

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in rates by Florida
Power & Light Company.

DOCKET NO. 080677-EI
ORDER NO. PSC-09-0280-PCO-EI
ISSUED: April 29, 2009

ORDER GRANTING IN PART AND DENYING IN PART
PETITION TO INTERVENE AND GRANTING MOTION TO STRIKE

Background

On November 17, 2008, Florida Power & Light Company (FPL) filed a test year letter, as required by Rule 25-6.140, Florida Administrative Code (F.A.C.), notifying this Commission of its intent to file a petition in the Spring of 2009 for an increase in rates effective January 1, 2010. Pursuant to the provisions of Chapter 366, Florida Statutes (F.S.), and Rules 25-6.0425 and 25-6.043, F.A.C., FPL filed the petition for an increase in rates on March 18, 2009.

On March 9, 2009, Thomas Saporito filed a Petition to Intervene (Petition) in this docket both in his individual capacity and as representative of Saporito Energy Consultants (SEC). On March 16, 2009, FPL filed a Response in Opposition to Mr. Saporito's Petition (Response), in which FPL objected to Mr. Saporito's participation in this proceeding either as an individual or as a representative of SEC. On March 23, 2009, Mr. Saporito filed a Reply to FPL's Response to Mr. Saporito's Petition (Reply). On March 24, 2009, FPL filed a Motion to Strike Mr. Saporito's Reply (Motion to Strike). On March 30, 2009, Mr. Saporito filed a Reply in Opposition to FPL's Motion to Strike his Reply (Reply to FPL's Motion to Strike).

Petition to Intervene

Mr. Saporito and SEC's Petition

According to his Petition, Mr. Saporito is an FPL customer and stockholder whose interests will be substantially affected by the Commission's decision to adjust FPL's rates in this proceeding. Mr. Saporito asserts that SEC, a Florida business entity, will also be affected by the Commission's determination, and as President of SEC, he seeks to represent SEC's interests in this proceeding. In addition, Mr. Saporito raises the issues of whether FPL improperly misled its ratepayers in its assessment of costs associated with the operation of its existing power plants, and whether FPL should be allowed to charge its customers for such costs.

FPL's Response

In its response, FPL objects to Mr. Saporito's participation in this proceeding both as an individual and as a representative of SEC. With respect to Mr. Saporito's intervention as an individual, FPL asserts that Mr. Saporito's Petition was filed for an improper purpose and that his attempt to intervene constitutes a frivolous and retaliatory effort to harass FPL and cause

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unnecessary delay in the proceedings. In support of this assertion, FPL recites an extensive 21-year history of repetitive litigation between FPL and Mr. Saporito, commencing in 1988 when Mr. Saporito's employment with FPL was terminated for cause. Since that time, Mr. Saporito has initiated proceedings against FPL in a variety of forums.

According to FPL, Mr. Saporito filed five whistleblower complaints against FPL before the Department of Labor, all of which were dismissed, denied review, or affirmed on appeal. FPL contends that within this 21-year span, Mr. Saporito also sought to initiate some 19 proceedings against FPL before the U.S. Nuclear Regulatory Commission, all of which were ultimately denied. FPL contends that Mr. Saporito's litigious history against FPL evidences a pattern of filing actions for improper purposes, including the intent to coerce an offer of employment or other economic consideration from FPL and to delay the proceeding in question. FPL contends that Mr. Saporito's attempt to intervene in this proceeding is in accordance with that pattern and that his participation in this rate case would add nothing but confusion and delay.

Regarding Mr. Saporito's intervention as an SEC representative, FPL argues that SEC will not suffer any injury in fact as a result of the resolution of any issues the Commission will address in this proceeding. FPL notes that SEC is not a customer of FPL, nor will its interests be substantially affected by the outcome of this rate case. Additionally, FPL contends that SEC has failed to satisfy the associational standing requirements.

In the alternative, FPL states that if Mr. Saporito's Petition is granted, his participation should be limited to issues that are properly within the Commission's jurisdiction in this proceeding, recognizing that the issues regarding whether FPL improperly misled ratepayers regarding the costs of power plants and whether FPL should be allowed to charge customers for such costs are not proper in this rate case. FPL urges the Commission to instruct Mr. Saporito that issues related to his competitive economic or business interests are beyond the scope of this rate case proceeding, his participation must be limited strictly to proper issues, and abuse of the proceeding will not be tolerated.

Standard for 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 days before the evidentiary hearing, conform with Rule 28-106.201(2), F.A.C., and 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 by 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 that (1) he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and (2) 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 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), which 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.

Analysis & Ruling

It appears that Mr. Saporito in his individual capacity meets the two-prong standing test set forth in Agrico, in that he is a customer of FPL whose interests may be substantially affected by this proceeding. Therefore, the Petition shall be granted with respect to Mr. Saporito's intervention in this proceeding as an individual FPL customer.

The Petition fails, however, to allege that SEC is a customer of FPL or that it will suffer any injury as a result of the resolution of issues addressed in this proceeding; therefore, it fails to meet the Agrico test. The Petition also fails to show how SEC satisfies the requirements for associational standing. Accordingly, the Petition shall be denied without prejudice with respect to SEC's intervention.

The decision to grant Mr. Saporito intervention should not be construed to permit him to raise arguments outside the scope of the issues the Commission determines to address in this rate proceeding. The appropriateness of the issues will be determined during the normal course of issue identification. Pursuant to Rule 25-22.039, F.A.C., Mr. Saporito takes the case as he finds it. As an intervenor in this proceeding, Mr. Saporito is expected to comply with the same standards, rules, statutes, and procedures as all other parties to this proceeding and shall be required to stay within the scope of this proceeding as established through the issues, rules, and governing statutes.

Motion to Strike

As stated above, on March 23, 2009, Mr. Saporito filed a Reply to FPL's Response. The following day, FPL filed a Motion to Strike Mr. Saporito's Reply. FPL argues that no provision within the Florida Administrative Code allows a reply to be filed in response to an answer to a

petition. FPL contends that pursuant to Rule 28-106.204(1), F.A.C., the Commission treats petitions to intervene as motions and allows only a single response to a motion. FPL notes that in similar situations, this Commission has recognized that the Florida Administrative Code does not contemplate that a party can file a reply to a response in opposition to a motion. See Rule 28-106.204(1), F.A.C.; In re: Petition for approval to revise customer contact protocol by BellSouth Telecommunications, Inc., Order No. PSC-04-0636-FOF-TLI, Docket No. 031038-TL, issued July 1, 2004, at 4 (noting that “the Administrative Procedure Act do[es] not expressly authorize replies”); In re: Adoption of Numeric Conservation Goals by Florida Power & Light Company, Order No. PSC-98-1435-PC-EG, Docket No. 971004-EG, issued October 26, 1998, at 3 (holding that “the pleading cycle must stop at a reasonable point” and “unequivocal precedent” prohibited such replies); and In re: Complaint of Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. for violations of the Telecommunications Act of 1996, Order No. PSC-00-1777-PCO-TP, Docket No. 980119-TP, issued September 28, 2000, at p. 3 (“neither the Uniform Rules nor [this Commission’s] rules contemplate a reply to a response to a Motion.”).

In his Reply to FPL’s Motion to Strike, Mr. Saporito argues that his Reply to FPL’s Response was intended as a supplement to his original Petition to Intervene. Mr. Saporito asserts that his Reply should be construed as an amendment to the original Petition rather than a reply to FPL’s response.

Analysis & Ruling

After reviewing the arguments presented by both parties, FPL’s Motion to Strike Mr. Saporito’s Reply shall be granted. This Commission has acknowledged on numerous occasions that neither the Uniform Rules nor its own rules provide for a reply to a response to a motion. This reasoning is equally applicable in this case pertaining to a reply to a response to a petition. Although Rule 28-106.203, F.A.C., permits a response to a petition, there is no provision permitting a further reply. See In re: Petition for approval to revise customer contact protocol by BellSouth Telecommunications, Inc., Order No. PSC-04-0636-FOF-TL, Docket No. 031038-TL, issued July 1, 2004, at 2. Mr. Saporito has failed to offer any reason to deviate from application of this rationale in this case. Furthermore, he very clearly styled his filing as a “Reply” to FPL’s Response, not as an “Amended Petition to Intervene.” Therefore, FPL’s Motion to Strike Mr. Saporito’s Reply is granted.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petition to Intervene filed by Thomas Saporito in his individual capacity is hereby granted. It is further

ORDERED that the Petition to Intervene filed by Saporito Energy Consultants is hereby denied. It is further

ORDERED that Florida Power & Light Company’s Motion to Strike is hereby granted. It is further

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ORDERED that all parties to this proceeding shall furnish copies of all testimony, exhibits, pleadings and other documents which may hereinafter be filed in this proceeding, to:

Thomas Saporito
Post Office Box 8413
Jupiter, Florida 33465-8413
Voice: (561) 283-0613
Fax: (561) 952-4810
Email: SaporitoEnergyConsultants@gmail.com

By ORDER of Commissioner Katrina J. McMurrian, as Prehearing Officer, this 29th
day of April, 2009.


KATRINA J. McMURRIAN
Commissioner and Prehearing Officer

(SEAL)

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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 25-22.0376, 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 25-22.0376, 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.