FLORIDA PUBLIC SERVICE COMMISSION
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MEMORANDUM

November 20, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (HELTON)
DIVISION OF ELECTRIC & GAS (DUDLEY)

RE: DOCKET NO. 970898-E.G. - PETITION OF LEE COUNTY FOR DECLARATORY STATEMENT CONCERNING CONSERVATION STATUS OF ELECTRIC POWER AND ENERGY PRODUCED FROM LEE COUNTY RESOURCE RECOVERY FACILITY

AGENDA: 12/2/97 - REGULAR AGENDA - DECISION ON DECLARATORY STATEMENT - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\APP\WP\970898RE.RCM

CASE BACKGROUND

On July 17, 1997, Lee County, Florida (Lee County) filed a Petition for Declaratory Statement pursuant to Section 120.565, Florida Statutes, and Rule 25-22.020, Florida Administrative Code. The Legal Environmental Assistance Foundation (LEAF) filed a petition to intervene or request for hearing. In addition, Florida Power and Light (FPL) filed a "Memorandum of Law Addressing the Insufficiency of Lee County's Petition." Finally, a member of the Sierra Club National Solid Waste Committee submitted comments concerning Lee County's petition.

In a pleading dated September 2, 1997, Lee County waived the requirement that the Commission must answer the petition in 90 days as set forth in Section 120.565, Florida Statutes.

As discussed below, staff recommends that Lee County's petition for declaratory statement be denied.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission affirmatively answer Lee County's Petition for Declaratory Statement?

RECOMMENDATION: No, the Commission should deny Lee County's petition. It asks for an impermissibly broad statement of general applicability that would make a declaration upon the effect of statutes and rules on third persons. In addition, the petition can be denied on the merits since the capacity and energy produced by the Lee County Resource Recovery Facility falls under the category of "general" conservation goals, and does not qualify as the type of measure that may be counted towards meeting the numeric demand-side conservation goals of a utility.

STAFF ANALYSIS: Section 120.565, Florida Statutes, provides in pertinent part:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
>
> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

In its petition, Lee County states that it owns and operates the 40 MW Lee County Resource Recovery Facility, which is a solid waste facility under Section 377.709, Florida Statutes. (Petition at 4-5) Lee County is currently under contract to sell its net electrical energy output to FPL. (Petition at 5) According to the petitioner, the facility enables the county "to dispose of solid waste in an environmentally preferable manner" and it "contributes significantly to the State's energy conservation goals and to reducing the State's dependence on expensive fossil fuels." Id.

Lee County seeks a declaration that electric capacity and energy produced from its facility "is properly considered as an energy conservation measure and may properly be counted toward meeting the energy conservation goals of an electric utility pursuant to Section 366.82(2), Florida Statutes, and Commission Rule 25-17.0021(1), Florida Administrative Code." (Lee County Petition at 5-6) Lee County asserts it has a real and immediate need for this declaratory statement because the Commission's

interpretation and application of these statutes and rules has a direct affect on the County's ability to pursue firm capacity and energy contracts with electric utilities. (Lee County Petition at 2)

In Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So. 2d 928, 936-937 (Fla. 1st DCA 1990), the First District Court of Appeal addressed the permissible scope for declaratory statements. The court observed:

> [D]eclaratory statements are not to be used as a vehicle for the adoption of broad agency policies. Nor should they be used to provide interpretations of statutes, rules or orders which are applicable to an entire class of persons. Declaratory statements should only be granted where the petition has clearly set forth specific facts and circumstances which show that the question presented relates only to the petitioner and his particular set of circumstances. Thus, petitions which provide only a cursory factual recitation or which use broad, undefined terms . . . should be carefully scrutinized. . . . When an agency is called upon to issue a declaratory statement in response to a question which is not limited to specific facts and a specific petitioner, and which would require a response of such a general and consistent nature as to meet the definition of a rule, the agency should either decline to issue the statement or comply with the provisions of Section 120.54 governing rulemaking.

Id. at 937 (Emphasis omitted). See also Tampa Electric Company v. Florida Department of Community Affairs, 654 So. 2d 998, 999 (Fla. 1st DCA 1995)(The court found a declaratory statement that set forth "a general policy of far-reaching applicability" to be impermissibly broad); Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158, 162 (Fla. 1st DCA 1994)("[A]n administrative agency may not use a declaratory statement as a vehicle for the adoption of a broad agency policy or to provide statutory or rule interpretations that apply to an entire class of persons.").

In this case, the Commission cannot answer Lee County's petition without making a statement of general applicability concerning the role that solid waste facilities may play in the conservation goals setting process for electric utilities. This is true especially since Lee County presents no facts or circumstances which would distinguish it from the other solid waste facilities

throughout the state. Nor does Lee County state whether it is currently negotiating with a utility who is considering seeking authorization from the Commission to include the facility in its conservation goals. Even Lee County "recognizes that there may be policy implications associated with this [declaratory] statement, and that this issue may be suspectable to rulemaking in the future." (Lee County response to FPL memorandum at 7)

In addition, the requested declaration is contrary to the legislative requirement in Section 377.709(5)(a), Florida Statutes, which requires the Commission to "establish rules relating to the purchase of capacity or energy by electric utilities . . . from solid waste management facilities." The law in Florida is that a declaratory statement is not a rule. Florida Optometric, 567 So. 2d at 936 ("[D]eclaratory statements and rules serve clearly distinct functions under the scheme of Chapter 120.") Therefore, the specific rulemaking requirements in Section 377.709(5) also prohibit the Commission from granting the petition.

In Florida, "[a]n administrative agency cannot effectively repudiate one of its own rules by making a contrary expression in a declaratory statement." Regal Kitchens, 641 So. 2d at 162. If the Commission were to affirmatively answer the petition sought by Lee County, it would be ignoring its rule that goals will be reviewed, mod fied, or set only in a proceeding initiated for that purpose. Rule 25-17.0021(2), Florida Administrative Code. A declaratory statement procedure is not the goals setting proceeding envisioned by Rule 25-17.0021(2).

Because the declaratory statement requested by Lee County is impermissibly broad, staff recommends that it be denied. Staff makes this recommendation notwithstanding Lee County's argument that because this is an issue of first impression, the "declaratory statement may be granted by the Commission within the scope of incipient agency policy development, for which rulemaking is not required." (Lee County's response to FPL memorandum at 6) Nor does staff find Lee County's argument persuasive that the declaration sought "would apply, in a non-binding manner, to [only] one of a small number of potential purchasing electric utilities." Id. at 7.

Moreover, Lee County does not have standing to seek the declaratory statement. Lee County is impermissibly seeking a declaration as to the effect the purchase of energy and capacity from its facility will have on a utility's conservation goals, and not on itself. Manasota-88, Inc. v. Gardinier, Inc., 481 So. 2d 948, 949 (Fla. 1st DCA 1986)(Petitions for declaratory statements were denied that sought a declaration as to the effect of statutes

on third parties, contrary to Section 120.565). Lee County is not seeking a declaration as to the application of Section 366.82(2), Florida Statutes, and Rule 25-17.0021(1), Florida Administrative Code, to the "petitioner's particular set of circumstances" as required by Section 120.565(1), Florida Statutes.

Staff finds Lee County's argument unpersuasive that "the requested declaratory statement may have incidental effects on another entity . . . [but] these effects are incidental to the determination requested by the County and are neither mandatory nor determinative of any other party's substantial interests." (Lee County response to FPL memorandum at 2-3) Under the "Florida Energy Efficiency and Conservation Act" (FEECA), Sections 366.80-366.85, Florida Statutes, and the Commission's rules implementing the act, it is a utility that must come before the Commission to have its conservation goals set and then seek approval for measures to meet those goals.

Nor is Lee County's reliance on Department of Administration, Division of Retirement v. University of Florida, 531 So. 2d 377 (Fla. 1st DCA 1988), persuasive. (Lee County response to FPL memorandum at 4) In this case, the First District found that the university's duties to inform and provide information to employees about their retirement options, and to make appropriate retirement contributions, to be sufficient to confer standing to seek a declaratory statement concerning the university's responsibilities. According to the court, "[t]he allegations of substantial interest were sufficient to show that the order had an impact upon it as an entity." Id. at 380. In the petition before the Commission, a declaration that the facility's capacity and energy can be considered a conservation measure such that it may be counted toward a purchasing utility's conservation goals is not the substantial interest required to have standing under Section 120.565.

Thus, Lee County's petition should also be denied because it is impermissibly asking for the Commission's interpretation of statutes and rules that will affect a utility's conservation goals, and not the petitioner's.

As addressed above, staff recommends Lee County's request for declaratory statement be denied on procedural grounds. However, the petition can also be denied on the merits.

FEECA, which became effective July 1, 1980, mandated that the Commission develop and adopt goals and plans related to the conservation of electric energy and natural gas usage. Pursuant to this requirement, the Commission adopted Rules 25-17.001 through

25-17.015, Florida Administrative Code. These rules require general goals as well as specific demand-side numeric goals.

Lee County has referenced Rules 25-17.001 and 25-17.0021, Florida Administrative Code, in part, as permitting electric capacity and energy from its "solid waste facility" to be considered as an energy conservation measure that could count towards meeting the energy conservation goals of an electric utility.

Rule 25-17.001, Florida Administrative Code, provides general information regarding conservation goals and related matters and identifies two types of conservation goals, numeric demand-side goals and general goals. Subsections (2), (3), and (4) of this rule speak specifically to increasing the efficiency of "end-use" consumption and reducing peak demand and kilowatt hour consumption. Subsection (5) of Rule 25-17.001, provides in pertinent part:

> In addition to specific demand-side goals, general goals and methods for increasing the overall efficiency of the bulk electric power system of Florida are broadly stated since these methods are an ongoing part of the practice of every well-managed electric utility's programs and shall be continued.

(Emphasis added) These general goals are further defined in paragraphs (5)(a) through (5)(f), with paragraph (5)(d) specifically addressing small power producers like the Lee County facility. Paragraph (5)(d) encourages all electric utilities to:

> Aggressively integrate nontraditional sources of power generation including cogenerators with high thermal efficiency and small power producers using renewable fuels into the various utility service areas near utility load centers to the extent cost effective and reliable.

This rule clearly indicates that though the Commission encouraged reliance on general conservation efforts much like Lee County's facility, it is not appropriate to count such capacity and energy sales as demand-side conservation efforts.

Any remaining confusion is eliminated by Rule 25-17.0021(1), which provides that:

> The goals shall be based on an estimate of the total cost effective kilowatt and kilowatt-hour savings reasonably achievable through demand-side management in each utility's service area over a ten-year period.

(Emphasis added) Similarly, subsections (3) and (4) of Rule 25-17.0021 speak specifically to meeting conservation goals through cost-effective demand-side management. Furthermore, numeric conservation goals are based on incremental demand and energy reductions. The Lee County facility is an existing facility currently selling energy to FPL. Therefore, energy from the facility cannot be categorized as an incremental reduction in load.

City of Gainesville vs. Florida Public Service Commission, 3 F.A.L.R. 2448-A (1981), also supports the conclusion that Lee County's petition can be denied on the merits. In this case, the City of Gainesville had challenged several Commission rules that implemented FEECA. In its final order, the Division of Administrative Hearings' Hearing Officer made several findings of fact and conclusions of law dealing with the applicability of "supply-side" measures to a utility's conservation goals. In particular, the Hearing Officer found that the Commission has consistently and appropriately determined that specific conservation goals be met with end use programs. Id. at 2450-A. The Hearing Officer also found that:

> Whatever ambiguity there is in the emergency rules as to whether supply side programs could be used to meet the specific goals, there is no ambiguity under the permanent rules adopted by the Commission. Rule 25-17.02[1] sets specific goals for "end use KW [kilowatt] demand" and "KWH [kilowatt-hour] consumption." End use solutions are clearly required under the permanent rules.

Id. (Emphasis added) Ultimately, the Hearing Officer concluded that the "Commission's interpretation of its emergency rules as requiring end use as opposed to supply side solutions to meet the specific goals is reasonable and compatible with the language of the rule. The interpretation is even more obvious in the adopted permanent rules." Id. at 2451-A. Staff believes this conclusion is applicable to Lee County's request for declaratory statement, and, as such, the request must be denied.

Staff agrees that capacity and energy produced by the Lee County facility constitutes an effective conservation effort as recognized in Section 377.709, Florida Statutes. However, staff recommends that though capacity and energy from the facility falls within the category of "general" conservation goals, it does not

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[1] Rule 25-17.02 has been repealed and replaced by Rule 25-17.0021.

qualify to count towards meeting the numeric conservation goals of an electric utility.

ISSUE 2: Should the Commission grant the Legal Environmental Assistance Foundation's petition to intervene, or, in the alternative, request for hearing?

RECOMMENDATION: If the Commission approves staff's recommendation to deny Lee County's petition for declaratory statement, LEAF's petition for intervention/request for hearing will be rendered moot.

STAFF ANALYSIS: On August 22, 1997, LEAF filed a petition to intervene, or, in the alternative, requested a hearing. Lee County filed a memorandum in response to LEAF's petition on September 11, 1997. On October 15, 1997, LEAF responded to Lee County's response to the LEAF petition. By letter dated October 17, 1997, Lee County responded to the October 15, 1997, LEAF response.

If the Commission approves staff's recommendation in Issue 1, LEAF's petition to intervene and request for hearing will be rendered moot. Accordingly, it is not necessary for the Commission to act on the petition.

ISSUE 3: Should the Commission accept Florida Power and Light Co.'s Amicus Curiae Memorandum of Law Addressing the Insufficiency of Lee County's Petition and the Sierra Club National Solid Waste Committee's comments?

RECOMMENDATION: Yes, the Commission should accept FPL's Amicus Curiae Memorandum of Law Addressing the Insufficiency of Lee County's Petition and the Sierra Club National Solid Waste Committee's comments.

STAFF ANALYSIS: On August 25, 1997, FPL filed a Motion for Leave to File an Amicus Curiae Memorandum of Law Addressing the Insufficiency of Lee County's Petition, as well as the accompanying Memorandum. Lee County was granted additional time to respond to FPL's memorandum, and did so on September 5, 1997. In response to Lee County's response, FPL withdrew one paragraph from its memorandum by letter dated September 9, 1997.

On September 15, 1997, a member of the Sierra Club National Solid Waste Committee submitted substantive concerns regarding Lee County's petition. Lee County responded to these comments on October 17, 1997.

Section 350.042(1), Florida Statutes, allows a commissioner to hear ex parte communications concerning declaratory statements filed under Section 120.565, Florida Statutes. Because FPL and the Sierra Club could have made its comments directly to the members of the Commission, it is appropriate to include them in the record of this proceeding for the Commission's consideration. Moreover, Lee County has taken advantage of the opportunity to file written responses to these comments. The Commission has also considered such comments in prior declaratory statement proceedings. In re: Petition of Florida Power and Light Company for a Declaratory Statement Regarding Request for Wheeling, 89 F.P.S.C. 2:298, 300 (1989).

Finally, FPL's amicus curiae memorandum also raises the point that Lee County's petition is an improper attempt to elicit a rule or general policy statement and that it is an improper attempt to address the applicability of statutes and rules to other persons.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: If the Commission accepts staff's recommendation in Issue 1, this docket should be closed.

STAFF ANALYSIS: If the Commission votes to deny the petition as recommended by staff, a final order disposing of the petition should be entered and the docket closed.