STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA POWER DEVELOPMENT, LLC,
A FLORIDA LIMITED LIABILITY
COMPANY,

Petitioner,

vs. Case No. 16-7615

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES, OFFICE OF
ENERGY,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 22, 2017, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the Florida Renewable Energy Production Tax Credit ("Tax Credit") application filed by Petitioner, Florida Power Development, LLC, A Florida Limited Liability Company ("Florida Power"), was eligible for consideration by Respondent, Department of Agriculture and Consumer Services, Office of Energy ("DACS" or the "Department" or "Office of Energy").

PRELIMINARY STATEMENT

On August 17, 2016, the Office of Energy received Florida Power's Tax Credit application. By letter dated September 30, 2016, DACS notified Florida Power that its application was ineligible for consideration because it had been received at DACS after the requisite deadline. On or about October 27, 2016 (the Petition is not dated), Florida Power filed a Petition for Formal Administrative Hearing with the Department, challenging whether its application should have been deemed ineligible. The Petition was forwarded to DOAH for assignment to an Administrative Law Judge ("ALJ"). Pursuant to notice, a hearing

was conducted by the undersigned ALJ on the date set forth above.

At the final hearing, Florida Power called the following witnesses: Rodney Waller, customer service manager for the United States Postal Service ("USPS"); Kimberly Brown, plant administrator; and John Lambert, Tateswood Energy Services ("Tateswood"). Florida Power's Exhibits 1 through 6 were admitted into evidence. The Department called three witnesses: Kelley Burk, director of the Office of Energy; April Groover Combs, senior management analyst; and John Reeves, operations and management consultant. The Department's Exhibits 1 through 5 were admitted into evidence.

The parties confirmed that a transcript of the final hearing would be ordered. By rule, the parties are allowed up to 10 days after the transcript of the final hearing has been filed to submit a proposed recommended order (PRO). The Transcript was filed on March 8, 2017. March 18, 2017, falling on a Saturday, the PROs were due on or before Monday, March 20, 2017. Each party submitted a PRO and each was duly considered in the preparation of this Recommended Order.[1/]

FINDINGS OF FACT

1. Florida Power is a company which produces power by way of burning biomass materials, primarily wood chips, at its energy plant at 10311 Cement Plant Road, Brooksville, Florida.

Most of the energy it produces is sold to Duke Energy. The plant had previously been a coal fired power plant, but Florida Power spent $196 million converting it into a renewable energy facility utilizing biomass fuel. JP Morgan is the parent company of Florida Power.

2. The Office of Energy is the state agency responsible for overseeing the Tax Credit program authorized under section 220.193, Florida Statutes (2016).[2/] The Department is empowered to review and approve (or disapprove) all Tax Credit applications which it receives. The Office of Energy is located at 600 South Calhoun Street, Suite 251, Tallahassee, Florida 32399-0001.

3. Applications for a Tax Credit are available on the DACS website, as are the statutes and rules governing the Tax Credit program. The rules specify the date applications are due in each "production year" and set forth the process for filing the applications. Applications addressing the production year at issue in this proceeding of January 1, 2016, through June 30, 2016, were due at the Office of Energy no later than August 15, 2016. Florida Power's application was not received by the Office of Energy until August 17, 2016, two days after the deadline. As a result, the Department deemed Florida Power's application ineligible for consideration. Florida Power believes that circumstances surrounding the filing of its

application for a Tax Credit excuse or make moot its failure to meet the deadline.

4. Florida Power had filed applications for Tax Credits in prior production years. In 2015, its application was prepared by Tateswood, a company located in Houston, Texas. Tateswood provides management services to several power plants, including several owned by Florida Power. The application was submitted via overnight delivery, i.e., FedEx, from Houston, Texas, to the Office of Energy in Tallahassee, Florida. A senior official from Tateswood, Jeff Winkler, signed the application and had it overnighted to the Department. The application was received timely and approved by the Office of Energy.[3/] Florida Power received a tax credit that year of approximately $1.49 million.

5. Around July 28, 2016, Florida Power received the data it needed from Duke Energy to file the Tax Credit application for the 2016 production year (which was less than a full year as the Tax Credit program was expiring). Florida Power's accountant, Lashauna Filo, also worked for Tateswood in Houston, Texas. She prepared the 2016 application for Mr. Winkler's signature. Mr. Winkler was traveling, but he was expected to be in Brooksville prior to the application submission deadline. Ms. Filo emailed the application to the Brooksville plant on August 10, 2016, five days prior to the date it was due in Tallahassee. Mr. Winkler signed the application and gave it to

Ms. Brown, plant administrator, who was given the task of submitting the application to the Office of Energy.[4/] She noted verbiage on the face of the application form which says it can be submitted to the Department via "certified mail or hand delivery." The due date of August 15 also appeared on the face of the application. Ms. Brown had not been involved with filing a Tax Credit application previously. After conferring with one of her supervisors, Dave Hermanson, she selected the first option--certified mail--for submitting the application. She typed an envelope, filled out a Certified Receipt form, and put the application into a post office box at the Brooksville, Florida, post office. Ms. Brown did not consider literally hand-delivering the application to DACS because Tallahassee is roughly a four-hour drive from Brooksville, and it seemed there was enough time for the package to get to the Department. Ms. Brown did not understand that "hand delivery" allowed for delivery by overnight courier. Neither Florida Power nor Tateswood have attorneys on staff to provide guidance or assistance in matters such as these. Instead, Ms. Brown relied upon the advice given her by Mr. Hermanson.

6. Unfortunately, the application did not sail smoothly through the USPS system. It was received by a Tampa USPS facility at 8:00 p.m., on August 10, was "coded" for Tallahassee, and departed that facility at 9:43 p.m., the same

evening. It arrived at the Adams Street USPS facility in Tallahassee at 1:19 p.m., on August 11. However, the package had been improperly "coded" in the Tampa USPS facility to zip code 32301, rather than to zip code 32399. The 32399 zip code is used for state agencies in Tallahassee. This mis-code by the Tampa office caused the package to be erroneously sent from the Adams Street office to the downtown Tallahassee facility, rather than being processed for a "state agency" delivery. Thereafter, it went to another USPS site, the Lake Jackson facility, where it arrived on August 12. The package did not make it back to the Adams Street facility where it belonged until 5:36 a.m. on August 16--one day after the submission deadline. The application was delivered to DACS on August 17, 2016, at 9:08 a.m., two days after the deadline.

7. Clearly, Florida Power's application for a Tax Credit was not timely received by the Office of Energy. However, Florida Power raises several facts which may relate to whether equitable tolling or equitable estoppel principles apply to this situation.

8. Florida Power points out that verbiage on the face of the application itself does not specifically use the words "overnight express" as a means of submitting the application. Florida Power maintains, therefore, that it was misled into believing that physical hand-delivery or certified mail were its

only options. Inasmuch as Florida Power had submitted their prior year's application via FedEx, their claim lacks credence. Furthermore, the rule addressing application submission defines "hand delivery" as "any physical submission of an application to the Office [of Energy] from a representative of an applicant, courier, or a private delivery service." Fla. Admin. Code R. 5O-2.003(3)(b)2. Florida Power was very familiar with the Tax Credit program, but could not say why it was not familiar with the rules governing that program.

9. Unfortunately, certified mail, Florida Power's delivery option for the application at issue, does not guarantee delivery by a date certain. Rather, certified mail--which is processed exactly the same way as non-certified mail--is merely a means for tracking a letter or package. Thus, a person who mails a letter by way of certified mail assumes the risk that the letter may not be delivered on or before a desired date. It appears that the risk is quite high. A USPS employee testified at final hearing that there are 50 to 70 complaints per day in Tallahassee concerning certified mail and several hundred certified letters may be misdirected each week.

10. Florida Power further argues that the Department has seen several applications submitted via certified mail arrive at DACS late, i.e., after the "received by" deadline. Florida Power asserts that this fact has put DACS on notice that

allowing an applicant to submit an application via certified mail constitutes a flaw in the system. The Department maintains that the use of certified mail is a valid way of tracking applications and is feasible. During the development of the rule governing submissions of the applications, no interested party voiced any objection to the use of certified mail as a delivery option. There is no evidence in the record that DACS was previously aware of the magnitude of errors by USPS so that it (DACS) should not include certified mail as an option for submitting applications.

11. One must wonder, as does Florida Power, why there needs to be tracking of the applications at all since the operative date is the date of receipt by DACS. But the Department must deem it necessary for some reason and it is the current state of the law.

12. Florida Power contends in its PRO that there are numerous fallacies in the Department's rule regulating Tax Credit applications. This proceeding, however, is not a rule challenge brought pursuant to section 120.56, Florida Statutes. The validity or propriety of the rule is not in question. At issue in the instant proceeding is whether Florida Power complied with the duly promulgated and existing rule.

13. DACS is one of the few state agencies which await delivery of its mail from the post office, rather than sending

someone to retrieve it from USPS. DOAH is also one of those agencies. While awaiting delivery may delay an agency's receipt of mail at times, it would not have affected Florida Power in this case because the package was not available for pick-up until August 16, one day after the deadline. There is no requirement in law or rule that any state agency opt to pick up its mail from USPS rather than have it delivered. Florida Power's lament that DACS could have chosen to have its mail delivered is of no consequence.

14. Some government agencies use the postmark on letters or packages as evidence that the item was timely mailed out; think IRS and April 15, for example. However, the DACS rule requires receipt of the application by the Department; the rule does not currently employ a "submitted by" compliance date. See Fla. Admin. Code R. 5O-2.003(b).

15. When the Tax Credit program was originally initiated, the Department undertook regular rule development. The first rule promulgated by the Department was drafted in July 2012 and was ultimately adopted in the spring of 2013. That version of the rule stated that all applications must be "submitted" by a date certain. Upon receipt of one application after the due date, but which had been "submitted" by the applicant before the deadline, the Department decided it needed to re-think that provision. Rulemaking was recommended in order to amend the

language relating to timely filing of applications. During the rulemaking process, which was duly noticed and advertised, DACS received no input from interested parties concerning the proposed amendment to the rule.

16. The amended rule requires applications to be "received by" DACS on or before the deadline established by rule. This amendment eliminated any disputes concerning when an application was "submitted" by an applicant. The current, duly promulgated rule utilizes "received by" rather than "submitted" as the operative date.

17. Florida Power points out that DACS has missed some of its own statutorily mandated deadlines concerning the reporting of Tax Credit information to the governor's office. Florida Power does not cite to any authority which relieves an applicant from the requirements of a rule when an agency misses its own deadlines. So, that DACS was not timely in carrying out its own mandated duties is irrelevant to whether Florida Power satisfied its required actions. Nonetheless, the Department provided a legitimate rationale for its tardiness, though such reasons are irrelevant to the issue in this case.

18. DACS employees utilize a checklist when reviewing Tax Credit applications. The checklist is just that, a matrix that can be checked off as each element or requirement of the application is reviewed, i.e., date of receipt, signature,

application form, etc. The first question on the checklist asks whether the application "was submitted by" the requisite due date. April Groover Combs, who reviewed the Florida Power application using the checklist, simply interpreted the "was submitted by" language as "was received by." Mrs. Combs had authored the rule and was involved in its amendments, so she understood what was required regardless of how the checklist referred to the items. Florida Power suggests that the internal checklist error somehow invalidates the Department's actions; it does not. An internal document used by employees is not meant to provide rights to the public. It is not a rule. Thus, any errors within such a document are immaterial.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

20. Florida Power has the burden of proving that its application for a Tax Credit should have been considered by the Department. See Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.") § 120.57(1)(j), Fla. Stat.

21. The standard of proof is by a preponderance of the evidence. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). § 120.57(1)(j), Fla. Stat.

22. The Tax Credit program is found in section 220.193, Florida Statutes. Florida Administrative Code Rule 5O-2.003 sets forth the process whereby renewable energy facilities may apply for the Tax Credit. The portions of the rule relevant to the instant proceedings are:

> (3)(a) Applicants must complete and submit a Florida Renewable Energy Production Tax Credit Application, FDACS-01919, (Rev.01/15).
>
> (b) Applications must be received by the Office, located at 600 South Calhoun Street, Suite 251, Tallahassee, Florida 32399-0001, either by certified mail or hand delivery.
>
> 1. Certified mail means the service provided by the United States Postal Service whereby the sender is provided with a mailing receipt and delivery record.
>
> 2. Hand delivery means any physical submission of an application to the Office from a representative of an applicant, courier, or a private delivery service.
>
> (c) Applications must be received by the Office no later than close of business on:
>
> * * *
>
> 4. August 15, 2016 for the production period January 1, 2016 through June 30, 2016.

> (d) Applications received after the due date will be determined ineligible.
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> * * *
>
> (6) The Office will evaluate the application to verify that the applicant has met the qualifying statutory and rule criteria. The Office will issue a written certification that the applicant is eligible for a tax credit or will issue a written notification that the application was determined incomplete and will include a description of the application's deficiencies. If the Office determines that an application is incomplete, the taxpayer must submit a corrected application within five business days from notification of the application's deficiencies. The Office will provide the Florida Department of Revenue a copy of each certification issued upon approval of an application.

23. Clearly the applicant in this case, Florida Power, did not effectuate the receipt of its application by DACS on or before August 15, 2016. The application was therefore appropriately deemed ineligible for consideration.

24. All that remains for consideration is Florida Power's claim that equitable tolling or equitable estoppel principles may operate in this situation.

Equitable Estoppel

25. Equitable estoppel is based on principles of fair play and essential justice that arise when one party lulls another into a disadvantaged legal position. Mid-Continent Cas. Co. v. Basdeo, 742 F. Supp. 2d 1293 (S.D. Fla. 2010); Bueno v. Workman,

20 So. 3d 993 (Fla. 4th DCA 209). Equitable estoppel involves, generally, words or conducts which cause another person to believe a certain state of things exists and to consequently change his or her position in an adverse way. Grove Mgt., Inc. v. McKiness, 578 So. 2d 883 (Fla. 1st DCA 1991).

26. The elements of estoppel are: (a) representation as to a material fact that is contrary to a later-asserted position; (b) reliance on that representation; and (c) a change in position detrimental to the party claiming estoppel that is caused by the representation and reliance thereon. State v. Harris, 881 So. 2d 1079 (Fla. 2004); Curci Village Condo. Ass'n, Inc. v. Maria, 14 So. 3d 1175 (Fla. 4th DCA 2009).

27. There is no evidence in this case that a "representation as to a material fact" was asserted by DACS and later changed. At no time relevant to this proceeding did DACS tell Florida Power that it could not submit its application by way of overnight delivery. The "hand delivery" language on the application form--as interpreted in the rule--did not change. Florida Power was well aware of its right to submit the application via any means set forth in the rule, including overnight delivery. It had availed itself of that right just the prior year.

28. Although the delays caused by USPS were not Florida Power's fault and were mostly out of its control, Florida Power

assumed the risk of sending its application by certified mail. Had it chosen a different method allowed by law, the application might have arrived timely.

Equitable Tolling

29. Section 120.569(2)(c) addresses the filing of "petitions" at a state agency. Such petitions are to be dismissed if they are untimely filed. However, the statute also states that, "This paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition." Although the application filed by Florida Power is not a petition, per se, case law addressing equitable tolling for late-filed petitions is worth considering. As noted by Florida appellate courts, "The doctrine of equitable tolling can be applied to extend an administrative filing deadline." See Williams v. Dep't of Corr., 156 So. 3d 563, 565 (Fla. 5th DCA 2015).

30. Florida Power cites to Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1980), as support for its claim for equitable tolling in the instant case. That reliance is misdirected. In Machules, an employee timely engaged in a grievance process as an alternative to filing a direct appeal to the department. The Court held that Machules had been lulled into inaction regarding his appeal when the employer agency agreed to a hearing date for his grievance procedure, which was

after the date for filing his appeal. This, the Court reasoned, might have suggested to Machules that he did not need to file the appeal yet. (Justice Grimes dissented, saying the employer had no duty to warn Machules that he had chosen the wrong avenue for remedy.) In the present case, Florida Power did not timely file its application in an alternative forum; it did not become lulled into not filing its application timely. Rather, Florida Power chose an allowable method of submitting its application without regard to the possibility of problems arising. There is no basis for equitable tolling in this case.

Constructive Possession

31. Florida Power also argues that DACS was somehow in constructive possession of the application when it was delivered to the first Tallahassee USPS office. There is no evidence in the record to support a claim of constructive possession. The Office of Energy was not in possession of the application until August 17, 2016.

Constitutional Due Process

32. Florida Power also raises the issue of violation of its due process rights under the state and federal constitutions. This tribunal has no authority to rule upon the constitutionality of rules or their application. See State Dep't of Admin., Div. of Personnel v. State, Dep't of Admin., Div. of Admin. Hearings, 326 So. 2d 187 (Fla. 1st DCA 1976).

That Court recognized the many duties and responsibilities of DOAH hearing officers (now ALJs), but said:

> Yet it does not follow that a hearing officer named by the Division of Administrative Hearings to determine disputes cognizable under the Administrative Procedure Act is empowered to authorize the exhaustive discovery procedures that often attend judicial inquiry into constitutional questions formulated in Fourteenth Amendment terms of equal protection of the laws and due process of law. Canney v. Board of Public Instruction of Alachua County, 278 So. 2d 260 (Fla. 1973); Otto v. Harllee, 119 Fla. 266, 161 So. 2d 402 (1935); State ex rel. Watson v. Caldwell, 156 Fla. 618, 23 So. 2d 855 (1945); Art. II, § 3, Fla. Const.; § 20.02(1), Fla. Stat. (1973).

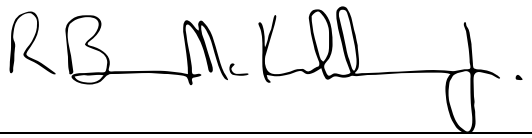
33. For the reasons set forth herein, Florida Power has failed to prove, by a preponderance of evidence, that its application for a Tax Credit is eligible for consideration by the Department.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Department of Agriculture and Consumer Services upholding its rejection of the Tax Credit application filed by Florida Power as ineligible for consideration.

DONE AND ENTERED this 6th day of April, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of April, 2017.

ENDNOTES

[1/] Actually (and ironically), Florida Power's PRO was efiled at DOAH on March 20 at 6:38 p.m., i.e., after close of business, and was thus deemed received on March 21--one day late. Fla. Admin. Code R. 28-106.104(3). The slight tardiness of the PRO did not prejudice the Department, however, so the PRO was accepted and considered by the undersigned.

[2/] All references to Florida Statutes shall be to the 2016 version.

[3/] In fact, the 2015 application submitted by Florida Power was initially rejected because the person signing the application was not an authorized signatory, and he submitted the wrong version of the application. The Department allowed Florida Power to submit a revised application after the submission deadline, but that allowance was pursuant to rule. See Fla. Admin. Code R. 5O-2.003(6).

[4/] Ms. Brown is not an employee of Florida Power. Although she testified, she "works for Florida Power Development." Mr. Lambert, president of the management company (Tateswood), said that Florida Power has no employees. The persons working at the plant are actually employees of IHI, a contracted

operator of the plant. Florida Power is responsible for the employees' salaries, however.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.