

BEFORE THE GOVERNOR AND CABINET
STATE OF FLORIDA
SITTING AS THE SITING BOARD

IN RE:

APPLICATION FOR SUPPLEMENTAL)
CERTIFICATION OF ORLANDO UTILITIES) OGC # 91-2450
COMMISSION, et al., FOR CURTIS H.) DOAH CASE NO. 91-1813EPP
STANTON ENERGY CENTER UNIT 2)
APPLICATION NO. PA81-14B)

FINAL ORDER APPROVING SUPPLEMENTAL CERTIFICATION

On December 17, 1991, this case came before the Governor and Cabinet, sitting as the Siting Board, pursuant to the Florida Electrical Power Plant Siting Act (PPSA), Section 403.501 et seq., Florida Statutes, (Supp. 1990), for final action concerning a recommended order dated November 15, 1991, attached as Exhibit 1, a recommendation for supplemental certification of the Curtis Stanton Energy Center site for construction of Stanton Unit 2 and directly associated facilities. The Stanton Energy Center site received certification on December 14, 1982, for an ultimate site generating capacity of approximately 2000 megawatts (MW). This case involves the first application for supplemental certification filed under Section 403.517(1)(a) of the PPSA.

Three exceptions to the recommended order were filed by St. Johns River Water Management District (SJRWMD) on December 2, 1991. SJRWMD objects to the hearing officer's recommended conclusion that because a condition of certification ("Condition 7") proposed by SJRWMD poses a procedural restriction preempted by Section 403.510 of the PPSA, it may not lawfully be imposed to

require periodic reapproval by SJRWMD of water uses involved in power generation following initial approval by the Board in the site certification. Declaring Condition 7 to be the linchpin of its regulatory effort "to optimize the allocation and protection of Florida's water resource in a manner deemed most in the public interest . . ."; SJRWMD objects to the hearing officer's acceptance of the other conditions of certification proposed by SJRWMD to govern consumptive uses of water on the Stanton site on the basis of a stipulation between SJRWMD and the applicant, Orlando Utilities Commission (OUC). SJRWMD asserts that its stipulation was to be effective only upon acceptance of all of its proposed conditions, including the disputed Condition 7.

At page 55-56 of the recommended order, the disputed SJRWMD condition is characterized as follows:

[P]roposed Condition No. 7 . . . would require OUC to submit a "report" demonstrating compliance with the rules and policies of SJRWMD ten years after the Board's certification of Stanton 2 The purpose and legal effect of this proposed condition is to require OUC, through said report, to apply for and obtain a periodic consumptive use of water permit in order to continue groundwater withdrawals necessary for the operation of Stanton 2.

SJRWMD does not dispute the accuracy of this characterization, stating at page 27 of its exceptions that "Condition 7 merely establishes an authorized procedure whereby OUC must seek renewal of its water allocation in a manner consistent with the substantive standards of the SJRWMD...."

The issue framed by SJRWMD's exceptions is whether, under Section 403.510, Florida Statutes, a certified electrical power plant's authorization for consumptive use of water extends for .

the life of the certification, as the hearing officer concluded, or is limited to whatever term the water management district having jurisdiction over the plant determines to be in the public interest, as SJRWMD contends. SJRWMD argues that: "A rejection of Condition 7 is the equivalent of concluding that power plants under the PPSA operate under the prior appropriation doctrine while the rest of Florida's regulated water uses must abide by the comprehensive water use permit system established under Chapter 373." SJRWMD Exceptions, at p. 11.

Pursuant to Section 120.59(2), Florida Statutes, the Board has considered the exceptions of SJRWMD and finds them to be without merit. First, the comprehensive water permit system established under Chapter 373, Florida Statutes, does not apply to electrical power plants certified under the PPSA. A PPSA certification is "the sole license of the state and any agency as to the...operation of the proposed electrical power plant, except for... licenses required under any federally delegated or approved permit program...." §403.511(1), Fla. Stat. (Supp. 1990). As the recommended order correctly notes, at p. 58-59, Section 403.510(1) of the PPSA implements the state's preemption of local regulation of power plants which are subject to the PPSA. This preemption applies to the local consumptive use permit programs established by the water management districts under the aegis of Section 373.236, Florida Statutes. This fact is also recognized in SJRWMD's own rules, which exempt certified power plants from having to obtain consumptive use permits. § 40C-2.051, F.A.C.; SJRWMD Applicant's Handbook, Art. 3.4, subsection

(b). See Exhibit 1, at p. 56.

There is no dispute that Condition 7 is intended to create for Stanton Unit 2 a consumptive use permit procedure analogous to that preempted by the PPSA; no similar procedure applies to the water uses of Stanton Unit 1. SJRWMD defends its proposed new procedure as a substantive requirement of Florida water law, but its argument is essentially self-contradictory. It does not logically follow that because water users have no prescriptive right to continued water withdrawals, a certified power plant's water uses must be subject to periodic reauthorization by a "permit" program, as opposed to a certification subject to modification for cause. A certified power plant does not become a "prior appropriator;" it receives a license of indefinite term which can be modified or revoked if necessary to protect the public.

By enacting the PPSA, the Legislature saw fit to establish "a lifetime, permanent state license to operate a power plant" AES Cedar Bay, Inc. v. Department of Environmental Regulation, DOAH Case No. 88-5740, Certification PA88-24, Feb. 11, 1991, slip op. at 5. The recommended order correctly notes, at p. 58, that the PPSA "does not contain any procedural requirement for a renewal of power plant certifications or authorization for agencies periodically to reconsider or revoke their positions taken in the initial certification proceedings." If an applicant for certification, like the applicant in the AES case cited above, is willing to accept conditions of certification which establish an interim,

mid-certification water use review procedure, the Board has no objection to the inclusion of such conditions in a certification. But nothing in the PPSA allows an agency like SJRWMD to insist upon the imposition of interim "permit" procedures on the theory that procedures are substantive requirements of law. As the hearing officer correctly concluded, SJRWMD's proposed Condition 7 does not embody a nonprocedural requirement within the meaning of Section 403.503(18), Florida Statutes. Exception 1 is rejected.

SJRWMD's second and third exceptions rest on a collateral attack by SJRWMD upon its own stipulation with OUC. It is axiomatic that a party will not be heard to complain as to matters subsumed within its own stipulation. Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So 2d 670 (Fla. 1951); Lopez v. Dublin Co., 489 So 2d 805 (Fla. 3d DCA 1986) The factual matters contained within the stipulation between OUC and SJRWMD provide a more than adequate evidentiary foundation for findings 96, 97, 99, 101, and 113 of the recommended order. The challenged findings are supported by competent substantial evidence. §120.57(1)(b)10, Fla. Stat. (Supp.1990). Exceptions 2 and 3 are rejected.

Accordingly, it is ORDERED that

1. The Recommended Order of November 15, 1991, is approved and adopted.

2. The Siting Board APPROVES supplemental certification of Stanton Unit 2 and directly associated facilities in accordance with Section 403.517, Florida Statutes (Supp.1990), subject to

the supplemental conditions of certification contained in Exhibit A to Exhibit 1.

3. All existing conditions of certification for the Curtis H. Stanton Energy Center, as modified and supplemented by the supplemental conditions imposed by this Order, shall remain in full force and effect.

NOTICE OF RIGHTS

Any party to this certification proceeding has the right to seek judicial review of this order pursuant to Section 120.68, Florida Statutes, by filing of a notice of appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Siting Board in the Department of Environmental Regulation Office of General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400; and by filing a copy of the notice with the appropriate District Court of Appeal. The notice of appeal must be filed within 30 days of the date this Final Order is filed with Clerk of the Siting Board.

DONE AND ORDERED this 17th day of December, 1991, at Tallahassee, Florida, pursuant to the vote of the Governor and Cabinet sitting as the Siting Board, at a duly-noticed and constituted Cabinet meeting on December 17, 1991.

FILING AND ACKNOWLEDGEMENT

FILED, on this date, pursuant to §120.52 Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

Barry C. Carter
Clerk

12-17-91
Date

THE GOVERNOR AND CABINET SITTING AS THE SITING BOARD

BY:
THE HONORABLE LAWTON CHILES
GOVERNOR

Lawton Chiles

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order Approving Supplemental Certification has been furnished by U.S. Mail on this 18th day of December, 1991, to the following:

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