IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

SEMINOLE ELECTRIC COOPERATIVE, INC., Appellant,	
v.	Case No. 5D07-3005
	DOAH Case No. 06-929EPP
STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	DEP/OGC No. 06-0780
Appellee.	

REPLY BRIEF OF APPELLANT SEMINOLE ELECTRIC COOPERATIVE, INC.

On Administrative Appeal from a Final Order of the Department of Environmental Protection

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I. DEP'S SUBSTITUTE FACTS OMIT THE PPSA REVIEW PROCESS

The Department of Environmental Protection's (DEP's) alternative recitation of the facts (Answer Brief, pp. 1-5) starts with Seminole's application of March 9, 2006 and then jumps ahead to the Joint Stipulation Between the Parties ("Joint Stipulation") dated February 22, 2007. But the events during the intervening eleven months are not, as DEP claims, "irrelevant" or mere "procedural descriptions." (Answer Brief, p.1.) During this period DEP and other agencies[1] conducted an incremental, comprehensive review of Seminole's Unit 3 application in accordance with specific statutory procedures and standards, culminating in DEP's written analysis[2] recommending certification of Unit 3 subject to Conditions of Certification. (Initial Brief, pp. 7-10.)

This multi-agency review and analysis is the foundation of the Joint Stipulation. Most importantly, the documentation of Seminole's submittals and the agency determinations established an undisputed and inherently reliable evidentiary basis for certification of Unit 3. This characterization is verified in the

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[1] One of the participating agencies, the St. Johns Water Management District, is inadvertently referred to as the Southwest Water Management District on Initial Brief pages 2 and 8.

[2] This 230 page report (including attachments) [R. 2741-977] is referred to as the "Staff Analysis Report," "written analysis," or "report." It is summarized in the Initial Brief on page 8.

Joint Stipulation, which confirmed that the following shall constitute the "evidentiary record":

> ...the Application for Site Certification, Seminole's Response to Sufficiency Request, and the FDEP's Staff Analysis Report, submitted on November 9, 2006, including the several agency reports and proposed conditions of certification.

[R. 3543.] Additional language in the Joint Stipulation (nowhere acknowledged in DEP's Answer Brief) states in part:

> The parties agree that the Site Certification Application, as supplemented by the responses to agency sufficiency questions, and the agreed-upon conditions of certification provide reasonable assurances that construction and operation of the proposed Seminole Generating Station Unit 3 Project will comply with all applicable agency standards.

[R. 3539.] And this paragraph (also not mentioned in DEP's Answer Brief) verifies that all impacts have been accounted for:

> Environmental and other impacts of the Project have been assessed and determined. <u>All impacts have been adequately addressed</u> through the Conditions of Certification agreed to by the parties and attached to the FDEP's Staff Analysis Report as Appendix I.

[R. 3542.] (Emphasis added.)

These paragraphs in the Joint Stipulation explicitly link the statutorily-mandated analysis set forth in DEP's Staff Analysis Report to the parties'

conclusion, in a statutorily-authorized Joint Stipulation, that "all impacts" have been addressed through "Conditions of Certification" which are "agreed to by the parties." [R. 3542.]

In sum, the extensive Power Plant Siting Act (PPSA) review and analysis led to the Joint Stipulation, which incorporated the corresponding documentation into the evidentiary record. These are among the most significant facts of this case. It is revealing that DEP's Answer Brief ignores these key facts and parallel paragraphs in the Joint Stipulation. This deficiency in DEP's Statement of the Facts gives rise to a deficiency in the Argument of the Answer Brief. DEP attempts to down-grade the Joint Stipulation (at pp. 17-20) by ignoring the key facts of this case and important paragraphs in the Joint Stipulation.

II. THE JOINT STIPULATION WAS NOT DEFICIENT

A premise that is sprinkled throughout DEP's Answer Brief (see, e.g., pp. 18, 22, 41, 47), but is not adequately explained or justified (or supported with legal citations), is that the Joint Stipulation contained only "conclusory statements" and lacked specificity.

DEP is wrong. The Joint Stipulation did not "lack detailed facts" at all. The Joint Stipulation arose from a methodical regulatory review process, and the parties built this context into the Joint Stipulation by expressly incorporating into the evidentiary record Seminole's Site Certification Application and responses to

the agencies' sufficiency questions, as well as DEP's comprehensive analysis in the Staff Agency Report, which included reports from the commenting agencies and consensus Conditions of Certification. [R. 3542, 3543.] These undisputed materials, exceeding 2,500 pages and filled with detailed, technical information and agency expert analysis, set forth the stipulated "facts" of this case. See In re: OUC, Curtis H. Stanton Energy Center, Unit 3 IGCC Project Power Plant Siting Supplemental Application No. PA81-14SA3,. 29 F.A.L.R. 2551 (DEP Dec. 2006) (consistently citing to statements in the Site Certification Application, sufficiency responses, and Staff Analysis Report as "facts"). Whereas the Final Order characterized the Joint Stipulation and evidentiary record as "sparse" and the Answer Brief repeats that characterization, it is readily apparent from the full record below, and reading all of the Joint Stipulation, that the opposite is true.[3]

DEP's Answer Brief (pp. 18, 27-29) also argues that the Joint Stipulation was not binding on the agency head with regard to issues of law. Although ample authority supports the proposition that a stipulation cannot control a court's determination on an issue of law, the proceedings below were administrative in

[3] The PPSA states, "Parties may submit proposed recommended orders" to the agency head in stipulated cases. § 403.508(6)(d)2., Fla. Stat. A proposed order was co-authored and filed without objection by DEP and Seminole. [R. 3555-83.] (A proposed order also was filed in the OUC case, discussed below. In re: OUC, Curtis H. Stanton Energy Center, 29 F.A.L.R. at 2551-52.) In its Answer Brief (at p. 41, n. 10), DEP characterizes the proposed order as "just argument." In reality, the proposed order was the next logical step in implementing the Joint Stipulation.

nature. DEP fails to cite a single legal authority supporting the proposition that an agency cannot bind the agency head on issues of law through a statutorily-authorized stipulation. In the PPSA, the Florida Legislature has clearly indicated that "all parties" may "stipulate that there are no disputed issues of fact or law...." § 403.508(6)(a), Fla. Stat. (Emphasis added.)

Contrary to DEP's assertions, the Joint Stipulation was not light on facts and did not over-reach on issues of law.[4] And it was consistent with the governing statute. The agency head failed, as required by Section 403.509(1)(a), Fla. Stat., to issue a final order that applied the PPSA test (§ 403.509(3), Fla. Stat.) "in accordance" with the Joint Stipulation. No valid rationale has been articulated or is otherwise available for disregarding this PPSA requirement. DEP's claim that the Final Order "acknowledged" the Joint Stipulation (Answer Brief, p. 22) falls flat because its acknowledgement merely consisted of recognizing the Joint Stipulation's existence rather than its substantive and binding nature. DEP failed to act "in accordance" with the Joint Stipulation as required by statute.

III. DEP DID NOT AFFORD SEMINOLE AN "OPPORTUNITY"

DEP's Order of Remand undertook to send the Unit 3 PPSA case back to the Division of Administrative Hearings (DOAH) to develop a factual record "through

[4] DEP's argument concerning issues of law is not only unsupported by case law, it is a red herring, as the Final Order did not identify any alleged mistakes on issues of law in the Joint Stipulation.

either further administrative proceedings or submittal of a stipulation that provides detailed facts...." [R. 3597.] On page 4 of its Answer Brief, DEP states, "After remand, the parties failed to agree on a detailed stipulation." On page 6, DEP asserts that Seminole failed to take advantage of its "opportunity to cure [the] deficiencies [in the Joint Stipulation]." Similarly, on pages 17 and 26, DEP again states that Seminole failed to take advantage of the "opportunity" to correct the alleged deficiencies in the Joint Stipulation. These statements seem to imply harmless error on grounds that an opportunity existed for Seminole to either develop a redrafted statement of facts to accompany an amended Joint Stipulation or to go through an administrative hearing before DOAH.

Insofar as DEP's intention is to imply that DEP was receptive to developing and filing an amended stipulation subsequent to issuance of the Order of Remand, Seminole's actual experience was to the contrary.

The Department's repeated suggestions that Seminole could have "cured" the agency's failure to act in accordance with the Joint Stipulation through the "opportunity" of going through a formal administrative hearing are unaccompanied by legal citations indicating that administrative litigation is an adequate substitute for implementing a stipulation. There is no case law supporting that proposition. As explained - - with ample citations to case law - - in the Initial Brief (pp. 21-22), Florida courts consistently hold that administrative agencies must abide by and

implement their stipulations. DEP's suggestion that the Joint Stipulation is non-binding, based on the "opportunity" to go through an administrative hearing process, would render the Joint Stipulation meaningless, undermine the statute, and compel pointless litigation in a case lacking contested factual or legal issues.

IV. DEP HAS NOT AND CANNOT JUSTIFY ITS DEPARTURE FROM THE OUC AND WEST COUNTY PPSA PRECEDENTS

DEP's Answer Brief, at pages 30-46, attempts to diminish the applicability of two relevant PPSA administrative decision issued the month prior to the parties' entry into the Joint Stipulation: In re: OUC, 29 F.A.L.R. 2551 (DEP Dec. 2006) and In re: Florida Power & Light Co. West County Energy Center Power Plant Siting Application No. PA 05-47, 29 F.A.L.R. 2596 (Siting Bd. Dec. 2006).

First, DEP argues that Seminole cannot cite OUC or West County as representing agency precedent in its Initial Brief because Seminole did not mention these administrative cases or elaborate on an agency precedent argument in the Unit 3 administrative proceedings.[5] (Answer Brief, pp. 31-33.) But all of the cases cited by DEP involve appeals from matters that went to trial or to a formal administrative hearing. It is true that issues must be preserved for appeal in the course of a trial or administrative hearing, but there was no administrative hearing in the Seminole Unit 3 case, because the parties resolved all factual and legal

[5] In its Motion to Strike DEP's Order of Remand, Seminole did cite the OUC case. [R. 3631.]

issues through the statutorily-authorized Joint Stipulation. Under the circumstances of this case, Seminole had no way of anticipating what legal deficiencies or unexplained departures from precedent might appear in DEP's Final Order until the Final Order was issued. Apparently mindful of that conundrum, DEP argues (Answer Brief, pp. 32, 33) that Seminole should have raised the agency precedent argument because "Seminole could only reasonably anticipate that, with no change in the Stipulation or record, its application would be denied." Seminole did not anticipate denial; it expected DEP to abide by its Joint Stipulation and the PPSA, particularly after the Administrative Law Judge denied DEP's Motion to Withdraw Stipulation and rejected DEP's remand "as being contrary to Section 403.508(6), Florida Statutes... ." [R. 3642.] It is not reasonable to expect Seminole to guess how many or which legal mistakes might be set forth in the Final Order. DEP's Answer Brief does not cite any legal authority indicating that Seminole was required to anticipate the legal defects in the Final Order.

DEP additionally argues that the OUC and West County precedents should not be considered on appeal because they were not introduced into the record. (Answer Brief, p. 33.) But administrative agencies are required to catalogue and publish their final orders, see § 120.53(3), Fla. Stat., and in that respect most agencies use Florida Administrative Law Reports (F.A.L.R.) for meeting that

statutory obligation. (See Appendix I, p. 3 to this Reply Brief.) The OUC and West County final orders were published in F.A.L.R. The appellate rules specifically instruct how to cite to F.A.L.R. (Florida Rules of Appellate Procedure 9.800(d)(3)), and this Court, like others, has issued decisions citing to agency orders published in F.A.L.R. See Beverly Healthcare Kissimmee v. Agency for Health Care Admin., 870 So. 2d 208, 211 (Fla. 5th DCA 2004). Once again, no case law supports DEP's argument.

DEP contends that insofar as there is disparity between the Final Order and the policy or practice of a published PPSA precedent, it did not need to explain that disparity because a single agency action does not establish an agency practice or precedent.[6] (Answer Brief, p. 34.) Case law demonstrates that the opposite is true. Courts v. Agency for Healthcare Admin., 965 So. 2d 154, 159 (Fla. 1st DCA 2007) ("one time event" argument rejected). Further, DEP argues that the Chapter 120 provision requiring consistency in agency policies or practices only applies to agency decisions concerning the same applicant or same facility. (Answer Brief, pp. 35-40.) Neither the plain language of Section 120.68(7)(e)3., Florida Statutes, nor any legal decision supports this limitation. Once again, the opposite is true. In Hopwood v. Department of Envtl. Regulation, 402 So. 2d 1296, 1299 (Fla. 1st

[6] The value of DEP's point is questionable, because the Initial Brief and Reply Brief show that the Final Order contravenes two agency precedents.

DCA 1981), for example, the court specifically reversed a final order in part because it conflicted with previous agency decisions published in F.A.L.R. and involving other applicants and other facilities.

DEP attempts to distinguish the legal analysis (i.e., policy) articulated in West County on the basis that there was a formal administrative hearing in that case. (Answer Brief, pp. 34-36.) While true that there was no evidentiary hearing concerning Unit 3, the absence of a hearing does not diminish the case's relevance; it further supports it. The West County precedent unmistakably addresses the evidentiary significance in PPSA cases of an uncontested site certification application and sufficiency answers, and an uncontested staff analysis report. Seminole and DEP's Joint Stipulation explicitly incorporates the site certification application and sufficiency responses, as well as DEP's Staff Analysis Report, into the undisputed evidentiary record. This record does not somehow evaporate because the parties invoked a statutorily-authorized stipulation process to avoid a needless hearing. With the threshold burden of proof obviously met by the stipulated evidentiary record, "the burden shifts to those opposing the project to offer contrary evidence of equivalent quality." In re: West County, DOAH Case No. 05-1493EP, Recommended Order (DOAH 2006) at ¶ 98, adopted in toto by Siting Board at 29 F.A.L.R. 2596 (Siting Bd. Dec. 2006). Nobody did, and no contrary evidence whatsoever exists in this case.

The OUC precedent verifies that the West County legal analysis applies equally in stipulated PPSA cases. In the OUC final order entered by the Secretary of DEP, all of the findings of fact were based on statements in the uncontested site certification application, sufficency responses, and staff analysis report of that case. In re: OUC, 29 F.A.L.R. 2551, 2553-62 (DEP Dec. 2006). The final order in the OUC case goes on to state "[t]he evidence in the record reveals that the Applicants have met their burden of proof to demonstrate that [the project] meets the criteria for certification under the PPSA." Id. at 2563. Thus, the site-certification application, sufficiency responses, and agency report were regarded by DEP as "evidence in the record" meeting the applicant's "burden of proof" in a stipulated PPSA case.

DEP also argues in its Answer Brief that the Unit 3 Final Order "fully complied with this requirement [of consistency with precedent]" on grounds that the Final Order "explained... the rationale for [the DEP Secretary's] decision to deny Seminole's application for certification." (Answer Brief, p. 41.) The Answer Brief goes on to summarize the Final Order's rationale for denial, as though any rationale would suffice. Section 120.08(7)(e)3, Florida Statutes, provides that the agency must do more; it must "explain" its "deviation" from "officially stated agency policy or practice." The Final Order contains no attempt whatsoever - - not

even a single sentence - - to distinguish the policy and practice set forth in the OUC and West County cases.

The Secretary of DEP is not free simply to ignore the Joint Stipulation, the PPSA, the uncontested evidentiary record, and agency precedents. DEP still has not attempted to articulate a single substantive shortcoming concerning the Unit 3 project. As verified by the West County and OUC precedents, thousands of pages of uncontested design information and agency expert analysis, comprising the undisputed evidentiary record in this case, met Seminole's burden of proof under the PPSA.

V. THE AGENCY HEAD'S DISCRETION IN THIS CASE WAS CONSTRAINED BY THE JOINT STIPULATION AND THE PPSA

The Answer Brief decries the prospect that the agency head in a stipulated PPSA case is required to merely "rubber stamp" the parties' (including his own agency's) Joint Stipulation (Answer Brief, pp. 45, 47), and equates acting in accordance with the Joint Stipulation as preventing him from applying the PPSA at all. (Answer Brief, pp. 15-16) This argument appears to be based primarily on DEP's premise that the Joint Stipulation did not include sufficient facts. (Answer Brief, pp. 15-16, 46-47.) As shown above (supra, pp. 1-5) the Joint Stipulation was not deficient at all.

Although application of Section 403.509(3) of the PPSA involves agency discretion, section 403.509(1)(a) provides that in a stipulated case the agency head must act based on both the test for certification "and the stipulation of the parties." And the PPSA specifically contemplates the stipulation of both issues of fact and issues of law. § 403.508(6)(a), Fla. Stat. After nearly a year of rigorously evaluating all aspects of the Unit 3 project, DEP knowingly and willfully constrained its own discretion, from that point forward, when it entered into the Joint Stipulation.

In the OUC case, the agency head did apply the PPSA certification test in accordance with the parties' Joint Stipulation. See, In re: OUC, 29 F.A.L.R. 2551 (DEP Dec 2006). After reciting numerous facts drawn from the stipulated evidentiary record [id. at 2553-62], describing the agencies' positions as set forth in DEP's staff agency report and other agency reports [id. at 2562], and noting the PSC's need determination, [id. at 2563], the OUC final order applied Section 403.509(3) based on "[t]he evidence in the record." Id. at 2563.

An agency's exercise of discretion is subject to the discipline imposed under Chapter 120, Florida Statutes and the agency's authorizing legislation. McDonald v. Department of Banking & Finance, 346 So. 2d 569, 577 (Fla. 1st DCA 1977). Thus, there is nothing inherently "absurd" [Answer Brief, p. 43] in the concept of applying both the PPSA certification test and the Joint Stipulation. This is exactly

what Section 403.509(1)(a) requires, and it is exactly what was done in the OUC case.

Again, the parties, including DEP, agreed in the Joint Stipulation that "all impacts" from Unit 3 "have been adequately addressed." DEP's Answer Brief suggests that although the parties agreed to Conditions of Certification for Unit 3 [R. 3542], they did not agree to certification. And although DEP and the other parties other agreed that there are reasonable assurances that "all applicable agency standards" will be met [R. 3539], DEP asserts that the PPSA certification test (itself an agency standard) is not met. DEP does not, because it cannot, identify a cognizable policy or legal rationale for being released from its Joint Stipulation and denying certification of Unit 3.

When, as in this case, the uncontroverted evidence, as well as the agency's own analysis and prior practice and precedent, dictate a particular result, the judicial branch has not hesitated to order it done. See Hopwood, supra. The need for this Court to give very specific directions to DEP on remand is underscored by footnote 12 of DEP's Answer Brief. DEP indicates here that in the event of a remand the agency head will "comb the cold record for facts" and in doing so will be unconstrained in accepting or rejecting their veracity. This would be contrary to the requirements of the PPSA. The cases cited by DEP in footnote 12 address the

roles of trial judges in unstipulated civil matters; these cases have no bearing on the agency head's role in a stipulated administrative case under the PPSA.

In light of DEP's refusal to honor its Joint Stipulation, its failure to follow established agency policy and practice applying the PPSA, its disregard of the undisputed record, and its threat in footnote 12 to conduct a de novo review of the record unconstrained by the Joint Stipulation on remand, this Court should ensure that DEP timely satisfies its statutory duty to act in accordance with the Joint Stipulation and the PPSA by directing DEP to issue a final order granting certification of Seminole Unit 3 consistent with the stipulated Conditions of Certification.

Respectfully Submitted this 3rd day of March, 2008,

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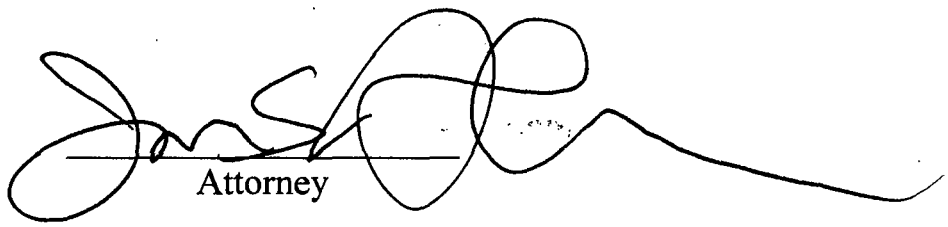

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