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Florida Electrical Power Plant Sitting Act: Perpetuating Power Industry Supremecy in the Certification Process

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NOTES

FLORIDA ELECTRICAL POWER PLANT SITING ACT: PERPETUATING POWER INDUSTRY SUPREMACY IN THE CERTIFICATION PROCESS*

I. INTRODUCTION

The process of power plant site selection exemplifies the inherent conflict between the energy demands of an industrialized society and the need for environmental protection.[1] As the largest stationary source of air pollution, electrical power plants cause profound environmental damage.[2] Yet energy is the cornerstone of our industrial-

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1. Thermal electric power plant siting raises a fundamental conflict between two important societal interests: the need for adequate electric power on the one hand and the need to prevent further environmental degradation on the other. Whenever governmental agencies make decisions concerning the location of power plants, they inevitably must compromise one interest or the other. Consequently, the regulatory process often becomes a battleground where environmental groups and electric utilities compete to determine whose interests will prevail.

Comment, *California's Energy Commission: Illusions of a One-Stop Power Plant Siting Agency*, 24 U.C.L.A. L. REV. 1313, 1313 (1977) (footnotes omitted) [hereinafter cited as *California's Energy*]. For an exhaustive listing of articles on power plant siting, see Hamilton, *Power Plant Siting: A Literature Review*, 19 NAT. RESOURCES J. 75 (1979).

2. Willrich, *The Energy-Environment Conflict: Siting Electric Power Facilities*, 58 VA. L. REV. 257, 266 (1972). Electric power plants emit sulfur oxides, nitrous oxides, carbon monoxide,

and particulants. Note, *Energy Facility Siting in North Dakota*, 52 N.D.L. REV. 703, 707-08 (1976) [hereinafter cited as *Energy Facility*]. Although the exact effects of these pollutants on humans is unknown, all cause respiratory and other related health problems. *Id.* In addition, sulfur oxides combine with rain to form "acid rain" which causes severe damage to both terrestrial and aquatic environments. *Id.* at 708. A 415 megawatt plant, for example, will emit approximately 57 tons of SO_2 per 24 hours. Reply Brief of Sierra Club at A-3, A-4, Florida Chapter of the Sierra Club v. Orlando Util. Comm'n, 436 So. 2d 383 (Fla. 5th D.C.A. 1983). This SO_2 will combine with rain to produce approximately 85 tons of H_2SO_4 (sulfuric acid) per 24 hour period. *Id.*

Pollution control devices can decrease plant emissions. *See generally* FLA. DEP'T OF ENVTL. REGULATION, ELECTRIC POWER PLANT SITE CERTIFICATION REVIEW FOR SEMINOLE ELECTRIC COOPERATIVE'S SEMINOLE PLANT UNITS 1 & 2 (1979) [hereinafter cited as SEMINOLE SITE CERTIFICATION REVIEW]. Pollution control devices, however, escalate costs and fuel consumption enormously. *Id.* at 58b. For example, in a facility with two 600 megawatt units, removing 91% of SO_2 emissions costs $12.5 million dollars and requires approximately 76,000 tons of coal over a 35-year period. *Id.* at 58(b). Removing 96% of SO_2 emissions costs $140.8 million dollars and requires approximately 3.6 million tons of coal over a 35-year period. *Id.*

In addition to air pollution, power plants also cause water pollution and result in both land disturbances and solid wastes. *See Energy Facility, supra,* at 706-08. Water pollution results when water used in the cooling process is discharged into lakes or streams. *Id.* at 708. This water contains both chemical and thermal pollution. *Id.* Chemical pollution occurs when cooling water is treated to prevent naturally occurring salt deposits from accumulating on the boiler and cooling apparatus. *Id.* Chemical pollution also results from run-off from ash and sludge piles. *Id.* at 705. Thermal pollution results when heat is dissipated into the cooling water. *Id.* at 708. Both forms of pollution adversely effect aquatic life and may result in significant fish kills. *Id.*

The amount of land encompassed in a power generating facility varies depending on the type of cooling system, pollution control devices, fuel used, and the generating capacity of the plant. *Id.* at 709. Proposed sites in Florida varied in size from 10,000 acres to 23,000 acres. FLA. POWER & LIGHT CO., TEN YEAR POWER PLANT SITE PLAN 1983-1992 at 82-93 (submitted to Department of Community Affairs, Apr. 1, 1983) [hereinafter cited as 1983 FP&L TEN YEAR PLAN]. The figures do not include land disturbance caused by coal strip mining. *See Energy Facility, supra,* at 709. Nor do they include the land used in constructing transmission lines and railroad tracks to and from the plant. *See* SEMINOLE SITE CERTIFICATION REVIEW, *supra,* at 30-32. At the Seminole Electric Plant, approximately 204 miles of transmission lines were required to connect the plant to distribution sources. *Id.* at 32. This 204 mile corridor encompassed 3,672 acres of land which were cleared and maintained by the use of herbicides and mechanical devices. *Id.* at 32-33. Construction of approximately one mile of railroad track was also required. *Id.* at 4, 28.

Solid wastes generated by an electric plant are the ash and sludge generated from pollution control devices. *See Energy Facility, supra,* at 709. At the Seminole Electric Power Plant, which contains two 600 megawatt power generating units, an estimated 16,000 acre feet of solid wastes will be produced over the 35-year life of the plant. SEMINOLE SITE CERTIFICATION REVIEW, *supra,* at 45. These solid wastes are difficult to dispose of because they contain concentrations of heavy metals which can contaminate groundwater or result in run-off into streams and rivers. *Id.* at 45-54.

In addition to environmental impacts, construction of power plants causes economic and demographic changes in the surrounding community. *See* SEMINOLE SITE CERTIFICATION REVIEW, *supra,* at 30. During construction and operation of the plant, the population will increase as construction and then operational crews move into the community. *Id.* This population expansion will increase the demand for housing and educational facilities. Johnson, *A Model Approach to Decision Making: The Power Plant Siting Act*, 52 FLA. B.J. 334, 338 (1978). Along with the construction of the plant, it will also increase the tax base. *Id.* Generally, the more rural and sparsely populated the area, the more pronounced are these effects. *Id.*

ized society.[3] In an attempt to statutorily reconcile environmental concerns with industrial progress, the Florida legislature enacted the Florida Electrical Power Plant Siting Act (FEPPSA) in 1973.[4]

At the time of FEPPSA's enactment, the 1973 oil embargo was tightening and a rapid conversion to non-petroleum based fuels was a national priority.[5] FEPPSA streamlined the notoriously lengthy and expensive proceedings previously required for site certification by preempting local government actions[6] and consolidating the approval of most state agencies into a single license.[7] Additionally, because the

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3. A high energy consumption and a high standard of living are correlative. Per capita energy consumption is roughly proportional to per capita gross national product. Willrich, *supra* note 2, at 261.

4. FLA. STAT. §§ 403.501-.517 (1983).

5. During the 1973 oil embargo, fuel costs more than tripled in six months from $4.50 per barrel to $15.50 per barrel. Comment, *Con Edison: The Crisis of the Investor-Owned Utility*, 3 FORDHAM URB. L.J. 545, 547 (1975) [hereinafter cited as *Con Edison*]. Certain utilities with oil burning power plants absorbed this cost. *Id.* Some utilities were unable to generate sufficient energy to meet demand and were forced to purchase costly energy from other utilities. *Id.* at 548. When alternative energy was unavailable, consumers experienced blackouts and brownouts. *See* Johnson, *supra* note 2, at 336-37. Due to these increased costs, some utilities faced a financial crisis which was only avoided by state economic intervention. *See Con Edison, supra,* at 545.

6. Under FEPPSA, counties and municipalities may become parties to the need determination hearing. *See infra* notes 44-45 and accompanying text. Additionally, at the land use hearing, zoning authorties have the authority to declare a proposed site inconsistent with existing zoning ordinances. *See infra* notes 30-37 and accompanying text. The Siting Board, however, may override this determination by granting a zoning variance. *See infra* note 35.

A recent case, Gaines v. Orlando, illustrates popular discontent with FEPPSA's preemption of local government. 450 So. 2d 1174 (5th D.C.A. 1984). In *Gaines,* citizens appealed the lower court's dismissal of a writ of mandamus compelling the city of Orlando to take action on a petition to amend the city charter. *Id.* at 1176. The amendments prohibited both the city of Orlando and the Orlando Utility Commission (OUC) from constructing or assisting in the construction of any coal-fired electrical plants within Orange County. *Id.* In upholding the portion of the amendment applicable to the city the court wrote:

> The stated legislative intent, and the substantive provisions of the Siting Act show that the area preempted by the state is the process by which a utility or public authority obtains permission and a certification of need in order to build a plant. Whether a city or a utility initially decides to build a plant, or having decided to do so, decides *not* to continue, is beyond the scope of Chapter 403. Therefore, there is no preemption problem with the charter amendments.

Id. at 1180. The court, however, declared unconstitutional that part of the amendment pertaining to the OUC. *Id.* at 1182. It reasoned that the amendment would be in direct conflict with state laws granting the OUC authority and control over the supply of electricity within the city of Orlando. *Id.* In essence, this decision does little to increase local government control in the siting process. While curtailing the city's theoretical right to build a plant outside the city or to assist in building a plant, the court's decision insulates the utility empowered with supplying energy to Orlando from citizen referendums. Opponents of a proposed plant must fight its approval inside the limited channels afforded under FEPPSA.

7. *See* Hopping & Raepple, *A Solution to the Regulatory Maze: The Transmission Line Siting Act,* 8 FLA. ST. U.L. REV. 441 (1980) (author discussing streamlining of state agency licensing under the Transmission Line Siting Act, a statute modeled after FEPPSA) [hereinafter

procedural and performance standards for FEPPSA substantially comported with federal requirements, federal licensing was facilitated.[8]

FEPPSA attempts to balance energy needs against their potential environmental impact to insure that the location and operation of new power plants will have only minimal adverse effects on the environment.[9] Despite the Act's laudable goal, however, recent estimates

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cited as Hopping]. For a discussion of Florida's attempt to streamline environmental permitting, see Rhodes, *Streamlining State Environmental Permitting — The Florida Experience*, 12 NAT. RESOURCES LAW. 727 (1979).

8. Despite consolidated processing at the state level, applicants must still obtain a plethora of federal permits. For any undertaking constituting federal action, including issuance of any federal permit, applicants must prepare an environmental impact statement in compliance with NEEPA. As administered by the DER, applicants must also comply with air and water standards established in the Federal Water Pollution Control Act and the Clean Air Act. For any discharge (including thermal) into navigable waters, a permit is required from the Army Corps of Engineers under the Rivers and Harbor Act of 1899. Construction of plants in coastal areas must comply with the Coastal Zone Management Act. Additionally, applicants must comply with the Endangered Species Act, The Fish and Wildlife Coordination Act, and the Endangered Species Act of 1973. The National Historic Preservation Act and Executive Order 11593 establish regulations for the protection of historical and cultural properties. Lastly, sites which impact on federal highways, air traffic, waterways, or shellfish must contact, respectively, the Federal Highway Administration, the Federal Aviation Administration, the United States Coast Guard, the National Marine Fisheries Service, or the Gulf Coast Fisheries Service. For a detailed explanation of these federal acts, see FLA. BAR CONTINUING LEGAL EDUC., ENVIRONMENTAL REGULATION AND LITIGATION IN FLORIDA (1981) [hereinafter cited as ENVIRONMENTAL REGULATION AND LITIGATION]. For a discussion of the interface between Florida law and federal law in specific areas, see Boyd, *Florida's Power Siting Act and the Coastal Zone Management Act*, 51 FLA. B.J. 711 (1977); Maloney, *More Heat Than Light: Thermal Pollution Versus Heat Energy Utilization*, 25 U. FLA. L. REV. 693 (1973); Woodson, Corbett & Tannen, *Onshore Impact in Florida of Offshore Energy Development*, 31 U. FLA. L. REV. 284 (1979); Note, *Nuclear Power Plant Siting: Additional Reductions in State Authority*, 28 U. FLA. L. REV. 439 (1976). For an informative discussion of how other state statutes interact with federal law, see Willrich, *supra* note 2, at 272; Comment, *Energy Facility Siting in Oregon: Towards Regulatory Effectiveness*, 58 OR. L. REV. 220 (1979).

9. FLA. STAT. § 403.502 (1983) provides:

> Legislative intent — The Legislature finds that the present and predicted growth in electric power demands in this state requires the development of a procedure for the selection and utilization of sites for electrical generating facilities and the identification of a state position with respect to each proposed site. The Legislature recognizes that the selection of sites and the routing of associated transmission lines will have a significant impact upon the welfare of the population, the location and growth of industry, and the use of the natural resources of the state. The Legislature finds that the efficiency of the permit application and review process at both the state and local level would be improved with the implementation of a process whereby a permit application would be centrally coordinated and all permit decisions could be reviewed on the basis of standards and recommendations of the deciding agencies. It is the policy of this state that, *while recognizing the pressing need for increased power generation facilities, the state shall ensure through available and reasonable methods that the location and operation of electrical power plants 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. It is the intent to seek courses of action that will fully balance*

place Florida's energy reserve capacity at a substantial forty-three percent.[10] Thus, new plants are continually being certified even though additional energy generation is unnecessary.[11]

Current administrative approaches to power plant siting are undermining the careful balancing process required by FEPPSA. Despite the time lapse since the energy crisis of the early 1970's, a crisis atmosphere still pervades power plant siting in Florida. By assuming that future energy needs require the continuous construction of new power plants, administrators feel compelled to site plants quickly.[12] These energy demand projections, which include predictions of economic savings, often override considerations of environmental impact.[13] As a practical result of FEPPSA's current administrative structure, proponents of new power plants are granted a greater voice in the certification decision than are advocates of environmental

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the increasing demands for electrical power plant location and operation with the broad interests of the public. Such action will be based on these premises:

(1) To assure the citizens of Florida that operation safeguards are technically sufficient for their welfare and protection.

(2) *To effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility,* including air and water quality, fish and wildlife, and the water resources and other natural resources of the state.

(3) To provide abundant, *low-cost* electrical energy.

Id. (emphasis added).

10. George, *State Utilities Locked into Building Spree,* Gainesville Sun, Apr. 2, 1983, at B4, col. 6. Currently, the national planning standard for reserve capacity is 15%. *Id.*

11. Despite this surplus generating capacity, the Public Service Commission (PSC) determined that ten new plants are needed in Florida. *Id.* at B5, col. 2.

12. In a sense, new plants are always needed. In 1982, Florida Power & Light Co. had 67,000 new customers. *Id.* As one of the fastest growing states in the nation, the number of energy consumers in Florida will, doubtlessly, continue to grow. *Id.* An increase in the per capita consumption of energy may also increase energy demand. Johnson, *supra* note 2, at 336. To keep up with a growth rate of 6-7%, a utility must double its capacity every 12 years. *Id.* This figure does not include construction to replace outdated units. *Id.* In addition, because electrical power plants require approximately 5-6 years to build, utilities must keep well ahead of themselves in planning and construction of plants. *Id.* at 335.

Even with these inflexible parameters of energy supply and demand, however, Florida does not need additional generating capacity until the 1990's. *But see* SEMINOLE SITE CERTIFICATION REVIEW, *supra* note 2, at ii (Florida needs the additional generating capacity to maintain a reliable supply of electricity in the mid 1980's). Due to conservation efforts, Florida's current energy demand growth rate has leveled off to approximately 3%. 1983 TEN-YEAR STATE PLAN, STATE OF FLA., FLORIDA ELECTRIC POWER COORDINATING GROUP, INC., at II-6 (1983) [hereinafter cited as 1983 COORDINATING GROUP TEN YEAR PLAN]. Yet, administrators continue to certify plants at the same rate as in the early 1970's when Florida's average energy demand growth rate was 8.2%. 1978 TEN-YEAR PLAN, STATE OF FLA., FLORIDA ELECTRIC POWER COORDINATING GROUP 69 app. A (1978) [hereinafter cited as 1978 COORDINATING GROUP TEN YEAR PLAN]. This practice will simply carry the staus quo of over-certification into the future.

13. *See infra* notes 84-88 and accompanying text.

protection.[14]

This note will first outline the administrative procedures the Act provides. It will then analyze some of the administrative problems inherent in FEPPSA and will reveal an unarticulated policy of expediency which substantially impairs the legislative intent of the statute. Recurring problems, such as the ambiguous role of the Department of Environmental Regulations and the lack of meaningful public participation in the certification process, which further undermine the intent of the statute will then be discussed. Finally, this note will briefly compare FEPPSA to the siting statutes of other states. Based on this comparison, amendments to the Act's provisions will be proposed.

II. Administrative Procedure Under FEPPSA

Under FEPPSA, the certification of new power plants involves five steps: the initial filing of an application, the land use hearing, the need determination hearing, the certification hearing, and the final Siting Board hearing.[15] During the initial filing and the certification hearings, the Department of Environmental Regulation (DER) acts as lead agency,[16] coordinating and expediting the siting process.[17] A hearing officer appointed by the Department of Administrative Hearings (DOAH) administers the land use and certification hearings[18] and resolves any administrative disputes that arise during certification.[19] The Public Service Commission (PSC) presides over the need determination hearing.[20] At the final hearing, the Siting Board, which consists of the Governor and his cabinet, ultimately decides whether to certify the proposed plant.[21]

At the initial filing, applications are submitted to the DER, accompanied by a mandatory fee of between $5,000 and $50,000,[22]

14. *See infra* notes 97-100 and accompanying text.

15. Fla. Stat. §§ 403.5065, 503(1), .519, .508(3) & .509 (1983). For a "walk-through" and detailed discussion of FEPPSA, see Environmental Regulation and Litigation in Florida, *supra* note 8, at 518.

16. Fla. Stat. § 403.504 (1983).

17. *Id.* § 403.504(5). Section 403.504(5) provides that the DER shall have the duty to "administer the processing of applications for electric power plant site certifications and to ensure that the applications are processed as expeditiously as possible."

18. *Id.* § 403.5065.

19. *Id.* §§ 403.5065(2) & .508(6). Disputes that arise are generally over whether the application is complete. FEPPSA specifically empowers the hearing officer to make this determination. *Id.* For a discussion of this provision, see Johnson, *supra* note 2, at 338.

20. Fla. Stat. §§ 403.508(3) & .519 (1983).

21. *Id.* §§ 403.503(9) & .509.

22. *Id.* § 403.504(7)(a). This fee is calculated by either the size, type, and ultimate capacity of the proposed plant or the increase in generating capacity proposed by the applicant. *Id.*

which covers both administrative costs and the expenses incurred by DER for verification studies.[23] The DER must then forward copies of the application to the PSC, the Department of Community Affairs (DCA), the relevant water management district, and any affected state agencies.[24] In addition, DER must notify DOAH which appoints a hearing officer, preferably one with power plant siting experience.[25]

Upon receipt of the forwarded copy, the PSC prepares a report determining whether the proposed plan is needed.[26] In turn, the DCA evaluates the proposed plant's compatibility with the state comprehensive plan.[27] The water management district and other relevant agencies, such as the Department of Natural Resources, issue reports outlining the proposed plant's potential impact on matters within their jurisdiction.[28] The agencies then submit their evaluations to DER prior to the certification hearing.[29]

Prior to the certification hearing, a land use hearing is held in the county of the proposed site.[30] The hearing's sole purpose is to determine whether the proposed plant complies with existing zoning ordinances.[31] At the close of the land use hearing, the hearing officer issues recommendations to the Siting Board.[32] Once the Siting Board finds the proposed site consistent with existing zoning ordinances, the certification process continues and zoning authorities are precluded from amending existing ordinances to foreclose siting of the plant.[33] Should the Siting Board find the proposed site inconsistent with existing zoning, however, the applicant must apply with local authorities for a zoning change.[34] If local authorities deny the peti-

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23. *Id.* §§ 403.504(7)(a) & .507(2). For an example of a DER report, see SEMINOLE SITE CERTIFICATION REVIEW, *supra* note 2. FEPPSA also makes provisions for fee reimbursement. FLA. STAT. § 403.504(7)(b). For a discussion of reimbursement under FEPPSA, see *infra* notes 95-96 and accompanying text.

24. FLA. STAT. § 403.507 (1983).

25. *Id.* § 403.5065.

26. *Id.* § 403.507(1)(b).

27. *Id.* § 403.507(1)(a).

28. *Id.* § 403.507(1)(c) & (d). In addition to the Department of Natural Resources, these agencies may include the Game and Fresh Water Fish Commission, the Department of Transportation, the Department of Commerce, and the Division of Archives, History, and Records Management. For an exhaustive listing of these agencies, see ENVIRONMENTAL REGULATION AND LITIGATION, *supra* note 8, at 518.

29. FLA. STAT. § 403.504(7) (1983).

30. *Id.* § 403.508(1). FEPPSA mandates that the land use hearing be held as close as possible to the proposed site. *Id.* The DER publishes notice of the hearing. Individuals may file to participate up to 45 days before the hearing. *Id.* For a discussion of the difficulties associated with participation in the certification process, see *infra* notes 105-08 and accompanying text.

31. FLA. STAT. § 403.508(2) (1983).

32. *Id.*

33. *Id.*

34. *Id.* FEPPSA does not specify when the county commission should hold a hearing to

tion, the applicant may then appeal to the Siting Board for a zoning variance.[35] The Board will issue a variance if it determines the proposed plant will serve the public interest.[36] A denial of the variance terminates the certification process and the applicant must consider an alternative location.[37]

After the land use hearing, applicants proceed to the need determination hearing.[38] As a condition precedent to the certification hearing, the PSC must conclude that the plant is needed.[39] In reaching its conclusion, the PSC considers energy demand, cost, reliability and any other factors, such as conservation efforts, which might mitigate energy demand.[40] The PSC's determination of need is binding upon both the hearing officer and the Siting Board.[41]

After the PSC renders an affirmative decision, the certification hearing is held.[42] Statutory parties to the hearing include the applicant, the DER, the PSC, the DCA, and the water management dis-

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decide whether to change local zoning to accommodate the proposed plant. *See* ENVIRONMENTAL REGULATION AND LITIGATION, *supra* note 8, at 535. Generally, however, the county commission will have held this hearing well in advance of the filing of the certification application, thus preventing further time delay. *Id.*

35. FLA. STAT. § 403.508(2) (1983).

36. *Id.* A finding that the plant is in the public interest, in effect, preempts local government's zoning authority.

37. *Id.* Alternatively, applicants could modify the proposed plant so as to conform with local land use plans or zoning ordinances. *Id.*

38. *Id.* § 403.508(3).

39. FLA. STAT. 403.508(3) (1983) provides: "[A]n affirmative determination of need by the Public Service Commission pursuant to []§ 403.519 shall be a condition precedent to the conduct of the certification hearing."

40. *Id.* § 403.519. In the only case to interpret FEPPSA, the Fifth District Court of Appeal showed great deference to the need determination role of the PSC. Florida Chapter of the Sierra Club v. Orlando Util. Comm'n, 436 So. 2d 383 (Fla. 5th D.C.A. 1983). The court held that the PSC's determination of need is binding on both the hearing officer and Siting Board. In the court's own words:

> No Florida court has interpreted section 403.519, but the language therein, as well as the language from section 403.508(3), compels the finding that the PSC is the sole judge as to the need for the power plant, with the hearing officer, and, indeed, the Siting Board, bound by that determination.

Id. at 387. Furthermore, the court indirectly affirmed that, even if energy demand changes, the PSC's determination of need is still binding unless the PSC, itself, recedes from this determination. *Id.* at 387-88. The court also excluded need determination from any other phase of the certification process. *Id.* at 388.

41. 436 So. 2d at 387. *See also supra* note 40.

42. Before the certification hearing, the DER publishes notice of the hearing. FLA. STAT. § 403.504(9) (1983). Notice requires publication of the nature, date, and location of the proceeding in newspapers of general circulation, in the Florida Administrative Weekly, and possibly in a news release to the media. *See* Hopping, *supra* note 7, at 452. Landowners whose property will be taken by the proposed plant receive no special notice. *Id.* They are notified only after the plant has been approved and negotiations or eminent domain proceedings are underway. *Id.*

trict.[43] Additionally, any affected counties, municipalities, agencies, or other interests[44] may become parties by filing a notice of intent at least fifteen days prior to the certification hearing.[45] Other individuals may intervene up to fifteen days prior to the certification hearing upon a showing that they have a substantial interest being affected and determined by the hearing.[46] The hearing officer retains the discretion to grant, deny, or impose conditions on the intervention.[47] When appropriate, non-party individuals may submit to the hearing officer oral or written testimony[48] which is subject to cross-examination if the hearing officer considers it in making his decision.[49]

Based on the evidence obtained at the certification hearing, the hearing officer makes findings of fact and conclusions of law and submits a recommendation to the Siting Board.[50] Although FEPPSA does not provide specific guidelines in reaching this recommendation, the hearing office will theoretically adhere to legislative intent by balancing environmental impact against energy need.[51] In this balancing, the PSC's determination that the plant is needed binds the hearing officers.[52]

In the final phase of the certification process, the Siting Board either affirms or denies the hearing officer's recommendation. Denial of certification constitutes final administrative action, although applicants can seek judicial review pursuant to chapter 120 of the Florida

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43. FLA. STAT. § 403.508(4)(a)(1-5) (1983).

44. These include environmental, labor, commercial, and industrial groups. *Id.* § 403.508(4)(b) & (d).

45. *Id.* § 403.508(5)(b). As with the Transmission Line Siting Act, FEPPSA does not require inclusion as parties of all agencies whose property or works will be affected by the proposed plant. *See* Hopping, *supra* note 7, at 451; FLA. STAT. § 403.327(3)(e) (1983). An agency, however, which did not receive notice of the hearing and which was not made a party to the hearing is not bound by the certification order. *Id.* Applicants must seek this agency's approval in a separate proceeding. *Id.* FEPPSA, therefore, provides that either an applicant or the DER may request that an agency be joined as a party. FLA. STAT. § 403.508(4)(e) (1983). Failure of a municipality, county, or agency to file constitutes waiver of the right to participate as a party, but not of the opportunity to participate. *Id.* § 403.508(4)(c). These entities may present oral or written testimony at the hearing pursuant to § 403.508(5).

46. FLA. STAT. § 403.508(4)(d) (1983). FEPPSA was designed to make early intervention into the certification process easy, but later intervention more difficult. *See* Johnson, *supra* note 2, at 338. Legislators chose this approach to avoid the inordinate delays usually associated with late intervention. *Id.* Therefore, FEPPSA requires that late intervenors must have a substantial interest being affected by the proposed plant. FLA. STAT. § 403.508(4)(d) (1983). The hearing officer has absolute authority in deciding if this interest exists. *Id.*

47. *Id. See also supra* note 46.

48. FLA. STAT. § 403.508(5) (1983). Again, the hearing officer has the sole discretion of whether to consider this testimony in making a decision. 436 So. 2d at 387.

49. FLA. STAT. § 403.508(5) (1983).

50. *Id.* §§ 120.57(1)(b)(8) & 403.508(6).

51. *Id.* § 403.502. *See also supra* note 9.

52. *See supra* note 41 and accompanying text.

Statutes.[53] In granting the certification, the Board may either modify the hearing officer's recommendation[54] or vary any other agency standard expressly considered in the certification.[55]

Even after final certification, FEPPSA provides for continuing administrative action. Certification orders may be modified, suspended, or revoked due to changed circumstances or for just cause.[56] The Act also permits the expedient processing of supplemental applications requesting additional generating capacity for previously certified plants.[57] Provided the generating unit does not exceed either the previously certified geographical boundaries or maximum generating capacity, another land use hearing is not required.[58]

III. EXPEDIENCY — FEPPSA'S IMPLICIT POLICY

FEPPSA has resulted in remarkably expedient power plant certification. Indeed, most plants in Florida have obtained certification

53. FLA. STAT. §§ 403.509(3) & .513 (1983).

54. *Id.* § 403.509(1).

55. *Id.* § 403.511(2). This section provides:

> [T]he certification agreement may include conditions which constitute variances from nonprocedural standards or regulations of the department or any other standards or regulations of any other agency which were expressly considered during the proceeding and which otherwise would be applicable to the construction and operation of the proposed electrical power plant.

Id. Section 403.511(4) excludes, however, the PSC's rate-making powers and local government's right to tax and enforce building codes from modification. Translated, this provision means that if an agency is not notified by DER or joined as a party by the applicant then the certification order is not binding on its property or works. *See supra* note 45. The key phrase in this interpretation is the use of the word "specifically." If specific agency regulations are considered in the certification process, then the agency will, undoubtedly, be notified or joined as a party. Section 403.511(2) usually applies when an agency is "overlooked" and yet the conditions of certification violate the agency's standards. In fairness to the agency, these conditions are not binding. The chances of this situation occurring are slim, however, because both the DER and the applicant would have to fail to recognize that the agencies had an interest affected by the proposed plant.

56. FLA. STAT. §§ 403.512 & .516. Certification may be revoked or suspended for: (1) a material false statement in the certification process which would have resulted in denial of the recommendation; (2) failure to comply with the conditions or terms of certification; or (3) violation of FEPPSA. *Id.* § 403.512. Certification orders may be modified in three ways. The Siting Board may delegate the responsibility to modify specific conditions to the DER. *Id.* § 403.516(1). Alternatively, parties to the certification hearing may agree by mutual written agreement to modify specific terms. *Id.* § 403.516(2). This agreement is subject to final approval by the Siting Board. *Id.* Lastly, if the parties cannot agree on the modification, the applicant files a petition with the DOAH. *Id.* § 403.516(3). A hearing is held and the hearing officer makes a recommendation which the Siting Board either approves or denies. *Id.*

57. *Id.* § 403.517. This provision was enacted to avoid the time-consuming relitigation of issues previously resolved in the initial certification process. Johnson, *supra* note 2, at 338. The scope and extent of administrative review under this section depends on the time elapsed between the initial certification and the request for additional generating capacity. *Id.*

58. FLA. STAT. § 403.517(3)(a) & (b) (1983).

within fourteen months.[59] In pursuing a blanket policy of expediency, however, administrators subordinate or distort the other equally important goals of FEPPSA. Invariably, the policy of expediency includes the tacit assumption that a plant is needed.[60] This assumption distorts the initial determination of whether the need for a plant outweighs its environmental impact.[61] Even after administrators determine a plant is necessary, the policy of expediency frustrates the careful balancing of energy and environmental needs required for determining conditions of operation.[62]

FEPPSA was enacted at a time when the immediate certification of nonoil-dependent power plants was a state necessity.[63] Despite this

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59. FLA. BAR CONTINUING LEGAL EDUC., 1983 SUPPLEMENT TO ENVIRONMENTAL REGULATION AND LITIGATION IN FLORIDA 16.3. In New York, for example, certification may take 3 ½ years and cost up to $25 million. Cronin & Turner, *Article VIII of the Public Service Law — The Brave New World of Power Plant Siting in New York: A Critique and Suggestion for an Alternative Approach*, 42 ALB. L. REV. 537, 544 (1978).

60. Expediency is only important when utilities must certify plants immediately to meet demand. *See supra* note 12. Pursuing a policy of blanket expediency, therefore, fosters the belief that new plants are always needed.

61. *See infra* notes 63-67 and accompanying text.

62. *See infra* notes 68-71 and accompanying text.

63. *See supra* note 5. Florida is still continuing the conversion away from petroleum to alternative fuel sources. In recent certifications, the PSC has focused almost exclusively on the economic savings and the decreased dependence on foreign oil that would accrue from plant constructions:

> Construction of Big Bend 4 is warranted as economically cost-effective based on the cost differential in coal and oil. Appendix D presents an analysis of Big Bend 4's effect on the capacity and generation mix of Peninsular Florida, revealing displacement of oil fired generation within the first nine months of operation should coal fired generation prove to be less expensive than oil fired. Supportive of the likelihood of these savings is the reasonableness of Tampa Electric's forecast of the rate of escalation associated with the prices for coal and oil. Tampa Electric's forecast assumes a 9% annual escalation rate for coal and a 14% rate for oil in 1985-1990, and 12% thereafter. The Commission staff's comparison of these rates with those forecasted by the Federal Energy Information Administration (EIA) disclosed they fall within ranges forecasted by EIA or are within an acceptable range relative to the average EIA escalation rate.

In re: APPLICATION FOR CERTIFICATION OF TAMPA ELECTRIC COMPANY'S PROPOSED 417 MEGAWATT NET COAL-FIRED BIG BEND UNIT NO. 4, 81 FLA. PUB. SERV. COMM'N REP. 64, 66 (1981) (Public Service Commission Order Certifying Need for Tampa Electric Company's Big Bend Coal-Fired Plant) [hereinafter cited as PSC BIG BEND ORDER].

> Should coal fired generation prove less costly than oil fired generation, as has been indicated by testimony in this case, substantial socio-economic benefits will be realized. An approximate savings of 3.9 million barrels of oil will be displaced annually by Big Bend 4 based upon Tampa Electric estimates contained in Appendix F of the final report. The impact of this reduction in Peninsular Florida's dependence on imported oil and correspondingly added security of fuel supplies is considerable. Assuming that the risk of loss due to unpredictable oil supplies is that in any year there is a 10 percent chance that only 50 percent of the oil required as fuel in steam plants is available, the value of Big Bend 4's contribution to reducing Florida's dependence on imported oil would approximate $232 million in 1980 dollars.

recognized exigency, legislators enacted a law which requires careful consideration of whether a plant is needed.[64] Currently, energy demand in Florida has leveled off considerably.[65] As a result, Florida requires no immediate additional generating capacity.[66] Yet the approval of every site ever submitted for certification evidences that the certification process essentially skips the initial determination of whether the need for a plant outweighs its environmental impact.[67]

Even without its tacit assumption that a plant is needed, the policy of expediency undermines the implementation of FEPPSA. Formerly, opponents of a proposed plant could force concessions from a utility simply by tying up the certification process.[68] Currently, how-

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Id. at 67.

> Having considered the record in this matter, we find that a need exists for the construction of St. Johns River Power Park Units 1 and 2 in the time frame proposed by the applicants, in that construction of the units appears to be the best available alternative to the continued use of expensive oil-fired generation, based upon the most reasonable projections of future fuel cost and our appraisal of possible alternatives. . . .

In re: JEA/FPL's APPLICATION FOR NEED FOR PUBLIC SERVICE COMMISSION ST. JOHN'S RIVER POWER PLANT UNITS 1 AND 2 AND RELATED FACILITIES 81 FLA. PUB. SERV. COMM'N REP. 6:220, at 226 (June 26, 1981) [hereinafter cited as PSC ST. JOHN'S ORDER]. While converting from oil to alternative fuels does have political and economic advantages, it has disadvantages as well. Rather than having one plant running at full capacity, Florida has several plants running below capacity. George, *supra* note 10, at B5, col. 2. This practice results in a greater emission of pollution. It is also inefficient because plants are designed to run most efficiently and economically at full capacity. Johnson, *supra* note 2, at 335.

64. FLA. STAT. § 403.502(1983). *See supra* note 9.

65. In peninsular Florida, peak summer energy demand increased by an average 12.2% per year from 1968-73. SEMINOLE SITE CERTIFICATION REVIEW, *supra* note 2, at E-9. From 1974-77, peak summer energy demand increased by 3.9% per year. *Id.* By 1982, the annual increase in energy demand had continued to decline to approximately 3%. 1983 COORDINATING GROUP TEN YEAR PLAN, *supra* note 12, at III-6.

66. *See infra* note 85 and accompanying text.

67. For a listing of these applications, see ENVIRONMENTAL REGULATION AND LITIGATION (Supp. 1983), *supra* note 8, at 16.3.

68. When faced with a delay in the certification process, utilities who need a new plant to meet pressing energy needs can either compromise with opponents, buy costly energy from other sources, or risk a possible black-out or brown-out. Willrich, *supra* note 2, at 270. Utilities not on a critical time path still face the significant costs associated with litigation. *See* Weinberg, *Power Plant Siting in New York: High Tension Issue,* 25 N.Y.L. SCH. L. REV. 569, 587 (1980). In the interim during litigation, fuel and construction costs continue to climb and costly reports become outdated. *Id.*

Criticizing the use of delaying tactics in the certification process, one author wrote:

> Indeed, opponents of given projects — and not only power plants — have been quick to seize on this vulnerability and use delaying tactics as a device to force concessions of one sort or another. This tactic may be very effective in the short run, but it is not part of a rational decision-making process. It also imposes far greater costs in the long run than a rational decision-making process which is structured to take all concerns into account and produce the result costing society the least, given the applicable constraints. Typically, the life of a first mortgage bond used to finance an electric power plant is 30 years. Thus, any uncertainty or delay which is reflected as an increase in the cost of that

ever, FEPPSA's reasonable time limits guard against unnecessary delay.[69] The only significant delay associated with power plant siting is the actual lead time needed to construct the plant.[70] Yet in pursuing expeditious results, administrators have failed to acknowledge that the delay caused by judicious exploration of all pertinent factors may produce better decisions.[71] To effectuate the statutory intent of FEPPSA, legislators need to establish a clear priority of policies. An impartial balancing of need and impact cannot take place when administrators presuppose a plant is needed. Nor can administrators make careful and meticulous decisions when expediency is their primary goal.

FEPPSA mandates a balancing of energy and environmental needs. Yet implementing this mandate presents considerable difficulty. Regardless of how sophisticated the model, computations of energy need are only approximations.[72] Furthermore, controversy

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bond will be paid for in higher electricity costs for the same 30-year period. Thus, a rational decision-making process is vital.

Johnson, *supra* note 2, at 336.

69. Under FEPPSA, the land use hearing must be held within 90 days. FLA. STAT. § 403.508(1) (1983). The certification hearing must occur within 10 months. *Id.* § 403.508(3). As a result, the need determination hearing, which is a condition precedent to the certification hearing, must take place well in advance of this date. The hearing officer must submit a recommended order within 12 months after receipt of the complete application. *Id.* Within 60 days of receipt of the hearing officer's recommended order, the Siting Board must issue a final order. *Id.* § 403.509(1). The governor then has 30 days to sign the certification order. ENVIRONMENTAL REGULATION AND LITIGATION, *supra* note 8, at 16.15. *See* FLA. STAT. § 403.511(1). These time limits span approximately 14-15 months. For a graphic representation of these time limits, see ENVIRONMENTAL REGULATION AND LITIGATION, *supra* note 8, at 16.11-.17.

The only significant delay now associated with power plant siting is the actual lead time needed to construct the plant. Construction time for fossil fuel power units takes from 4-6 years. PSC BIG BEND ORDER, *supra* note 63, at 73. Nuclear units take 10-12 years to construct. *Id.*

70. Construction time for fossil fuel power units takes from 4-6 years. PSC BIG BEND ORDER, *supra* note 63, at 73.

71. Hamilton, *supra* note 1, at 91.

> [T]he bulk of this literature . . . seems to accept electric utility industry figures on the financial cost of construction delays as conclusive evidence that the site approval process should be expedited. But the assumption that such delays are necessarily detrimental (even though costly) has not been tested against the possibility that such an extended amount of time may be desirable to ensure adequate scrutiny of the siting proposal. Many proposals have been modified during siting proceedings, but nowhere is there evidence of research which might show whether or not better decisions have been made as a result of time devoted to more careful review of utility plans.

Id. (footnotes omitted).

72. Energy demand, a component of need, can change radically from year to year. In 1973 energy demand was increasing by 12.7% per year. SEMINOLE SITE CERTIFICATION REVIEW, *supra* note 2, at E-8. By 1974 energy demand was decreasing by .5% per year. *Id.* The PSC, itself, seemed to admit the unreliability of projecting energy demand in its statement:

surrounds those factors, aside from energy demand, which should be included in the need computation.[73] While balancing implies a weighing of two options,[74] FEPPSA does not assign any particular weight to energy need or environmental impact.[75] Therefore, balancing is largely a subjective undertaking of the hearing officer or the Siting Board. Paradoxically, this balancing has resulted in uniform approval of certification applications.[76] Unlike the flexible model envisioned in the Act, in practice any determination of need preempts the balancing process.

IV. FEPPSA's Procedural Problems

A. Need Determination

As a condition precedent to any certification hearing, FEPPSA requires the PSC to issue a certificate of need.[77] In determining need, FEPPSA empowers the PSC to consider both energy cost and energy reliability.[78] Energy reliability comprises both the energy required to meet present demand and the energy required to provide a safety

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Clearly, we cannot use historical growth rates for projecting future growth. An abrupt change occurred in 1974. However, we have only seen the short stub of a new growth pattern and it is too early to determine what the 10 to 20 year pattern will be at this time. One thing appears certain: the number of customers in peninsular Florida is increasing and this increase will result in increased energy and power demands.

Id. at 9. For samples of the models used in projecting energy demand, see 1983 FP&L Ten Year Plan, *supra* note 2; 1983 Coordinating Group Ten Year Plan, *supra* note 12.

73. *See infra* note 84-85 and accompanying text.

74. *See* 436 So. 2d at 391 (Sharpe, J., dissenting).

It is difficult for me to conceive of how a hearing officer can weigh or balance the need for a plant against its adverse environmental impact if all evidence regarding the quality of the need is excluded. It is like putting a known quantity on one side of a scale, and then weighing it against an unknown on the other side. No realistic weighing can be done unless both components are examined and known.

Id.

75. *See* Fla. Stat. § 403.502 (1983), *quoted at supra* note 9.

76. *See* Environmental Regulation and Litigation, *supra* note 8, at 16.3.

77. Fla. Stat. § 403.508(3) (1983).

78. *Id.* § 403.502. *See also* Willrich, *supra* note 2, at 301.

A comprehensive approach to the siting problem should reflect the state's electric power supply policy. A policy regarding the supply of electric power should deal explicitly with three factors: [1] the growth rate of generating capacity; [2] the reliability of the supply system; and [3] the cost to the consumer of the electricity produced. A supply policy may favor increasing, maintaining, or decreasing any one of these factors; but, since the factors are interrelated, a desirable change in one may entail an undesirable change in another.

Id.

margin in excess of demand.[79] Due to the constant fluctuation in energy demand, however, projections of energy needs have inherent limitations.[80] The time delay between the application for certification and the onset of plant operations may further exacerbate any existing inaccuracies. Yet pursuant to FEPPSA, the entire certification process is contingent upon the determination of energy need.[81] The certification hearing cannot proceed without a certificate of need, and FEPPSA does not mandate a redetermination of energy need during the certification process.[82] As the exclusive forum for need determination, the PSC retains the sole discretion to reassess its determination. Furthermore, both the Siting Board and the hearing officer are bound by the PSC's decision, notwithstanding potential fluctuations in energy need occurring after the initial need determination hearing.[83]

The inclusion of economic savings as a component of energy need compounds the inaccuracy of projecting energy demand. As the per capita decrease in Florida's energy demand illustrates,[84] new plants are "needed" primarily to provide future savings for the consumer and the utility company, not to meet existing energy demand.[85] Con-

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79. Reliability is measured by the reserve capacity or the loss of load probability (LOLP) of the plant. SEMINOLE SITE CERTIFICATION REVIEW, *supra* note 2, at D-7. The LOLP reflects the probability of generating capacity failure superimposed upon the probability of peak demand. "[I]n other words, the probability is that on one day in 10 years, the system will not be able to meet the load imposed on it." Johnson, *supra* note 2, at 335. In general, utilities have considered the probability of this occurring on one day out of 10 years (.190) as safe. Similarly, a reserve capacity of 20% is also considered safe. *Id.* Willrich, *supra* note 2, at 265 n.12. Both LOLP and reserve capacity margins have serious limitations.

> For example: a utility with a 800 megawatt peak demand and one 1000 megawatt generating unit will have a 25 percent reserve margin which may be called adequate. However, any time that one unit malfunctions and trips off-line, a blackout will result.
>
> Another system with an 800 megawatt peak demand and five 200 megawatt generating units will also have a 25 percent reserve margin and be able to withstand the loss of one unit, even at time of peak.

SEMINOLE SITE CERTIFICATION REVIEW, *supra* note 2, at D-3.

80. *See supra* note 72. In 1978, for example, energy demand from 1978 to 1987 was projected to increase at approximately 5% per year. 1978 COORDINATING GROUP TEN YEAR PLAN, *supra* note 12, at 69. Currently, however, the annual increase in energy demand has tapered off to around 3%. 1983 COORDINATING GROUP TEN YEAR PLAN, *supra* note 12, at III-5. This figure is now expected to decline throughout the 1980's. *Id.*

81. *See supra* note 39.

82. Even during the 14 month span required for certification, energy demand and thus need, can fluctuate significantly. *See infra* notes 84-85 and accompanying text.

83. *See supra* note 40.

84. *See supra* note 65.

85. In summary, our evaluation indicates that pursuant to our assumptions in establishing Conservation Goals for the growth of kilowatt demand in Florida, the additional capacity from Big Bend Unit No. 4 is not needed in Peninsular Florida. However, based on the best available information to us, Big Bend Unit No. 4 is needed and should be

sequently, the PSC's determination of need is increasingly based on projected economic benefits rather than true energy demand.

B. Balancing

Although FEPPSA mandates a balancing of environmental factors and energy needs, the Act provides no methodology for accomplishing this goal. Balancing requires an entirely subjective evaluation by the hearing officer. Theoretically, the hearing officer weighs, at the certification hearing, the environmental cost of a project against its need. As in initial need determination, however, the potentiality for economic savings often tips the scales in favor of new plant construction. Environment impact is not readily reduceable to a cost benefit analysis[86] because the "price" of externalities such as water, air, and thermal pollution are rarely expressed in economic terms.[87] As a result, hearing officers "balance" a concise statement of

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> certified from an economic standpoint. . . . The primary goal of generation expansion planning is to develop a plan for the construction of generating facilities to serve future loads at the lowest cost possible.

PSC BIG BEND ORDER, *supra* note 63, at 72-73.

> Even though the Stanton Center is not required in the 1980's to meet the peninsula's capacity needs, the project will provide significant economic benefits for peninsular Florida in terms of supplying an alternative to oil-fired capacity generation. FCG's analysis determined that energy savings would be realized beginning with 1987, the first full year of operation. The percentage increase in savings during the first few years of the unit's operation is projected to be substantial. . . .

In re: PETITION FOR CERTIFICATION OF NEED FOR ORLANDO UTILITIES COMMISSION, CURTIS H. STANTON ENERGY CENTER UNIT 1, AND RELATED FACILITIES 81 FLA. PUB. SERV. COMM'N REP. 10:18, at 20 (Oct. 2, 1981) (public service commission order certifying need for energy plant) [hereinafter cited as PSC CURTIS STANTON ORDER].

86. *See* SEMINOLE SITE CERTIFICATION REVIEW, *supra* note 2. While some reports do contain qualitative analysis, even this is very complex and difficult for a layman to understand. For a discussion of the problems inherent in trying to make reports comprehensible for the layman, see *Energy Facility*, *supra* note 2, at 720.

87. Even those impacts which are amenable to economic valuation, such as habitat loss, remain uncalculated. For example, the Seminole Certification Review states simply: "A more significant impact may be the loss of habitat. Although some species may be able to relocate, this may cause overcrowding in the surrounding undisturbed habitat." SEMINOLE SITE CERTIFICATION REVIEW, *supra* note 2, at 63. Although this statement acknowledges the adverse impact of plant construction, it makes no attempt to explain the seriousness of this impact in comprehensible terms. This example illustrates a major failing in FEPPSA. Although an exhaustive list of factors are reported on, these factors do not actually impact on the certification process as they should. This happens because crucial environmental reports are either impossibly complex or, as above, uselessly vague. Simply put, FEPPSA seems to foster the belief that once a problem is acknowledged and reported on it can simply be forgotten.

Another problem in FEPPSA is that the hearing officer has the discretion to pick which expert testimony he or she wishes to believe. *See infra* note 90. In the certification hearing for the Orlando Curtis Stanton Plant, an expert witness for the Sierra Club testified that acidity levels due to acidic rain were reaching critical levels in Florida lakes. Reply Brief of Sierra Club

economic gain against a vague environmental impact report. Invariably, hundreds of millions of dollars in savings easily outweigh an amorphous, economically unquantified environmental impact.[88]

Monetary considerations may also inhibit administrators from imposing the conditions and restrictions on power plant operations provided by FEPPSA. Presumably, FEPPSA's policy of minimizing environmental impact contemplates a balancing test which allows some potential environmental damage in order to meet actual energy demand. Thus, when energy demand is low, the tolerable level of environmental impact should be correspondingly lower. Yet administrators have refused to implement this policy, largely because projected cost savings inflate the calculations of energy need.

Hearing officers often reduce the entire process to a conclusory statement that balancing has occurred.[89] Furthermore, the hearing officer's discretion is largely unreviewable. Appellate review consists only of determining whether substantial competent evidence exists to justify the decision.[90] The PSC certificate of need alone satisfies this standard of review. The certificate does not, however, ensure that the hearing officer has properly balanced all relevant factors.

V. Environmental Advocacy: The Role of the DER in the Administration of FEPPSA

Theoretically, the appointment of DER as lead agency should result in environmental favoritism in power plant siting.[91] As lead

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at A-4, Florida Chapter of the Sierra Club v. Orlando Util. Comm'n, 436 So. 2d 383 (Fla. 5th D.C.A. 1983). Although opposing witnesses admitted to not having conducted studies of acid rain in the area, the hearing officer, nevertheless, chose to believe their testimony that acid rain was not a problem. *Id. See infra* note 94.

88. In the PSC's need determination hearing for the St. John's power plant, the PSC projected savings of $8 billion. PSC St. John's Order, *supra* note 63, at 226. Yet no attempt was made to offset this figure with economic valuations of habitat loss, fish and animal kills, and air and water pollution.

89. The hearing officer issued the following recommendation for the Curtis Stanton plant:

> Unit 1 and its associated facilities, if constructed as applied for with the subject conditions of certification, 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. The operation safeguards as proposed for Unit 1 are technically sufficient for the protection and welfare of the citizens of Florida. *Further, a reasonable balance is struck between the need for the facility and the environmental impact resulting from construction and operation of the facility.* Finally, the facility is capable of providing abundant low-cost electrical energy.

436 So. 2d at 386 (emphasis added). *See also* Reply Brief, *supra* note 87, at 9.

90. "The decision to believe one expert over another is left to the hearing officer and the Board, and cannot be substituted by this court absent a finding of lack of competent, substantial evidence." 436 So. 2d at 389.

91. *See* Willrich, *supra* note 2, at 308. *See also* Hamilton, *supra* note 1, at 90.

agency, however, DER has the considerable burden of organizing, processing, and generally overseeing the entire certification process.[92] In performing these functions, DER has assumed the role of a neutral agency. While DER has occasionally imposed lenient restrictions on plant operations,[93] it has never acknowledged an environmental impact severe enough to preempt any consideration of energy need.[94] This practice essentially compromises environmental concerns before the actual balancing stage of power plant certification. Because DER has no control over need determination, hearing officers do not consider the effect of these environmental compromises when determining need. As a result, hearing officers balance a relatively diluted environmental impact statement at the certification hearing.

The dynamics of the certification process may have influenced DER to adopt an administrative rather than adversarial role. Although applicants pay up to $50,000 in application fees, and the DER does sometimes refund unused portions of the fee, many certification costs are not accessed against the applicant. Agencies such as the PSC, water management districts, and even the DER receive compensation for their expenses only upon request.[95] If the filing fee is insufficient to cover all expenses, agencies receive only a prorated share.[96] Any delay in siting or any alteration in the proposed conditions of operation escalates agencies' administrative costs. Likewise, denial of an application would probably result in the proposal of an alternative site, requiring the DER and other agencies to duplicate their efforts. As a result, the DER has an interest not only in approving initial plant certification, but also in doing so quickly.

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92. FLA. STAT. § 403.504 (1983).

93. *See supra* note 67 and accompanying text.

94. *See* SEMINOLE SITE CERTIFICATION REVIEW, *supra* note 2, at app. A. In some cases the DER actually grants variances from state law. *Id.* at A-6.

95. Conversation with Hamilton S. Over, Department of Environmental Regulations, Division of Environmental Permitting, Power Plant Siting (Apr. 29, 1985). In the certification process for Unit I at the Orlando Utilities Commission's Curtis H. Stanton Energy Center, only the DER and the DCA requested fee reimbursement. Letter from Larry R. Wright, Assistant Chief, Bureau of Accounting and Budgeting, Department of Environmental Regulations, to D.E. Shoup, Orlando Utilities Commission (May 15, 1984) (discussing filing fee distribution). Both agencies were fully compensated and the applicant received a $4,260.52 refund. *Id.*

96. For example, in the certification process for the Jacksonville Electric Authority's St. Johns River Power Park, the DER incurred salary expenses of $23,585.70. Letter from Teddy F. Payne, Assistant, Bureau of Accounting and Budgeting, Department of Environmental Regulations, to Royce Lyles, Managing Director, Jacksonville Electric Authority (Sept. 29, 1982) (discussing filing fee distribution). Because the $30,000 filing fee was insufficient to cover all salary expenses, the DER received a prorated portion of only $4,024.08. *Id.* Similarly, the PSC incurred salary expenses of $26,705.16 and was refunded only $4,555.83. *Id.*

VI. Public Participation

FEPPSA provides for public participation at every phase of the certification process.[97] Participation as a party, however, involves considerable time and monetary expenditures. Often, individuals and conservation groups simply do not have the resources to adequately participate in the certification process.[98] Conversely, utilities generally have much larger financial reserves which are more than adequate to cover the costs of litigating the certification process.[99]

The relative unavailability of information further hinders public participation under FEPPSA. Applications, agency reports, DER recommendations, and hearing transcripts are all located in the DER office in Tallahassee. Upon request, the public may receive copies of these materials at their own expense.[100] Despite its laudable intent, this provision of FEPPSA overlooks the significant inconvenience the public will encounter in traveling to Tallahassee. It also overlooks the expense involved in copying hundreds and possibly even thousands of pages of transcripts.

VII. Proposed Modifications of FEPPSA

While FEPPSA purports to balance energy need and environmental impact, in practice it favors the power industry. Resolution of this problem would not necessarily require significant expense or statutory revision. Pre-screening potential plant sites in addition to clari-

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97. Fla. Stat. §§ 403.508-.509 & .519 (1983).

98. *See Energy Facility, supra* note 2, at 723. For a discussion of the problems encountered by public participants in agency proceedings, see Gellhorn, *Public Participation in Administrative Proceedings*, 81 Yale L.J. 359 (1972). In his article, Irving Kaufman identified six major obstacles to public participation in agency proceedings:

> (1) Notice of the Agency proceedings are, in effect, not readily available to the interested public,
>
> (2) Regulated industry often has private access to information that ordinary citizens cannot get. The citizen, in effect, is "fenced out" of participation in the Agency proceedings,
>
> (3) Many phases of Agency decisionmaking exclude citizen representatives.
>
> (4) The question of who qualifies as an "interested party" for intervention is often left entirely to the discretion of an Agency.
>
> (5) The expense of citizen intervention is exceedingly prohibitive.
>
> (6) The procedural rules of many Agencies are hopelessly complex and provide no clue to the layman of his rights.

Kaufman, *Power for the People — And by the People: Utilities, the Environment and the Public Interest*, 24 Ad. L. Rev. 3, 9 n.15 (1972). Except for the total exclusion of public participation, all these obstacles are also present in FEPPSA.

99. For example, in the certification process for a large 600-800 megawatt plant, utilities may spend up to $1,000,000. *See* conversation with Hamilton S. Over, *supra* note 95.

100. Fla. Stat. § 403.515 (1983).

fying the DER's role and fostering public participation would alleviate FEPPSA's policy problems and administrative difficulties. Perhaps the most difficult step in modifying FEPPSA would be dispelling the traditional favoritism granted the power industry.[101] Legislators would have to recognize not only that an inequity exists, but also that this inequity is undesirable.

A. Pre-Screening Site Locations: Site Inventories

Pre-screening power plant locations in advance of their actual need would eliminate both FEPPSA's overreliance on need projections and administrative overconcern with expediency. Currently, Florida utilities publish a ten-year energy plan which identifies possible plant locations.[102] The identification of possible sites, however, is only an informal process. A final administrative determination of site suitability is needed.

Site evaluation ideally should proceed in three phases. In the initial pre-screening phase, officials would assess the suitability of site location, independent energy demand, and any other relevant factors.[103] At the second phase, administrators would determine the type of plant facility needed.[104] During the third phase, administrators

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101. Regulatory agencies responsible for licensing new power plants have historically favored utility interests, subordinating environmental concerns to the desire for abundant and economical power. Despite recent legislative and judicial efforts to achieve greater responsiveness to environmental needs, these agencies continue to make site-by-site decisions, allowing new plants to be constructed whenever projected electricity needs require them. In so doing, they ignore fundamental questions concerning the amount of electricity that should be consumed and the sources of power that should be exploited. Thus, instead of consciously balancing competing economic, environmental and social considerations, the regulatory process leaves the fundamental questions to be resolved randomly, if at all.

California's Energy, supra note 1, at 1314-15, (footnotes omitted).

Proving favoritism in the certification process is very difficult. In the avalanche of documents prepared for plant certification, officials can always find some report or opinion to mask their subjective decisionmaking. Furthermore, merely illustrating that the DER, the hearing officer, and the Siting Board always grant the utilities' requests does not necessarily prove that favoritism exists. Although statistically unlikely, studies could, in every case, support these decisions.

When administrators do show favoritism, it is usually outside the formal certification hearing or during an unimportant phase of the process. In using these minor cases to prove agency-wide favoritism, environmentalists are often accused of making a proverbial mountain out of a molehill.

102. *See* 1983 FP&L TEN YEAR PLAN, *supra* note 2, at 82.

103. Cronin & Turner, *supra* note 59, at 584-85. The authors label need determination as one of the "sacred cows" of plant siting. *Id.* at 595. Their recommendation of abandoning need determination at the early stages of certification is based upon the assumption that energy demand will, on the whole, continue to increase. *Id.* In other words, it assumes that at some point in the future the plant will be needed.

104. *Id.* at 593. At this second phase administrators would scrutinize site suitability more

would balance need against impact and impose final conditions of operation.[105]

In contrast to FEPPSA, pre-screening sites would enable administrators to assess site suitability independent of energy need. As a result, administrators could compile an inventory or bank of suitable sites.[106] Having alternative sites available for use might prompt decisionmakers to prevent plant construction at unsuitable sites. In addition, because the majority of the certification process will already have taken place in the pre-screening process, certification would be greatly expedited.

Pre-screening sites would also alleviate the inaccuracy of need projections. Due to a decrease in the actual amount of time required for the certification process, need figures would not have to project as far into the future. Nor would those figures be as apt to become outdated over this short period of time. Most importantly, the PSC may feel more confident in waiting to issue a certificate of need when the Commission knows sites are approved and ready for virtually immediate use.

States have employed a variety of methods in implementing the policy of site pre-screening. In Maryland, the state environmental agency actually buys sites for later use by the utilities.[107] Other states, such as New Hampshire, require utilities to keep an inventory of potential sites.[108] New York requires applicants to include duplicate studies of an alternate site.[109]

Implementation of a scheme such as Maryland's would require a vast commitment of state funds as well as a restructuring of

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carefully. *Id.* Approval of the facility-type (coal, oil, etc.) and the type of environmental control technology would also be decided upon. *Id.*

105. *Id.* at 597. At the final phase decisionmakers would essentially make a "go"/"no-go" decision based on current energy need.

106. Having an inventory of sites might also foster public participation. A published list of potential sites would put the public on notice long before the power company actually applied for certification. *Energy Facility, supra* note 2, at 724. A utility would also be aware of public opposition to a proposed site before it invested significant resources in the site. *Id.* at 721-22. To ensure active public participation, sites should be pre-screened one at a time. Cronin & Turner, *supra* note 59, at 592. If more than one site were pre-screened, public interest might become diffused. Furthermore, administrators would have to impress upon the public that pre-screening was final and their all sites which were approved would eventually be used. *Id.* at 595. Therefore, public participants' only chance to object to the site would be at the pre-screening phase. *Id.* Public participants could, however, still intervene at the second and third phases of certification.

107. Best, *Recent State Initiatives on Power Plant Siting: A Report and Comment,* 5 NAT. RESOURCES LAW. 668, 676-77 (1972). The Maryland statute also creates an environmental trust fund which researches environmental, social, and other impacts of energy generation and is funded by an energy surcharge. *Id.* at 677-78.

108. *Id.* at 676.

109. *See* Cronin & Turner, *supra* note 59, at 545.

FEPPSA. In addition to these drawbacks, commentators criticize Maryland's method of inventorying potential sites because state environmental officials actually acquire an interest in having purchased sites approved for use.[110] Similarly, New York's statute has serious drawbacks. Requiring applications to contain studies and analyses of two potential sites enormously increases time and monetary expenditures.[111] Furthermore, the statute makes no provision for "inventorying" an alternative site which is suitable for plant capacity but which is not actually used.[112] Requiring utilities to keep a pre-screened inventory of potential sites, as in New Hampshire, is probably the most viable means of implementing site pre-screening in Florida.

Even if a statute were modeled after the New Hampshire or North Dakota statute, implementing the policy of pre-screening would necessitate the resolution of several problems. Site purchasing involves complex financial and investment problems. Legislators would have to make provisions to enable utilities to keep an inventory of sites. Allowing utilities to levy an energy surcharge may be an alternative.[113] In addition, the legislature would have to ensure that pre-screening, absent a change of circumstances, was final. To provide for flexibility if a change of circumstances occurs, administrators could pre-screen sites for maximum generating capacity. In later phases of the certification process, utilities could then choose from this fixed range of generating capacities. As a corollary to finality of the pre-screening process, administrators would have to ensure public participation did not wane due to an inaccurate belief that pre-screening was only a tentative and not a final approval of site suitability.[114]

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110. In Virginia, an aggressive entrepreneurial role for a state agency seems out of character. Most state agencies, including those with environmental responsibilities, are financed austerely and, as a result, are understaffed. If a state agency were charged with responsibility for acquiring sites for future power plants, nothing would guarantee that its siting proposals would be better than those proposed by the utilities. Indeed, the utilities can apply resources and manpower to sight [sic] selection that a state agency would be hard pressed to match. Moreover, an agency that acquires power plant sites would also acquire a financial stake in the outcome of the electricity-environment conflict. Environmentalists might label the agency a major polluter, and the utilities might be grateful for a scapegoat.

Willrich, *supra* note 2, at 310.

111. *See supra* note 59.

112. Cronin & Turner, *supra* note 59, at 550.

113. As a model, legislatures could refer to the Maryland statute which authorizes an energy surcharge to fund energy research and development. *See* Best, *supra* note 107, at 677-78.

114. *See supra* note 106 and accompanying text.

B. The Promotion of Environmental Advocacy: Redefining the Role of the DER

Appointment of the DER as lead agency to oversee FEPPSA's certification process has influenced the DER to remain neutral at the expense of its role as an environmental guardian.[115] Public environmental groups could voluntarily assume this role, but no guarantees of consistent and thorough environmental representation would exist in the certification process. As an alternative, the Florida legislature could establish a new agency to process power plant applications,[116] leaving the DER free to act as an environmental advocate unrestrained by its dual role under FEPPSA.[117] Creation of a new agency, however, would require an enormous monetary expenditure and a significant revision of FEPPSA. A more palatable alternative would entail a statutory reassessment of the DER's role in the certification process. While retaining the DER's existing duties, this reassessment would delineate and expand the DER's role as an environmental advocate into the certification process.

Effective public participation might also cure some of the inequities in the certification process. Many states, recognizing the inequality between funding for utilities and funding for public interest groups, have taken measures to ensure meaningful public participation. In New York, applicants pay a $150,000 filing fee available to public participants in the certification process.[118] Other states provide counsel for opponents of proposed power plants. In Washington, the Attorney General appoints a legal assistant to exclusively represent the public interest in preserving the quality of the environment.[119] Similarly, in New Hampshire, the Attorney General appoints an assistant who represents the public interest in terms of environmental advocacy and maintaining an adequate energy supply.[120]

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115. *See supra* notes 92-94 and accompanying text.

116. States which have created an agency specifically empowered to handle energy concerns include: Arizona, Connecticut, New Hampshire, New York, Oregon, and Washington. Best, *supra* note 107, at 672.

117. A substantive policy may be clear and specific, yet the outcome of particular decisions applying that policy will depend heavily on who the decision-makers are and the structure of their relations with each other. When the substantive policy upon which a decision must be based is vague or general, the identity of the decision-makers and their power relations become crucial elements in determining outcomes in particular cases.

Willrich, *supra* note 2, at 309.

118. Weinburg, *supra* note 68, at 590.

119. Best, *supra* note 107, at 675.

120. *Id.* Of these two alternatives, Washington's method of appointing counsel for the public's interest in the environment is probably the best. Currently, the PSC represents the public's interest in an adequate energy supply. Making counsel responsible for representing this interest would only duplicate the PSC's efforts. It would also make counsel responsible for

Increasing the filing fee, thereby essentially requiring utilities to subsidize certification opponents, would significiantly improve public participation under FEPPSA. Raising the filing fee to cover both certification and opponent costs would undoubtedly meet strong opposition from the power industry. In light of the favoritism shown to utilities in the past, adoption of this plan is improbable.[121] Alternatively, Florida could foster public participation in the certification process by providing legal counsel for participants and by ensuring public access to relevant information. As accomplished by Washington and New Hampshire, the legislature could either appoint a legal representative for the public interest or subsidize the public's choice of its own advocate.[122] Florida legislators could also rectify the paucity of information currently available to public participants[123] by disseminating certification information to libraries or information centers.[124] In recognition of the economic disparity between utilities and the public, amendments to FEPPSA should also provide gratuitous information to members of the public who become actual parties to the certification process.[125]

VIII. Conclusion

FEPPSA mandates a statutory balancing of energy and environmental needs in power plant certifications. In practice, however, the Act falls short of these goals. The reasons for this failure are varied and complex, but most problems would be amenable to basic remedial measures. Perhaps the greatest obstacle to reforming FEPPSA is the continued deference and favoritism traditionally shown to the power industry. Only when administrators view the import of environmental and energy needs as equal can the true intent of FEPPSA be effectuated.

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representing two antagonistic interests. *See supra* note 1 and accompanying test.

121. *See supra* note 101.

122. Subsidizing the public's or public interest groups' choice of counsel would eliminate any claims of political favoritism. Appointment of a public advocate, however, could be easily modeled after the existing ombudsman council created in Fla. Stat. § 400.301-.307 (1983).

123. Weinberg, *supra* note 68, at 578. New York law requires administrators to file information at the public library. *Id.*

124. Best, *supra* note 107, at 675.

125. Kaufman, *supra* note 99, at 9 n.15. New Hampshire provides information to the public free of charge. Best, *supra* note 107, at 675.