

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for limited proceeding to approve 2017 second revised and restated settlement agreement, including certain rate adjustments, by Duke Energy Florida, LLC.

DOCKET NO. 20170183-EI  
ORDER NO. PSC-2017-0397-PCO-EI  
ISSUED: October 20, 2017

ORDER DENYING CHARGEPOINT, INC.'S PETITION TO INTERVENE

On August 29, 2017, Duke Energy Florida, LLC (DEF) filed a Petition for Limited Proceeding asking the Commission to Approve its 2017 Revised and Restated Settlement Agreement, Including Certain Rate Adjustments (Settlement Agreement). DEF has stated that the Settlement Agreement determines, in a comprehensive manner, all remaining Levy Nuclear Project Issues, as well as issues that may adversely affect DEF's customers. The Settlement Agreement would replace and supplant the 2013 Revised and Restated Stipulation and Settlement Agreement, and has been signed and executed by DEF, the Office of Public Counsel, Florida Industrial Power Users Group, White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate, Florida Retail Federation, and the Southern Alliance for Clean Energy. By Order No. PSC-2017-0345-PCO-EI, issued September 6, 2017, the Commission will address the Settlement Agreement at an administrative hearing on October 25, 2017. By petition dated October 18, 2017, ChargePoint, Inc. (ChargePoint) requested permission to intervene in this proceeding (Petition). DEF filed its response in opposition to ChargePoint's petition on October 19, 2017 (Response).

Petition for Intervention

ChargePoint is an electric vehicle charging network with independently owned and operated Level 2 and DC fast charging spots, and is headquartered in Campbell, California. ChargePoint states in its Petition that it is the nation's largest electric vehicle charging network and has 1,021 public charging ports in Florida, including ports located within DEF's service territory. ChargePoint further states that it seeks to intervene in this docket "for the opportunity to be heard on matters of vital importance to the company and the future of the competitive market for electric vehicle charging services within DEF's service territory and Florida, as a whole."

ChargePoint alleges that the Electric Vehicle Charging Station Pilot Program (pilot program), as proposed within the Settlement Agreement, would cause "direct harm to the value of ChargePoint's services and networks if it is implemented in a way that supplants the fundamental characteristic of the free market: customer choice to select and control the product offering that best fits their needs." ChargePoint argues that the pilot program lacks certain considerations which would provide a site host's ability to control, manage, and operate a charging station according to the specific needs of their sites and properties. ChargePoint concludes by stating that its services will be substantially affected by the pilot program, and that

its interest in protecting the “very existence of a competitive market” is sufficient to establish standing and grant its Petition.

Duke Energy Florida, LLC’s Response

On October 19, 2017, DEF filed its Response to the Petition. DEF argues that the allegations made within ChargePoint’s Petition do not satisfy either prong of the standing test set forth in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). DEF relies on Commission Order Nos. PSC-02-0324-PCO-EI and PSC-14-0329-PCO-EI, as well as the First District Court of Appeals’ decision in Fla. Soc. of Ophthalmology v. State Bd. Of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988) in support of its argument that ChargePoint’s interest in the development of the electric vehicle charging market in Florida and the value of ChargePoint’s facilities are economic interests that are too remote and speculative to grant standing in this proceeding.

Additionally, DEF argues that the Settlement Agreement was filed under Section 366.076, Florida Statutes (F.S.), and that nothing within that statute evidences a legislative intent to protect the type of interests asserted within ChargePoint’s Petition. DEF contends that this hearing is not a proceeding that is designed to protect ChargePoint’s economic interests in the development of the electric vehicle charging market. DEF agrees with ChargePoint in that interested persons should have an opportunity to heard at the hearing; however, such an interest is not sufficient to grant standing to intervene and exercise all other rights afforded to parties. DEF argues that ChargePoint’s Petition should be denied.

Standard for Intervention

Rule 25-22.039, Florida Administrative Code (F.A.C.), provides:

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 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 in an administrative proceeding, an intervenor must meet the two-prong standing test set forth in Agrico. 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, F.S., hearing; and (2) the substantial injury is of a type or nature which the proceeding is designed to protect. The first prong of the test addresses the degree of injury. The second addresses 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. 3rd DCA 1990); 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).

### Analysis & Ruling

Upon review of ChargePoint's Petition and the facts alleged therein, ChargePoint does not satisfy the two-prong test established within Agrico to establish standing within this proceeding. The first prong established within Agrico requires that the intervenor show that it will suffer injury-in-fact, which is of sufficient immediacy to entitle it to a Section 120.57, F.S., hearing. Additionally, the injury-in-fact must be both real and immediate and not speculative or conjectural. ChargePoint has not shown that it is in immediate danger of direct injury as a result of the outcome in this proceeding. Rather, ChargePoint alleges that direct harm will result to the value of its services and networks personally, and to the free market generally. ChargePoint's alleged harm is abstract and speculative, and not directly affected by the outcome of this proceeding. The First District Court of Appeals stated in Village Park Mobile Home Ass'n, that the "petitioner must allege that [it] has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct."<sup>1</sup>

As DEF pointed out in its Response, this Commission has found that an indirect effect on economic competition does not meet the 'immediacy' test of Agrico. Order No. PSC-02-0324-PCO-EI (citing *Fla. Soc. of Ophthalmology v. State, Bd. of Optometry*, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988)). ChargePoint has failed to allege any facts that can support its claim that the pilot program would impact ChargePoint's current market share or customers, or interfere with "the very existence of a competitive market." Competitive economic injury may only qualify as an injury if the applicable governing statute is designed to protect against such an interest.<sup>2</sup> For these foregoing reasons, ChargePoint's Petition shall be denied.

DEF's petition was filed pursuant to the Commission's authority under Chapter 366, F.S., which states in part that "the [C]ommission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service." While ChargePoint states that "this type of proceeding . . . is precisely the type of proceeding that provides a procedural failsafe to give interested persons one last opportunity to be heard," ChargePoint's alleged injury to its economic interests and the free market are not what the governing statutes of this proceeding were meant to protect. As a result, ChargePoint is unable to satisfy the second prong of Agrico because the substantial injury alleged is not of a type or nature which the proceeding is designed to protect. While DEF is correct that the mere desire to be heard on an issue that interests a putative intervenor does not confer standing to intervene and "exercise all other rights afforded to parties in this proceeding," this Commission firmly believes that interested persons should be afforded the right to participate in this proceeding and has provided notice that public comments will be allowed at the hearing at the appropriate time designated by the presiding officer.

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<sup>1</sup> Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 433 (Fla. 1st DCA 1987)

<sup>2</sup> See Agrico at 482.

For the reasons stated above, ChargePoint has failed to meet the legal standard for intervention; therefore, its Petition to intervene is denied.

Based on the foregoing, it is hereby

ORDERED by Chairman Julie I. Brown, as Prehearing Officer, that the Petition to Intervene filed by ChargePoint, Inc., is hereby denied.

By ORDER of Chairman Julie I. Brown, as Prehearing Officer, this 20th day of October, 2017.



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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

KRM

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.