

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition To Determine Need For an Electrical Power Plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee. DOCKET NO. 060635-EU
DATED: December 20, 2006

**FLORIDA MUNICIPAL POWER AGENCY, JEA, REEDY CREEK
IMPROVEMENT DISTRICT AND CITY OF TALLAHASSEE'S (APPLICANTS')
MOTION TO STRIKE PORTIONS OF TESTIMONY AND EXHIBITS FILED BY
THE SIERRA CLUB, INC., JOHN HEDRICK, AND BRIAN LUPIANI**

Florida Municipal Power Agency, JEA, Reedy Creek Improvement District and City of Tallahassee ("Applicants"), by and through their undersigned counsel, pursuant to Rule 28-106.204, Florida Administrative Code, and Rule 1.140(f), Florida Rules of Civil Procedure, hereby moves to strike portions of the testimony of Hale Powell submitted by the Sierra Club, Inc., John Hedrick, and Brian Lupiani ("Sierra") in the above-captioned proceeding. Specifically, the Applicants move to strike those portions of Mr. Hale Powell's testimony and exhibits pertaining to issues that are outside the jurisdiction of the Commission, that are speculative and without probative value, that are hearsay not corroborated by competent evidence and thus irrelevant to the disputed issues in this proceeding, and issues for which Mr. Powell lacks the relevant expertise.

ARGUMENT

1. Florida's Administrative Procedure Act requires the Commission to exclude irrelevant, immaterial or unduly repetitious evidence from the proceeding. Section 120.569(2), Florida Statutes; see also Rule 1.140(f), Florida Rules of Civil Procedure (motions to strike "redundant, immaterial, impertinent, or scandalous matter from any pleading); Lewis v. State, 55

Fla. 54, 45 So. 998, 1002 (1908) (“A motion to strike out evidence that has been introduced in a case must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself, and not upon the ground that is not sufficient.”); McClurkin v. Parrish Volvo, Inc., 317 So.2d 85, 86 (Fla. 1st DCA 1975) (trial court has power to strike exhibits which contain redundant, immaterial, impertinent, or scandalous matters); Sonderling v. Sonderling, 600 So.2d 1285, 1287 (Fla. 3d DCA 1992) (allegations that bear some relation to the issues may be struck if they are not an integral part of the case and are offered to gratify private spite or promote public scandal).

2. Section 90.401, Florida Statutes, defines relevant evidence as “evidence tending to prove or disprove a material fact.” Section 90.403, Florida Statutes, provides that “[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issue, misleading the jury or needless presentation of cumulative evidence.”

EVIDENCE RELATING TO ISSUES OUTSIDE THE PSC’S JURISDICTION

3. Testimony regarding environmental issues is irrelevant to this need proceeding because it addresses matters that are outside the jurisdiction of the Public Service Commission. As the Commission has previously recognized, the PPSA sets forth a comprehensive process for the licensing of new and expanded steam electric generation plants. See In re: Petition of Florida Power & Light Company to determine need for electric power plant -- Martin Expansion Project, Order No. 23080 (1990) (“FPL Martin”); In re: Petition of Florida Power & Light Company to determine need for electric power plant -- Lauderdale Repowering, Order No. 23079 (1990) (“FPL Lauderdale”). There are several divisions of responsibility under the PPSA, but the final decision on certification is made by the Governor and Cabinet sitting as the Siting Board. §403.509, F.S. Ultimately, the Siting Board must make a decision “that will fully

balance the increasing demands for electrical power plant location and operation with the broad interests of the public.” §403.502(2), F.S. In particular, the Siting Board is charged with the responsibility, among other things:

To effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility, including air and water quality, fish and wildlife, and the water resources and other natural resources of the state.

§403.502(2), F.S.

4. The Siting Board’s decision is made on the record developed before an Administrative Law Judge who is charged with preparing a recommended order based on all evidence of record at the final certification hearing. §403.508(2)(a), F.S. Under Section 403.508(3), F.S., the Commission is one of several statutory parties to the certification hearing. Other statutory parties include, but are not limited to, the Florida Fish and Wildlife Conservation Commission, the applicable water management district, and the Department of Environmental Protection (“DEP”). §403.508, F.S. These agencies have the expertise, and jurisdiction under the PPSA, to address any environmental and natural resource impacts. §403.507, F.S.

5. The Commission’s role in the PPSA process is set forth in three separate statutory sections. Section 403.507(4), F.S., requires the Commission to prepare a report as to the present and future need for the electrical generating capacity to be supplied by the proposed power plant. That report “may include the commission’s comments with respect to any matters within its jurisdiction.” (emphasis added). The factors to be considered by the Commission in the preparation of that report are spelled out in more detail in Section 403.519, F.S, which states in pertinent part:

In making its determination [of need], the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, the need for fuel diversity and supply reliability, 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 serve as the commission's report required by s. 403.507(4). (emphasis added).

6. Many of the issues raised in Mr. Powell's testimony and exhibits relate to environmental considerations that are beyond the Commission's jurisdiction and, therefore, inappropriate for consideration in this Need for Power proceeding and inclusion in its PPSA report. These include Mr. Powell's testimony¹:

- Page 5, paragraph numbered "3" near top of page (regarding "global warming, climate change, and other important environmental issues")
- Page 17, paragraph numbered "4" (regarding "respiratory illnesses")
- Page 18, paragraph numbered "7" at top of page (regarding environmental issues, including "greenhouse gas emissions," "heat-trapping pollution" and "reduc[ing] climate change impacts")
- Page 18, in first full Q&A on page (regarding "environmental benefits" and "respiratory ailments")
- Page 23, third bullet on page (regarding "environmental benefits" and "global warming and climate change issues")

7. Nothing in the PPSA, and nothing in the other statutes defining the scope of the Commission's jurisdiction, gives the Commission any responsibility to consider the environmental or natural resource impacts of the construction of new generating facilities. These matters are simply not "within [the Commission's] jurisdiction" and are, therefore, inappropriate for consideration in this proceeding under Sections 403.507(4) or 403.519, F.S. Indeed, the

¹ Due to Mr. Powell's testimony lacking line numbers, narrative descriptions of the locations of the objectionable testimony is provided.

Commission repeatedly has held that the Commission “does not have statutory jurisdiction over the environment or natural resources in the State of Florida” and that “[t]hese matters are simply not within the jurisdiction of this body and therefore are not properly considered in the need determination[.]” FPL Martin, at 21-22; FPL Lauderdale, at 19. Likewise, the Commission has previously refused to consider environmental externalities in need proceedings when evaluating cost-effectiveness of a proposed power plant. The Commission explained: “This is because the statutory scheme envisions the bifurcation of environmental issues (which are considered by the [DEP]) and regulatory issues (which are considered by the Commission). The Florida Public Service Commission has neither the expertise, the personnel, nor a statutory directive to consider environmental issues.” In re: Joint Petition to determine need for electric power plant to be located in Okeechobee County by FPL and Cypress Energy, LLP., Order No. PSC-92-1355-FOF-EQ, pp. 15-16 (1992).²

8. The Commission’s inability to consider environmental issues does not preclude substantially affected persons from raising legitimate environmental issues in an appropriate manner in the certification hearings before the DOAH Administrative Law Judge, nor ultimately before the Governor and Cabinet. In fact, under Section 403.507(5), F.S., the DEP is charged with the responsibility and authority to prepare a project analysis, studies, and reports, to be filed with the Administrative Law Judge. The DEP’s project analysis shall include a “statement indicating whether the proposed electrical power plant and proposed ultimate site capacity will

² See also Re Seminole Generating Station Petition for Determination of Need (Docket No. 060220-EC) (Order No. PSC-06-0481-PHO-EC, June 5, 2006) (Notice of Hearing and Prehearing Order):

Only issues relating to the need for the proposed power plant will be heard at this hearing. Separate public hearings will be held before the Division of Administrative Hearings at a later date to consider environmental and other impacts of the proposed plant and associated facilities.

be in compliance and consistent with matters within the [DEP's] standard jurisdiction, including the rules of the [DEP]....” §403.507(5), F.S.

9. Given the existence of the site certification forum for consideration of the types of environmental and natural resource issues inappropriately raised in Sierra's testimony and exhibits, there is no policy reason for the Commission to interlope into the jurisdictional areas of other agencies. These areas involve matters within the expertise of the environmental agencies. Additionally, it would be an inefficient use of the Commission's time and resources, and a totally duplicative exercise, for the Commission to attempt to consider these complicated and technical issues in the context of a need determination proceeding. These issues should be left for resolution by the Governor and Cabinet following the certification hearing where the Legislature contemplated that the environmental agencies would participate, and the environmental and natural resource issues would be considered.

10. The Applicants therefore respectfully move to strike the portions of Mr. Powell's testimony discussed above (page 5, paragraph 3; page 17, paragraph 4; page 18, paragraph 7, and first full Question & Answer; and page 23, third bullet point) and preclude them from consideration in this proceeding.

SPECULATIVE EVIDENCE WITHOUT PROBATIVE VALUE

11. Certain portions of Mr. Powell's testimony and exhibits relate to potential future regulation of carbon emissions. As discussed below, such potential future environmental regulation is speculative and beyond the scope of cognizable issues in the proceeding.

12. Specifically, Mr. Powell's testimony (page 8, first full paragraph, and page 10, paragraph numbered "2" at top of page) speculates regarding costs related to carbon dioxide controls and a hypothetical "carbon tax". The Commission has previously recognized that it cannot reach findings of fact relating to proposed or possible regulations because such findings

of fact require speculation as to what might or might not occur.³ Indeed, the Pre-Hearing Officer has already recognized that the potential costs associated with future carbon dioxide regulation are too speculative and conjectural to confer standing to participate in this proceeding. See Order Nos. PSC-06-0867-PCO-EU (Oct. 20, 2006), PSC-06-0954-PCO-EU (Nov. 15, 2006); Order No. PSC-06-0971-PCO-EU (Nov. 21, 2006). The Applicants have appropriately addressed potential CO₂-related costs by submitting a sensitivity analysis for the Commission's information only. However, because there currently are no federal, state, or local regulations that impose CO₂ mitigation costs on power plants in Florida, the Commission cannot make any dispositive findings regarding potential CO₂ emission costs or otherwise base its decision on what, if any, CO₂ regulation and associated costs may be imposed in the future. Accordingly, the testimony of Mr. Powell referenced above is without probative value and should be stricken, to the extent that it is being offered to establish the course and impact of future regulation.

UNSUPPORTED HEARSAY

13. Hearsay evidence that is not supported or corroborated by other record evidence should be stricken from the record. See § 90.801, Florida Statutes (hearsay not admissible unless an exception applies); § 120.57(1)(c), Florida Statutes (hearsay is not sufficient by itself to support a finding of fact unless the hearsay would be admissible under an exception to the hearsay rule); In Re: Complaint of Jory Bricker Against Florida Power Corporation Regarding High Electric Bills, DOAH Recommended Order, Case No. 93-5713, *adopted by PSC*, Order No. PSC-94-0306-FOF-EI (Mar. 17, 1994) (Order Adopting Hearing Officer's Recommended Order) (hereinafter "Bricker Recommended Order") (striking exhibits containing "uncorroborated

³ See Re Gulf Power Company, Docket No. 921155-EI, Order No. PSC-93-1376-FOF-EI (Sep. 20, 1993); Re Gulf Power Company, Docket No. 921155-ET, Order No. PSC-94-0264-FOF-EI (Mar. 8, 1994) (order denying motion for reconsideration); see also Duval County School Bd. v. Spruell, 665 So. 2d. 262 (Fla. 1st DCA 1996) (Court refused to speculate as to results of future agency action).

hearsay” and that are not properly authenticated, and where the “expert qualifications of those giving the opinions contained in the exhibits were not demonstrated”).

14. Portions of Mr. Powell’s testimony and exhibits that were not prepared by Mr. Powell or under his supervision are inadmissible hearsay and should be stricken from the record in this proceeding. This includes:

- The study by the Land and Water Resources Fund referenced on page 17, paragraph numbered 6 of Mr. Powell’s testimony, which was not provided as an exhibit to Mr. Powell’s testimony and which Mr. Powell acknowledged in his deposition was not prepared by him or under his supervision.⁴
- Studies referenced on page 19, first Q & A on the page, and final Q & A on the page, of Mr. Powell’s testimony, which were not provided as exhibits to Mr. Powell’s testimony and which Mr. Powell acknowledged in his deposition were not prepared by him or under his supervision.
- Proclamation by the Western Governors Association, included on pages 20-21 of Mr. Powell’s testimony, which Mr. Powell acknowledged in his deposition was not prepared by him or under his supervision.
- Exhibit HP-1 to Mr. Powell’s testimony - Mr. Powell acknowledged in his deposition that this exhibit was not prepared by him or under his supervision.
- Exhibit HP-2 to Mr. Powell’s testimony – this exhibit is a gratuitous addition to Mr. Powell’s testimony as it is never referenced in the testimony; further Mr. Powell acknowledged in his deposition that this exhibit was not prepared by him or under his supervision.

⁴ The deposition transcript has not yet been received. References to the deposition transcript will be provided after Applicants receive a copy of the deposition transcript.

- Exhibit HP-5 to Mr. Powell’s testimony, and page 22 and page 23 (final bullet point) of Mr. Powell’s testimony referring to Exhibit HP-5 – Mr. Powell acknowledged in his deposition that the document was not prepared by him or under his supervision. Thus, the review and his statements characterizing the review are hearsay that are not corroborated by competent evidence.

15. These documents and portions of testimony related to them are untested hearsay that are not corroborated by competent evidence. Accordingly, the Applicants respectfully move to strike the portion of Mr. Powell’s testimony and exhibits listed above and preclude that information from consideration in this proceeding.

EVIDENCE FOR WHICH MR. POWELL LACKS EXPERTISE

16. Section 90.705(2), Florida Statutes, provides that where a witness does not have sufficient basis for an opinion included in his testimony, the opinions and inferences of that witness are inadmissible unless the party offering the testimony establishes the underlying facts or data. See also Bricker Recommended Order (PSC adopted recommended order which struck evidence for which the “expert qualifications of those giving the opinions contained in the exhibits were not demonstrated”).

17. Mr. Powell does not have any expertise relating to medicine, as acknowledged in his deposition. Therefore, his testimony relating to medical or health-related issues should be stricken; it is outside his expertise and knowledge and not otherwise supported by evidence as to the underlying facts or data. This includes his testimony on page 17, paragraph numbered 4 (regarding health-related issues); and page 18, first full Q & A (regarding respiratory ailments).

18. Accordingly, the Applicants respectfully move to strike the portion of Mr. Powell’s testimony listed above and preclude that information from consideration in this proceeding.

IRRELEVANT EVIDENCE NOT SUPPORTED BY RECORD EVIDENCE

19. Portions of Mr. Powell's testimony relate to demand-side management (DSM) measures. This testimony is irrelevant to the issues in this need proceeding because there has been no showing that the DSM-related information submitted by Mr. Powell has any relation to the cost-effectiveness analysis performed by the Applicants regarding DSM measures.

20. This includes the following portions of Mr. Powell's testimony:

- Page 10, paragraph numbered 3 (asserting speculation that a different DSM analysis will "likely" identify viable DSM alternatives)
- Page 18, last Q&A on the page (asserting that "successful" DSM projects include certain projects by other utilities in other states, but providing no evidence of any relation of those DSM projects to the TEC proposal or to the Applicants)
- Page 19, last Q&A on the page (asserting that DSM programs have "huge" potential, but providing no evidence of any relation of those DSM projects to the TEC proposal or to the Applicants)
- Page 23, second bullet point (asserting that DSM programs have "significant job creation benefits," but providing no evidence of any relation of those DSM projects to the TEC proposal or to the Applicants)
- Exhibit HP-1 (regarding DSM measures, but providing no showing that the DSM measures are available and cost-effective for any of the Applicants, and no showing that the customer base or avoided unit(s) for the reported utility is analogous in any way to those of any of the Applicants)

21. Similar to the DSM measures discussed above, Mr. Powell's testimony includes allegations regarding transmission investments (page 19, first Q&A on the page) and clean energy policies (page 20, full page, and page 21, first two paragraphs) that are wholly irrelevant

to the issues before the Commission in this need proceeding. Further, Sierra has made no showing that the Applicants could achieve the results or policies described in Mr. Powell's testimony in a cost-effective manner.

22. Accordingly, the Applicants respectfully move to strike the portion of Sierra's testimony and exhibits listed above and preclude that information from consideration in this proceeding.

CONCLUSION

For the reasons explained above, the testimony and exhibits offered by Mr. Hale Powell on behalf of Sierra are irrelevant, immaterial, and unduly repetitious. Accordingly, the Commission should strike those portions of Sierra's testimony and exhibits described above.

RESPECTFULLY SUBMITTED this 20th day of December, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Applicants' Motion to Strike Portions of Testimony and Exhibits Filed by The Sierra Club, Inc., John Hedrick, and Brian Lupiani in Docket No. 060635-EU was served upon the following by electronic mail(*) or U.S. Mail(**) on this 20th day of December, 2006:

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