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Subject: PEF Response in Opposition to SEC Petition - DKt# 080001

Attachments: Document.pdf

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Docket 080001-EI

On behalf of Progress Energy Florida

Consisting of 6 pages.

The attached document for filing is PEF's Response In Opposition to SEC's Petition to Intervene in the Aforementioned docket.

<<Document.pdf>>

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor	DOCKET NO. 080001-EI FILED: November 3, 2008

PROGRESS ENERGY FLORIDA, INC.'S RESPONSE IN OPPOSITION TO PETITION TO INTERVENE OF SAPORITO ENERGY CONSULTANTS

Progress Energy Florida, Inc. ("PEF" or the "Company") files this response in opposition to the Petition to Intervene of Thomas Saporito, as an individual and on behalf of Saporito Energy Consultants ("SEC") (hereinafter referred to as the "Petition") and states:

Introduction

This Petition was filed the day before the final hearing in this docket.[1] The Petitioners allege that the sole purpose of their intervention with respect to PEF is to determine the reasonableness and prudence of costs incurred for PEF's Crystal River 3 ("CR3") uprate project.[2] Petition at ¶ 10. Mr. Saporito is not a PEF customer. His company, SEC, is not a PEF customer and, as a "privately held entity," that is not registered with the state it cannot satisfy the requirements for association standing before the Commission. Id.

The Petition should be denied. First, the Petition was not timely filed. Second, the reasonableness and prudence of PEF's CR3 Uprate costs were addressed and approved in Docket 080009-EI and, therefore, this proceeding is not designed to protect the Petitioners' alleged injuries. Third, Mr. Saporito does not have standing because he is not a PEF customer. Fourth, SEC does not have the legal capacity to intervene in this proceeding, and it does not meet the

[1] The Petition was electronically filed on Saturday, November 1, 2008, and pursuant to Commission practice, is deemed to be filed on the next business day, Monday, November 3, 2008.

[2] The Petition also includes allegations specific to Florida Power and Light Company ("FPL"). This response, however, is specific only as to those allegations regarding PEF.

associational standing requirements. Finally, even if SEC were recognized as a proper association to intervene in this proceeding, Mr. Saporito is not a qualified representative of the association, pursuant to Commission rule.

Argument

I. The Petition was not Timely Filed Consistent with Rule 25-22.039, F.A.C.

Rule 25-22.039, F.A.C. requires that all petitions to intervene must be filed at least five days prior to the final hearing in the proceeding. There are no exceptions. Id. The Petition was filed November 3, 2008, just one day before the final hearing, which begins November 4, 2008. The Petition should therefore be denied as untimely.

II. This Docket is Not Designed to Protect the Petitioners' Alleged Injuries.

The only issue in the Petition relates to PEF's CR3 Uprate costs. Petitioners state that "the purpose of the proceedings in this docket is to evaluate FPL's and PEF's requests to recover from customers their respective costs and expenditures associated with the upgrade improvements to their nuclear generating units, to determine if those costs are reasonable and prudent and, thus, appropriate for recovery." (Petition at ¶ 9). The Commission approved the prudence of PEF's actual CR3 Uprate project costs, as well as the reasonableness of its projected costs, in Docket No. 080009. Petitioners request that the Commission, in this fuel proceeding, consider the same issues already decided in Docket No. 080009. This request is an improper collateral attack on prior Commission action.

The Commission will only decide in this proceeding if the nuclear uprate costs approved in Docket No. 080009 have been calculated correctly as part of the Company's capacity cost recovery clause factor. Issue 29A in this proceeding states: "Has PEF included in the capacity cost recovery clause the nuclear cost recovery amount ordered by the Commission in Docket 080009-EI?" This is a ministerial determination. Petitioners, therefore, cannot satisfy the

Agrico standing test, which requires in relevant part that the party seeking intervention must show that its injury is of a type or nature which the proceeding is designed to protect. See Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). See also In Re: Petition for Generic Proceedings to Establish Expedited Process . . . by BellSouth Telecommunications, Inc., Docket No. 010782-TL, Order No. PSC-01-1629-PCO-TL (Aug. 9, 2001) (petition to intervene denied where allegations of injury were beyond the scope of the proceeding). Accordingly, the Commission must deny the Petition.

III. Mr. Saporito is not a PEF Customer and Thus Does Not Have Individual Standing

Mr. Saporito admits in the Petition that he is not a PEF customer. See Petition at footnote 1. The Petition contains no other allegations of a specific injury that Mr. Saporito would suffer as a result of Commission approval of the amount to be included in the capacity clause recovery factor for the CR3 Uprate project costs. Mr. Saporito, therefore, does not have standing because he cannot demonstrate under Agrico test that he will suffer an injury in fact by Commission approval of PEF's cost recovery request in this proceeding. Agrico Chemical Co., 406 So. 2d at 482. Where a party is not a customer of the utility and where no other specific injury is alleged, intervention must be denied. See Order No. 01-1629; In re Petition to Determine Need for West County Energy Center Unit 3 Electrical Power Plant by Florida Power & Light Company, Docket No. 080203-EI, Order No. PSC-08-0398-PCO-EI, (June 17, 2008). Accordingly, the Commission should deny Mr. Saporito's Petition.

IV. SEC Does Not Have the Legal Capacity, nor does it Meet the Associational Standing Requirements, to Intervene in this Proceeding.

SEC does not have the legal capacity to intervene as an entity in this proceeding. SEC is a "privately held entity." Petition at ¶ 6. The Petition contains no allegations that SEC is a corporation or other entity with the legal capacity to sue on behalf of itself as an organization.

SEC, however, is not registered with the Florida Secretary of State's Division of Corporations. SEC, therefore, is not an entity recognized with the legal capacity to intervene in Commission proceedings. See, e.g. Order No. 08-0398 (intervention denied in part because organization was not registered with the Division of Corporations and was not chartered to conduct business as a nonprofit association in Florida); In re Petition to Determine Need for Polk Unit 6 Electrical Power Plant by Tampa Electric Power Company, Docket No. 070467-EI, Order No. PSC-07-0695-PCI-EI (Fla. P.S.C. 2007) (requiring filing of proof that organization had a valid certificate issued by the Department of State before granting intervention).

SEC also does not have standing as an association on behalf of its "customer base." For an association to have standing on behalf of its members, it must show the following: (1) that a significant number of its members will be substantially affected by the results of the proceeding; (2) the subject matter of the proceeding is within the group's general scope of interest; and (3) the relief requested is of the type appropriate for an organization to receive on behalf of its members. Florida Home Builders v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982) and Farmworker's Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services, 417 So. 2d 753 (Fla. 1st DCA 1982). The Petition fails to meet any of these three requirements to prove associational standing.

There is no indication how many SEC clients or customers are actually PEF customers. SEC further alleges that its general scope of interest is that SEC is "dedicated to addressing the needs and interests of our environment by providing energy consulting services to individuals and to corporations." Petition at ¶ 6. In other words, SEC is in the business of selling energy services to its customers. There is no alleged relationship between PEF's CR3 Uprate project costs and SEC's consulting services. Finally, SEC nowhere alleges that the type of relief requested in the Petition is appropriate for SEC's clients or customers. SEC, therefore, cannot

intervene in this proceeding on behalf of its "clients" or "customers," and the Petition should be denied.[3]

V. Even if SEC had Associational Standing, Mr. Saporito is not Qualified to Represent SAC in this Proceeding

Mr. Saporito, in any event, is not a qualified representative to participate in this formal administrative proceeding. Rule 28-106.106, F.A.C. provides that an association must be represented by an attorney, a duly designated law student, or an individual duly authorized as a Qualified Representative. The Petition contains no allegations regarding Mr. Saporito's qualifications to represent SEC in this proceeding. For this additional reason, the Petition must be denied.

Conclusion

WHEREFORE, for all the foregoing reasons, PEF respectfully requests that this Commission deny the SEC Petition to Intervene, both on behalf of Thomas Saporito as an individual and representing Saporito Energy Consultants.

Respectfully submitted,

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[3] PEF notes that the Commission recently denied intervention to SEC in another docket for failing to establish legal capacity to sue as an entity, as well as failing to meet any of the prongs of the associational standing test. In re: Energy conservation cost recovery clause, Docket No. 080002-EG, Order No. PSC-08-0596-PCO-GU (Sept. 16, 20008). The reasons cited by the Commission in that order equally apply to the instant petition for intervention.

CERTIFICATE OF SERVICE
Docket No. 080001-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery on the 3rd day of November, 2008, to the following:

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