

Shawna Senko

From: Murphy, Katharine <kmurphy@ngn-tally.com>
Sent: Friday, May 16, 2014 2:53 PM
To: Filings@psc.state.fl.us
Cc: Curt Kiser; Adam Teitzman; Mary Anne Helton
Subject: Docket 140059-EM; Response in Opposition to TECO's Motion for Leave to File Attached Comments
Attachments: Response in Opposition to TECO's Motion for Leave to File Attached Comments.pdf

Full name, address, telephone number, and e-mail address of the person(s) responsible for this filing:

Brian P. Armstrong, Esq.
William C. Garner, Esq.
John R. Jenkins, Esq.
Nabors, Giblin & Nickerson, PA
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
(850) 224-4070 (telephone)
barmstrong@ngnlaw.com
bgarner@ngnlaw.com
jjenkins@ngnlaw.com

Docket number and title if filed in an existing docket:

140059-EM

Name of the Party on whose behalf this document is filed:

Babcock Ranch Community Independent Special District

Total number of pages in this document:

7

Brief, but complete, description of the attached document:

Attached for filing is the Babcock Ranch Community Independent Special District's Response in Opposition to Tampa Electric Company's Motion for Leave to File Attached Comments

Katie Murphy
Legal Assistant



1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
(850) 224-4070 Tel.
(850) 224-4073 Fax
kmurphy@ngnlaw.com

The information contained in this email is attorney privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. Moreover, any unintentional dissemination of this message does not waive any attorney-client privilege that applies to this communication. If you have received this communication in error, please notify us immediately by telephone collect and delete the original message. Thank you.

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Notice Pursuant to Rule 25-9.044, Florida
Administrative Code of New Electric Service
Provider, Babcock Ranch Community
Independent Special District, and Request for
Partial Waiver

Docket No. 140059-EM

Filed: May 16, 2014

**BABCOCK RANCH COMMUNITY INDEPENDENT SPECIAL DISTRICT'S
RESPONSE IN OPPOSITION TO TAMPA ELECTRIC COMPANY'S
MOTION FOR LEAVE TO FILE ATTACHED COMMENTS**

The Babcock Ranch Community Independent Special District ("Babcock District" or "District"), by and through its undersigned counsel, pursuant to Rule 28-106.204(1), Florida Administrative Code, files this response in opposition to Tampa Electric Company's ("TECO") Motion for Leave to File Attached Comments ("Motion") filed May 13, 2014, and in support hereof, says:

1. TECO's interest in the outcome of the proceeding is not sufficiently substantial or immediate to entitle it to participate by commenting on the merits of pleadings by parties that actually do have a tangible and immediate interest in the outcome, it has plead no facts to demonstrate a substantial or immediate interest, and no such fact exists, even if not plead. It therefore has no standing to address the Commission, even in a proceeding following the Proposed Agency Action ("PAA") procedure.

2. No express procedure exists authorizing a party with no substantive immediate interest in the proceeding to comment on the merits where the substantial interests of other

parties are at stake. In rare cases, the Commission has treated comments as amicus briefs, but the circumstances present in those rare cases are not present here.

3. Because TECO has no cognizable interest in this proceeding, and the rare circumstances that would suggest propriety of commentary by *amicus curiae* do not exist, TECO's request for leave to file comments should be denied and the Commission should refrain from considering them in deciding the substantial interests of the actual parties.

TECO Has No Standing, and Is Not an "Interested Person" Authorized to Participate in This PAA Proceeding

4. The Commission has determined time and again that the proper test to determine standing is the two-prong test set forth in Agrico Chemical Company v. Department of Environmental Protection, 406 So. 2d 478 (Fla. 1st DCA 1981). Under Agrico, before a person may participate in an administrative proceeding, that person must show: 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to Section 120.57, Florida Statutes, hearing; and 2) that his substantial injury is of the type or nature which the proceeding is designed to protect. The first prong of the test concerns the degree of the injury and the second prong concerns the nature of the injury. Id.

5. In its Motion, TECO alleges that it "has a significant interest in the manner in which Chapter 366, Florida Statutes, is construed in connection with other laws that may affect public utilities in this state." TECO's Motion offers no allegations at all as to what statutory construction would be harmful to its interests, offers no explanation of what set of conditions exists in its operations that compare to the situation presented by the District in this proceeding, and identifies no other heretofore unidentified entity chartered by a Special Act anywhere in Florida, let alone within its own service area, that might have the potential of asserting powers

affecting TECO similar to those asserted in this proceeding by the District. TECO alleges, essentially and solely, that its interest is the indeterminate future impact to it of precedent established by the Commission interpreting the Babcock District Law and other laws that have been cited in this case. Such an uncertain, indeterminate impact is wholly inadequate to form a basis for standing as an interested party, and the Commission has said so in prior Orders.

6. “[A]n injury premised on a potential precedent that might have an effect [on a party] at some unspecified time in the future is too speculative to confer standing.” In re: Applications for original certificates to operate water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation and by Intercoastal Utilities, Inc., Order No. PSC-00-1265-PCO-WS (July 11, 2000)(citing, Village Park Mobile Home Association v. Department of Business and Professional Regulation, 506, So. 2d 426, 430 (Fla. 1st DCA 1987)(rev. denied, 513 So. 2d 1063 (Fla. 1987))). Petitions asserting such a speculative interest fail the first prong of the Agrico test, which requires an intervenor to show that he or she will suffer an injury in fact which is of an immediate nature. Id.

7. Moreover, the Commission has determined that a person failing to establish an injury in fact under the Agrico test lacks standing to raise its concerns in PAA proceedings. See In re: Joint application for approval of indirect transfer of control of telecommunications facilities by Embarq Corporation, CenturyTel, Inc., Embarq Florida, Inc., and Embarq Payphone Services, Inc., Order No. PSC-09-0126-PAA-TP (March 3, 2009). See also, In re: Joint Application of MCI Worldcom, Inc. and Sprint Corporation for Acknowledgment or Approval of Merger whereby MCI Worldcom will acquire control of Sprint and its Florida Operating Subsidiaries, ASC Telecom, Inc. d/b/a Alternatel (IXC Certificate No. 4398), Sprint Communications Company Limited Partnership (holder of PATS Certificate No. 5359 and

ALEC Certificate No. 4732), Sprint Communications Company Limited Partnership d/b/a Sprint (holder of IXC Certificate No. 83), Sprint Payphone Services, Inc. (holder of PATS Certificate No. 3822), and Sprint-Florida, Incorporated (holder of LEC Certificate No. 22 and PATS Certificate No. 5365), Order No. PSC-00-0421-PAA-TP (March 1, 2000)(denying participation by the Telecommunications Reseller’s Association, a trade organization that wished to intervene “for the specific purpose of monitoring the proceeding and submitting a brief”); In Re: Petition of Jacksonville Electric Authority to Resolve a Territorial Dispute with Florida Power & Light Company in St. Johns County, Order No. PSC-96-0158-PCO-EU (February 5, 1996)(denying Florida Steel’s intervention in a PAA proceeding regarding a joint petition for approval of a territorial agreement).

17. TECO has failed to establish an injury in fact under applicable legal standards, lacks standing to raise issues in this proceeding, and should not be permitted to file comments addressed to pleadings of interested parties.

TECO Should Not Be Treated as a “Friend of the Court” (Amicus Curiae)

18. It is exceedingly rare for the Commission to grant “friend-of-the-court” status, except in the case of generic proceedings or in cases that involve a petition for declaratory statement. Neither case applies to this proceeding. Research reveals only six instances of such a grant of status by the Commission where the proceeding is not generic and does not involve a petition for declaratory statement. In one case OPC filed an amicus brief without objection from any party. The Commission noted in its Order the fact that there was no objection, and therefore it declined to address the propriety of the filing.¹ In another such instance, the Attorney General

¹ In re: Application for transfer of facilities and Certificates Nos. 353-W and 309-S in Lee County from MHC Systems, Inc. d/b/a FFEC-Six to North Fort Myers Utility, Inc., holder of Certificate No. 247-S; amendment of

was permitted to file an amicus brief addressing a post-hearing settlement which attempted to resolve a complaint that a third-party billing company was mis-timing calls and over-billing customers. The Attorney General's filing was a prelude to an investigation by the Department of Legal Affairs, a department within the Office of the Attorney General.² In the remaining four cases where the Commission granted a person amicus curiae status, that person (i) had standing otherwise as a party to the proceeding³ and participated as such for limited purposes, (ii) presented a set of facts where the effect on its substantial interests from the outcome of the case was a certainty⁴, or (iii) presented arguments in a case that interpreted statutes in a way that clearly and directly affected the substantial interests of an entire class of power generators.⁵

19. The circumstances of this case do not warrant similar treatment for TECO. TECO may only speculate as to how an undefined and indeterminate Commission interpretation of a special law could potentially affect it IF the Legislature ever grants powers to another special district within TECO service territory that are identical to those granted to the Babcock District. Moreover, TECO does not otherwise have standing to intervene in this proceeding and seek a hearing.

Wherefore, for the reasons indicated in this Response, the Babcock District respectfully requests that the Commission (1) deny TECO's Motion for Leave to File Attached Comments,

Certificate No. 247-S; and cancellation of Certificate No. 309-S, Order No. PSC-01-0360-PAA-WS (February 9, 2001).

² In re: Complaint by Telecom Recovery Corp. against Transcall America, Inc. d/b/a ATC Long Distance regarding billing discrepancy, Order No. PSC-93-1237-AS-TI (August 24, 1993).

³ In re: Rate Schedule Modification of the City of Tallahassee, Order No. 11221 (October 4, 1982).

⁴ In re: Investigation of proposed updates to the Routing Data Base System (RDBS) and Business Rating Input Database system (BRIDS) affecting the Tampa telecommunications carriers, Order No. PSC-01-1577-FOF-TP (July 31, 2001); In re: Application for original certificates to operate water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation and by Intercoastal Utilities, Inc., Order No. PSC-00-1265-PCO-WS (July 11, 2000).

⁵ In re: Joint petition for determination of need for an electrical power plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., Order No. PSC-99-0535-FOF-EM (March 22, 1999).

(2) refrain from treating TECO's comments as "Friend of the Court" comments; and (3) grant the District such further relief as may be just and proper.

Respectfully submitted this 16th day of May, 2014.

s/William C. Garner
WILLIAM C. GARNER
Florida Bar No. 577189
BRIAN P. ARMSTRONG
Fla. Bar No. 888575
JOHN R. JENKINS
Florida Bar No. 435546
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
(850) 224-4070 Telephone
(850) 224-4073 Facsimile
*Attorneys for Babcock Ranch Community
Independent Special District*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing was furnished by electronic mail to the following this 16th day of May, 2014:

James D. Beasley, Esq.
J. Jeffry Wahlen, Esq.
Ausley Law Firm
P.O. Box 391
Tallahassee, FL 32302
jbeasley@ausley.com
jwahlen@ausley.com

John A. Noland, Esq.
Henderson Law Firm
P.O. Box 280
Ft. Myers, FL 33902
john.noland@henlaw.com

D. Bruce May, Jr., Esq.
Kevin Cox, Esq.
Holland Law Firm
P.O. Drawer 810
Tallahassee, FL 32302-0810
bruce.may@hklaw.com
kevin.cox@hklaw.com

Dennie Hamilton
Frank R. Cain, Jr.
Lee County Electric Cooperative, Inc.
P.O. Box 3455
North Ft. Myers, FL 33918-3455
dennie.hamilton@lcec.net
frank.cain@lcec.net

Paula K. Brown
Regulatory Coordination
Tampa Electric Company
P.O. Box 111
Tampa, FL 33601
regdept@tecoenergy.com

John T. Butler, Esq.
Scott A. Goorland, Esq.
700 Universe Boulevard
Juno Beach, FL 33408-0420
john.butler@fpl.com
scott.goorland@fpl.com

William B. Willingham
Michelle L. Hershel
Florida Electric Cooperatives Assoc., Inc.
2916 Apalachee Parkway
Tallahassee, FL 32301
fecabill@embarqmail.com
mhershel@feca.com

Matthew R. Bernier, Esq.
Duke Energy Florida
106 East College Avenue
Tallahassee, FL 32301
matthew.bernier@duke-energy.com

Martha Carter Brown, Esq.
Jennifer Crawford, Esq.
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
mbrown@psc.state.fl.us
jcrawfor@psc.state.fl.us

s/William C. Garner
WILLIAM C. GARNER