

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Energy conservation cost recovery
clause.

DOCKET NO. 080002-EG
ORDER NO. PSC-08-0596-PCO-GU
ISSUED: September 16, 2008

ORDER DENYING INTERVENTION

Pursuant to Rule 25-17.015(1), Florida Administrative Code (F.A.C.), the Commission has a continuing Energy Conservation Cost Recovery (ECCR) - Electric Utilities docket. Pursuant to Order No. PSC-08-0168-PCO-EG, issued March 20, 2008, this matter has been scheduled for a formal administrative hearing on November 4-6, 2008.

Petition for Intervention

By petition, dated August 8, 2008, Saporito Energy Consultants (SEC) and its President Thomas Saporito (Mr. Saporito) requested permission to intervene in this docket (Petition to Intervene). According to SEC and Mr. Saporito, SEC is a privately held entity within the State of Florida and its clients' interests will be affected by the Commission's determination in this proceeding as to whether FPL should be ordered to refund monies paid by its customers towards the Sunshine Energy Program.¹ Therefore, according to the Petition to Intervene, SEC, Mr. Saporito, and its clients' substantial interests will be affected by this proceeding.

FPL's Response

In its response, FPL argues that the Petition to Intervene should be denied because Mr. Saporito fails to allege an adequate basis for intervention, SEC lacks legal capacity and fails to allege an adequate basis for intervention, and Mr. Saporito is not entitled to appear and represent SEC or SEC's clients.

In support of this contention, FPL asserts that Florida law provides a two-prong test for determining whether a party has a substantial interest entitling the party to intervene in a proceeding. FPL contends that Mr. Saporito has failed to allege that he will (or even could possibly) suffer any injury in fact as a result of the resolution of any Sunshine Energy Program issues that are addressed in the ECCR docket. Furthermore, FPL states that any decision related to the Sunshine Energy Program will not personally affect Mr. Saporito because he was never a participant in the program.

¹ The Sunshine Energy Program is a renewable energy program that was given final approval by Order No. PSC-06-0924-TRF-EI, issued November 6, 2006, in Docket No. 060577-EI, In Re: Petition to convert green power pricing research project to permanent program and to extend program to commercial customers, by Florida Power and Light Company. The Commission terminated the program at its July 29, 2008, Agenda Conference. An Order memorializing that decision is forthcoming.

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FPL further contends that SEC is not a legal entity with the capacity to participate in this proceeding. FPL asserts that SEC is not currently registered with the state as an entity recognized in Florida with the capacity to intervene. Furthermore, even if SEC had the legal capacity to intervene, SEC has failed to allege that it will suffer any injury in fact as a result of the resolution of any Sunshine Energy Program issues in this docket, as SEC was never a participant in the Sunshine Energy Program.

FPL argues that if SEC is trying to establish associational standing to intervene on behalf of its clients, its petition plainly fails to establish such standing for the following reasons: (1) the petition is silent as to how many SEC clients, if any, ever participated in the Sunshine Energy Program; (2) there is no description of SEC's general scope of interest and activity; and (3) the petition fails to demonstrate that the relief requested is of a type appropriate for SEC to receive.

Lastly, FPL argues that Mr. Saporito is not entitled to represent SEC or SEC's clients because the Commission's rules require that a party be represented by an attorney or a qualified representative. FPL contends that while Mr. Saporito is purporting to represent SEC and SEC's clients' interests, Mr. Saporito is not an attorney and has not made the required filing of qualifications for consideration to become a qualified representative.

Amended Petition for Intervention

On August 18, 2008, SEC and Mr. Saporito filed an Amended Petition for Leave to Intervene in Response to FPL's Response in Opposition to Intervention (Amended Petition), which in part amended SEC's petition to intervene. However, the Amended Petition also provided arguments addressing points raised in FPL's Response. Neither the Uniform Rules nor our rules contemplate a reply to a response to a motion; however, the filing will be treated as an Amended Petition to Intervene.²

As part of his Amended Petition, Mr. Saporito argues that he is an FPL ratepayer, and as such, he is at risk of suffering substantial injury to entitle him to a hearing. Mr. Saporito contends that FPL accepted funds from some of its ratepayers on a voluntary basis and that those customers were "duped" into believing that their funds would be appropriately applied to the Sunshine Energy Program. As such, Mr. Saporito contends that he is at risk of being "duped" by FPL in the future unless the Commission orders FPL to refund the Sunshine Energy Program funds.

According to Mr. Saporito, SEC is a privately held entity. Further, Mr. Saporito is the current president of SEC, and his tax filings with the IRS require that he claim and identify all funds received by SEC on his "personal" tax return. Thus, Mr. Saporito argues that SEC is duly recognized by the US government agency as a legal entity accountable for taxation just the same

² On August 25, 2008, Mr. Saporito filed an Answer to FPL's Response in Opposition to the Amended Petition to Intervene. As previously noted, neither the Uniform Rules nor our rules contemplate a reply to a response to a motion and as such, those arguments need not be considered. Further, it should be noted that Mr. Saporito failed to request permission to Amend his original Petition to Intervene, as required by Ruled 28-106.202, F.A.C.

as registered companies like FPL. In addition, Mr. Saporito states that SEC is currently seeking a business partnership with FPL to provide FPL's customers with a home energy survey. Thus, Mr. Saporito asserts that FPL's management practices with respect to the Sunshine Energy Program directly affects SEC and its business plan.

Finally, Mr. Saporito contends that he represents not only his personal interests in the instant action, but also the interests of the FPL customers and ratepayers who took part in the Sunshine Energy Program.

FPL's Response to Amended Petition

FPL contends that the Amended Petition fails to allege any new facts sufficient to provide a basis for standing to intervene, and the Amended Petition is a reply to FPL's response, which is not allowed by Commission rule. As such, FPL argues that Mr. Saporito's Amended Petition should be denied.

FPL asserts that the Amended Petition demonstrates that neither Mr. Saporito nor SEC were ever participants in the Sunshine Energy Program. FPL further asserts that the Amended Petition, like Mr. Saporito's first petition, does not allege any facts indicating that he will suffer any injury in fact. FPL contends that Mr. Saporito's concern about other future FPL programs is not an injury in fact sufficient to demonstrate standing. Similarly, SEC's request to establish a business partnership with FPL does not provide SEC with a basis for standing to intervene. As such, FPL argues that Mr. Saporito has again failed to show that either he or SEC will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing, and that his substantial interest is of a type or nature this proceeding is designed to protect.

FPL states that Mr. Saporito also attempts to demonstrate that he is entitled to appear and represent the interests of FPL's customers in general. However, FPL contends that while customers are permitted to intervene or represent their own interests as pro se participants, only an attorney or a qualified representative can represent the interests of others. Accordingly, FPL argues that Mr. Saporito has not demonstrated any personal interest that provides a sufficient basis for standing to intervene as a pro se participant.

Standards of Intervention

Pursuant to Rule 25-22.039, F.A.C., persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition for leave to intervene. Petitions for leave to intervene must be filed at least five (5) days before the final hearing, must conform with Rule 28-106.201(2), F.A.C., and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it.

To have standing, the intervenor must meet the two-prong standing test set forth in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The intervenor must show (1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and (2) that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990). See also, Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. den., 513 So. 2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote).

Further, the test for associational standing, which was established in Florida Home Builders v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), and Farmworker Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services, 417 So. 2d 753 (Fla. 1st DCA 1982), is also based on the basic standing principles established in Agrico. Associational standing may be found where: (1) the association demonstrates that a substantial number of an association's members may be substantially affected by the Commission's decision in a docket; (2) the subject matter of the proceeding is within the association's general scope of interest and activity; and (3) the relief requested is of a type appropriate for the association to receive on behalf of its members. Furthermore, Rule 28-106.106, F.A.C. provides that an association must be represented by an attorney who is a member of the Florida Bar, a duly designated law student, or an individual duly authorized as a Qualified Representative, to participate in a formal administrative proceeding.

Analysis & Ruling

The Amended Petition fails to demonstrate that either Mr. Saporito or SEC has standing to participate as a party in this proceeding. While Mr. Saporito may be a customer of FPL, the petition does not allege any facts to show that he has a substantial interest that will be affected by the outcome of this proceeding or that his interest is one this proceeding is designed to protect. Mr. Saporito was not a participant of the Sunshine Energy Program; thus, any decision related to the Sunshine Energy Program in this proceeding will not directly affect Mr. Saporito or cause any injury in fact. For these reasons, Mr. Saporito's Petition for Intervention is hereby denied.

Furthermore, the Amended Petition does not allege any facts to show that SEC's participation as a party meets either prong of the Agrico test or the associational standing requirements of Florida Home Builders and Farmworker. Specifically, SEC does not allege that it is a corporation, non-profit corporation, or any other entity with the legal capacity to sue. SEC is not registered with the state³ as an entity with the capacity to intervene and has failed to allege that it will suffer any injury in fact, as SEC was never a participant of the Sunshine Energy Program. SEC has failed to establish associational standing because the petition does not demonstrate that a substantial number of its clients may be substantially affected by the


³ Section 607.0128, F.S., requires that associations must register with the state in order to transact business.

Commission's decision in a docket; that the subject matter of the proceeding is within SEC's general scope of interest and activity; and the relief requested is of a type appropriate for SEC to receive on behalf of its clients. Finally, the petition does not allege any facts that demonstrate that Mr. Saporito has made the required filings by Rule to be considered a qualified representative of SEC. For these reasons, SEC's Petition for Intervention is hereby denied.

Based on the foregoing, it is

ORDERED by Commissioner Katrina J. McMurrian, as prehearing officer, that the Amended Petition for Intervention filed by Saporito Energy Consultants and its president, Thomas Saporito, is hereby denied.

By ORDER of Commissioner Katrina J. McMurrian, as Prehearing Officer, this 16th day of September, 2008.


KATRINA J. McMURRIAN
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-

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22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.