mr. Dickens' conclusions and asymmetrical recommendations are contrary to both regulatory principles and competitive markets, and fail to achieve best cost". In addition, the testimony of FPC rebuttal witness Flynn discusses why he believes the concept of entering into short term power purchase agreements to meet the need for capacity resources is flawed and why a long term solution is needed. Without commenting on the merits of any of the testimony, I note that without question the testimony of these three witnesses address whether the construction of the Hines 2 Unit is the most cost effective alternative available.

Another topic discussed by Staff Witness Dickens and the company's rebuttal witnesses is the change in market conditions in the electric industry and whether this should be considered in this need determination proceeding. Certainly this topic is relevant to the issues of need for electricity at a reasonable cost and the most cost effective alternative. While the witnesses disagree on whether market conditions have changed sufficiently to be taken into consideration in this proceeding, both sides of the argument

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are represented in the testimony. All witnesses will be subject to cross-examination and the decision in this case, as in all others, will be based on the development of the record on the issues.


Therefore, I conclude that the testimony of Staff Witness Dickens is relevant to this need determination proceeding in that it addresses Preliminary Issues 4 and 7 already identified and accepted by the parties. The company's rebuttal testimony of witnesses Cicchetti and Flynn is likewise relevant to this proceeding. In that regard, Preliminary Issue 6 is duplicative of other issues and therefore unnecessary in this proceeding. Accordingly, the motion to strike Preliminary Issue 6 is granted. The motion to strike the testimony of Staff Witness Dickens is denied.

Therefore, for the foregoing reasons, it is

ORDERED by Commissioner Lila A. Jaber, as Prehearing Officer, that Florida Power Corporation's Motion to Strike Staff's Preliminary Issue Number 6 is granted. It is further

ORDERED that Florida Corporation's Motion to Strike the Direct Testimony of Billy R. Dickens is denied.

By ORDER of Commissioner Lila A. Jaber as Prehearing Officer, this 19th Day of October, 2000.

  
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LILA A. JABER  
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that

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is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.