

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination)
of Need of Hines Unit 3 Power)
Plant)
_____)

Docket No.: 020953-EI

Submitted for filing: November 19, 2002

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**FLORIDA POWER CORPORATION'S MEMORANDUM
IN OPPOSITION TO PACE'S AMENDED PETITION TO INTERVENE**

INTRODUCTION AND BACKGROUND

Florida Power Corporation ("Florida Power" or "FPC") commenced this proceeding on September 4, 2002, to obtain a determination of need for Florida Power's proposed Hines Unit 3. Two months later, on October 31, 2002, the Florida Partnership for Affordable Competitive Energy ("PACE") filed its initial Petition to Intervene in these proceedings. On November 8, 2002, the Prehearing Officer denied PACE's Petition to Intervene, without prejudice. (Referred to herein as the Prehearing Officer's "Order.")

In denying PACE's initial Petition to Intervene, the Prehearing Officer appropriately pointed out that PACE was seeking to challenge "the general appropriateness" of FPC's

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methodology and to question "whether FPC has met a burden of proof in demonstrating the cost effectiveness of its proposed Hines 3 plant as applied generically to all members." (Order, p. 2)

(all emphasis added unless noted). The Prehearing Officer further observed that intervention might be appropriate "[t]o the extent that an individual participant in FPC's Request for

Proposals (RFP) process can allege that the process was not conducted in accordance with Rule 25-22.082 . . . or that FPC failed to take into account some facts or circumstances which resulted in prejudice to that participant." (Order, p. 2).

PACE has not remedied these deficiencies. The Commission should deny PACE's Amended Petition to Intervene for at least three reasons.

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First, the fact remains that PACE is not a bidder and has not alleged that a bid submitted by any particular member would be a superior choice for FPC's customers compared to Hines 3. The Bid Rule makes clear on its face that, to challenge the outcome of an RFP conducted pursuant to that Rule, a would-be intervenor who seeks to assert the interests of power suppliers must have participated in the RFP process as a bidder. PACE does not meet this essential requirement.

Second, PACE does not meet the legal test for standing established in Agrico. Neither Section 403.519 nor the Bid Rule are designed to protect the competitive economic interests of PACE or its members.

Third, PACE has not established its standing to raise any of the "issues" enumerated in its Amended Petition, and none of these "issues" should rise to the level of a disputed issue in this proceeding. For example, the recent objection of the Southwest Florida Water Management District ("SWFMD") so prominently highlighted in PACE's petition concerns a different proceeding and involves an amendment of emergency water supply provisions for Hines Units 1 and 2. It has no bearing on the water supply for Hines 3.

ARGUMENT

I. Governing Principles

The Florida Supreme Court established the ground-rules for associational standing in Florida Home Builders Ass'n v. Department of Labor and Employment Sec., 412 So. 2d 351 (Fla. 1982). There, the Court held that an association must demonstrate that (1) a substantial number of its members, although not necessarily a majority, are 'substantially affected' by the proposed agency action (in that case, a rule), (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 the type appropriate for the association to receive on behalf of its members. Id. at 353-54.

Whether an association is able to meet this test depends, in turn, on whether the association's members may establish standing under the two-prong test set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), and later adopted by the Supreme Court in Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997):

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Agrico, 406 So. 2d at 482. These principles are incorporated in Rule 25-22.039 of the Florida Administrative Code, which provides that intervenors must:

[D]emonstrate 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.

II. PACE Cannot Meet the Standards for Intervention

A. PACE Seeks to Intervene to Protect Its Members' "Competitive" Interests

PACE has not demonstrated in its Amended Petition that it can meet these requirements. To the contrary, it is clear on the face of the Amended Petition that PACE cannot meet these requirements.

As a threshold matter, PACE has now abandoned any pretense of intervening to protect the interests of Florida Power's customers and now expressly seeks to intervene to protect the "competitive" interests of its members. (Amended Petition, p. 5, n. 2). PACE insists that the Bid Rule obviously includes the competitive interests of bidders within the zone of interests the Bid Rule is intended to protect. This argument is misconceived.

The Florida Supreme Court made clear in TECO v. Garcia, 767 So. 2d 428 (Fla. 2000), that neither Section 403.519, Florida Statutes, nor the Florida Electric Power Plant Siting Act empowers the Commission to promote or protect the competitive interests of independent power producers such as PACE's membership. Id. at 435 (holding that existing legislation does not authorize Commission to promote the "competitive market in wholesale power"). Accordingly, the Bid Rule may not be properly read to protect PACE's "competitive" interests, or this would jeopardize the legality of the Bid Rule itself. Because PACE advances this ground as the fundamental premise for its Amended Petition, it alone provides sufficient basis to deny PACE's Amended Petition to intervene.

B. PACE Has Not Alleged that FPC Should Have Selected Any Particular Alternative Proposal

Even apart from PACE's failure to meet the most fundamental test of standing, i.e., asserting a substantial interest legitimately protected by this proceeding, none of the particular grounds that PACE seeks to assert in this proceeding provides any justification for granting PACE's Amended Petition.

All PACE has done is to attempt to identify more specifically certain supposed "issues" that it seeks to raise generically on behalf of all of its members. PACE has not cured the fundamental defect of its initial petition, namely, PACE's failure to argue that "the actual RFP process was not conducted in accordance with the bid rule, to the actual detriment of any member, or that FPC's RFP process failed to take into account some fact which disadvantaged any member." (Order, p. 2). Unless and until PACE is able to demonstrate how FPC acted to disadvantage a particular member, so that that member stands to gain or lose as a direct result of this proceeding, no amount of discussion about supposed "issues" can establish PACE's own

standing to raise them. Because PACE has not remedied this fundamental defect in its petition, its Amended Petition should be denied.

Specifically, in its Amended Petition, PACE argues that it should be entitled to intervene in these proceedings based on four considerations: (1) PACE argues that the Southwest Florida Water Management District (“SWFMD”) has asserted an objection relating to site certification conditions at the Hines Energy Complex and somehow this entitles PACE to intervene in this need proceeding, (2) FPC’s projected heat rate in the Hines 3 Need Study differs from heat rate specified for Hines 3 in FPC’s 2002 Ten-Year Site Plan, which PACE contends calls into question the cost figures for the Hines 3 power plant, (3) PACE asserts that FPC has indicated that it may be engaging in wholesale sales, calling into question whether this business strategy was a factor used in FPC’s self-selection of the Hines 3 unit, and (4) PACE asserts that FPC may have assigned excessive cost to “filler” supply alternatives in comparing the self-build option with other alternatives.

PACE skates by the fundamental question why PACE should be given standing to assert any of these arguments in this proceeding. Just as important, none of these “issues” could affect the outcome of this proceeding.

In fact, what is conspicuously missing from PACE’s Amended Petition is any allegation that, as a result of these “issues,” FPC should have selected, but failed to select, any particular alternative proposal as more cost-effective than Hines 3. No individual member of PACE who actually participated in FPC’s RFP has stepped forward to assert, or alleged any basis to conclude, that its proposed project is superior to Hines 3. At most, PACE seeks to persuade the Commission that FPC’s process suffered from a general lack of fairness, but PACE leaves the Commission without any reason whatsoever to conclude that FPC had a specific, concrete option that was more in fact cost-effective than Hines 3. PACE’s participation in this proceeding would

be purely theoretical. Neither PACE nor any of its members would stand to gain or lose in any concrete, legitimate way as a direct result of the Commission's final decision. To grant intervention in these circumstances would nullify the word and the intent of the Bid Rule and render meaningless the time-tested requirements for standing established in Agrico and Florida Homebuilder.

We now turn to each of the particular arguments PACE advances in support of its Amended Petition to Intervene.

(1) First, PACE contends that it somehow has a substantial interest in intervening in these proceedings to talk about SWFMD's preliminary objection to FPC's site certification modification concerning water usage at the Hines Energy Complex ("HEC"). To state this proposition is to expose its lack of merit. PACE has no proper business raising any issues in this proceeding that may be the subject of different proceedings before the Department of Environmental Protection. Further, apart from the fact that this subject may not be appropriately addressed in this need proceeding, merely to identify the fact that SWFMD has asserted this objection does not somehow confer standing on PACE to speak to the issue in any forum.

Further, it is evident on the face of the objection that it is addressed solely to FPC's request for emergency allocations of groundwater from existing permitted sources to supplement water levels in the cooling pond solely for the operations of Hines Units 1 and 2. That request by Florida Power in no way affects the previously-approved groundwater supply for Hines 3 under the existing Conditions of Certification. Sufficient water to accommodate the addition of Hines 3 was approved in the original Site Certification.

Thus, SWFMD's written objection to emergency allocation for Hines Units 1 and 2 makes no reference to Hines 3. It does not state or even suggest that the existing permitted allocation of up to 5 MGD of groundwater for Hines 3 is inconsistent with the existing

Conditions of Certification, as approved by the Siting Board. Accordingly, there is no real “issue” here to resolve in this proceeding.

(2) Next, PACE asserts that it seeks to argue that the heat rate FPC identified for Hines 3 in its 2002 Ten-Year Site Plan differs from the heat rate FPC identifies in its Need Study for Hines 3, putting into question the cost figures for Hines 3. PACE is mixing apples and oranges. The heat rate identified in the Ten-Year Site Plan is plainly identified in that document as the “Average Net Operating Heat Rate,” whereas the heat rate reflected in the Need Study is identified as the “Full Load Heat Rate.” No change has occurred, and there is no resulting impact on the cost evaluation of Hines 3. These numbers simply reflect definitionally different heat rate values. So there is no “issue” here, either.

Moreover, PACE cannot point to any provision of the Bid Rule, or any principle of resource selection, that says that a utility may not use specifications and cost projections for its next-planned unit not included in its Ten-Year Site Plan projection. In suggesting that it seeks to intervene in order to make this assertion, even taking PACE’s obvious misstatement as true, PACE has succeeded merely in demonstrating that it cannot allege in good faith that FPC departed from any actual requirement of the Bid Rule, to the specific detriment of any of PACE’s members.

(3) Third, PACE asserts that it seeks leave to intervene to argue that FPC intends to make some wholesale system sales. PACE makes no showing whatsoever how this issue has any material bearing on which alternative project is the most cost-effective for Florida Power’s customers. PACE does not allege, and cannot allege, that any of its member’s particular proposals become cheaper, or that Hines 3 becomes more expensive, if FPC makes wholesale system sales.

Moreover, the whole premise of this supposed “issue”—PACE’s assertion that Florida Power relied on unspecified wholesale need as a part of the total need supporting Hines 3—is simply false. The forecast used to determine Florida Power’s need for Hines 3 included only native load and firm wholesale sales that Florida Power has already committed to make. So there is no “issue” here.

(4) Finally, PACE says it is entitled to participate to argue that FPC assigned excessive costs to “filler” supply options that favored the self-build alternative. This argument, too, is a red herring. As a preliminary matter, PACE does not allege that this consideration or any other, for that matter, changes the bottom line. Specifically, PACE does not allege facts from which the Commission should conclude that the cost of its members’ proposals were lower than the cost of Hines 3 and thus should have been chosen as a more cost-effective proposal than Hines 3.

The reason for this is obvious. As demonstrated by Exhibit 6 of Daniel Roeder’s pre-filed testimony, all of the bids submitted during the RFP process were more expensive than Hines 3 without any regard to “filler” units. So there is no “issue” here.¹

C. PACE Continues Merely to Assert Generic Concerns of Its Members

Fundamentally, PACE’s Amended Petition suffers from the critical defect that PACE is not purporting to intervene in support of any of its member’s particular proposals. As we discussed in our opposition to PACE’s initial Petition to Intervene, a disappointed bidder is given standing to participate in a bid protest for the very purpose of advocating a particular proposal that the bidder can credibly allege should have been accepted instead of the bid actually chosen. Otherwise, the would-be intervenor could not demonstrate that it has a concrete interest in the

¹ As we discussed in our opposition to PACE’s initial Petition to Intervene, the Commission’s prior order permitting PACE to intervene in the Florida Power & Light need proceeding does not control this case for a number of reasons. Certainly, the Commission’s order in that case did not approve the arguments asserted in PACE’s Amended Petition as a basis for intervention.

outcome of the proceeding. As the Court held in Agrico, in order to demonstrate a substantial interest in the outcome of a proceeding, the prospective intervenor must establish that it “will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing.” Agrico, 406 So. 2d at 482 (all emphasis added unless noted).

In this case, however, none of PACE’s members who actually submitted a bid seeks to intervene in support of its own proposal. Further, PACE declines to do as a trade association what none of its members is willing to do individually—that is, contend that any particular project is superior to the project for which Florida Power is seeking an affirmative determination of need. PACE cannot assert associational standing based on interests that no one is asserting—namely, the interests of disappointed bidders in demonstrating that their projects should have been selected by Florida Power in lieu of the Company’s self-build alternative.

The courts have repeatedly recognized that, to gain intervention in a bid protest, a bidder must be prepared to demonstrate that its particular project would have been selected but for the option actually chosen. Only then will the bidder’s interest be sufficiently immediate to meet the prerequisites for standing. For this reason, courts have held that only the second-lowest bidder to a public contract has standing to challenge a state agency’s acceptance of another bid. See Preston Carroll Co. v. Florida Keys Aqueduct Authority, 400 So. 2d 524, 524 (Fla. 3d DCA 1981). In Preston Carroll Co., the Third District stated, “In order to contest the award of a public contract to an apparent low bidder, appellant was required to establish that it had a ‘substantial interest’ to be determined by the agency. A second lowest bid establishes that substantial interest.” Id. at 524. The reasoning behind this rule is clear. In most cases, the company with the second-lowest bid is the only company that would have been granted the contract if the accepted bid had been rejected. Thus, that company is the only one that is immediately injured by the agency’s decision.

As already discussed, the Agrico decision establishes that standing requires a showing of “immediate” injury in fact. The “immediacy” requirement is intended to preclude participation based on stated concerns that are speculative or remote. See Village Park Mobile Home Ass'n, Inc. v. State, Dep't of Bus. Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987) (stating, “[A]bstract injury is not enough. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct.”).

In this case, PACE does not and cannot allege that Florida Power would have and should have selected any one of its members’ bids in lieu of Florida Power’s self-build option. Accordingly, PACE cannot assert standing based on the interests of any one of its members, let alone all of these competing bidders, and PACE’s Amended Petition to Intervene should be denied.

This result is compelled by the Commission’s own rules and decisions. Rule 25-22.090(8) of the Florida Administrative Code provides: “The Commission shall not allow potential suppliers of capacity who were not participants to contest the outcome of the selection process in a power plant need determination proceeding.” The Commission has explained that the intent of this rule is to preclude intervention by prospective power suppliers who have some agenda other than advocating particular proposals actually presented and considered during the utility’s RFP process. See In re: Petition by Florida Power Corporation for Waiver of Rule 25-22.082, FAC, selection of generating capacity, 1999 Fla. PUC LEXIS 227, 99 FPSC 2:92 (Feb. 9, 1999) (“FPC Bid Rule Waiver Decision”) (the Bid Rule was intended “to preclude likely intervenors” who do not actually submit proposals during the RFP process). Thus, the Bid Rule was enacted in significant part to prevent intervention by those who do not intend to demonstrate

they submitted a particular project during the RFP project that should have been but was not selected by the utility.

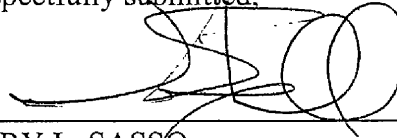
PACE's amendments to its Petition do not change the irrefutable fact that PACE stands before the Commission as a non-bidder that wishes to raise issues of general concern. Non-bidders do not have standing to challenge the results of a bid proceeding. Brasfield & Gorrie General Contractor, Inc. v. AJAX Construction Co. of Tallahassee, 627 So. 2d 1200, 1203 (Fla. 1st DCA 1994) ("a non-bidder, who is not and cannot potentially be a party to the contract with the public body, is not entitled to the relief of either an award of the contract, or a re-bid"); Fort Howard Co. v. Dep't. of Management Services, 624 So. 2d 783 (Fla. 1st DCA 1993) (holding that non-bidder supplier did not have standing to challenge bid results even though it was the supplier for the two vendors submitting the lowest bids).

In Westinghouse Electric Corp. v. Jacksonville Transportation Authority, 491 So.2d 1238 (Fla. 1st DCA 1986), the First District held that, absent extraordinary circumstances, a non-bidder does not have standing to file a bid protest. The court reasoned that non-bidders should not be allowed to learn the terms of other bids and then challenge the process in an attempt to force a re-bidding. Id. at 1241. Such "sandbagging" would erode the integrity of the public bidding process. Id. The exclusion of non-bidders also protects against the intervention of limitless parties in bid determinations. See Fort Howard Co., 624 So. 2d at 785 (holding that allowing a non-bidder to challenge the bid process would open the floodgate of potential protestants to bid awards). Accordingly, PACE's Amended Petition, like its initial Petition should be denied.

Conclusion

For the foregoing reasons, Florida Power respectfully requests that the Commission deny PACE's Amended Petition to Intervene.

Respectfully submitted,

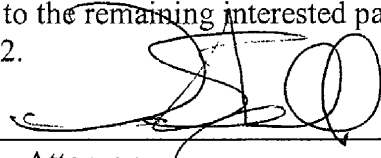


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been served by hand delivery to Lawrence Harris and Marlene Stern, Legal Division, Florida Public Service Commission, Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850 and Jon Moyle, Jr. and Cathy M. Sellers, Moyle, Flanigan, Katz, Raymond & Sheehan, 118 North Gadsden Street, Tallahassee, FL 32301; and by U.S. Mail to the remaining interested parties of record as listed below on this 19th day of November, 2002.



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