STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In Re: Seminole Electric Cooperative)		
Seminole Generating Station Unit 3	)	DEP CASE NO. 06-0780
Power Plant Siting Application	)	DOAH CASE NO. 06-0929EPP
No. PA 78-10A2.	)	
	)	

SEMINOLE ELECTRIC COOPERATIVE, INC.'S RESPONSE TO DEP'S MOTION TO WITHDRAW STIPULATION

Seminole Electric Cooperative, Inc. ("Seminole"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C.") hereby responds to the Department of Environmental Protection's ("DEP") Motion to Withdraw Stipulation which was filed on June 19, 2007. In its filing, DEP seeks to have the Joint Stipulation Between the Parties, filed on February 22, 2007, "deemed void or withdrawn,"[1] and based on a lack of such a Joint Stipulation, requests that Seminole's June 12, 2007 Motion to Relinquish Jurisdiction be denied and an administrative hearing be conducted. In sum, DEP's Motion should be denied for failure to provide a factual or legal basis for withdrawal of the Joint Stipulation, and DEP's failure to address its other equivalent stipulations and filings in this proceeding. Regardless of the ruling on DEP's Motion, however, there continues to be no basis to conduct a hearing in this matter.

In accordance with Section 403.508(6)(a), Florida Statutes ("F.S."), DEP entered the Joint Stipulation freely, knowingly and deliberately, stipulating with all parties that there are "no disputed issues of fact" and "no disputed issues of law to be raised at the certification hearing" which was previously scheduled in this proceeding, and that they "do not object to the certification of the project" or "the entry of a final order of certification for the Project by the

[1] DEP is presumably seeking only to have its inclusion in the Joint Stipulation withdrawn, since its Motion provides no statement regarding conferring with any other party and does not purport to be on behalf of any other party.

Secretary." Joint Stipulation, p. 7. DEP now argues that the Stipulation is "so deficient that it should be deemed a nullity" and that new "facts" and pending policy formulation justify its withdrawal.

Requirements for Stipulations under Section 403.508(6), F.S.

DEP's argument that the Stipulation should have contained a recitation of "what the agreed facts and law were" and "identify the facts that were uncontested," attempts to read into the plain language of Section 403.508(6)(a), F.S., requirements that are simply not there. That provision merely requires the parties to stipulate that "there are no disputed issues of fact or law to be raised at the certification hearing." Contrary to DEP's assertions, there is no requirement that the parties agree upon specific facts or state how those facts relate to the law, or address how those facts result in issuance of certification in a stipulation entered under this statute. There is no provision found or cited by DEP in Section 403.508, or any other provision of the Power Plant Siting Act ("PPSA"), that requires such a stipulation to identify specific facts or apply those facts to the law before seeking cancellation of the site certification hearing. Rather, pursuant to Section 403.508(6)(d)2., F.S., "parties may submit proposed recommended orders to the Department no later than 10 days after the Administrative Law Judge issues an order relinquishing jurisdiction" to assist the Secretary by providing proposed Findings of Fact and Conclusions of Law. (emphasis added). Significantly, as described in Seminole's June 19 Motion, DEP and Seminole jointly and voluntarily submitted such a Proposed Final Order to the Secretary, wherein DEP expressly agreed to and included detailed Findings of Fact and Conclusions of Law. (See Notice of Filing Joint Proposed Final Order, dated March 5, 2007). Accordingly, not only does Section 403.508(6)(a), F.S. not require the Stipulation to contain

agreed upon facts or the application of those facts to the law, but DEP agreed to such details in the Joint Proposed Final Order.

Therefore, far from being "so deficient," the Stipulation entered into by all parties, including DEP, on February 19, 2007 fully satisfied the legal requirements of Section 403.508(6)(a), F.S. The terms of this stipulation are neither "so vague as to be unenforceable" nor "anticipate future agreement on critical issues" as DEP would now seek to have the statute and the Stipulation require. All of the parties, including DEP, were simply following the process created by the PPSA for situations where the parties have resolved any and all disputed issues. This same process was followed by the parties and the ALJ in the Orlando Utilities Commission's coal-fired IGCC project site certification proceeding. DOAH Case No. 06-0735EPP. DEP found this process, involving an equivalent stipulation of the parties, to be fully acceptable when it entered a final order granting certification to the OUC coal fired IGCC project on December 8, 2006. DEP fails to explain why the same stipulation that it found to be wholly acceptable for one site certification proceeding six months ago is not acceptable in this site certification proceeding. Accordingly, the Joint Stipulation for Seminole's Unit 3 Project meets the requirements of the statute, reflects the unambiguous agreement of the parties to those statutory requirements, and conforms to recent precedent.

Minimum Requirements to Withdraw from a Stipulation

As DEP admits in its Motion, the parties to litigation are bound by stipulations on matters appropriate for such stipulations. Gunn Plumbing, Inc. v. Dania Bank, 252 So. 2d 1 (Fla. 1971) ("A stipulation properly entered into and relating to a matter to which it is appropriate to stipulate is binding upon the parties." 252 So. 2d at 4). Further, a stipulation is not only binding upon the parties, it is also binding upon trial and appellate courts that review such stipulations,

and by extension, to DEP when acting in its judicial capacity in entering a final order in an administrative proceeding such as this PPSA proceeding. McGoey v. State, 736 So. 2d 31 (Fla. 3rd DCA 1999) ("When appropriately made, stipulations are binding not only upon the parties but also upon the trial and appellate courts."). Florida courts have also held that "it is well settled that a stipulation entered into between parties in good faith and without fraud, misrepresentation or mistake is binding on the parties and the court. . . . Unless grounds for rescission or withdrawal are shown, the trial court is bound to strictly enforce the agreement between the parties." EGYB, Inc. v. First Union Nat'l Bank of Florida, 630 So.2d 1216, 1217 (Fla. 5th DCA 1994). Beyond attempting to read new legal requirements into the Power Plant Siting Act, DEP has offered no evidence or allegations that this Stipulation results from "fraud, misrepresentation or mistake."

Further, "if a party enters into an agreement, not as a result of a mistake of fact, but merely due to a lack of *full* knowledge of the facts, caused by the parties' failure to exercise due diligence to ascertain them, there is no proper ground for relief." Sunshine Utilities of Cent. Florida, Inc. v. Florida Public Service Comm'n, 624 So. 2d 306, 310 (Fla. 1st DCA 1993) (emphasis added). In Florida Independent Auto. Dealers Ass'n Helath and Welfare Ben. Plan v. Fidelity Sec. Life Ins. Co., 636 So. 2d 37 (Fla. 5th DCA 1994), an insolvent insurance company sought to be excused from a stipulation that its receiver had executed. The insurance company based its request for relief from the stipulation on the receipt of erroneous information regarding the validity of certain claims. However, the trial court, which was upheld by the appellate court on this issue, found that the erroneous information was not the product of any fraud, overreaching or misrepresentation. In fact, the receiver for the insolvent insurance company had access to the correct information prior to entering into a stipulation. In those circumstances, the

insurer was held to the terms of the stipulation due to its lack of due diligence in ascertaining the actual facts. However, the stipulation in that case was voided for other procedural reasons.

In a similar vein, DEP argues that new intervening "facts" concerning the composition of the Siting Board and the potential regulation of greenhouse gas emissions is information that was not available to DEP at the time it entered into the Joint Stipulation. [2] To the contrary, as of February 19, 2007, the date DEP signed the Joint Stipulation, it was common knowledge that a new Governor and two new Cabinet members had taken office and therefore were new members of the Siting Board. Similarly, the issue of greenhouse gases had been widely discussed both among policymakers and the public for the past several years. Again, DEP accurately states that it does not currently regulate greenhouse gas emissions, and at the time of signing the Joint Stipulation was seeking legislative authority to develop an inventory of greenhouse gas emissions in Florida. Further, because DEP's "new facts" were common knowledge, DEP has not met the minimum requirements to obtain relief from a stipulation in the Sunshine Utilities decision (624 So. 2d 306) -- that is, that the facts were beyond knowledge by a reasonable exercise of due diligence. Accordingly, DEP has not identified any new, mistaken or unknown "facts" that would allow DEP to withdraw from its Stipulation.

Further, allowing DEP to withdraw from its Stipulation at this date, and requiring a certification hearing, would be highly prejudicial to Seminole. Specifically, the 2012 in-service date determined necessary by the Public Service Commission could not be met if this proceeding

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[2] DEP's Motion is also legally deficient, as the courts in both Gunn Plumbing (cited above) and Fawaz v. Florida Polymers, 622 So. 2d 492, 495 (Fla. 1st DCA 1993) (and cases cited therein) held that a motion seeking to withdraw from a stipulation must be supported by an affidavit showing good cause, asserting that the stipulation was obtained by fraud, misrepresentation or mistake of fact not ascertainable through an exercise of reasonable due diligence. See also Curr v. Helene Transp. Corp., 287 So. 2d 695 (Fla. 3rd DCA 1973). DEP has offered no such affidavit showing good cause to relieve DEP of this Stipulation, rendering its Motion to Withdraw Stipulation legally deficient and baseless.

is subjected to months of additional pre-hearing, hearing and post-hearing processes, not to mention potential appeals.

DEP's Additional Stipulations and Filings

Significantly, DEP fails to acknowledge or address several other separate stipulations and filings that DEP submitted into the record in this proceeding, each reflecting DEP's belief that there were no disputed issues of fact or law and that the Project should be certified because it met the requirements of the PPSA. For example, DEP stated its position in the Prehearing Stipulation filed on January 4, 2007, as follows:

> The Department of Environmental Protection has reviewed Seminole's application for site certification for the Seminole Generating Station Unit 3 Project. It is the Department's position that Seminole's application for site certification for the Project should be granted in accordance with conditions of certification proposed by the Department of Environmental Protection. The proposed electrical generating facility meets all requirements of the Florida Electrical Power Plant Siting Act, Section 403.501, et seq.

(emphasis added). DEP's instant Motion fails to address these very substantial statements by the Department acknowledging its belief that Seminole's proposed power plant meets the requirements for certification under the PPSA, and which fails to identify any disputed issues of fact or law needing to be addressed at a hearing. Further, on January 8, 2007, DEP entered into a Joint Motion of FDEP, Seminole Electric Cooperative and Sierra Club for a continuance to allow time for cancellation of the previously-scheduled site certification hearing. That Joint Motion acknowledged a resolution of outstanding issues between Seminole and the Sierra Club, and stated that "Seminole, the Sierra Club and the Department [of Environmental Protection] intent [sic] to pursue cancellation of the site certification hearing, pursuant to Section 403.508(6), Florida Statutes." Joint Motion at page 1. Further, paragraph 8 of this Joint Motion states that "in light of the Settlement Agreement between the Sierra Club and Seminole,

the undersigned parties [which includes DEP] believe that there are no remaining disputed issues of fact or law to be addressed at the site certification hearing in this matter." Joint Motion at page 3. The Joint Motion went on to say that "there is no longer a statutory requirement to conduct a site certification hearing if there are no disputed issues of law or fact exist [sic] among the parties to this site certification proceeding on Seminole's Unit 3 Project." DEP also filed a Staff Analysis Report on November 9, 2006 and a Joint Proposed Final Order on March 5, 2007, recommending certification of the Project and identifying no further issues that should be considered at an administrative hearing. Accordingly, even if DEP were allowed to withdraw from the Joint Stipulation dated February 19, 2007, DEP would still be bound by its other stipulation and filings which it submitted into the record of this proceeding.

Consideration of Greenhouse Gas Emissions

Seminole is well aware of the issues related to emissions of greenhouse gases and possible future regulation of such emissions. Seminole has already taken steps to mitigate the emissions of such greenhouse gases, as it has acknowledged in this proceeding. This is reflected, in part, in the Settlement Agreement between Seminole and the Sierra Club which was attached to the Joint Motion of the parties dated January 8, 2007 and filed in this proceeding. See paragraphs 1 and 2, found on page 2 of the Settlement Agreement attached to that Joint Motion. Seminole committed to use its best efforts to investigate additional renewable energy opportunities and incentives, as well as to continue to develop and implement additional programs that will result in offsets of emissions of greenhouse gases. The issue of CO2 cost was also addressed separately in the Public Service Commission's (PSC) affirmative need order for Seminole's Unit 3 Project, dated August 7, 2006. At pages 5 and 7 of its Final Order, the PSC discussed the economic evaluation of the Seminole Unit 3 Project based, in

part, on environmental costs from a future CO2 emission allowance program. The PSC's final need determination order is found in Appendix II-1 of the DEP's Staff Analysis Report filed with the Division on November 9, 2006. Thus, the issue of greenhouse gases has been addressed in this proceeding; it is not a new issue that must now be addressed at DEP's last minute behest.

Seminole's proposed new Unit 3 is also not avoiding or circumventing any regulatory requirements. To the contrary, DEP readily acknowledges in paragraph 6 of its Motion that it does not currently regulate emissions of carbon dioxide, and moreover, pursuant to Section 403.511(5)(a), F.S., of the Power Plant Siting Act, "an electrical power plant certified pursuant to this act shall comply with rules adopted by the Department subsequent to the issuance of the certification which prescribed new or stricter criteria, to the extent that the rules are applicable to the electrical power plants. . . . [S]ubsequently adopted rules which prescribe new or stricter criteria shall operate as automatic modifications to certifications." (emphasis added). Thus, if the nascent greenhouse gas regulatory programs that are being considered by the federal and state legislatures are adopted by the Florida Legislature, and when DEP adopts rules to implement such legislation, the Seminole Unit 3 Project will be subject to those future regulations. Accordingly, granting DEP's Motion to Withdraw from the Stipulation will not allow the Seminole Unit 3 Project to be subjected to more or less regulation; it is subject to existing law, and will be subject to future laws.

Given the lack of any federal or state legislative directive or program to regulate greenhouse gas emissions, DEP's apparent approach to undertake such regulation on a case-by-case basis, presently in the context of the certification of the Seminole Unit 3 Project, is improper under Florida's Administrative Procedure Act (APA). As prescribed by Section 120.54(1)(a),

F.S., "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by [Section 120.54] as soon as feasible and practicable."[3] Yet DEP's premise for requesting a certification hearing in this case (stated in paragraph 10 of its Motion) is that "greenhouse gases by utilities and other producers of air pollution is an issue for which state policy is currently being formulated" and "should be considered in the context of this proceeding." To the extent DEP is attempting to develop statewide policy in the context of this certification proceeding, such action is prohibited by the APA sections cited above, as well as Section 120.53, F.S. requiring specific statutory authority to adopt a rule. Moreover, if DEP is attempting to develop incipient policy in this proceeding (assuming, arguendo, clear legislative authority), requesting an administrative hearing in this context essentially (and improperly) delegates its rulemaking authority to develop such policy to the Siting Board.

In addition to DEP not regulating carbon dioxide emissions, Governor Crist recently vetoed CS/SB 7123, cited by DEP at paragraph 9 of its Motion for the proposition that the "Florida Legislature passed legislation expressing concern over the impact of greenhouse gases," including providing DEP authority to develop an inventory of greenhouse gas emissions in Florida. It is significant that by this veto, the state of Florida has deferred consideration of any state-wide legislatively-enacted regulatory program until at least the 2008 Legislative session. In the absence of any Florida legislation or rules on the subject of greenhouse gases, it is unfathomable that any orderly development of public policy on

[3] § 120.52(15) states in relevant part, " 'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

greenhouse gases can be developed in a single site certification proceeding under the policy formulation process that DEP is now proposing.

DEP's Additional Issues That "Should be Considered"

In paragraph 15 of its Motion, DEP for the first time identifies issues which it states "should be considered in this proceeding." Eight of the issues relate to greenhouse gases and comprise an unjustifiable attempt to ask additional "completeness" or "sufficiency" questions, nearly a year late.[4] DEP determined that Seminole's Site Certification Application was complete on March 24, 2006. On May 15, 2006, DEP filed a Notice of Insufficiency requiring Seminole to respond to more than 75 questions and subparts from 10 separate agencies or divisions; the issues DEP now identifies were not included. Following Seminole's response, DEP formally determined that Seminole's application contained sufficient information on July 26, 2006. Further, DEP issued its Staff Analysis Report on November 9, 2006, and entered a Prehearing Stipulation on January 4, 2007, identifying all issues about which DEP or any other agency expressed concern, and its position on all issues, including a recommendation that the certification should be granted. In neither document did DEP identify the issues it now raises in paragraphs 15(a) through (j) of its Motion. Accordingly, not only is there no legal basis for raising these issues, or a standard for considering them, DEP has repeatedly failed to identify them in a timely manner, and thus should be precluded from raising them at this time.

In paragraph 15(J) of its Motion, DEP suggests that one of the issues to be considered at a future administrative hearing is "whether additional conditions of certification can address these concerns" related to greenhouse gas emissions. However, DEP's own Rule 62-

[4] Curiously, DEP has also raised mercury emissions as an issue needing further consideration, when there are existing regulatory standards for such emissions and DEP has already thoroughly evaluated and stipulated to the Seminole Unit 3 Project's ability to comply with such requirements. In fact, the Project will result in a facility-wide reduction in mercury emissions, and Unit 3 will be subject to a limit several times more stringent than required.

17.133(6), F.A.C., provides that "any . . . proposed condition must cite the specific statutes, rule, regulation, or ordinance as applicable which provides the substantive, nonprocedural legal authority for the agency's jurisdiction for the . . . proposed condition." Given DEP's admission that there are no applicable regulatory requirements for greenhouse gas emissions, it is uncertain how DEP could propose any "additional conditions of certification" while complying with its requirements to cite the specific authority for such conditions.

Importantly, the Order of Remand entered by the DEP Secretary on April 4, 2007, makes no reference to greenhouse gas emissions as an issue that must be addressed as part of the Secretary's request for additional stipulations of the parties or as an issue that should be raised at any future administrative proceedings. It is therefore uncertain what basis DEP now has for suggesting that effects and controls of greenhouse gas emissions are issues that should be considered in this proceeding under the Order of Remand. Rather than representing a reasonable extension of the Order of Remand, it seems that DEP's recitation of greenhouse gas emission issues in its Motion to Withdraw Stipulation is offered more to infuse new issues into this already-settled case than to shed any light on the issues that the Secretary requested be addressed under the Order of Remand, or that the PPSA requires be addressed in a certification proceeding.

Conclusion

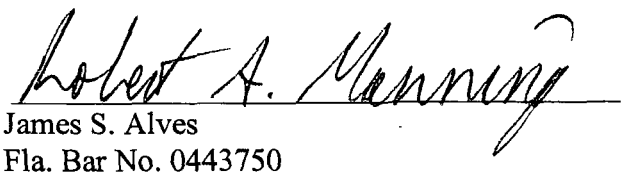
For the foregoing reasons, Seminole Electric Cooperative requests that the ALJ deny DEP's Motion to Withdraw Stipulation. DEP must be held to the terms of its multiple stipulations and filings that the Seminole Unit 3 Project meets the requirements for certification under the PPSA and that no disputed issues of fact or law exist that warrant a hearing in this proceeding. Accordingly, Seminole requests that the ALJ enter an order to relinquish

jurisdiction to DEP for entry of the final order in this proceeding, for the reasons stated in Seminole's Motion.

Counsel for Seminole is available for a hearing on these Motions if the ALJ believes it to be helpful.

Respectfully submitted this 26th day of June, 2007.

HOPPING GREEN & SAMS, P.A.

By: 

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I HEREBY CERTIFY that copies of the foregoing have been furnished to the following by U.S. Mail on this 26th day of June, 2007:

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