



FECA

Florida Electric Cooperatives Association, Inc.

2916 Apalachee Parkway
Tallahassee, Florida 32301
(850) 877-6166
FAX: (850) 656-5485

October 8, 2013

Ms. Ann Cole
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

**RE: Docket No. 130235-EQ: Petition of Southeast Renewable Fuels, LLC, for a
Declaratory Statement Regarding Co-Ownership of Electrical Cogeneration Facilities in
Hendry County**

Dear Ms. Cole:

Attached for filing on behalf of Florida Electric Cooperatives Association, Inc. are its
Motion For Leave To File An Amicus Curiae Memorandum of Law, Amicus Curiae
Memorandum of Law and its Motion To Address The Commission.

If you have any questions, please call me at (850)877-6166, ext. 1.

Sincerely,

Bill Willingham

Attachments

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Southeast Renewable)
Fuels, LLC, for a Declaratory Statement)
Regarding Co-Ownership of Electrical)
Cogeneration Facilities in Hendry County.)
_____)

DOCKET NO. 130235-EQ

FILED: October 8, 2013

**MOTION OF THE FLORIDA ELECTRIC COOPERATIVES
ASSOCIATION, INC. TO ADDRESS THE COMMISSION**

Pursuant to Rule 25-22.0021(7), F.A.C., the Florida Electric Cooperatives Association, Inc. ("FECA") moves for permission to address the Florida Public Service Commission ("Commission") regarding the issues raised by the declaratory statement petition filed by Southeast Renewable Fuels, LLC ("Southeast") in this proceeding. Southeast's petition raises new issues that are potentially very significant for electric cooperatives. As acknowledged by Southeast on page 6 of its Petition, "the precise question posed here has never been expressly addressed by the Commission." On October 8, 2013, FECA filed a motion for leave to file an amici curiae memorandum of law and its amici curiae memorandum addressing Southeast's petition. FECA respectfully submits that its participation in the Agenda Conference or any other hearing in which Southeast's Petition is considered will assist the Commission's deliberation of the issues raised by Southeast.

WHEREFORE, FECA respectfully requests that it be granted the opportunity to address the Commission as an Amici Curiae on the issues raised in the declaratory statement petition.

DATED this 8th day of October 2013.

Respectfully submitted,



William B. Willingham
Michelle L. Hershel
Florida Electric Cooperatives Association, Inc.
2916 Apalachee Parkway
Tallahassee, Florida 32301
Email: fecabill@embarqmail.com
mhershel@feca.com
Phone: (850) 877-6166
Fax: (850) 656-5485

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion of the Florida Electric Cooperatives Association, Inc. to Address the Commission has been furnished by electronic mail*, overnight mail**, hand delivery*** or U. S. Mail**** on this 8th day of October 2013, to the following:

Ms. Rosanne Gervasi*
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
rgervasi@psc.state.fl.us

Southeast Renewable Fuels, LLC*
6424 NW 5th Way
Fort Lauderdale, FL 33309
apecpper@serenewablesfuels.com

Robert Scheffel Wright*
John T. Lavia, III
Gardner, Bist, Wiener, Wadsworth, Bowden,
Bush, Dee, LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, FL 32308
schef@gbwlegal.com
jlavia@gbwlegal.com



WILLIAM B. WILINGHAM

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Southeast Renewable)
Fuels, LLC, for a Declaratory Statement)
Regarding Co-Ownership of Electrical)
Cogeneration Facilities in Hendry County.)
_____)

DOCKET NO. 130235-EQ

FILED: October 8, 2013

**THE FLORIDA ELECTRIC COOPERATIVES ASSOCIATION,
INC.'S MOTION FOR LEAVE TO FILE
AMICUS CURIAE MEMORANDUM OF LAW**

The Florida Electric Cooperatives Association, Inc. ("FECA" or "the association") moves the Commission for leave to appear as Amicus Curiae and to file the attached Memorandum of Law addressing legal issues raised in the Petition filed in this proceeding on behalf of Southeast Renewable Fuels, LLC ("Southeast Renewable", "Southeast" or "Petitioner") and, as grounds therefore, states:

1. Movant's name and address are:

Florida Electric Cooperatives Association, Inc.
2916 Apalachee Parkway
Tallahassee, Florida 32301

2. Copies of all notices and pleadings with respect to this Motion should be furnished to:

William B. Willingham
Michelle L. Hershel
Florida Electric Cooperatives Association, Inc.
2916 Apalachee Parkway
Tallahassee, Florida 32301
(850) 877-6166
(850) 656-5485 (fax)
bill@feca.com
mhershel@feca.com

3. FECA is a Florida corporation and a trade association that represents almost all of Florida's electric cooperatives. FECA's office is located at 2916 Apalachee Parkway, Tallahassee, Florida, 32301. All 17 of FECA's members ("Members") are electric cooperatives, and all 17 members are regulated by the Florida Public Service Commission (the "Commission") pursuant to Chapter 366, Florida Statutes. FECA's members that are distribution cooperatives provide retail service to approximately 800,000 retail accounts that are located throughout 56 Florida counties. FECA's members also own and operate generation and transmission facilities throughout Florida.

4. FECA, its Members, and electric consumer/members that its Members serve have a significant and abiding interest in the preservation and enforcement of the regulatory provisions set forth in Chapter 366, Florida Statutes, which are applicable to all electric utilities. Those interests include:

- a. the avoidance of territorial disputes;
- b. the avoidance of further uneconomic duplication of generation, transmission and distribution facilities;
- c. the planning, development and maintenance of a coordinated electric power grid throughout Florida; and
- d. the Commission's exclusive jurisdiction to protect the public by prescribing and enforcing safety standards for transmission and distribution facilities of all electric utilities.

5. One of the purposes of FECA is to represent the interests of its Members in proceedings before the Commission that will impact its Members and their electric consumer/members. Given its long-standing representation of the majority of Florida's electric

cooperatives in Commission proceedings, FECA believes it is qualified to assist the Commission as Amicus Curiae concerning certain legal issues which must be resolved in this proceeding.

6. FECA requests that it be allowed to file the attached Amicus Curiae Memorandum of Law addressing the following issues:

Issue No. 1: Is the electric generation and distribution scheme that is vaguely described in Southeast's Petition an "electric utility" pursuant to Section 366.02(2), F.S.?

Issue No. 2: Is there sufficient information in Southeast's Petition for the Commission to determine that the distribution of electricity from a jointly owned generator to two otherwise unrelated entities does not require the generator and affiliated distribution facilities to be regulated as a "public utility" pursuant to Section 366.02(1), Florida Statutes?

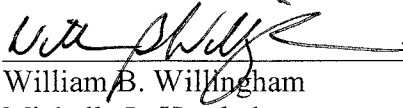
Issue No. 3: If the "self-serve" scheme alleged in Southeast's Petition does not qualify the energy selling entity as an "electric utility", how can the Commission exercise its regulatory obligations and exclusive jurisdiction: to protect the public by prescribing and enforcing safety standards for transmission and distribution facilities of all electric utilities; to avoid territorial disputes and the uneconomic duplication of facilities; and to oversee a coordinated power grid throughout Florida?

7. Consent of parties. Counsel for FECA have contacted counsel for Southeast, Mr. Robert Scheffel Wright, and are authorized to represent that Mr. Wright does not object to this Motion.

WHEREFORE, FECA respectfully requests that the Commission accept and consider the attached Amicus Curiae Memorandum of Law in its disposition of the Petition filed in this proceeding.

DATED this 8TH day of October 2013.

Respectfully submitted,



William B. Willingham
Michelle L. Hershel
Florida Electric Cooperatives Association, Inc.
2916 Apalachee Parkway
Tallahassee, Florida 32301
(850) 877-6166
(850) 656-5485 (fax)

ATTORNEYS FOR THE FLORIDA ELECTRIC
COOPERATIVES ASSOCIATION, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave to File Amicus Curiae Brief, filed on behalf of the Florida Electric Cooperatives Association, Inc., has been furnished by electronic mail*, overnight mail**, hand delivery*** or U. S. Mail**** on this 8th day of October 2013 to the following:

Ms. Rosanne Gervasi
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
rgervasi@psc.state.fl.us

Southeast Renewable Fuels, LLC
6424 NW 5th Way
Fort Lauderdale, FL 33309
apepper@serenewablesfuels.com

Robert Scheffel Wright*
John T. Lavia, III
Gardner, Bist, Wiener, Wadsworth, Bowden,
Bush, Dee, LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, FL 32308
schef@gbwlegal.com
jlavia@gbwlegal.com



WILLIAM B. WILLINGHAM

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Southeast Renewable)
Fuels, LLC, for a Declaratory Statement)
Regarding Co-Ownership of Electrical)
Cogeneration Facilities in Hendry County.)
_____)

DOCKET NO. 130235-EQ

FILED: October 8, 2013

**THE FLORIDA ELECTRIC COOPERATIVES ASSOCIATION, INC.'S
AMICUS CURIAE MEMORANDUM OF LAW**

The Florida Electric Cooperatives Association, Inc. ("FECA" or "the association") has requested leave to file this Amicus Curiae legal memorandum addressing the issues raised in Southeast Renewable Fuels, LLC's ("Southeast") Petition for a Declaratory Statement. The issues before the Florida Public Service Commission ("Commission") are of great concern to FECA, the 17 electric cooperatives that are members of FECA, and to the consumer-members that are served by those electric cooperatives. FECA maintains that Southeast has failed to provide any facts that would allow the Commission to find that it is not a public utility, and has failed to ask another important question of whether it will be an "electric utility" that would be subject to the Commission's regulatory jurisdiction. FECA maintains the Commission should issue its order declaring that Southeast would be creating an electric utility subject to its jurisdiction, which will be a public utility unless it is organized as an electric cooperative or a municipality. Alternatively, the Commission should deny the Petition because Southeast failed to provide sufficient facts to permit the Commission to reach the conclusions urged by Southeast.

Introduction

On the one hand FECA celebrates the fact that Southeast and the Confidential Partner appear to be locating in the service area of an electric cooperative. Every new consumer-

member improves the economies of scale of a cooperative and benefits all of its members. However, Southeast appears to be asking the Commission to take the unprecedented step of determining that there can be electric utilities in Florida that are not under the Commission's jurisdiction if they "self-serve" two (or potentially more) users. Such a determination would fly in the face of two statutes that form the bedrock of the Commission's jurisdiction: Section 366.02, F.S., which defines the utilities under the Commission's regulatory control, and Section 366.04, F.S. (the "Grid Bill"). If the organization described in the Petition is not an "electric utility" it will not be subject to the Grid Bill and the Commission will not have jurisdiction over Petitioner's facilities to protect the public by prescribing and enforcing safety standards for their transmission and distribution facilities; avoid territorial disputes and the uneconomic duplication of facilities; and oversee a coordinated power grid throughout Florida. Pursuant to Section 366.04(6), F.S., the Commission's safety jurisdiction is exclusive, which means that the public, firefighters, and other first responders are relying on the Commission to help protect them from unsafe situations. This jurisdictional hole would grow quickly if similar arrangements were allowed to proliferate throughout Florida.

The Facts

The limited facts presented in the Petition are that Southeast and a "Confidential Partner" plan to join together to generate electricity to serve their respective individual electric needs. This is the very same model that Florida's citizens relied upon in the 1930s and 1940s to start rural electric cooperatives in areas where other utilities could not or would not serve. Of course, things are very different today, and there is an existing electric utility that is ready, willing, and able to serve Southeast, the Confidential Partner, and all others at Southeast's location, and that utility is coordinated with all of the other electric utilities in Florida.

Electric cooperatives have been subject to the Commission’s jurisdiction for almost 40 years.¹ It is noteworthy that the Petition does not provide any facts that distinguish Southeast’s proposed business model from the electric cooperative business model or any other electric utility. There is very limited information in the Petition about the electric generation equipment or the ownership of that equipment, other than the statement on page 11 of the Petition to the effect that Southeast and the “Confidential Partner” will both own an undivided interest and each party’s ownership share “will be at least as great as its maximum power requirements.” On page 12 of the Petition, Southeast notes that the parties have not yet entered into an agreement to define “the specifics of the arrangement”. On that same page are the only facts about the operation of the electric generation equipment - that it will be operated by a third party that will be paid by both Southeast and the “Confidential Partner”.

There is no information about how each party will connect to or take service from the generator, other than the claim that it will be “self-serve”. However, since both parties will “self-serve” from the electric generator, both parties must necessarily be electrically connected to the electric generator through some form of distribution and/or transmission facilities. The Petition does not indicate how this will be done, but its use of the term “self-serve” strongly indicates that it will not be wheeled through a utility’s facilities, and that distribution facilities must be included in the facilities they will build and operate. Connecting two or more customers is much more complicated than self-service involving just one entity, and the facilities involved in the instant case surely would be “transmission or distributions facilities” as those terms are used in Section 366.02(2), F.S.

¹ The Grid Bill of 1974 expanded the Commission’s jurisdiction to include electric cooperatives and municipalities to ensure that the Commission could provide safety to all Floridians and could coordinate the entire grid.

The Petition does not reveal whether either party will take backup or standby service from the local electric utility to provide cold start power to the generator, or for their individual use when their generator is not operating. This lack of information should be especially troubling in light of the Commission's "exclusive jurisdiction" over safety in Section 366.04(6), F.S., which requires the Commission "to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities, cooperatives organized under the Rural Electric Cooperative Law, and electric utilities owned and operated by municipalities." Since both parties will "self-serve" from the electric generator, they both must be electrically connected to the electric generator. If either party also elects to take backup service from the local utility, or if the electric generator takes backup power from the utility, FECA believes this could be the first time that two or more separate customers would be electrically interconnected behind the retail meter of an electric utility in Florida. This would have to be a very complicated configuration that would require an innovative system protection scheme for the utility. More importantly, however, it is very likely that this configuration will not allow a single disconnect switch -- which fire fighters depend on for their safety. FECA believes the electric generator will need backup power for cold startups. In addition, both Southeast and the Confidential Partner probably will desire backup service for those times when their generator is not working due to preventative maintenance or an unexpected outage. If Southeast and/or the Confidential Partner take backup service they probably will have to take that service directly from the local utility and could not rely on the backup service to their generator because most, if not all, electric utilities prohibit the resale of the electricity they furnish. *See In re: Investigation of the practice, policy and procedures of public utilities engaged in the sale of electricity to be resold*, 1970 Fla. PUC Lexis 148 (Docket No. 69319-EU; Order No. 4874) April 23, 1970.

The operation described in the Petition includes at least three distinct legal entities: Southeast, the Confidential Partner, and whatever the entity that jointly owns the generation equipment and distribution and/or transmission facilities will become. Although page 1 of the Petition states that the “Confidential Partner” is “a business partner” of Southeast, there is nothing in the Petition to indicate that either entity is wholly-owned by the other or that Southeast and the “Confidential Partner” are anything other than separate and unrelated legal entities. In fact, there is nothing to indicate that they are related at all except for their alleged plans to jointly own a power plant through a partnership, joint venture or some other arrangement that will be a third legal entity. This third legal entity will not be wholly-owned by Southeast or the Confidential Partner and there is no unity of interests between these entities.

The Law

In 1974, the Legislature gave the Commission jurisdiction over electric cooperatives and municipalities with the enactment of the Grid Bill to ensure that the Commission’s authority over all of Florida’s electric utilities. The Grid bill requires the Commission to protect the public by prescribing and enforcing safety standards for transmission and distribution facilities of all electric utilities; to oversee the planning, development and maintenance of a coordinated electric power grid throughout Florida; to approve territorial agreements and resolve territorial disputes; and to avoid further uneconomic duplication of generation, transmission and distribution facilities.

Section 366.02, F.S., describes two types of electric utilities – “electric” and “public.” As set forth in Section 366.02(2), “electric utility” means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state. The definition of “public

utility” in Section 366.02(1), however, is not as specific; it includes investor-owned utilities but also could include some other, unspecified, type of entity that supplies electricity, other than an electric cooperative or a municipality.

As explained above, Southeast and its Confidential Partner must be electrically connected to their jointly-owned generator in order to receive individual service, which will require transmission and/or distribution facilities. Southeast failed to reveal the method by which ownership of the generator, transmission and distribution facilities would be established, and in fact gave no indication whatsoever of who would own the transmission and distribution facilities. Ownership of the transmission and distribution facilities alone could render investors in these facilities an “electric utility” under Section 366.02(2), F.S., and the Petition fails to provide any information that would permit the Commission to conclude that these facilities will not be owned by investors. Even without this information, however, the Commission should decline to grant the requested relief. “Public utility” is broadly defined to include “every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity . . . to or for the public within this state,” except electric cooperatives and municipalities. Section 366.02(1), Florida Statutes. It is well-settled that the sale of electricity to even one end-user will render the seller a “public utility” subject to the Commission’s regulatory jurisdiction. *P.W. Ventures, Inc., v. Nichols*, 533 So.2d 281 (Fla. 1988), affirming *In re: Petition of PW Ventures, Inc. for Declaratory Statement in Palm Beach County*, 1987 Fla. PUC Lexis 289 (Docket No. 870446-EU, Order No. 18302-A) October 22, 1987.

The Commission has determined that a single entity that owns and operates an electric generator for its own use is not necessarily a “public utility”. However, in the instant case there are at least two distinct and separate end-users and an electric generator that is not wholly-owned

by either end-user and is operated by a third party. It appears the Commission already has deemed this type of scheme to be jurisdictional. *In re: Petition of PW Ventures, Inc. for Declaratory Statement in Palm Beach County*, 1987 Fla. PUC Lexis 289 at 11 (Docket No. 870446-EU, Order No. 18302-A) October 22, 1987. Nevertheless, paragraph 6 of the Petition asserts that “the precise question posed here has never been expressly addressed by the Commission.” Southeast then argues the Commission’s orders that clearly are limited to a single end-user/generation owner, stand for the proposition that “self-serve” electricity does not render it a “public utility” if the multiple end-users simply have an undivided ownership interest in the generator. Southeast is incorrect, and there is no such precedent. Taken to its extreme, this argument could be used to say that electric cooperatives should be exempt from the Commission’s jurisdiction since the members of an electric cooperative each have an undivided ownership interest in the cooperative and all of its assets, but electric cooperatives clearly are regulated under the Grid Bill.

FECA believes that Southeast’s Petition presents the following issues:

Issue No. 1: Is the electric generation and distribution scheme that is vaguely described in Southeast’s Petition an “electric utility” pursuant to Section 366.02(2), F.S.?

Yes. The Petition describes an electric utility, as it will own and operate generation and it must own and operate distribution and/or transmission facilities in order to serve Southeast and the Confidential Partner.

Issue No. 2: Is there sufficient information in Southeast’s Petition for the Commission to determine that the distribution of electricity from a jointly owned generator to two otherwise unrelated entities does not require the generator and affiliated distribution facilities to be regulated as a “public utility” pursuant to Section 366.02(1), Florida Statutes?

No. Petitioner’s “self-serve” scheme, with multiple end users and a third-party operator of the electric generator does not fit any of the exceptions to the Supreme Court’s ruling in *P.W. Ventures, Inc.* The Commission only has enough information to conclude this scheme would be a public utility.

Issue No. 3: If the “self-serve” scheme alleged in Southeast’s Petition does not qualify the energy selling entity as an “electric utility”, how can the Commission exercise its regulatory obligations and exclusive jurisdiction: to protect the public by prescribing and enforcing safety standards for transmission and distribution facilities of all electric utilities; to avoid territorial disputes and the uneconomic duplication of facilities; and to oversee a coordinated power grid throughout Florida?

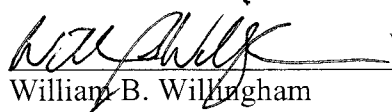
The Commission’s jurisdiction under the Grid Bill only applies to electric utilities. The Grid Bill was intended to give the Commission broad jurisdiction over the electric generation, distribution and transmission facilities in Florida. The Commission would not be able to fulfill its obligations to the public unless it determines that Petitioner’s “self-serve” scheme creates an electric utility.

Conclusion

Southeast’s Petition is woefully lacking in facts the Commission would need in order to grant their request for an exclusion from the definition of “public utility”, and the Commission cannot grant the relief requested therein. However, the Petition does make it clear that the electric generation and “self-serve” scheme described in the Petition fits neatly within the definition of an “electric utility” in Section 366.02(2), F.S., and the Commission should issue its order denying Petitioners relief and declaring that the electric generation and “self-serve” scheme would be an electric utility.

DATED this 8TH day of October 2013.

Respectfully submitted,



William B. Willingham
Michelle L. Hershel
Florida Electric Cooperatives Association
2916 Apalachee Parkway
Tallahassee, Florida 32301
Email: fecabill@embarqmail.com
mhershel@feca.com
Phone: (850) 877-6166
Fax: (850) 656-5485

ATTORNEYS FOR THE FLORIDA ELECTRIC
COOPERATIVES ASSOCIATION, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave to File Amicus Curiae Brief, filed on behalf of the Florida Electric Cooperatives Association, Inc., has been furnished by electronic mail*, overnight mail**, hand delivery*** or U. S. Mail**** on this 8th day of October 2013 to the following:

Ms. Rosanne Gervasi
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
rgervasi@psc.state.fl.us

Southeast Renewable Fuels, LLC
6424 NW 5th Way
Fort Lauderdale, FL 33309
apepper@serenewablesfuels.com

Robert Scheffel Wright*
John T. Lavia, III
Gardner, Bist, Wiener, Wadsworth, Bowden,
Bush, Dee, LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, FL 32308
schef@gbwlegal.com
jlavia@gbwlegal.com



WILLIAM B. WILLINGHAM