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090372-EQ

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Sent: Tuesday, August 10, 2010 4:05 PM
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Subject: Electronic Filing - Docket 090372-EQ
Attachments: 090372.FBE.MTD.AmendedPetition.8-10-10.pdf

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b. 090372-EQ

In Re: Petition for Approval of Negotiated Purchase Power Contract with FB Energy, LLC by Progress Energy Florida.

c. Document being filed on behalf of Florida Biomass Energy, LLC (FB Energy).

d. There are a total of 18 pages.

e. The document attached for electronic filing is Florida Biomass Energy, LLC's Motion to Dismiss Amended Petition.

(see attached file: 090372.FBE.MTD.AmendedPetition.8-10-10.pdf)

Thank you for your attention and assistance in this matter.

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DOCUMENT NUMBER - DATE

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FPSC-COMMUNICATIONS

8/10/2010

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of
negotiated purchase power
contract with FB Energy, LLC by
Progress Energy Florida.

DOCKET NO. 090372-EQ

FILED: August 10, 2010

FLORIDA BIOMASS ENERGY, LLC'S MOTION TO DISMISS AMENDED PETITION

FLORIDA BIOMASS ENERGY, LLC ("FB Energy"), pursuant to Rule 28-106.204(2), Florida Administrative Code ("F.A.C."), hereby moves to dismiss the Amended Petition Protesting Notice of Proposed Agency Action Order Approving Negotiated Purchase Power Contract (the "Amended Petition") filed in this proceeding by U.S. Funding Group, LLC ("Funding Group") on July 21, 2010.

In summary, the Commission must dismiss Funding Group's Petition because Funding Group has failed to allege facts that, even if assumed to be true, would establish its standing under applicable Florida law: Funding Group has failed to establish that it will suffer injury in fact of sufficient immediacy to entitle it to a section 120.57 hearing, and Funding Group has likewise failed to established that its claimed injuries are within the zone of interests to be protected by this proceeding.

Significantly, Funding Group has not alleged that it is a customer of Progress Energy Florida ("PEF," "Progress Energy," or "Progress"), nor has it alleged that it was a customer of PEF as of the time that it filed its Initial Petition. Although

Funding Group has asserted that it "owns property within Progress's service area," Amended Petition at 7, and that the subject property is "served by Progress Energy," Amended Petition at 2, these allegations, even if true, are insufficient to establish standing. Stated as simply as possible, Funding Group has not alleged that it is a customer of Progress and has not alleged that it was a customer at the time it filed its Initial Petition, and therefore, its allegations are insufficient to establish its standing. Moreover, Funding Group's allegation that it "owns property within Progress's service area," even if true, is legally insufficient to establish its standing unless Funding Group can also establish that it was a customer of Progress at the time it filed its Petition. To prevent this spurious allegation from misleading the Commission as to Funding Group's status, and to prevent further delays, FB Energy has propounded discovery to Funding Group that will, when answered truthfully, demonstrate that Funding Group is not a customer of Progress at the address where it claims to own property in its Amended Petition and that Funding Group was not a customer of Progress when it filed its Initial Petition.

In light of the clearly articulated purposes of Commission Rule 25-17.0832, F.A.C., namely to protect the interests of a utility's customers and ratepayers, Funding Group cannot

establish facts that will meet either the "injury in fact" prong or the "zone of interest" prong of the Agrico test.¹ Moreover, Funding Group's other allegations are either so speculative as to fail to satisfy the "injury in fact" prong of the Agrico test or wholly outside the zone of interests to be protected by this proceeding. This is Funding Group's fourth bite at the standing apple, and it has failed, yet again, as required by controlling law and by Commission order, to "conclusively show why Funding Group has standing under Agrico."² Accordingly, the Commission must dismiss Funding Group's Amended Petition, with prejudice.

BACKGROUND

1. On July 16, 2009, Progress Energy Florida, Inc. ("PEF") and FB Energy filed their joint petition for approval of a negotiated purchase power contract (the "PPA"). The PPA contemplates that FB Energy will construct, own, and operate a biomass-powered electrical power plant in Manatee County, Florida and that PEF will purchase power generated by the plant.

2. On December 30, 2009, the Commission issued Order No. PSC-09-0852-PAA-EQ (the "PAA Order") in which the Commission proposed to approve the PPA.

¹ Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981).

² Order No. PSC-10-0434-FOF-EQ, Order Granting Motion for Reconsideration and Leave to File Amended Protest at 3.

3. On January 20, 2010, Funding Group filed its Petition Protesting Notice of Proposed Agency Action Order Approving Negotiated Purchase Power Contract (hereinafter "Initial Petition") with the Commission and electronically served a copy of the Initial Petition on FB Energy.

4. FB Energy timely moved to dismiss the Initial Petition on several grounds, including Funding Group's failure to satisfy the pleading requirements of the Florida Administrative Code and its failure to allege facts that would establish Funding Group's standing to pursue its protest of the Commission's PAA Order. On April 26, 2010, the Commission issued its Order No. PSC-10-0256-FOF-EQ, Order Granting Motion to Dismiss, by which it dismissed Funding Group's Initial Petition. On May 11, 2010, Funding Group filed a motion for reconsideration of the Commission's Order Granting Motion to Dismiss, asserting that it should be given leave to amend. Because of the peculiar procedural posture of the docket and not conceding that Funding Group has standing to pursue its protest of the PAA Order, and principally to avoid potential delays associated with an appeal of the Order Granting Motion to Dismiss, FB Energy supported granting Funding Group's request for leave to amend. Reconsideration was accordingly granted by the Commission's Order No. PSC-10-0434-FOF-EQ on July 6, 2010. Among other things, the Commission's Order Granting Reconsideration, at page

3, required Funding Group to "conclusively show why Funding Group has standing under Agrico." Commissioner Skop dissented from the majority's decision. On July 21, 2010, Funding Group filed its Amended Petition. This motion to dismiss has been filed within 20 days of service of the Amended Petition; accordingly, the motion to dismiss is timely filed. See Rule 28-106.204(2), F.A.C.

STANDARD OF REVIEW FOR MOTIONS TO DISMISS

5. The standard of review for a motion to dismiss is whether, taking all facts pled in the petition of which dismissal is sought as true, the petition states a claim sufficient to proceed. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993) In this instance, the question is whether Funding Group's allegations, even if assumed to be true, constitute sufficient grounds to establish Funding Group's standing to maintain and pursue its protest of the Commission's PAA Order.

STANDING

6. Even assuming its allegations to be true, Funding Group has failed to allege facts that would establish its standing, i.e., facts that would establish that Funding Group satisfies the Agrico standing test recognized under Florida administrative law. Accordingly, Funding Group's Petition must be dismissed.

7. To establish standing, a petitioner seeking a hearing under Sections 120.569 and 120.57, F.S., must demonstrate:

- 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and
- 2) that his substantial injury is of the type or nature which the proceeding is designed to protect.

Agrico, 406 So. 2d at 482. Both prongs of this two-pronged test must be satisfied for a petitioner to establish standing in a Chapter 120 proceeding. The first prong of the standing test "deals with the degree of injury." Id. To satisfy the first prong, a petitioner must assert that the agency action will result in an injury that is immediate, not remote. The injury cannot be based on speculation or conjecture. Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); International Jai-Alai Players Association v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1226 (Fla. 3rd DCA 1990) (finding alleged injuries to be "too remote and speculative" to qualify under the first prong of the Agrico test). The second prong of the Agrico test "deals with the nature of the injury." Agrico, 406 So. 2d at 482. The second prong of the Agrico test requires a showing that the petitioner's substantial interest is of the type and nature that the proceeding is designed to protect. Stated alternatively, a petitioner's injury must fall within the "zone of interest" to

be protected by the rules and statutes at issue. Numerous Florida cases addressing the second prong of the Agrico standing test have concluded that a purely economic interest cannot serve as the basis for standing. See, e.g., Agrico, 403 So. 2d at 482; International Jai-Alai Players, 561 So. 2d at 1225-26; see also In Re: Tampa Electric Company dba Peoples Gas System, FPSC Docket No. 011622-EG, Order Granting Motion to Dismiss, 2002 WL 1559716 (dismissing a petition for failing to meet the second prong of the Agrico test). Of course, if the economic interest asserted is, itself, within the zone of interest to be protected, such as is the case with customers seeking protection from unjust rates under the Commission's ratemaking statutes, then standing will be granted.

Injury In Fact

8. To satisfy the "injury in fact" prong of the Agrico test, a would-be petitioner must establish "either (1) that he had sustained actual injury at the time of filing his petition; or (2) that he is immediately in danger of sustaining some direct injury as a result of the challenged agency's actions." Village Park Mobile Home Ass'n v. State Dep't of Business Regulation, 506 So. 2d 426, 433 (Fla. 1st DCA 1987) (emphasis supplied). The Commission has relied on Village Park in dismissing petitions for hearing or intervention. See, e.g., In Re: Application for Acknowledgement of Transfer of Nassau County

Land and Facility to Nassau County by Florida Water Service Corporation, Docket No. 030543-WS, Order No. PSC-03-1417-FOF-WS at 6 (December 16, 2003) (Commission denied intervention, and subsequent motion for reconsideration of denial, to property owners' association where association, although situated in water service company's service territory, was not a customer of water company and accordingly, the association's claimed injury was "conjectural and not real or immediate"); In Re: Matrix Telecom, Inc., Docket No. 050200-TX, Order No. PSC-05-1126-FOF-TX (November 8, 2005) (Commission dismissed protest of PAA order because it amounted to conjecture about future economic detriment).

9. The Commission has also held that alleged future injuries are insufficient to satisfy the injury in fact prong of the Agrico test. In AmeriSteel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997), the Court upheld the Commission's holding that, in a territorial agreement case, a large industrial customer of Florida Power & Light Company ("FPL") could not satisfy the injury in fact prong of Agrico based on its claim that the rates that it was already paying FPL were high and threatened the continued viability of its plant. The Court held that AmeriSteel's claim "is not an injury in fact of sufficient immediacy to entitle AmeriSteel to a 120.57 hearing." Id. In In Re: Application for Transfer of Certificate No. 492-S in

Franklin County from Resort village Utility, Inc. to SGI Utility, LLC, Docket No. 991812-SU, Order No. PSC-00-0757-PCO-SU at 2-3, the Commission dismissed a protest of a PAA order, where the protest alleged damages in the form of decreased property value due to proposed construction of a wastewater treatment plant near the would-be protester's property, finding that the "alleged injuries are speculative and tenuous and they do not meet the immediacy and factually based injury requirements under the Agrico test."

10. Funding Group's alleged injuries fail to satisfy the injury in fact prong of the Agrico test. Since Funding Group is not a customer of PEF at the address alleged in its Amended Petition, and since Funding Group was not a customer of PEF when it filed its Initial Petition, it cannot have sustained either actual injury at the time of filing its petition, nor can it satisfy the alternative immediate danger criterion. (Funding Group's alleged injuries to its property in Manatee County are not only speculative, they are also - as alleged environmental and economic damages to Funding Group's property, see Initial Petition at 2 - wholly outside the Commission's jurisdiction and thus obviously outside the zone of interests protected by this PPA approval proceeding.)

11. That this proceeding is designed to protect the interests of Progress's customers - not persons or corporations

who "own property within Progress Energy's service area," as alleged by Funding Group in its Amended Petition at page 7 - is readily demonstrated by reference to Commission Rule 25-17.0832, F.A.C., Firm Capacity and Energy Contracts. This is the rule under which the Commission reviewed the PPA and pursuant to which the Commission issued the PAA Order. Sections (2) and (3) of this Rule apply to the Commission's review and approval of negotiated power purchase contracts; relevant excerpts are reproduced here.

(2) Negotiated Contracts. Utilities and qualifying facilities are encouraged to negotiate contracts for the purchase of firm capacity and energy to avoid or defer the construction of all planned utility generating units which are not subject to the requirements of Rule 25-22.082, F.A.C. . . . Negotiated contracts will be considered prudent for cost recovery purposes if it is demonstrated by the utility that the purchase of firm capacity and energy from the qualifying facility pursuant to the rates, terms, and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a cost to the utility's ratepayers which does not exceed full avoided costs, giving consideration to the characteristics of the capacity and energy to be delivered by the qualifying facility under the contract. . . .

(3) Cost Recovery for Negotiated Contracts. In reviewing negotiated firm capacity and energy contracts for the purpose of cost recovery, the Commission shall consider factors relating to the contract that would impact the utility's general body of retail and wholesale customers including:

* * *

(d) Considering the technical reliability,

viability, and financial stability of the qualifying facility, whether the contract contains provisions to protect the purchasing utility's ratepayers in the event the qualifying facility fails to deliver firm capacity and energy in the amount and times specified in the contract.

(Emphasis supplied.)

12. These provisions of the Rule governing this proceeding make clear that the interests to be protected by Commission review of negotiated contracts pursuant to Rule 25-17.0832, F.A.C. are the interests of the purchasing utility's ratepayers, i.e., its customers. At most, Funding Group might be a future customer of PEF at the address cited in its Amended Petition, but it is not now a customer at that address, and accordingly, even the allegations that its "property in Wildwood is served by Progress Energy," Amended Petition at 2, and that "Funding Group owns property within Progress Energy's service area," Amended Petition at 7, are too speculative to satisfy the injury in fact prong of the Agrico test.

13. In other words, since Funding Group is not a customer, it is legally incapable of suffering injury in fact as a result of the Commission's approval of the PPA. Therefore, all of Funding Group's allegations in paragraphs 8 through 12, 15 through 18, 22, 28 and 29, as well as its allegations in paragraphs 34.c, 34.d, 34.e, 36-39, 41, and 42, which relate in one way or another to potential injuries and interests of a

utility's customers, fail to satisfy the injury in fact prong of the Agrico test. Accordingly, none of these allegations establishes grounds for Funding Group's standing in this docket.

14. Funding Group's allegations regarding potential harm to its property or to general system reliability during or resulting from storm events, set forth in paragraphs 19-22, 29-33, and 34.b, are conjectural and speculative - i.e., these allegations do not even pretend to assert any immediate injury in fact - and therefore insufficient to satisfy the injury in fact prong of Agrico.

Zone of Interest

15. As noted above, the Commission's Rules governing this PPA approval proceeding clearly define the zone of interests³ to be protected herein as the interests of a purchasing utility's customers. The zone of interests to be protected by this proceeding does not include the interests of non-customers, and therefore all of Funding Group's allegations in paragraphs 8 through 12, 15 through 18, 22, 28 and 29, as well as its allegations in paragraphs 34.c, 34.d, 34.e, 36-39, 41, and 42, fail to satisfy the zone of interest prong of the Agrico test.

³ The point of the discussion above was to establish that in order to satisfy the injury in fact prong of Agrico, a petitioner would have to be an actual customer - not a potential future customer - of Progress. This section addresses the zone of interest prong, which, naturally and obviously, grounds in the same governing rules.

Accordingly, none of these allegations establishes grounds for Funding Group's standing in this docket.

16. Moreover, the zone of interests to be protected by this proceeding, which is the review and approval of a power purchase agreement pursuant to Rule 25-17.0832, F.A.C., does not include:

- (a) any of Funding Group's allegations in paragraphs 13, 14, and 34.f, regarding harm, including environmental harm and impairment of environmental conditions, to its property in Manatee County;
- (b) any of Funding Group's allegations (in paragraphs 14, 19, 20, 21, 22, 29, 30, 31, 32, 33, and 34.b) regarding potential harm to its property or to general electric system reliability during or resulting from storm events;
- (c) any of Funding Group's allegations in paragraphs 30, 34.b, 34.f, and 40 regarding environmental impacts;
- (d) any of Funding Group's allegations (in paragraphs 23, 24, 25, 26, 27, 28, 42) to the effect that FB Energy's project does not or cannot satisfy various Comprehensive Plan and zoning requirements; or
- (e) Funding Group's allegations in paragraphs 30, 31, and 34.b that the construction and operation of FB Energy's proposed plant "will impose physical and

environmental risks for the surrounding areas, including Funding Group's Manatee County property" violates Section 366.03, Florida Statutes, which prohibits public utilities from imposing or giving undue prejudice or advantage to any locality or person.

SUMMARY

17. In summary, if Funding Group had been a Progress customer at the time it filed its petition, as required to satisfy the injury in fact prong of the Agrico test as stated in Village Park, it likely could have established standing to protest the PAA Order. However, it was not a customer when it filed its Initial Petition and is not a customer at the address alleged in its Amended Petition, and accordingly, it cannot satisfy the injury in fact test at all. Moreover, its claims in paragraphs 34.c, 34.d, and 34.e that are based on the alleged fact that it owns the residential property in Wildwood at the address stated in its Amended Petition, even if true, at most establish that Funding Group might someday be a customer of Progress at that address. Commission precedent holds that such future impacts are speculative and do not satisfy the injury in fact prong of the Agrico test, and accordingly, these allegations simply do not establish any basis for Funding Group's standing in this case. Many of Funding Group's claimed

injuries, particularly those related to hypothesized reliability and physical impacts that might result from future tropical storms, are also conjectural and speculative, and accordingly insufficient to satisfy the injury in fact prong. Moreover, because Funding Group is not a customer of Progress, it cannot establish that the interests it seeks to protect are within the zone of interests to be protected in this PPA approval proceeding. Finally, many of Funding Group's allegations are wholly outside the scope of the statutes and rules governing this proceeding. (Funding Group's allegations in paragraphs 7 and 34.a simply state the Commission's jurisdiction and do not represent facts that would establish its standing, and its allegation in paragraph 35 is merely a conclusory allegation that it has standing, which also fails to plead facts that are sufficient to demonstrate that it has standing.)

18. On information and belief, FB Energy believes that certain of Funding Group's allegations are untrue, in part or in whole, as well as impertinent and irrelevant. However, even taking all of Funding Group's allegations as true, once Funding Group's claims that it has standing "because Funding Group owns property within Progress's service area" are recognized as being inadequate to establish Funding Group's standing - because Funding Group is not a customer at the address cited in its Amended Petition, and because Funding Group was not a customer

of Progress "at the time of filing [its] petition," Village Park at 433, the edifice that it has attempted to create to establish standing is revealed to be a flimsy house of cards that readily tumbles to the floor because, try as it might, Funding Group cannot satisfy the injury in fact prong of the Agrico test.

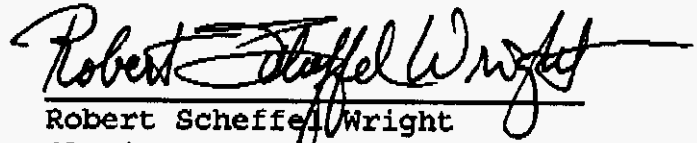
19. Finally, on information and belief, FB Energy continues to believe that Funding Group's Petition has been filed for the improper purpose of delaying FB Energy's project and unnecessarily increasing FB Energy's costs of developing its project.

CONCLUSION AND RELIEF REQUESTED

20. Even accepting all facts in the Amended Petition as true, Funding Group's Amended Petition is legally insufficient to satisfy the Agrico standing requirements or to comply with the Commission's Order requiring Funding Group to "conclusively show why Funding Group has standing under Agrico." Accordingly, its Amended Petition must be dismissed with prejudice.

WHEREFORE, for the reasons set forth, FB Energy, LLC respectfully moves the Commission to enter its order dismissing U.S. Funding Group's Amended Petition, with prejudice, and granting such other relief as the Commission deems appropriate.

Respectfully submitted this 10th day of August, 2010.

A handwritten signature in black ink that reads "Robert Scheffel Wright". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery and U.S. Mail this 10th day of August, 2010, to the following:

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