

**Ruth Nettles**

090372-EQ

**From:** Amra Rickwa [arickwa@icardmerrill.com]  
**Sent:** Wednesday, January 20, 2010 4:08 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Docket No. 090372-EQ - Petition Protesting Notice of Proposed Agency Action Order Approving Negotiated Purchase Power Contract  
**Attachments:** Petition Protesting Order No. PSC090852PAAEQ.pdf

a. Person responsible for filing

Robert K. Lincoln  
Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.  
2033 Main Street, Suite 600  
Sarasota, FL 34237  
Telephone: (941) 366-8100 x 340  
Facsimile: (941) 366-6384  
[rlincoln@icardmerrill.com](mailto:rlincoln@icardmerrill.com)

b. Docket No. 090372-EQ In re: Order No. PSC-09-0852-PAA-EQ Issued December 30,2009, In re: Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida

c. Filed on behalf of U.S. Funding Group, LLC.

d. Total Pages = 8

e. U.S. Funding, LLC Petition Protesting Notice of Proposed Agency Action Order Approving Negotiated Purchase Power Contract.

Robert K. Lincoln, Esq.



Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.  
2033 Main Street, Suite 600  
Sarasota, FL 34237  
Telephone: (941) 366-8100 x 340  
Facsimile: (941) 366-6384  
[rlincoln@icardmerrill.com](mailto:rlincoln@icardmerrill.com)

*Done  
1/20/10  
R. V.N.*

\*\*\*\*\*

The information transmitted is intended solely for the individual or entity to which it is addressed and may contain confidential and/or privileged material. Unless you are the addressee (or authorized to receive for the addressee), you may not use, copy or disclose to anyone the message or any information contained in this message. Any review, retransmission, dissemination or other use of or taking action in reliance upon this information by persons or entities other than the intended recipient is prohibited. If you have received this email in error, please contact the sender by reply email and delete the material from any computer.  
Thank you very much.

DOCUMENT NUMBER-DATE  
00496 JAN 20 09  
FPSC-COMMISSION CLERK

For more information about Icard Merrill Cullis Timm Furen & Ginsburg,  
P.A., please visit us at <http://www.icardmerrill.com>

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida.      DOCKET NO. 090372-EQ  
ORDER NO. PSC-09-0852-PAA-EQ  
ISSUED: December 30, 2009

**PETITION PROTESTING NOTICE OF PROPOSED AGENCY ACTION  
ORDER APPROVING NEGOTIATED PURCHASE POWER CONTRACT**

Petitioner, U.S. Funding Group, LLC ("Funding Group"), pursuant to Sections 120.569 and 120.57, Florida Statutes (2009), and Rules 28-106.201 and 25-22.029, Florida Administrative Code (F.A.C), files this petition for an administrative hearing in the above-styled matter and alleges:

**The Agency and Agency Action**

1. The affected agency is the Public Service Commission ("PSC"), 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850.
2. The agency file is Docket Number 090372-EQ. On December 30, 2009, the PSC issued Order No. PSC-09-0852-PAA-EQ (the "PAA"), granting preliminary approval to a contract between Progress Energy Florida, Inc. ("PEF") and Florida Biomass Energy, LLC ("FB Energy"). The contract is based on FB Energy constructing, owning, and operating an electric power production plant in Manatee County, Florida (the "Plant").

**The Petitioner**

3. U.S. Funding Group, LLC, is a Florida limited liability company in good standing, with offices at 4379 Ocean Blvd, Sarasota, Florida, 34242, telephone 941-926-1800.
4. Funding Group owns property located in Manatee County, more specifically located east of Bishop Harbor and west of U.S. 41, in the immediate vicinity of the Plant.

DOCUMENT NUMBER-DATE

00496 JAN 20 09

FPSC-COMMISSION CLERK

**Petitioner's Representative in this Proceeding**

5. U.S. Funding Group, LLC is represented by Robert K. Lincoln and Stacy Dillard-Spahn of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., whose address is 2033 Main Street, Suite 600, Sarasota, Florida 34237; and whose telephone number is (941) 366-8100. Petitioner has contracted to pay their attorney a reasonable attorney's fee for this matter.

**Notice of the Agency Decision**

6. The Funding Group received notice of the PSC's Proposed Action in this matter on January 10, 2010 by seeing a copy on the PSC web site.

**Disputed Issues of Material Fact**

7. Funding Group's residentially zoned property is located within ½ mile of the proposed Plant. The sole legal access to Funding Group's property is via Armstrong Road. As part of its zoning application, FB Energy is attempting to vacate and close Armstrong Road. Additionally, Funding Group's property will be adversely affected environmentally and economically by the close proximity of FB Energy's Plant.

8. Funding Group disputes that PEF and FB Energy have established that the contract offers sufficient performance guarantees to meet the requirements of Rule 25-17.0832(3)(d), F.A.C.

9. Funding Group disputes that PEF and FB Energy have established that the negotiated contract is prudent for cost recovery purposes, and further disputes that they have demonstrated the proposed purchase of firm capacity and energy from the Plant pursuant to the terms and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs, or provide energy security, as set forth in Rule 25-17.240, F.A.C.

10. Funding Group disputes the factual basis on which the PSC considered the reliability and viability of the Plant, and therefore disputes that the PSC properly assessed whether the performance guarantees in the contract are sufficient to protect the ratepayers.

11. In particular, Funding Group disputes the reliability and viability of the Plant and the accuracy of the information that was provided to the PSC regarding the status of FB Energy's permitting activities with respect to land use approvals and the necessary FDEP air quality permit.

12. The current land use regulations applicable to the proposed Plant site do not allow the proposed Plant. The Comprehensive Future Land Use Plan of the site must be amended and the site rezoned for the Plant.

13. On October 13, 2009, PSC Staff issued its 2<sup>nd</sup> Data Request to PEF, requesting specific information on the status of zoning for the Plant. In its October 27 Response PEF stated (emphasis added):

FB Energy began the land use and zoning approval process in April, 2009. The Comprehensive Land Use Plan approval process for a biomass facility has been completed and approved. FB Energy is currently in the process of the local re-zoning process. The site shall be re-zoned from the current light industrial zone to include a biomass power facility; and, based on initial discussions with County Staff and Commissioners, the project is well accepted and supported by both. While it has taken longer than expected for the full approvals, the local zoning approval should be received by January 2010.

14. In fact, the Comprehensive Land Use requirement had not been approved because on October 20, 2009, a full week before PEF issued its response to the PSC Staff, a challenge was filed to the comprehensive plan amendment. Because of this challenge, there is no Final Order regarding the Comprehensive Plan Amendment, regulations applicable to the site remain unchanged and the Plant is not permitted.

15. At this time, an administrative hearing on the Comprehensive Plan challenge is set for April 2010. Following a hearing in this matter, the Administrative Law Judge will consider the evidence and post-hearing filings and enter a Recommended Order to the Department of Community Affairs. An aggrieved party will have an opportunity to file objections to the Judge's Recommended Order. The Department of Community Affairs will then issue a Final Order determining whether or not the Plan Amendment is "in compliance." A party aggrieved by that Final Order has the opportunity to judicially challenge the Department's Final Order by appeal to the District Court of Appeals of Florida.

16. PEF's statement in direct response to Staff's request for information, that "The Comprehensive Land Use Plan approval process for a biomass facility has been completed and approved," is clearly false.

17. Also on October 27, 2009, PEF further stated "the local zoning approval should be received by January 2010." The rezoning necessary to allow the Plant was not filed until November 2009, even though PEF provided information to the PCS in September of 2009 that included a timeline indicating the re-zoning should have already been completed in August of 2009. The requested rezoning cannot be legally effective unless and until the Comprehensive Plan challenge is resolved in favor of allowing the amendment necessary for the Plant. Not only is that outcome tenuous, but there can be no resolution of this issue in the near future.

18. On September 23, 2009, in response to a PSC Staff request, PEF indicated that all necessary air permits for the Plant should be received by the end of December 2009. On October 13, 2009, the PSC Staff again requested additional information from PEF regarding the status of the air permit. In its October 27, 2009, Response PEF stated: "FB Energy reports that the air permit was filed in early October 2009. . . . The expected timeframe for the permit

to be issued would be January 2010.” FDEP requested additional information from PEF on November 10, 2009. At the time of the December 4, 2009 PCS hearing, there was no realistic expectation that the air permit would be issued by the end of January 2010. In fact, there remains every expectation that any notice by FDEP of any intent to issue the required air permit will be fully challenged.

19. PEF never updated or informed the PCS Staff that the information it had provided regarding the projected timing and/or receipt of the Comprehensive Plan Amendment, the rezoning, and the air permit was incorrect. The matters simply proceeded to the December 4, 2009, hearing before the PSC based on the false information.

20. The Contract between PEF and FB Energy contains dates by which permitting must be complete, but those dates and terms were redacted from the record.

21. The PSC was not informed of the permitting uncertainties identified herein. Due to the Contract’s redaction of critical dates and the failure of FB Energy and PEF to inform the PSC of the permitting delays and uncertainties for the Plant, the PSC could not appropriately apply and assess Rules 25-17.0832(3)(d) and 25-17.240, F.A.C., to the petition.

**Ultimate Facts and/or Mixed Facts and Conclusions of Law**

22. The Funding Group has substantial interests that are adversely affected for the purposes of Sections 120.569 and 120.57, Florida Statutes (2009) by the PSC’s Proposed Action and incorporates by reference the allegations set forth above.

23. PEF and FB Energy have not established that the contract offers sufficient performance guarantees to meet the requirements of Rule 25-17.0832(3)(d), F.A.C.

24. PEF and FB Energy have not established that the negotiated contract is prudent for cost recovery purposes, and has failed to demonstrate that the proposed purchase of firm

capacity and energy from the Plant pursuant to the terms and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs, or provide energy security, as set forth in Rule 25-17.240, F.A.C.

25. The viability of FB Energy's proposed Plant is highly questionable due to numerous permitting issues that were not disclosed to the PSC. The PSC could not and did not consider accurate information in assessing the reliability and viability of the Plant, and therefore failed to properly assess whether the performance guarantees in the contract are sufficient to protect the ratepayers.

**Statutes and Rules Warranting Relief**

26. Rule 25-17.0832(3), F.A.C., provides that in the PSC review of a negotiated contract, it must consider the performance guarantees provided in the contract. Relevant to this petition, the PSC must consider whether:

(d) Considering the technical reliability, viability, and financial stability of the qualifying facility, whether the contract contains provisions to protect the purchasing utility's ratepayers in the event the qualifying facility fails to deliver firm capacity and energy in the amount and times specified in the contract.

27. Rule 25-17.240, F.A.C. states:

(2) Negotiated contracts will be considered prudent for cost recovery purposes if it demonstrated by the investor-owned utility that the purchase of firm capacity and energy from the renewable generating facility pursuant to the rates, terms, and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility and provide fuel diversity, fuel price stability, and energy security at a cost to the utility's ratepayers which does not exceed full avoided costs, giving consideration to the characteristics of the capacity and energy to be delivered by the renewable generating facility under the contract.



28. If the full facts regarding the permitting challenges to FB Energy's Plant are considered, the reliability and viability of the facility is seriously in question and the contract provisions are insufficient to protect the ratepayers as required by Rule 25-17.0832(3)(d). Furthermore, the negotiated contract is not prudent as set forth in Rule 25-17.240, because given the challenges, timing and uncertainties of the land use approvals, the disclosed terms of the negotiated contract fail to establish that any anticipated purchase of capacity and energy from the Plant is reasonably likely to provide the measure of energy security necessary to protect the ratepayers.

**Relief Sought**

29. Funding Group requests the following relief:

- a. That the agency refer this matter to the Division of Administrative Hearings for the assignment of an Administrative Law Judge to conduct a hearing; and
- b. That the Administrative Law Judge enter an Order setting the above-styled proceeding for an administrative hearing; and
- c. That following said hearing, the Administrative Law Judge enter an order recommending that the Florida Public Service Commission DENY PEF's petition requesting approval of the negotiated purchase power contract between Progress Energy Florida, Inc. and Florida Biomass Energy, LLC.

Respectfully submitted,

s/ Stacy L. Dillard-Spahn

Robert K. Lincoln  
Fla. Bar No. 0006122  
Stacy Dillard-Spahn  
Fla. Bar No. 0022496  
Icard, Merrill, Cullis, Timm,  
Furen & Ginsburg, P.A.  
2033 Main Street, Suite 600  
Sarasota, Florida 34237  
Tel: 941-366-8100 / Fax: 941-366-6384

**CERTIFICATE OF SERVICE**

I CERTIFY that on January 20, 2010, I electronically filed the foregoing with the Florida Public Service Commission at [filings@psc.state.fl.us](mailto:filings@psc.state.fl.us) and furnished a true and correct copy of same by electronic and/or U.S. Mail to the following:

FB Energy, LLC  
Richard Jensen  
100 Third Ave. West  
Bradenton, FL 34205  
Ph: 941-567-1631

Progress Energy Florida, Inc.  
Mr. Paul Lewis, Jr.  
106 East College Avenue, Suite 800  
Tallahassee, FL 32301-7740  
Ph: 850-222-8738  
Fax: 222-9768  
[paul.lewisjr@pgnmail.com](mailto:paul.lewisjr@pgnmail.com)

Progress Energy Service Company, LLC (09a)  
John T. Burnett  
P.O. Box 14042  
Saint Petersburg, FL 33733-4042  
Ph: 727-820-5184  
Fax: 727-820-5249

Dye, Deitrich, Petruff & St. Paul, P.L.  
Patricia A. Petruff, Esq.  
James D. Dye, Esq.  
1111 Third Avenue West – Suite 300  
Bradenton, FL 34205  
Ph: 941-748-4411  
Fax: 941-748-1573  
[ppetruff@dyefirm.com](mailto:ppetruff@dyefirm.com)  
[jdye@dyefirm.com](mailto:jdye@dyefirm.com)

s/ Stacy L. Dillard-Spahn