State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: NOVEMBER 19, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF APPEALS (BELLAK) RCB DS
DIVISION OF SAFETY & ELECTRIC RELIABILITY (COLSON) RC JDJ

RE: DOCKET NO. 011356-EQ - PETITION OF LEE COUNTY, FLORIDA FOR DECLARATORY STATEMENT OF EXEMPTION, PURSUANT TO SECTION 377.709(6), F.S., FROM DETERMINATION OF NEED REQUIREMENT OF SECTION 403.519, F.S.

AGENDA: 12/04/01 - REGULAR AGENDA - DECLARATORY STATEMENT INTERESTED PERSONS MAY PARTICIPATE AT THE COMMISSION'S DISCRETION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\APP\WP\011356.RCM

CASE BACKGROUND

On October 11, 2001, Lee County, Florida filed its petition requesting a declaration that Lee County is exempt from having to obtain a determination of need for a contemplated expansion to Lee County's Resource Recovery Facility (Facility). Lee County owns the Facility, which is located in unincorporated Lee County, Florida.

Under the Florida Electrical Power Plant Siting Act (Chapter 403, Florida Statutes), the Commission is empowered to make a determination of need for any electrical power plant for which an applicant seeks certification under the act. As set forth in Sections 403.508(3) and 403.503(12), Florida Statutes, the Siting Act requires a need determination prior to certification of any generating facility greater than 75 MW, but provides that a need

determination may be obtained for a smaller facility. Lee County filed its petition for determination of need for the Facility on May 10, 1990 in Docket No. 900454-EQ. On January 7, 1991, the Commission issued Order No. 23963 granting Lee County's need determination petition.

According to Lee County's Petition, the Facility has a nominal electric generating capacity of approximately 40 MW. The Facility initially achieved commercial in-service status in December, 1994. The Facility is operated by Covanta Energy of Lee, Inc., formerly Ogden Martin Systems of Lee, Inc., on behalf of the County pursuant to a twenty-year operations contract which expires in December 2014.

As described in the Petition, p. 5-6, the Facility receives and disposes of solid waste by burning the waste in the Facility's furnaces. This combustion process then produces steam from boilers, which is then directed through the Facility's steam turbine generator to produce electricity. Approximately 5 to 10 MW of the Facility's output is used to operate the Facility, and the remaining 30 to 35 MW of the Facility's output is sold to Seminole Electric Cooperative, Inc. (Seminole). Accordingly, the Facility is a "solid waste facility" within the meaning of Section 377.709(2)(f), Florida Statutes.[1] Seminole purchases the Facility's output on a firm capacity and energy basis, pursuant to a negotiated power purchase agreement. Seminole in turn uses the power purchased from Lee County to meet the needs of its ten member electric distribution cooperatives.

Lee County believes that the need for this declaratory statement arises from statements made in certain opinions of the Florida Supreme Court which indicate that need determinations are only available for power plants being built by retail-serving utilities to meet the needs of their retail customers or by entities having contracts with such retail-serving utilities.

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[1] Section 377.709(2)(f) defines solid waste facility as "...a facility owned or operated by, or on behalf of, a local government for the purpose of disposing of solid waste, as that term is defined in s. 403.703(13), by any process that produces heat and incorporates, as a part of the facility, the means of converting heat to electrical energy in amounts greater than actually required for the operation of the facility."

Lee County is therefore uncertain whether the Florida Supreme Court's statements in the Nassau cases[2] and in Tampa Electric v. Garcia[3] may be construed to override or negate the clearly articulated exemption enacted by the Legislature in Section 377.709(6), Florida Statutes, so as to require that Lee County must obtain a need determination based on a demonstration that the output of the proposed Facility expansion is fully committed to meeting the specific needs of Florida retail-serving electric utilities and those utilities' customers. According to Section 377.709(6), Florida Statutes, both new solid waste facilities having capacity less than 75 MW and expansions of solid waste facilities of less than 50 MW are exempt from the need determination process. Lee County is now preparing to file with the Florida Department of Environmental Protection its application for the certification of a planned expansion to the Facility by approximately 20 to 25 MW, which will bring the total electric generating capacity of the Facility to approximately 60 to 65 MW.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Lee County's Petition for Declaratory Statement that its expansion is exempt from the need determination process pursuant to Section 377.709(6), Florida Statutes?

RECOMMENDATION: Yes. Since Lee County's Resource Recovery Facility is a "solid waste facility" within the meaning of Section 377.709(2)(f), Florida Statutes, its expansion by 20-25 MW is exempt from the need determination requirement pursuant to Section 377.709(6), Florida Statutes.

STAFF ANALYSIS: Staff believes that any uncertainty on Lee County's part is resolved in this instance because the contemplated facility expansion of 20-25 MW is within the limits provided by the exemption from the need determination process provided in Section 377.709(6), Florida Statutes. As to statements in the Nassau and Tampa Electric v. Garcia cases, those statements appear to have been directed toward implementation of the need determination

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[2] Nassau Power Corp. v. Beard, 602 So. 2d 1175 (Fla. 1992); Nassau Power Corp. v. Deason, 642 So. 2d 396 (Fla. 1994).

[3] Tampa Electric v. Garcia, 767 So. 2d 428 (Fla. 2000).

process as to entities subject to that process, rather than entities exempt from it. Moreover, the exemption is effective because the enactment of Section 377.709(6), Florida Statutes, in 1994 was subsequent to the revision of the conflict of laws provision of the Siting Act, Section 403.510, Florida Statutes, in 1990. Therefore, the Legislature should be assumed to have enacted Section 377.709(6), Florida Statutes, with knowledge of Section 403.510, Florida Statutes, and with the intent that the exemption provision be effective, rather than nullified by the earlier enacted provision. State v. Zimmerman, 370 So. 2d 1179, 1180 (Fla. 4th DCA 1979); State v. Parsons, 569 So. 2d 437, 438 (Fla. 1990).

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, if the Commission votes to dispose of the petition for declaratory statement, the docket should be closed.

STAFF ANALYSIS: A declaratory statement is issued as a final order and the docket may be closed.

RCB