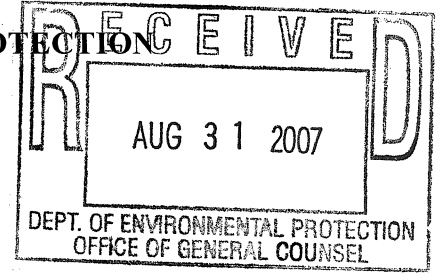


**STATE OF FLORIDA
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION**



SEMINOLE ELECTRIC COOPERATIVE, INC.)
)
Petitioner/Appellant,)
)
v.)
)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Respondent/Appellee.)
_____)

OGC Case No.: 06-0780

NOTICE OF ADMINISTRATIVE APPEAL

NOTICE IS GIVEN that the Petitioner/Appellant, Seminole Electric Cooperative, Inc. appeals to the District Court of Appeal for the Fifth District, the Final Order of the Florida Department of Environmental Protection dated August 17, 2007.

The nature of the order appealed is a Final Order denying certification of Seminole Electric Cooperative, Inc.'s Seminole Generating Station Unit 3 under Chapter 403, Part II, Florida Statutes. A conformed copy of the Final Order is attached.

Respectfully submitted this 31st day of August, 2007.

HOPPING GREEN & SAMS, P.A.

A handwritten signature in cursive script that reads "Douglas S. Roberts".

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Notice of Administrative Appeal has been furnished by hand delivery on this 31st day of August, 2007 to:

Lea Crandall, Agency Clerk
Department of Environmental Protection
3900 Commonwealth Blvd.
Tallahassee, FL 32399

and I hereby certify that a copy of this Notice of Administrative Appeal has been furnished by U.S. Mail on this 31st day of August, 2007 to:

Susan Wright, Clerk
Fifth District Court of Appeal
300 South Beach Street
Daytona Beach, FL 32114.

I hereby certify that copies of the foregoing have also been furnished to the following by U.S. Mail on this 31st day of August, 2007 to:

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**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**In Re: SEMINOLE ELECTRIC
COOPERATIVE SEMINOLE GENERATING
STATION UNIT 3 POWER PLANT SITING
APPLICATION NO. PA 78-10A2.**

**OGC CASE NO. 06-0780
DOAH CASE NO. 06-0929EPP**

FINAL ORDER

This matter is before me as Secretary of the Department of Environmental Protection ("DEP") for the purpose of entering a Final Order under Sections 403.508(6) and 403.509(1)(a), Florida Statutes ("F.S.").

BACKGROUND

On March 9, 2006, the DEP received an application from Seminole Electric Cooperative, Inc. (Seminole), for certification of its proposed Seminole Generating Station Unit 3. The Department requested assignment of an Administrative Law Judge ("ALJ") to conduct the proceedings required by the Florida Electrical Power Plant Siting Act ("PPSA"), Section 403.501, *et seq.*, F.S.

Prior to 2006, the PPSA required two formal administrative hearings for every application filed pursuant to the Act - a land use hearing and a certification hearing. These formal administrative hearings resulted in recommended orders that were acted on by the Siting Board, which entered Final Orders based on the findings of fact in the recommended orders.

In 2006, the Legislature amended the PPSA. See Ch. 2006-230, §§ 31 and 32, Laws of Fla. One of the amendments provided that a land use hearing need not be held unless the local government's land use determination was disputed and a hearing requested. See

§§ 403.50665(4) and 403.508(1), Fla. Stat. (2006). Another amendment, significant to this case, allowed for entry of a Final Order by the Secretary of the DEP under specified circumstances. Section 403.508(6)(a), F.S., provides that the parties may stipulate that there are no issues of fact or law to be raised at the certification hearing, and request the ALJ to relinquish jurisdiction to the DEP. If the ALJ grants the parties' motion, the Secretary of DEP "shall act upon the application by written order in accordance with the terms of this act and the stipulation of the parties in requesting cancellation of the certification hearing." See § 403.509(1)(a), Fla. Stat. (2006).

On February 22, 2007, the parties to this proceeding entered into such a Joint Stipulation Between the Parties. The stipulating parties included: Seminole, the Florida Public Service Commission, the Florida Department of Community Affairs, the Florida Fish and Wildlife Conservation Commission, the St. Johns River Water Management District, DEP, the Florida Department of Transportation and the Sierra Club. The Joint Stipulation of the parties was filed with the Division of Administrative Hearings ("DOAH"). The Joint Stipulation identified the parties, recited the nature and procedural history of the proceeding, the positions of the parties, and legal requirements. On the last page of the document the parties simply recite that there were no disputed issues of fact or law to be raised at the certification hearing. The parties also stipulated that for purposes of entry of any final order the evidentiary record consists of the Application for Site Certification, Seminole's Response to Sufficiency Request, and the DEP's Staff Analysis Report, submitted on November 9, 2006, including the several agency reports and proposed conditions of certification. Notably, this Joint Stipulation does not contain a detailed recital of agreed findings of fact.

The assigned ALJ treated the stipulation as a motion to relinquish jurisdiction and relinquished jurisdiction to the Department. On March 5, 2007, the DEP and Seminole submitted a Joint Proposed Final Order recommending approval of Seminole's application.¹ On review of the Joint Stipulation, I rejected the proposed order and entered an order remanding the case to the ALJ on April 6, 2007. In that order, I noted that the Joint Stipulation merely recited that there were no disputed issues of fact or law, but the Joint Stipulation did not contain specific agreed findings of fact that would allow me to fulfill my obligations to consider and balance the statutory criteria in the PPSA. I requested that a factual record be developed on remand either by stipulation or by further administrative hearings. On remand the parties failed to agree on a detailed stipulation. On June 12, 2007, Seminole filed a Motion for Entry of Order Relinquishing Jurisdiction Following Order of Remand, requesting the ALJ relinquish jurisdiction citing the parties prior Joint Stipulation. On June 19, 2007, DEP filed a Motion to Withdraw Stipulation and Response to Seminole's Motion to Relinquish Jurisdiction. The ALJ accepted jurisdiction to consider DEP's Motion to Withdraw Stipulation and Seminole's Motion for Entry of Order Relinquishing Jurisdiction Following Remand. On July 10, 2007 the ALJ entered an order denying DEP's Motion to Withdraw Stipulation, denying Seminole's Motion for Entry of Order Relinquishing Jurisdiction Following Remand as moot, and declining the remand.

The DEP filed a Proposed Final Order on July 20, 2007, recommending denial of Seminole's application. Seminole filed a motion to strike the DEP's Proposed Final Order as untimely and contrary to the parties' February 22, 2007, stipulation. DEP filed a

¹ Only Seminole and DEP jointly filed this Proposed Final Order. No other party to this proceeding joined in the filing, or filed any other proposed order.

response on August 3, 2007. As more fully explained in this final order the PPSA directs me to consider and balance competing policy interests in order to determine whether to approve or deny certification. I must ultimately determine whether the broad interests of the public are served and protected by the proposed project. In fulfilling those obligations I cannot conclude that a "bare bones" stipulation, which might be binding on the parties to the litigation, controls ultimate questions of law and policy involving reasonable assurance and the public interest that are clearly matters over which I have final authority and responsibility. *See generally Florida Power Corp. v. Dept. of Environmental Protection*, 638 So.2d 545 (Fla. 1st DCA 1994). As DEP argued in its response, the ALJ's order declining remand substantively ruled on motions pending before him. Thus, he deemed DOAH to have jurisdiction, and the order declining remand was, in effect, an order relinquishing jurisdiction. The parties then had no later than 10 days thereafter to submit proposed orders for my consideration. *See* § 403.508(6)(d)2., Fla. Stat. (2006). DEP submitted its proposed final order within 10 days of the ALJ's order relinquishing jurisdiction.

In addition, although the parties are authorized to submit proposed orders, they are not mandatory, serve only to assist in the issuance of a final order, and are not legally binding stipulations. *See* § 403.508(6)(d)2., Fla. Stat. (2006). Thus, Seminole's motion to strike DEP's proposed final order is denied.

GOVERNING STATUTE

In determining whether an application should be approved, approved with modifications, or denied, I am required under the provisions of Section 403.509(3), F.S., to consider whether, and the extent to which, the location of the electrical power plant and directly associated facilities and their construction and operation will:

- (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 energy needs of the state in an orderly 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.
- (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.

§ 403.509(3), Fla. Stat. (2006).

In enacting the PPSA the Legislature clearly stated its intent to “seek courses of action that will fully balance the increasing demands for electrical power plant location and operation with the broad interests of the public.” (Emphasis added). See § 403.502, Fla. Stat. (2006). Such courses of action must fundamentally assure Florida’s citizens that “operation safeguards are technically sufficient for their welfare and protection,” and “effect a reasonable balance between the need for the facility and the environmental impact.” *Id.* The Legislature declared that it is the policy of this state that it “shall ensure through available and reasonable methods” that plant location and operation will produce “minimal adverse effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.” *Id.*

The Legislature ensured that its intent and public policy declarations would actually be an integral part of the criteria for determining whether a certification application should be approved or denied. See § 403.509(3)(a) – (g), Fla. Stat. (2006). In addition, the DEP's interpretation of statutes governing its certification of electrical power plants should be consistent with state policies declared elsewhere in Chapter 403, F.S., and the Florida Constitution. For example, the Florida Air and Water Pollution Control Act which declares that pollution of air and waters constitutes a menace to public welfare and to aquatic life. See § 403.021, Fla. Stat. (2006). Also, "[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty," Art. II, § 7(a), Fla. Const. See also *Florida Wildlife Federation, Inc., et al. v. Coastal Petroleum Co.*, 21 F.A.L.R. 671 (Fla. Dept. Env. Prot. 1998), *aff.* 766 So.2d 226 (Fla. 1st DCA 2000).

The Legislature has therefore determined that balancing policy interests is the province of the Siting Board, and the Secretary in specified circumstances such as exist in this proceeding. See *e.g.*, *Florida Power & Light Co. v. State, Siting Board*, 693 So.2d 1025 (Fla. 1st DCA 1997); §§ 403.509(1)(a) and 403.509(3), Fla. Stat. (2006).

STATEMENT OF THE ISSUE

The issue to be decided in this proceeding is whether to approve certification in accordance with the PPSA, Section 403.501, *et seq.*, F.S., authorizing Seminole to construct and operate a new electrical generating unit (proposed Unit 3) at Seminole's existing Seminole Generating Station site (consisting of existing Units 1 and 2) in an unincorporated area of Putnam County.

EVIDENTIARY RECORD

The Joint Stipulation states that the parties agree that the evidentiary record consists *solely* of the following documents: (a) Application for Site Certification; (b) Seminole's Response to Sufficiency Request; and (c) The Department's Staff Analysis Report, submitted on November 9, 2006, including the several agency reports and proposed conditions of certification. Contrary to the Order of Remand, I have not been provided specific findings of fact either from the parties or from the ALJ. Thus, I must act upon the application in this final order based on a limited record and a "bare bones" stipulation.

My obligation under the PPSA is to consider and balance the public policy considerations set forth in the statute. See *Cross v. Dept. of Health & Rehabilitative Services*, 658 So.2d 1139, 1143 (Fla. 1st DCA 1995) ("Striking the proper balance between . . . competing policy considerations" is a decision to be made by an agency, as guided by the legislature.). However, the parties' stipulation did not contain specific findings of fact that would allow me to fulfill my obligations to consider and balance the factors listed above. I do not view the fulfillment of my statutory duties as simply one of automatic approval. See *In Re: Hugh M. Fletcher* 664 So.2d 934, 936 (Fla.1995)("[F]or this Court to act blindly on a stipulation and recommendation that is silent . . . reduces the Court to little more than a rubber-stamp in the review process.").

CONCLUSIONS OF LAW

1. The Department has jurisdiction to enter a final order in this matter pursuant to Sections 403.508(6) and 403.509(1)(a), F.S.
2. In determining whether an application should be approved, approved with modifications, or denied, I am required pursuant to Section 403.509(3), Fla. Stat., to

consider whether, and the extent to which, the location of the electrical power plant and directly associated facilities and their construction and operation will:

- (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 energy needs of the state in an orderly 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.
- (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.

3. The Legislature has determined that balancing policy interests is the province of the Secretary of DEP in specified circumstances such as exist in this proceeding. See *e.g., Florida Power & Light Co. v. State, Siting Board*, 693 So.2d 1025 (Fla. 1st DCA 1997); §§ 403.509(1)(a) and 403.509(3), Fla. Stat. (2006).

4. Seminole, as the applicant, has the burden of demonstrating that it is entitled to issuance of a Site Certification pursuant to the statute. It has not met this burden.

5. An agency generally may not reject an ALJ's findings of fact, nor make supplemental findings. See *Florida Power & Light Company v. State*, 693 So.2d 1025 (Fla.

1st DCA 1997). However, in this case, there are no underlying findings of fact. Neither the ALJ, after a hearing, nor the parties through a stipulation, have identified specific facts upon which I must base my conclusions. Although in my view the ALJ has not fulfilled his role, as requested in the Order of Remand, to conduct a fact finding proceeding, Seminole filed the motion to relinquish jurisdiction which has lead to this matter being presented again without sufficient findings of fact.

6. It is normally the duty of the ALJ to make basic findings of fact in a formal proceeding where an agency permitting action is being formulated. However, the determination of whether these findings of fact constitute the necessary "reasonable assurance" for an applicant to be entitled to issuance of a permit from the agency is a regulatory decision that must ultimately be made by the agency, rather than the ALJ. See, e.g., *Putnam County Environmental Council v. Georgia Pacific Corp.*, 24 F.A.L.R. 4674, 4685 (Fla. Dept. of Env. Prot. 2002) *app. den.*, Case Nos. 1D02-3673 and 1D02-3674 (Fla. 1st DCA, Nov. 26, 2003); *Miccosukee Tribe of Indians v. South Florida Water Management District*, 20 F.A.L.R. 4482, 4491 (Fla. Dept. of Env. Prot. 1998), *aff'd*, 721 So.2d 389 (Fla. 3d DCA 1998); *Barringer v. Speer and Associates*, 14 F.A.L.R. 3660, 3667 n.8 (Fla. Dept. of Env. Prot. 1992).

7. Based on the sparse Joint Stipulation and record I cannot conclude that Seminole has provided reasonable assurance that operational safeguards are technically sufficient for the public welfare and protection.

8. Based on the Joint Stipulation I cannot conclude that the proposed project effects a reasonable balance between the need for the facility as established by § 403.519

and the impacts on air and water quality, fish and wildlife, water resources, and other natural resources resulting from the operation of the facility.

9. Based on the Joint Stipulation I cannot conclude that Seminole has demonstrated that the project minimizes, 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.

CONCLUSION

In consideration of the foregoing, I conclude that Seminole failed to demonstrate that, if constructed and operated in accordance with its application, the proposed project will serve and protect the broad interest of the public and the application should therefore be denied.

IT IS THEREFORE ORDERED:

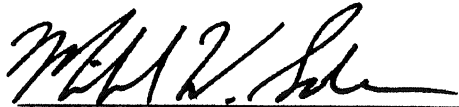
Site certification of Seminole Electric Cooperative, Inc., Seminole Generating Station Unit 3, as described in the Site Certification Application, is hereby DENIED.

Any party adversely affected by this Final Order has the right to seek judicial review of it under Section 120.68, Florida Statutes. Judicial review must be sought by filing a notice of appeal under Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate

district court of appeal. The notice of appeal must be filed within 30 days after this Final Order is filed with the Clerk of the Department.

DONE AND ORDERED this 17th day of August, 2007, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



MICHAEL W. SOLE
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

 8/17/07
CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

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this 17th day of August, 2007.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

A handwritten signature in black ink, appearing to read "Francine M. Ffolkkes for", written over a horizontal line.

FRANCINE M. FFOLKES
Senior Assistant General Counsel

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