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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Jun 11, 2014

Dept. of Environmental Protection
Office of General Counsel

IN RE: FLORIDA POWER & LIGHT CO.
TURKEY POINT UNITS 6 & 7
POWER PLANT SITING
APPLICATION NO. PA 03-45A3

DOAH CASE NO. 09-3575-EPP
OGC CASE NO. 09-3107

THE CITY OF MIAMI'S MOTION FOR RECONSIDERATION

The CITY OF MIAMI (hereinafter the "CITY") moves the Governor and the Cabinet members, acting as the Power Plant Siting Board, to reconsider their May 19, 2014 Final Order On Certification ("Final Order"). The purpose of this motion for reconsideration is to clarify the breadth of the Governor and the Cabinet's authority to approve, deny, or modify Florida Power & Light Company's ("FPL") application.¹ As grounds, the CITY states the following:

SUMMARY

On May 13, 2014, Florida's Governor and the Cabinet approved an FPL plan to erect miles of oversized transmission lines throughout densely populated, urban and residential neighborhoods in Miami-Dade County, additional transmission lines adjacent to Everglades National Park, and to expand its Turkey Point nuclear power plant. As outlined in the company's proposal, this is the largest utility project contemplated in over forty years.

¹ The Governor and the Cabinet have the inherent power to reconsider any order entered where the proceeding is essentially judicial in nature and action is taken before an appeal has been filed or before the time to file a notice of appeal has lapsed. *See Smull v. Town of Jupiter*, 854 So.2d 780 (Fla 4th DCA 2003). In addition to the arguments advanced herein, the CITY reaffirms all of the arguments made in its Exceptions to the Recommended Order, Responses to Exceptions, and any arguments made before the Governor and the Cabinet, sitting as the Power Plant Siting Board.

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Based on comments made at the Cabinet Meeting and the standards of review articulated in the Final Order, there may have been uncertainty regarding the full scope of the Governor and the Cabinet's right, ability, and authority as the Power Plant Siting Board.²

By statute, the decision to approve, deny, or modify FPL's short-sighted application is in the hands of the Governor and the Cabinet members. FPL does not have a right to approval of its project simply because it submitted an application. The Governor and the Cabinet members had the right, the ability, and the authority to deny FPL's application. If they chose to allow this project to go forward, it was the Governor and the Cabinet's decision to do so.

ARGUMENT

As the Power Plant Siting Board, the Governor and the Cabinet make their own judgments over policy and conclusions of law as if no decision had been previously rendered. This is the *de novo* standard. The *de novo* standard still applies when conclusions of law are labeled as factual findings or when factual findings are infused with policy considerations.³ In addition, the Governor and the Cabinet may reject or modify findings of fact that are not supported by competent substantial evidence.⁴

Nonetheless, the Final Order obscures the extent of the Governor and the Cabinet's authority in this case by stating that "the Siting Board may not overturn the [Administrative Law

² After her vote to approve FPL's application, Attorney General Bondi told the Miami Herald, "I hope they choose to do the right thing," and "[o]ur authority is very limited." See <http://tinyurl.com/unpopular-lines>; see also Transcript of Meeting of the Governor and Cabinet at 89, 104 (May 13, 2014) (available at <http://www.myflorida.com/myflorida/cabinet/mart.html>).

³ *Battaglia Prop., Ltd. v. Fla. Land and Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. Dist. Ct. App. 1994); *Pillsbury v. Dep't of Health & Rehabilitative Servs.*, 744 So. 2d 1040, 1042 (Fla. Dist. Ct. App. 1999); *Baptist Hosp., Inc. v. Dep't of Health & Rehabilitative Servs.*, 500 So. 2d 620, 622 (Fla. Dist. Ct. App. 1986); See also *Leapley v. Board of Regents*, 423 So. 2d 431 (Fla. Dist. Ct. App. 1982).

⁴ Section 120.57(1)(1)

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Judge's] conclusions of law in areas outside the Board's substantive jurisdiction."⁵ The Final Order fails to identify a single conclusion of law that the Governor and the Cabinet may not overturn. In truth, all the conclusions of law in this case are within the Power Plant Siting Board's substantive jurisdiction. Therefore, this prohibition does not apply here.

Moreover, the Governor and the Cabinet members must not defer to FPL in this proceeding. Instead, FPL, as the applicant, "carries the 'ultimate burden of persuasion' of entitlement through all proceedings, of whatever nature, until such time as final action has been taken by the agency."⁶ Hence, FPL is not entitled to certification as of right. Instead, it must affirmatively demonstrate "whether, and the extent to which the location, construction, and operation" of its project complies with the Power Plant Siting Act's requirements.⁷

Rather than simply rubber stamp FPL's application, the Governor and the Cabinet are required to ensure that FPL has met this burden concerning each of the seven elements of the Power Plant Siting Act's test for certification. Specifically, for the Governor and the Cabinet members to approve FPL's project, as described in the application, it must:

- (a) Provide reasonable assurance that operational safeguards are technically sufficient for the public welfare and protection.
- (b) Comply with applicable nonprocedural requirements of agencies.
- (c) Be consistent with applicable local government comprehensive plans and land development regulations.
- (d) Meet the electrical energy needs of the state in an orderly, reliable, and timely fashion.
- (e) Effect a reasonable balance between the need for the facility as established pursuant to s. 403.519 and the impacts upon air and water quality, fish and wildlife, water resources, and other natural resources of the state resulting from the construction and operation of the facility.

⁵ Page 2 of the Final Order

⁶ *Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So.2d 779, 787 (Fla. 1st DCA 1981).

⁷ See section 403.509(3)

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- (f) Minimize, through the use of reasonable and available methods, the adverse effects on human health, the environment, and the ecology of the land and its wildlife and the ecology of state waters and their aquatic life.
- (g) Serve and protect the broad interests of the public.⁸

Likewise, the determination of need issued by the Public Service Commission (PSC) does not compel the Governor and the Cabinet to approve FPL's application. Although the PSC is the sole forum for the determination of need for power plant projects, the Power Plant Siting Act gives final approval over whether these plants should actually be built to the Governor and the Cabinet.⁹ As shown above, it is wholly the responsibility of the Governor and the Cabinet members to balance the need for a power plant, as determined by the PSC, against the impacts to Florida's natural resources.¹⁰ The Governor and the Cabinet must then consider that balance against the six other requirements of the Power Plant Siting Act's test for certification.¹¹

All this authority is granted to the Governor and the Cabinet members along with the corresponding responsibility to "[s]erve and protect the broad interests of the public" as mandated by law.¹² By deferring to FPL, the Governor and the Cabinet disregarded their responsibility to the residents of Miami-Dade County.

⁸ *Id.*

⁹ *See* sections 403.519 and 403.509(3)

¹⁰ *See* section 403.509(3)(e)

¹¹ *See* section 403.509(3)(a)-(d) and (f)-(g)

¹² *See* section 403.509(3)(g)

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WHEREFORE, in light of their broad authority, the CITY OF MIAMI respectfully requests that the Governor and the Cabinet, acting as the Power Plant Siting Board: 1) recede from their May 19, 2014 Final Order On Certification, 2) grant the CITY's motion to reconsider FPL's application, and 3) deny, modify, or remand FPL's application for the reasons set forth in the CITY's Exceptions to the Recommended Order, Responses to Exceptions, and at the May 13, 2014 Cabinet Meeting.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the counsels listed in the attached Service List, this 11th day of June, 2014 via e-mail only.

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